

# HARRIS ON LGBTQ RIGHTS

Building on a Legacy of Undoing Harm, Expanding Protections, and Serving as a Bulwark Against State Attacks

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The Biden-Harris administration's record on LGBTQ rights suggests strongly that Kamala Harris, the Democratic candidate for president, would champion LGBTQ rights if elected. Given the significantly anti-trans policy environment that has emerged from state-legislative attacks on LGBTQ people over the past four years, the ACLU would push a future Harris administration to build on the Biden-Harris history and use the power of the federal government to protect LGBTQ people from harm in as many ways as possible.

From its first day in office, the Biden-Harris administration worked to undo many of the Donald Trump administration's regressive anti-LGBTQ federal policies, and to enhance federal protections. The Biden-Harris administration ordered federal agencies to protect LGBTQ people against discrimination by ensuring that the Supreme Court's historic decision in *Bostock v. Clayton County* applied in the contexts of not just employment, but housing, health care, and credit lending. It also reopened the military to transgender service members, reversing the Trump administration's ban. It expanded access to gender-affirming health care through government health-care programs, including in prisons. And it expanded access to accurate gender markers on federal government identification documents.<sup>1</sup>

The Biden-Harris administration has been a bulwark against anti-LGBTQ attacks by suing states over some of their anti-trans laws and policies. In particular, it sued several states over their bans on medically-necessary health care for trans adolescents, bringing the issue all the way to the U.S. Supreme Court this coming term.<sup>2</sup>

While so much more work remains, including passing comprehensive nondiscrimination legislation through Congress, we have seen significant progress under the Biden-Harris administration in undoing the erasure and harm of the Trump years, in strengthening and expanding protections for LGBTQ people, and in fighting back against state attacks on trans people through the courts.

Given this strong record, should Vice President Harris win election this November, our expectation is that much of this work will continue. How much progress we could see under a Harris administration will depend significantly on whether she has pro-equality majorities to work with in the House of Representatives and the Senate. Regardless of the outcome of the election, the ACLU will ensure that the rights and freedoms of LGBTQ people are protected.

## OVERALL RESPONSE

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### Courts

When a new presidential administration takes office in January 2025, the LGBTQ community will likely continue to confront a dismal policy landscape in about half the states where trans adolescents — and increasingly trans adults — cannot access gender-affirming medical care; where trans people are unable to use restrooms in schools and other government buildings; where updating

gender markers on identity documents is challenging or impossible; and where participation in society as their authentic selves is increasingly challenging and fraught.

In addition to trying to reduce or eliminate these harms through its independent regulatory authority and its ability to work with Congress to shape pro-LGBTQ legislation, a Harris administration will also have the opportunity to use the courts. This would continue the

Biden-Harris record of suing states for violating the civil rights of trans people, and the ACLU will urge a Harris administration to hold states accountable through the courts.

That said, a Harris administration, as well as the private litigants that the ACLU represents, will face a challenging course in using the federal courts to stop the ongoing attacks on the LGBTQ community. The 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.<sup>3</sup> And it was a Trump appointee — Justice Neil Gorsuch — who authored *Bostock v. Clayton County*, 590 U.S. 644 (2020), our 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 the courts, filing cases would allow both a Harris administration and private litigants to publicly call out unconstitutional and illegal policies, and to build the political and grassroots support that will ultimately result in more just policies over time. Accepting the illegal and unconstitutional anti-trans and anti-LGBTQ policies present in about half the states without a legal fight is not an option. Below we discuss how those state policies should be considered illegal and unconstitutional under any proper reading of precedent.

