

TRUMP ON LGBTQ RIGHTS

ERASING LGBTQ FREEDOMS BY ROLLING BACK PROTECTIONS, MANDATING DISCRIMINATION, AND WEAPONIZING FEDERAL LAW AGAINST TRANSGENDER PEOPLE

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Following the inauguration of Donald Trump in January 2017, we witnessed a sustained, years-long effort to erase protections for LGBTQ people across the entire federal government. This included an all-of-government effort to define “transgender” out of existence by eroding protections for transgender students and workers and weakening access to gender-affirming health care most transgender people already struggled to obtain.¹

While the Biden administration reversed many of those attacks, Trump himself has promised to go even further if re-elected to the White House. Based on his own campaign promises — and the detailed policy proposals of Project 2025²— we can expect a future Trump administration to deploy three tactics against LGBTQ rights.

First, a new Trump administration would reinstate and significantly escalate the **removal of anti-discrimination policies**. Indeed, Trump recently said that he would eliminate protections for transgender students “on day one” of his presidency. We can expect the federal government to rescind all federal regulations, rules, and other policies that prohibit discrimination on the basis of sexual orientation and gender identity, and to assert that federal civil rights statutes don’t cover anti-LGBTQ discrimination either. This could strip LGBTQ people of protections against discrimination in many

contexts, including employment, housing, education, health care, and a range of federal government programs.

Second, a new Trump administration would not only roll back existing protections, but **proactively require discrimination by the federal government** wherever it can, including by banning transgender people from serving openly in the Armed Forces and blocking gender-affirming medical care for transgender people in federal healthcare programs such as Medicare. The results would be devastating, as thousands of transgender people would immediately lose access to needed medical care.

Third — and most ominously — if Trump returns to the White House, we expect him to try to **weaponize federal law against transgender people across the country**. He plans to use federal laws — including laws meant to safeguard civil rights — as a cudgel to override critical state-level protections, arguing that state laws that protect transgender students violate the federal statutory rights of non-transgender students. Additionally, a second Trump administration would take the extreme position that the Constitution entitles employers to discriminate against LGBTQ people based on their religious beliefs, notwithstanding state nondiscrimination laws. And, shockingly, it would try to erase transgender people from public life entirely by using federal obscenity laws to criminalize gender

1 Trump Administration Eyes Defining Transgender Out of Existence,” The New York Times (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

2 Heritage Foundation. *Mandate for Leadership: The Conservative Promise* (Paul Dans & Steven Groves eds., 9th ed. 2023).

nonconformity.

The ACLU will use every tool at its disposal to fight these dangerous plans, including taking the Trump administration to court wherever we can. Litigation will be essential, but it will not be enough. We will engage on every advocacy front, including mobilizing and organizing our network of millions of ACLU members and activists in every state to work to protect LGBTQ people from the dangerous policies of a second Trump administration.

OVERALL RESPONSE

Courts

As detailed below, many of the planned anti-LGBTQ policies of a second Trump administration would violate the Constitution and federal law, such that litigation would be a significant part of our response. The ACLU has extensive experience litigating against the first Trump administration's egregious anti-LGBTQ policies, such as its exclusion of transgender people from military service and its interpretation of the Constitution and federal sex discrimination laws as carving out LGBTQ people from protection.³ Should a second Trump administration take office, we are ready to get courts to confirm that LGBTQ people are protected from discrimination under federal law, to invalidate policies mandating discrimination across the federal government, and to shut down Trump's expected efforts to weaponize the Constitution and federal laws to require discrimination against LGBTQ people by state and local governments and private entities. The ACLU has prevailed on these fronts in the past,⁴ and we will continue to fight.

We are clear-eyed about the challenging road we face in turning to the federal courts to stop

these planned attacks on the LGBTQ community. Four years of the first Trump presidency had an enormous impact on the courts, including the Supreme Court. Getting courts to understand the experience of transgender people and the impact of discriminatory policies on their lives was difficult even before Trump reshaped the judiciary. It is that much harder now.

That doesn't mean that we can't make an important impact with litigation. We have seen some Trump-appointed judges rule in favor of LGBTQ rights in the lower courts.⁵ And it was a Trump appointee — Justice Neil Gorsuch — who authored *Bostock v. Clayton County*, 590 U.S. 644 (2020), our clients' case establishing that Title VII, a federal law prohibiting sex discrimination in employment, protects against discrimination based on sexual orientation and gender identity.

But even when we don't prevail in courts, filing cases allows us to publicly call out unconstitutional and illegal policies and build political and grassroots support that will ultimately result in more just policies over time. Accepting the illegal and unconstitutional assaults on the LGBTQ community promised by a second Trump administration without a legal fight is not an option.

Below we discuss how the planned policies of a second Trump administration are illegal and unconstitutional under any proper reading of precedent.

Congress

Given the gravity of Trump's threats to the health and dignity of transgender people, and the fact we cannot count on litigation to stop all these planned attacks, it is imperative that the elected leaders in our democracy act. We anticipate that, in a second term, Trump will attempt to carry out much of

3 See, e.g., *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.) (challenge to transgender military service ban); *Bostock v. Clayton County*, 590 U.S. 644 (2020) (rejecting Trump administration argument that Title VII of the Civil Rights Act does not protect against anti-LGBTQ discrimination in employment).

4 See, e.g., *Bostock v. Clayton County*, 590 U.S. 644 (2020) (confirming that federal civil rights statute covers anti-LGBTQ discrimination); *United States v. Windsor*, 570 U.S. 744 (2013) (invalidating federal statute that unconstitutionally discriminated against lesbian, gay, and bisexual people); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), cert. denied 141 S. Ct. 894 (2020) (rejecting effort to use federal statutory and constitutional claims to require discrimination against transgender students); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018), cert. denied 139 S.Ct. 2636 (2019) (same).

5 See, e.g., *L.W. v. Skrmetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) (holding ban on gender-affirming medical care for minors unconstitutional), rev'd 83 F.4th 460 (6th Cir. 2023), cert. pet. pending; *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (M.D. Ala. 2022) (same), vacated 80 F.4th 1205 (11th Cir. 2023).

his sweeping, anti-LGBTQ policy agenda through executive actions. But this in no way eliminates the role for Congress to play in challenging these assaults.

Congress can and must use the power of the purse, and its oversight and investigative authorities, to constrain a second Trump administration's anti-LGBTQ agenda. If a pro-equality opposition controls either or both chambers of Congress in a second Trump administration, members of Congress who support the transgender community can use the appropriations process to hinder Trump's ability to mandate anti-trans discrimination and weaponize federal law against LGBTQ rights. Moreover, Trump's announced "day one" elimination of protections for transgender students in our nation's schools should prompt pro-equality members of Congress to go on the offensive by prioritizing passage of comprehensive nondiscrimination protections for LGBTQ people across the country in the form of the Equality Act⁶. We understand that comprehensive nondiscrimination legislation will not become law under a Trump presidency, however, it is important to demonstrate a stark contrast to the ugly discrimination of this administration, making clear that Trump's values are not those of most Americans. Polling consistently shows that the public supports strong nondiscrimination protections for LGBTQ people — not the Trump campaign's extreme anti-trans agenda.

States & Municipalities

Likewise, at the state and local level, we need elected officials to begin coordinating and planning now to protect transgender people from Trump's attempts to implement sweeping discrimination against them, including criminalizing gender nonconformity. Collective and coordinated action among committed pro-equality officials will be vital to anticipating,

revealing, and quickly responding to the Trump administration's blitz of anti-trans actions.

Organizing

The ACLU is also committed to fighting for LGBTQ rights in the court of public opinion. Legal and policy battles — even those that are unsuccessful in the short run — can serve to frame and focus fights over values in ways that are politically resonant in the long term. Banning books and bullying children are not popular actions outside of the MAGA base, and as advocates we will organize with our allies around specific moments that highlight the extremism and unpopularity of Trump's attacks on transgender people. The goal will be for the Trump administration's plans or actions to generate a public backlash that helps raise the political cost of discriminatory policies. Mobilizing public support on behalf of vulnerable children and youth — as the ACLU did in the context of family separation — will help deter further draconian policies and can help reshape the political narrative around transgender justice.