## Congress

Enacting explicit, comprehensive nondiscrimination protections based on sexual orientation and gender identity requires congressional action. While a pro-equality president can do a lot to protect the rights and freedom of LGBTQ people, they cannot achieve this long-sought goal on their own. Since the earliest days of her service in the Senate, Vice President Harris has consistently made clear her support for the Equality Act, which is legislation that would provide LGBTQ people with explicit, comprehensive protection against discrimination. She has consistently urged Congress to pass the legislation.<sup>4</sup>

In the event of a divided Congress, similar to what we have now, it will be essential for the Harris administration — combined with pro-equality members of Congress — to remain vigilant against efforts to include anti-LGBTQ measures, including those banning access to gender-affirming care, in must-pass legislation, such as bills

to fund the federal government. In 2023, anti-LGBTQ members of Congress attempted to include more than 50 such measures in must-pass annual appropriations bills.<sup>5</sup> These kinds of restrictions often fly under the radar and escape significant public attention, but their impact on the lives and health of LGBTQ people, particularly those who are transgender, can be devastating. As we did for the fiscal year (FY) 2023 bills, the ACLU will mobilize our grassroots to push for appropriations bills free of poison-pill riders.

## Federal Agencies

As we have repeatedly witnessed during the Biden-Harris administration's more than three years in office, actions by federal agencies have been essential in strengthening and advancing protections for LGBTQ people. The actions that federal agencies have taken to implement the *Bostock* decision have been critical in providing LGBTQ people with protection against discrimination across critical areas of daily life, including education, housing, health care, and credit. We expect this work to continue under a Harris administration. In the event of a divided Congress — or even one controlled by majorities that are hostile to the rights and freedom of LGBTQ people — action at the federal-agency level will be how progress, however halting or limited, is achieved in the near term.

Strengthening and expanding access to gender-affirming care is an area that various federal agencies can continue to act on to ensure that the health care needs of transgender people are met. These are actions that a pro-equality administration can take regardless of Congress. One significant action that a Harris administration could immediately take is to issue an executive order directing federal agencies to examine ways that they can affirmatively enhance access to gender-affirming care. This would send a powerful message about how a future-President Harris is prioritizing the health care needs of trans people, and it would strengthen coverage and access to gender-affirming care under federal policies and programs. The ACLU will continue to engage with federal agencies, including through the rulemaking process, to ensure that there are strong protections for LGBTQ people in place.

## States & Municipalities

Under a Harris administration, we expect to see pro-equality states work alongside the federal government to strengthen and expand protections for LGBTQ people. A Harris administration could work to ensure that states have the resources they need to expand their own pro-equality programs and protections. For example, state employees and state-funded programs should be

fully trained on LGBTQ competency, and state budgets must provide dedicated funding streams for LGBTQ-specific programs. State medical facilities and insurance programs can ensure trans and gender-expansive people have access to the care that is medically necessary to live their lives. State housing programs must have policies in place to ensure they are affirming and accessible to LGBTQ people. State laws and court rules can be updated to ensure all people can access legal name changes and state identification that reflects who they are. Criminal legal systems should be reformed to stop the disproportionate harm to LGBTQ people, specifically BIPOC trans people, and ensure there is increased funding to community-based alternatives to incarceration.

We know that a Harris win on the federal level may ignite backlash against LGBTQ people in the form of increased attacks in some states. With that, it will be equally, if not more important, that a Harris administration dedicates attention and resources to supporting LGBTQ people living in anti-equality states. During a Harris administration, the ACLU will work alongside the federal government to fight state attacks on LGBTQ people. This work will include bringing lawsuits to fight existing or new anti-LGBTQ laws that ban access to medical care for trans people, ban access to restrooms and facilities for trans people, strip schools of their ability to support and create a positive learning environment for LGBTQ students, and

more. In states where we see continued attempts to pass anti-LGBTQ laws, we will show up in hearing rooms and state houses across the country to fight these attacks.

## Organizing

The ACLU is committed to bringing the full power of its members, supporters, and volunteers to help ensure progress for LGBTQ equality under a Harris administration. Our goal of passing comprehensive federal nondiscrimination protections for LGBTQ people will not be possible without tremendous public pressure through aggressive lobbying and grassroots mobilization to create the urgency and momentum for Congress to enact these protections.

To help a future Harris administration pass federal nondiscrimination protections for LGBTQ people, we will prioritize organizing in states with key legislative targets to push Congress to reform the Senate filibuster and pass pro-equality legislation. We will engage our ACLU activists to join the fight for LGBTQ equality, hosting events in key districts to educate the public on this issue and engaging members of Congress in-district to get them on the record supporting LGBTQ rights. And we will push a Harris administration to prioritize passage of pro-LGBTQ legislation in Congress.