SPECIFIC THREATS & POSSIBLE RESPONSES

Erasing federal nondiscrimination protections for LGBTQ people

Just as the first Trump administration did, a second Trump administration would **remove federal nondiscrimination protections** by rescinding regulations and interpreting federal laws to eliminate such protections.⁷ This would strip LGBTQ people of nondiscrimination guarantees across a vast swath of federal government programs including Social Security, Medicare, and housing programs, as well

6 Brooke Migdon, Trump vows to reverse transgender student protections 'on day one,' The Hill, May 10, 2024, <https://thehill.com/homenews/lgbtq/4656405-donald-trump-transgender-students-athletes-title-ix-lgbtq/>

7 *Supra* note 6; See *supra* note 2 at 584 ("The President should direct agencies to rescind regulations interpreting sex discrimination provisions as prohibiting discrimination on the basis of sexual orientation, gender identity, transgender status, sex characteristics, etc."); at 496 ("Issue a proposed rule to restore the Trump regulations under Section 1557, explicitly interpreting the law not to include sexual orientation and gender identity discrimination"); at 489, ("The [HHS] Secretary's antidiscrimination policy statements should never conflate sex with gender identity or sexual orientation. Rather, the Secretary should proudly state that men and women are biological realities that are crucial to the advancement of life sciences and medical care and that married men and women are the ideal, natural family structure because all children have a right to be raised by the men and women who conceived them."); and at 447, ("HHS, through ACF and the Assistant Secretary for Financial Resources (ASFR), should repeal the unnecessary 2016 regulation that imposes nonstatutory sexual orientation and gender identity nondiscrimination conditions on agency grants . . .").

as federal government employment.⁸ Rescinding regulations that interpret federal civil rights laws to apply to anti-LGBTQ discrimination⁹ – and likely promulgating new regulations taking the position that they don’t¹⁰ – would convey the message to school districts, landlords, employers, healthcare providers, and others¹¹ that discrimination against LGBTQ people is lawful and, thus, embolden more discrimination.

Transgender people, in particular, already face discrimination across nearly every aspect of their lives. The 2022 U.S. Transgender Survey¹² found they faced higher rates of poverty and homelessness than their cisgender peers, and data from the

Human Rights Campaign¹³ found a persistent wage gap between transgender and cisgender people. The U.S. Census Bureau¹⁴ found that transgender people report higher rates of hunger. Numerous studies also found that they face higher rates of disability,¹⁵ long-term health risks¹⁶ – including HIV¹⁷ – and substance-use disorders,¹⁸ all of which contribute to a mortality risk twice that of their cisgender peers.¹⁹ Legal protections are but one pillar of addressing these systemic and widespread inequities, and the rollback of those protections would make matters worse.

In 2020, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act, which bars sex

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- 8 See, e.g., Federal Register, *Nondiscrimination in Health Programs and Activities* (May 6, 2024), <https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities>; U.S. Department of Health and Human Services, *HHS Issues Final Rule to Prevent Discrimination in Health and Human Services Grant Programs* (April 30, 2024), <https://www.hhs.gov/about/news/2024/04/30/hhs-issues-final-rule-prevent-discrimination-health-and-human-services-grant.html>; U.S. Dep’t of Housing and Urban Development, *Housing Discrimination and Persons Identifying as Lesbian, Gay, Bisexual, Transgender, and/or Queer/Questioning (LGBTQ)* (Feb. 1, 2022), https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq#:~:text=Pursuant%20to%20that%20Executive%20Order.orientation%20and%20gender%20identity%20under; The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.
- 9 See, e.g., Federal Register, *Nondiscrimination in Health Programs and Activities* (May 6, 2024), <https://www.federalregister.gov/documents/2024/05/06/2024-08711/nondiscrimination-in-health-programs-and-activities>; U.S. Department of Education, *U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination* (April 19, 2024), <https://www.ed.gov/news/press-releases/us-department-education-releases-final-title-ix-regulations-providing-vital-protections-against-sex-discrimination>.
- 10 For example, Project 2025 (at 584) takes the position that the Supreme Court’s decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), holding that Title VII’s prohibition against workplace discrimination on the basis of sex covers discrimination based on sexual orientation or gender identity, applies only to “hiring and firing” decisions and does not apply to other types of discrimination in the workplace such as discrimination involving dress codes, restrooms, or locker rooms.
- 11 Numerous federal laws prohibit discrimination based on sex. See, e.g., Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq; Patient Protection and Affordable Care Act, section 1557, 42 U.S.C. § 18116.
- 12 Sandy E. James, Jody L. Herman, Laura E. Durso, and Rodrigo Heng-Lehtinen, *Early Insights: A Report of the 2022 U.S. Transgender Survey*, Ntl. Center for Transgender Equality (Febr. 2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf.
- 13 *The Wage Gap Among LGBTQ+ Workers in the United States*, Human Rights Campaign, <https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states> (last visited June 2024).
- 14 Brian Glassman, *Financial Insecurity and Hardship in the Pulse: An In-Depth Look at Gender Identity and Sexual Orientation*, Poverty Statistics Branch of U.S. Census Bureau (April 20, 2023), <https://www.census.gov/content/dam/Census/newsroom/press-kits/2023/paa/2023-paa-paper-financial-insecurity-hardship-pulse-gender-identity-sex.pdf>.
- 15 Madeline Smith-Johnson, *Transgender Adults Have Higher Rates Of Disability Than Their Cisgender Counterparts*, National Library of Medicine (Oct. 2022), <https://pubmed.ncbi.nlm.nih.gov/36190882/>.
- 16 Kellan E. Baker, *Findings From the Behavioral Risk Factor Surveillance System on Health-Related Quality of Life Among US Transgender Adults 2014-2017*, JAMA Internal Medicine (April 22, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6583830/>.
- 17 *Issue Brief: HIV and Transgender Communities*, U.S. Centers for Disease Control & Prevention (May 16, 2024), <https://www.cdc.gov/hiv/policies/data/transgender-issue-brief.html#references>
- 18 Ryan Ruppert, Shanna K. Kattari, & Steve Sussman, *Review: Prevalence of Addictions among Transgender and Gender Diverse Subgroups*, Int J Environ Res Public Health (Aug. 22, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8393320/>.
- 19 Bridget M. Kuehn, MSJ, *Higher Mortality Risk Among Transgender People*, JAMA (Oct. 19, 2021), <https://jamanetwork.com/journals/jama/article-abstract/2785253>.

discrimination in the workplace, also covers anti-LGBTQ discrimination, rejecting arguments from the Trump administration.²⁰ Since then, both federal courts and federal agencies have interpreted other federal statutory bans on sex discrimination to bar anti-LGBTQ discrimination as well, including in the contexts of health care, education, and housing.²¹

While a second Trump administration would likely announce its view that these federal civil rights statutes do not protect LGBTQ people, the courts ultimately will decide this question. When they decide, Justice Gorsuch’s reasoning in the *Bostock* case that “... homosexuality and transgender status are inextricably bound up with sex”²² should prevail. The ACLU is already litigating the scope of federal nondiscrimination coverage for LGBTQ people in the courts, and we will continue to sue to protect the broad scope of these federal civil rights laws if a new Trump administration tries to narrow it.

In addition, should a new Trump administration cause the federal government itself to discriminate against LGBTQ people (such as interfering with LGBTQ people’s participation in federal programs or discriminating against LGBTQ federal employees), that would violate the Constitution’s Equal Protection Clause, as well as federal statutes. Such discrimination should be subjected to heightened equal protection scrutiny, since the Supreme Court has recognized in *Bostock*²³ that discrimination

based on sexual orientation or gender identity is discrimination based on sex, which is unconstitutional unless the government can prove that the discrimination is substantially related to an important government interest.²⁴ *Bostock* specifically involved employment discrimination prohibited by Title VII, but its reasoning—that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”²⁵ — applies equally to equal protection claims involving sex discrimination, as some courts have already recognized.²⁶ Therefore, excluding LGBTQ people from government programs or employment, or subjecting them to discriminatory conditions because of their sexual orientation or gender identity, would violate the Constitution. The ACLU will continue to advocate this position as these issues eventually work their way up to the Supreme Court.

In addition to rescinding nondiscrimination protections for LGBTQ people, a second Trump administration would permit faith-based, taxpayer-funded contractors that carry out vital federal government programs (e.g. disaster assistance and care for unaccompanied refugee minors, among many others) to use religious eligibility criteria to exclude LGBTQ people from participating in those programs.²⁷ If such discrimination were to occur, it would violate not only the Equal Protection Clause for the reasons discussed above, but also the

20 *Bostock v. Clayton County*, 590 U.S. 644 (2020).

21 See, e.g., *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F. 4th 760 (7th Cir. 2023) (applying *Bostock*’s reasoning to Title IX); *Doe v. Snyder*, 28 F. 4th 103 (9th Cir. 2022) (applying *Bostock*’s reasoning to section 1557 of the Affordable Care Act); The White House, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>; Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

22 *Bostock v. Clayton County*, 590 U.S. 644 (2020).