# SPECIFIC OPPORTUNITIES & RESPONSES

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## Filling in Remaining Gaps in LGBTQ Protections at the Federal Level

The Biden-Harris administration made great strides not only in reversing anti-LGBTQ actions by the Trump administration, but in advancing greater affirmative nondiscrimination protections for LGBTQ people at the federal level. Significant gaps still remain, and a Harris administration should move quickly to fill them.

### The Biden-Harris Record

The Biden-Harris administration's history on LGBTQ nondiscrimination makes us optimistic that a Harris administration would continue to prioritize this work. On the very first day of the Biden-Harris administration, President Biden signed Executive Order 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."<sup>6</sup> In it, the administration declared that it was the policy of the United States that "Every person should be treated with respect and dignity and should be able to live without

fear, no matter who they are or whom they love." The executive order affirmed the Supreme Court's historic ruling in *Bostock v. Clayton County*, in which the court held that it was a violation of Title VII of the Civil Rights Act of 1964 to fire someone because they are LGBTQ, and applied its holding to federal laws prohibiting discrimination in housing, education, health care, and credit. Some of these changes happened quickly, such as when the Department of Housing and Urban Development announced that it would enforce the Fair Housing Act to prohibit discrimination against LGBTQ people.<sup>7</sup> In some cases, this essential work has taken years to accomplish. It was only in April 2024 that the administration finalized a rule to strengthen nondiscrimination protections in health care and insurance coverage under the Affordable Care Act for LGBTQ people.<sup>8</sup>

Outside the context of Executive Order 13988, the Biden-Harris administration has repeatedly worked to expand LGBTQ rights. On its first day, President Biden signed another executive order, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."<sup>9</sup> This executive order made it U.S.

policy to use the federal government to advance racial equity and support for underserved communities, and explicitly included LGBTQ people within these measures. Just days into the Biden-Harris administration, the Department of Justice (DOJ) reversed a Trump-era memorandum that was intended to severely limit the application of the *Bostock* decision and thus its ability to protect LGBTQ people from a wide range of discrimination. On January 25, 2021, the Biden-Harris administration ended the ban on military service by transgender people that was put in place by President Trump.

The Biden-Harris administration's work on LGBTQ justice has been both substantive and symbolic. In June of 2021, Harris became the first sitting vice president to march in a Pride parade,<sup>10</sup> doing so as part of the Capital Pride Walk & Rally in Washington, DC. In addressing the crowd, Vice President Harris called on the Senate to take up and pass the Equality Act.<sup>11</sup> In addition, Vice President Harris has noted the close connection between politicians and legislators attacking health care for transgender people and those doing the same for abortion and other reproductive care, saying, "The intersection on the issue of reproductive care and trans care, and the ability of families to be able to have care for their children and their families, is really, again, an intersection around attacks that are on an identity."<sup>12</sup>

Still, significant gaps in federal protections for LGBTQ people remain, and a Harris administration must work to bridge those gaps.

### **Ensure strong and consistent access to medically necessary health care for trans people across the federal government**

The Biden-Harris administration has made progress in providing access to medically-necessary health care for trans people, but gaps remain. For example, while federal employee health plans, Medicare, and the Federal Bureau of Prisons all provide gender-affirming health care, including surgery, the Department of Veterans Affairs (VA) has been dragging its feet on this issue. Despite the VA announcing in February 2021 that it would begin reviewing its policies to ensure that they are fully inclusive of transgender veterans, including a plan to end the ban on comprehensive gender-affirming care, transgender veterans are still not able to access medically-necessary, even life-saving, surgical care within the VA health care system.<sup>13</sup> This is a serious issue because the armed forces are likely the country's largest employer of trans people, with approximately one in five (21 percent) trans people serving in the military at some point in their lives,<sup>14</sup> which makes the VA health system an essential resource for trans Americans.

In addition, the Department of Health and Human Services (HHS), including the Centers for Medicare and Medicaid Services, must strengthen coverage for gender-affirming care for federally-funded programs such as Medicare and Medicaid, including through mandatory coverage determinations and increased clarity around what must be covered.