23 *Bostock v. Clayton County*, 590 U.S. 644 (2020).

24 See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

25 *Bostock v. Clayton County*, 590 U.S. at 660.

26 See, e.g., *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (en banc).

27 See e.g., *supra* note 2 at 586, (“The President should make clear via executive order that religious employers are free to run their businesses according to their religious beliefs, general nondiscrimination laws notwithstanding, and support participation of religious employees and employers as federal contractors and in federal activities and programs.”); at 481 (“Protect faith-based grant recipients from religious liberty violations and maintain a biblically based, social science-reinforced definition of marriage and family. Social science reports that assess the objective outcomes for children raised in homes aside from a heterosexual, intact marriage are clear: All other family forms involve higher levels of instability (the average length of same-sex marriages is half that of heterosexual marriages); financial stress or poverty; and poor behavioral, psychological, or educational outcomes. For the sake of child well-being, programs should affirm that children require and deserve both the love and nurturing of a mother and the play and protection of a father. Despite recent congressional bills like the Respect for Marriage Act that redefine marriage to be the union between any two individuals, [Healthy Marriage and Relationship Education] program grants should be available to faith-based recipients who affirm that marriage is between not just any two adults, but one man and one unrelated woman.”).

Establishment Clause, which the Supreme Court has recognized prohibits religious criteria to be used in carrying out government programs, whether those programs are carried out by government employees or government contractors.²⁸ We will continue to challenge efforts to allow the use of religion to discriminate in government programs wherever possible, recognizing that the current Supreme Court has been hostile to our arguments.

Mandating discrimination against transgender people by the federal government

As argued above, a second Trump administration would go beyond policies that make discrimination legal and would also **mandate discrimination against LGBTQ people by the federal government.**

Prohibiting gender-affirming medical care in federal healthcare programs

A second Trump administration would ban gender-affirming medical care for transgender people in federal healthcare programs, including Veterans' Administration healthcare and Medicare.²⁹ This would result in the disruption of medically necessary care for transgender people across the country who depend on it, and the implications would be catastrophic. Gender dysphoria is a serious medical condition that, if left untreated, can result in significant distress, depression, anxiety, self-harm, and suicidality.³⁰

Categorically denying such healthcare would violate the Constitution and section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of sex in healthcare programs. This has been recognized by several courts,³¹ while others have

disagreed.³² The ACLU will continue to litigate this issue as it works its way up the courts, likely reaching the Supreme Court.

In addition, borrowing from lessons learned from the struggle to maintain access to abortion care, we will advocate for states to create reliable, permanent funding streams to ensure that those who would otherwise be cut off from gender-affirming medical care due to the exclusion of such care from federal programs are still able to access care under state programs. For example, in September 2022, California established a Reproductive Health Equity Fund within its Department of Health Care Access and Information. In April 2022, Maryland created an Abortion Clinical Training Program and allocated a \$10.6 million training grant over three years. In April 2024, the Illinois Department of Public Health awarded \$2 million in grants for abortion training. These programs — and similar ones at a much larger scale — exemplify the kind of support for and investment in the health of transgender people that will become necessary at the state level in a second Trump administration.

Excluding openly transgender people from serving in the military

Just as the Trump administration did in 2017, a second Trump administration would reverse policies allowing transgender people to serve openly in the military.³³ This would push out many active-duty transgender servicemembers who have served with distinction and would bar new transgender recruits from enlisting. Such a discriminatory policy would also violate the Equal Protection Clause because it should be subjected to heightened equal protection scrutiny, and there is no justification for excluding transgender people from service. In fact, a RAND

28 See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982).

29 *Supra* note 2 at 644 (“Rescind all [Veterans’ Administration] clinical policy directives that are contrary to principles of conservative governance starting with abortion services and gender reassignment surgery.”); at 474 (“CMS should repromulgate its 2016 decision that CMS could not issue a National Coverage Determination (NCD) regarding ‘gender reassignment surgery’ for Medicare beneficiaries. In doing so, CMS should acknowledge the growing body of evidence that such interventions are dangerous and acknowledge that there is insufficient scientific evidence to support such coverage in state plans.”).

30 See, e.g., American Psychological Ass’n, APA Policy Statement on Affirming Evidence-Based Inclusive Care for Transgender, Gender Diverse, and Nonbinary Individuals, Addressing Misinformation, and the Role of Psychological Practice and Science (Feb. 2024), <https://www.apa.org/about/policy/transgender-nonbinary-inclusive-care>.