A Harris administration should prioritize ensuring that all parts of the federal government provide medically necessary care for trans people. One of the most significant and powerful ways for a Harris administration to make clear how it is prioritizing the health care needs of trans people is by issuing a day one executive order directing federal agencies to examine ways that they can affirmatively enhance access to gender-affirming care in federally funded programs. An executive order like this would have the benefit of providing clear direction to federal agencies, and doing so in a way that will serve the goal of comprehensively addressing this issue, including through mandatory coverage determinations and increased clarity around what must be covered.

### **Passing Comprehensive Nondiscrimination Legislation**

A Harris administration should work to pass comprehensive LGBTQ nondiscrimination protections like the Equality Act through Congress.

The Biden-Harris administration has long prioritized passage of the Equality Act. Most recently, President Biden called on Congress to pass the bill in his 2024 State of the Union address.<sup>15</sup> From her earliest days in the Senate in 2017, Vice President Harris was a co-sponsor of the Equality Act.<sup>16</sup> A Harris administration would almost certainly prioritize passage of the Equality Act or other comprehensive nondiscrimination legislation for LGBTQ people. While a pro-equality administration is essential for the success of the decades-long struggle to pass federal nondiscrimination protections for LGBTQ people, it alone is insufficient. Not only will it require a pro-equality trifecta at the federal level, but passage through Congress will ultimately depend on reform or elimination of the filibuster in the Senate.

Today's version of the filibuster — unlike the way the Senate operated for almost 200 years on nearly all business — guarantees gridlock by giving the minority party a veto over the Senate's agenda. The ACLU is prepared to harness the public pressure necessary to push the Senate to restore its ability to deliver legislative results for the people. The ACLU will engage in a multi-front effort, including aggressive lobbying and grassroots mobilization, to make the case, create the urgency, and

provide the momentum necessary for Congress to act. Passage of legislation like the Equality Act is something that advocates and elected leaders have strived to achieve since the mid-1970s. We must be prepared to act to finally achieve this goal if the window of opportunity presents itself.

Even in the event of a pro-equality trifecta, the need to act quickly to secure these protections is of paramount importance. New presidential administrations with support from both chambers of Congress typically enact the bulk of their legislative agenda within the first six months of their first year in office. The window of opportunity to win comprehensive nondiscrimination protections for LGBTQ people will quickly close. Acting decisively and early will be essential. This is true not only because of the unforgiving reality of the legislative process in Congress but also because there is an urgency to secure these protections, particularly for transgender people. In recent years, we have seen state after state enact draconian restrictions on the health and lives of transgender people. Federal legislation like the Equality Act is urgently needed to safeguard the basic freedom of transgender people.

When this legislation is ultimately debated on the Congress floor, we can expect opponents of LGBTQ equality to do everything within their power to defeat it, including the “thousand cuts” strategy of offering amendments to water down and strip away its protections. One such tactic is adding anti-trans amendments to the bill. Another is likely to come in the form of amendments to provide religious exemptions for those who object to LGBTQ people. As a senator, Vice President Harris was the lead sponsor of the Do No Harm Act. This legislation would have prevented the Religious Freedom Restoration Act, or RFRA, which is now federal law, from being used to evade compliance with civil rights, labor, child welfare, and health care laws.<sup>17</sup> In sponsoring the Do No Harm Act, Vice President Harris demonstrated an understanding that while religious freedom is a core Constitutional value, it must not be used as a means of causing harm to other people. A Harris administration would need to maintain this position in the face of inevitable efforts to allow for sweeping discrimination against LGBTQ people.

While the path forward for comprehensive federal nondiscrimination legislation remains uncertain — and depends heavily on the outcome of the election — we can expect a Harris administration to continue to champion the Equality Act.

While the passage of explicit, comprehensive legislation protecting LGBTQ people from discrimination is the ACLU’s top LGBTQ priority in Congress, there are many other actions that a Harris administration should urge Congress to take to safeguard the rights of LGBTQ people.

For example, given the critical role that the DOJ has played in acting as a bulwark against anti-trans laws at the state level, a pro-equality Congress should act to increase funding for the Civil Rights Division to allow for the U.S. to play an even more active role in making the case, alongside organizations like the ACLU, for the rights of LGBTQ people in court. In addition, we can expect to see — and will support — additional pro-equality bills introduced by members of Congress to address specific areas of discrimination, such as the REAL ID Gender Requirement Reform Act. This legislation would remove the requirement to include gender under the federal REAL ID law, a step that would improve the ability of trans and nonbinary people to have accurate, REAL ID-compliant IDs.

## Use Federal Authority to Stop or Mitigate Discrimination by the States

The ACLU will push a Harris administration to work to mitigate the harms caused by the terrible anti-trans policy landscape in many states both through federal agency action and through the courts.

### Federal Agency Actions to Mitigate Harm to LGBTQ People at the State Level

We will continue to see attacks on the rights of LGBTQ people in anti-equality states over the coming years, and the federal government can play an important role in fighting those attacks.

Many federal agencies have an important role to play in protecting LGBTQ people across the country from harmful state laws. The Department of Education can strengthen protection of LGBTQ students across the country through more robust enforcement of nondiscrimination rules and more vigorous investigation and resolutions of Education Office of Civil Rights complaints based on sex discrimination. It is worth noting that the most recent Department regulations clarifying how Title IX can be used to protect LGBTQ students are enjoined in certain states, so the administration must continue to fight in the courts to lift that injunction.

The HHS Office of Civil Rights must also provide more robust enforcement of nondiscrimination policies. This includes providing proactive compliance enforcement with public and private insurance policies across the country to ensure they do not exclude care for transgender patients, as well as rigorously investigating all complaints of discrimination.



## Holding States Accountable Through the Courts

A Harris administration should continue the Biden-Harris practice of working through the courts to minimize states' anti-trans attacks.

Since the early days of its tenure, the Biden-Harris administration has consistently fought for LGBTQ people in the courts, repeatedly advancing legal arguments intended to expand protections. The Civil Rights Division of the DOJ filed statements of interest in litigation aiming to strike down laws banning healthcare for young trans people, laws prohibiting trans students from participating in sports, and laws preventing schools from creating a safe learning environment where trans students can use school restrooms and facilities. For example, in April 2021, the DOJ filed a statement of interest in a Georgia case, arguing that to comply with the Eighth Amendment's ban on cruel and unusual punishment, transgender prisoners must be housed according to their gender identity and provided with gender-affirming health care.<sup>18</sup> In June 2021, the DOJ argued that West Virginia's law prohibiting transgender women and girls from playing on sports teams was a violation of federal law and the Constitution.<sup>19</sup> In another statement of interest, the DOJ

argued that Arkansas' law prohibiting medical providers from providing transgender youth with medically-necessary care was a violation of the Constitution.<sup>20</sup>

Since then, the Biden-Harris administration has sued states over anti-trans policies around health care, including by joining a challenge brought by Tennessee families (represented by the ACLU and Lambda Legal) to that state's ban on medically-necessary health care for trans adolescents. This June, in response to a petition from the United States, the Supreme Court agreed to review a lower court decision upholding the Tennessee ban.<sup>21</sup> This partnership with the DOJ has been essential in serving as a bulwark against waves of state-level anti-trans attacks year after year.

Vice President Harris used her powers as attorney general of California to support transgender rights in the court,<sup>22</sup> and we expect that under her leadership the DOJ Civil Rights Division would continue to expand its litigation that aims to protect transgender people across the country from discriminatory state laws. The ACLU will work with a Harris administration to continue this partnership.

## CONCLUSION

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Based on the Biden-Harris administration's record, we see a strong basis for optimism that a Harris administration would continue to fight for LGBTQ people by working to expand federal protections and to combat regressive and harmful state policies. If Vice President Harris is elected president, the ACLU will be there both to partner

with her administration on enshrining vital protections, including the passage of comprehensive nondiscrimination legislation in Congress, and to push her when we must to ensure that her administration stays focused on protecting and expanding justice for the LGBTQ community.

# ENDNOTES

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