31 See *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (en banc); *Flack v. Wisc. Dep’t of Health Servs.*, 395 F.3d 1001 (W. D. Wisc. 2019); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018).

32 See, e.g., *L.W. v. Skrametti*, 73 F.4th 408 (6th Cir. 2024) (cert. pet. pending).

33 *Supra* note 2 at 104 (“Reverse policies that allow transgender individuals to serve in the military.”).

report from 2016 stated the effects of trans-inclusive “foreign military policies indicate little or no impact on unit cohesion, operational effectiveness, or readiness. Commanders noted that the policies had benefits for all service members by creating a more inclusive and diverse force.”³⁴ Should Trump have a second term, the ACLU will work with allies to elevate the contributions of transgender servicemembers to raise the political costs on the Trump administration of reinstating the ban on service, as well as explore all legal avenues to preventing its reinstatement. We know from our prior litigation on behalf of both transgender³⁵ and gay and lesbian servicemembers³⁶ that their stories of service and sacrifice³⁷ can help move public opinion and make Trump’s expected anti-trans policy deeply unpopular with the country.

Weaponizing federal law to require states and private actors to discriminate or tolerate discrimination against transgender people

A second Trump administration would likely take the extreme, potentially devastating position that federal law and the Constitution **require states and private actors to discriminate against transgender people** in a variety of contexts. If they are successful in these efforts, even strong, state-level nondiscrimination protections could be overridden. However, states can and should lay down clear markers that their own laws and constitutions require protection of transgender

people both to provide practical protections at least for a time and to create the opportunity for political organizing and mobilization when and if the Trump administration tries to override those state protections. We would also argue that states should have the freedom to create greater civil rights protections for groups they believe face discrimination — such as transgender youth and adults — and that federal civil rights laws should not be interpreted to overrule those state protections. If a second Trump administration allows abortion rights to be decided on a state-by-state basis — a scenario we doubt and will explore in a subsequent memo related to reproductive freedom — we would make the same states’ rights argument in the transgender rights context to preserve extant state protections.

Education

A second Trump administration could take action to stop school districts across the country from maintaining trans-inclusive policies and practices. Specifically, it would target school districts — by bringing civil rights enforcement actions against them and/or withholding federal funding — if school officials affirm transgender students’ gender identity by allowing them to use restrooms that accord with their gender identity³⁸ or by allowing³⁹ or acknowledging the existence of transgender people in the school.⁴⁰

Such actions would coerce school districts to discriminate against transgender students and

34 Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corp. (2016), https://www.rand.org/pubs/research_reports/RR1530.html.

35 See *Stone v. Trump*, no. 1:17-cv-02459 (D. Md.) (challenge to transgender military service ban).

36 See, e.g., *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

37 Juliet Eilperin, *Transgender in the Military: A Pentagon in Transition Weighs Its Policy*, *The Washington Post* (April 19 2015), https://www.washingtonpost.com/politics/transgender-in-the-military-a-pentagon-in-transition-weighs-its-policy/2015/04/09/ee0ca39e-cf0d-11e4-8c54-ffb5ba6f2f69_story.html.

38 *President Trump’s Plans to Protect Children from Left-Wing Gender Insanity* (Feb. 1, 2023), <https://www.donaldjtrump.com/agenda47/president-trumps-plan-to-protect-children-from-left-wing-gender-insanity> (See 8. “Direct the Department of Education to inform states and school districts that if any teacher or school official suggests to a child that they could be trapped in the wrong body, they will be faced with **severe consequences**, including, **potential Civil Rights violations** for sex discrimination, and the **elimination of federal funding**.”).

39 *President Trump’s Plan to Save American Education and Give Power Back to Parents* (Jan. 26, 2023), <https://www.donaldjtrump.com/agenda47/president-trumps-plan-to-save-american-education-and-give-power-back-to-parents> (See 6. Keep **men out of women’s sports**.)

40 *Supra* note 2 at 495 (“The noxious tenets of “critical race theory” and “gender ideology” should be excised from curricula in every public school in the country.”). See *supra* note 1 at 334 (“The next Administration should abandon this change redefining “sex” to mean “sexual orientation and gender identity” in Title IX immediately across all departments.” “On its first day in office, the next Administration should signal its intent to enter the rulemaking process to restore the Trump Administration’s Title IX regulation, with the additional insistence that “sex” is properly understood as a fixed biological fact.”).

erase the existence of transgender people in the curriculum, causing substantial harm to students in every state. As the Centers for Disease Control & Prevention found in its Youth Risk Behavioral Surveillance System survey,⁴¹ transgender youth are already significantly more likely to report feeling unsafe going to or attending school, to cite instances of physical or sexual violence, to indicate harassment at school and online, and to indicate mental health distress including suicide attempts.

A second Trump administration would likely attempt to justify these harmful actions by saying that trans-inclusive restroom or sports policies violate the rights of cisgender students under Title IX and their constitutional right to privacy. The ACLU has convinced courts to reject such claims in the past,⁴² and we will continue to fight against them should a new Trump administration try these arguments again.

Given the gravity of the threat and the uncertain legal landscape, as part of the ACLU's strategy for state-based resistance to assaults on civil rights, we will advocate for states and school boards to act wherever they can to ensure the highest possible level of protections for LGBTQ students. Such protections would include policy guidance regarding updating student names and pronouns, inclusive rules on gender-based activities, and best practices for school records. They would also include state policies that, in accordance with student privacy laws, direct school districts not to share information regarding transgender and non-binary students with a federal government intent on discriminating against these students except when legally required.

While these actions may not ultimately block the harm of a Trump administration's anti-LGBTQ assault on Title IX, they will provide students with important protections that could take a second

Trump administration time to override. Moreover, the federal government overturning policies enacted by local and state officials can create a clear narrative for the media about a MAGA government ramming through unpopular and extreme policies around which to build political resistance.

Healthcare

A second Trump administration would attempt to halt gender-affirming medical care for adolescents nationwide by threatening to deny Medicaid funding for hospitals that provide that care, asserting — against the recommendations of all major medical associations — that it does not meet federal health and safety standards.⁴³ This could coerce hospitals to discontinue care, making it difficult, if not impossible, for youth with gender dysphoria to access the treatment they need.

In the last three years, 24 states have categorically banned gender-affirming medical care for transgender youth, effectively ending health care access for more than 100,000 transgender youth.⁴⁴ Weaponizing federal law to target transgender health care in the remaining states would create a dire situation for transgender youth across the country, effectively ending access to care nationwide. The ACLU has already brought multiple cases challenging state-law bans on gender-affirming medical care for minors and would continue to litigate this issue in courts across the country should a second Trump administration further restrict this care for adolescents.

Where politically feasible, the ACLU will be encouraging states to pass their own laws or state constitutional provisions protecting access to gender-affirming health care and even, as noted above, ensuring access to consistent state funding for the care. Although the coercive power of federal

41 Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts*, 2017, 68 MMWR. 66-71 (Jan. 25, 2019). <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

42 See *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), cert. denied 141 S. Ct. 894 (2020); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018), cert. denied 139 S.Ct. 2636 (2019).

43 *President Trump's Plans to Protect Children from Left-Wing Gender Insanity* (Feb. 1, 2023), <https://www.donaldjtrump.com/agenda47/president-trumps-plan-to-protect-children-from-left-wing-gender-insanity> (See 5. “Declare that any hospital or healthcare provider participating in the chemical or physical mutilation of minor youth **will no longer meet federal health and safety standards for Medicaid and Medicare—and will be terminated** from the program.”). See also *supra* note 2 at 5 (“Allowing parents or physicians to “reassign” the sex of a minor is child abuse and must end.”).

44 Elana Redfield, Kerith J. Conron, Will Tentindo, and Erica Browning, *Prohibiting gender-affirming medical care for youth*, Williams Institute (March 2023), <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>.

funding cannot be underestimated, a coordinated effort by multiple states could force a showdown between medical ethics and state law and a punitive and overreaching federal government. The ACLU is laying groundwork to amplify and capitalize on such moments to create political backlash that forces the administration to reconsider.

The ACLU is also urging states to strengthen data privacy policies. Many states have enacted shield laws that prevent state officials from being complicit in other states' efforts to target transgender individuals or providers of gender-affirming medical care, among others. Although the Constitution's Supremacy Clause means that states must obey federal law, shield laws can be strengthened to limit cooperation with federal authorities unless compelled.

Workplace

A second Trump administration would take the position that employers may discriminate against LGBTQ employees based on the employer's religious beliefs notwithstanding applicable state or federal nondiscrimination laws.⁴⁵ This could be implemented as an executive order from the president, issued as a regulation. The administration might also intervene in litigation to try to prevent state and local governments from enforcing nondiscrimination requirements where the defendant asserts a religious motivation for the discrimination.

This position would likely be based on the Trump administration's extreme interpretation of the First Amendment as establishing a free exercise right to refuse to follow nondiscrimination requirements that conflict with one's religious beliefs, even though there is no Supreme Court precedent supporting that view. To the contrary, the court has rejected such claims in the past,⁴⁶ although it is not clear how the Supreme Court would rule on this issue now.

By enacting policies supporting a religious right

to be exempt from workplace nondiscrimination laws, a second Trump administration could create uncertainty about the enforceability of nondiscrimination laws against those who have religious objections to LGBTQ people. The ACLU has litigated against claims that the First Amendment entitles businesses that are open to the public to discriminate against LGBTQ people⁴⁷ and would similarly oppose such arguments asserted by employers.

Criminalizing gender nonconformity

One of the most extreme positions included in Project 2025 is the use of criminal laws to punish gender nonconformity in public life:

Pornography, manifested today in the omnipresent propagation of transgender ideology . . . has no claim to First Amendment protection. . . Pornography should be outlawed. The people who produce and distribute it should be imprisoned. Educators and public librarians who purvey it should be classed as registered sex offenders. And telecommunications and technology firms that facilitate its spread should be shuttered.⁴⁸

A second Trump administration would not be able to implement such a policy without Congress, making it likely that fair-minded people could prevent such a horror. If Congress were to create such a federal criminal provision, it could result in school officials and librarians facing potential felony criminal penalties for including books or lessons discussing transgender people in schools or libraries. And transgender people could face these criminal penalties for merely being themselves in public. This would not only threaten the freedom of countless transgender and cisgender people across the country; it would also send the damaging and stigmatizing message about what it means to be transgender, with significant implications for how transgender people are treated in all aspects of their lives. Such criminal laws would clearly violate well-established First Amendment law, and the ACLU would sue to stop them.

45 *Supra* note 2 at 586 ("The President should make clear via executive order that religious employers are free to run their businesses according to their religious beliefs, general nondiscrimination laws notwithstanding . . .").

46 See *Hishon v. King and Spalding*, 467 U.S. 69, 78 (1984); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968).

47 See, e.g., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617, 631 (2018) (remarking that "it is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

48 *Supra* note 2 at 5.

As part of the ACLU's playbook for states, we will urge governors, state attorneys general, and state legislatures to act now to prohibit the use of state resources to support any criminal prosecutions or other enforcement measures by the federal government unless compelled by federal law. While the end result of this approach may be to merely slow down the enforcement of federal criminal provisions, such as those Project 2025 is advocating for, it could be incredibly significant for the daily lives and futures of transgender people across the country.

The ACLU will urge states to offer an alternative, positive vision that welcomes transgender people to be full participants in society. For example, states should ensure that gender, whenever its disclosure is required, is always self-reported in the state, with no medical documentation requirements, and bar state and local officials from questioning or investigating sex or gender designations. Such a policy would prevent state and local officials from being complicit in the Trump administration's efforts to attack the legitimacy of transgender people and demonstrate that the state respects the dignity of transgender people and supports the community.

CONCLUSION

Across the country in recent years, transgender people and their families have been targeted by a relentless assault on their rights, their safety, and their fundamental freedom to be themselves. States have adopted laws criminalizing their health care, attempting to ban them from public life, and even threatening to remove transgender youth from families that love and affirm them. Throughout this political onslaught, the ACLU, our nationwide affiliate network, and our millions of members have remained stalwart in defense of the basic principle that all people deserve the freedom to be themselves and every state should be a safe place to raise every family.

Donald Trump's promises to take these discriminatory policies nationwide should be unthinkable, but it is nonetheless a future we're prepared for. Transgender people are no strangers to government persecution, political slander, or the criminalization of gender nonconformity. They know how to build safety, community, and care among one another, and the ACLU has a century-long history

of representing, supporting, and advocating for the powerless, the silenced, the marginalized, and the unapologetically queer against the kinds of attacks outlined in this report. We would zealously and unflinchingly defend LGBTQ families, LGBTQ rights, and LGBTQ health care against Donald Trump or anyone else who tries to extinguish LGBTQ freedom.