

# THE TRUMP MEMOS

The ACLU's Roadmap for Protecting Civil Rights and Civil Liberties Under a Trump Administration



*Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*

*Section 2. The House of Representatives in each State shall have the same Number of Representatives, which shall be determined by the following Rule, to-wit: That Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, free Persons, or three fifths of all other Persons, which shall be determined by the Census, or Enumeration, which shall be taken within the prescribed Time in such Manner as the Congress shall direct: but no State shall have less Representatives than the Number which it holds in the Congress of the United States.*



*Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for a Term of ten Years, so that one-half may be chosen every second Year; and when vacancies happen in the Representation from any State, the Legislature of the State in which the Vacancies exist shall choose them in such Manner as the Legislature may direct: but no Senator shall have served more than two Terms, which shall be vacated at the Expiration of the same.*





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September 9, 2024

## Dear Reader,

We are living through a historic year in American politics.

While the 2024 presidential election was initially set to be a rare [rematch](#) between Joe Biden and Donald Trump, Biden's decision to step down just three months before the election and endorse Vice President Kamala Harris as the Democratic Party's nominee is equally as rare. Not since 1968 — another historic year in American politics — has a presidential candidate [withdrawn from the race](#).

In a race already marked by unprecedented events, the 2024 election will also have an unprecedented impact on our civil rights and civil liberties.

While the American Civil Liberties Union (ACLU) does not endorse or oppose candidates for elected office, we know that a potential second Trump administration and a potential Harris administration will be [drastically different](#) when it comes to our civil rights and civil liberties. A second Trump administration will be disastrous for our most fundamental rights and freedoms, while a Harris administration will bring a mix of challenges and opportunities that largely leaves these rights and freedoms intact.

At the ACLU, our legal, policy, and advocacy experts have laid out a roadmap for protecting civil rights and civil liberties no matter who is elected president in November. The roadmap includes challenges and opportunities that each candidate will bring, and the concrete actions the ACLU will take in response. In June, ahead of the Democratic National Convention and Republican National Convention, we began sharing this roadmap in a [series of 13 memos](#) — seven memos on a potential second Trump administration and six on a potential Harris administration.

Enclosed you will find our compilation of the seven Trump memos, as well as short summaries of each. Issues covered include immigrants' rights, abortion access, LGBTQ justice, DEI (diversity, equity, and inclusion), the criminal legal system, surveillance, and voting rights. We will release a similar compilation of the Harris memos upon their completion. The memos and related media coverage can be found at [aclu.org/memos](https://aclu.org/memos).

Our goal with these memos is to move the national discourse from agonizing over potential challenges to analyzing potential solutions. To that end, the memos not only the threats to our most fundamental rights and freedoms, but also outline the legal, legislative, advocacy, and grassroots mobilization strategies the ACLU will use in response. These strategies will help us block punches in some cases — egregious attempts to ignore the Constitution — and lessen the blows in others.

Because [resignation and despair](#) are not a strategy, we and our allies must be prepared to fight back — especially during a second Trump administration. I know the ACLU is fit for the fight because I've seen what our organization can accomplish when our freedom is on the line. In 2016, the ACLU was the only national organization to issue a comprehensive plan for the policies of a potential Clinton administration, but also those of a potential Trump administration. The latter plan laid the groundwork for us to file 434 legal actions against the Trump administration, including the first lawsuit to halt the Trump administration's Muslim ban within hours of its enactment.

Our [detailed analysis](#) of Trump's policies foreshadowed a constitutional crisis that, nearly a decade later, continues to impact our nation. Today, our analysis once again prepares us to continue that fight, over the course of the next administration and beyond, just like we did in 2016.

As Trump and Project 2025 make clear, a second Trump administration will be significantly more aggressive and effective in executing its plans to fundamentally erode our democracy, take away our freedoms, and violate our Constitution. That's because President Trump and the leaders he's likely to put in place are more familiar with how to use the levers of government to their advantage.

If Trump wins, we stand ready to meet his administration head on — in the courts, in Congress, at the state and local levels, on the street, and at the ballot box. Already, we've taken note of the extremist rhetoric he's used on the campaign trail, including promises to:

- Erase protections for LGBTQ people across the entire federal government and mandate discrimination, including banning transgender people from serving in the armed forces.
- Pursue retrogressive immigration policies — including reinterpreting the Fourteenth Amendment to apply only to people who are born in the United States and have at least one parent who is a U.S. citizen or lawful permanent resident — that harm communities of color.
- Restrict refugee resettlement and asylum and end deportation protections for DACA recipients and those with Temporary Protected Status.
- Appoint justices who will carry out the Trump administration's intentions to use antiquated laws to ban abortion or limit access to contraception.
- Eliminate race-conscious instruction in schools and DEI training in the workplace.
- Undermine press freedoms by regularly attacking media organizations he dislikes, and invoke the Insurrection Act to intimidate opponents and shut down dissent.
- Renew efforts to make it harder for Americans to vote and to spread false, debunked theories to undermine confidence in the integrity of our voting system.
- Promote unconstitutional and brutal state policing and federal law enforcement practices, dehumanize people in our criminal legal system, and accelerate mass incarceration.

Four years after Trump was elected, our nation was reeling from relentless attacks on fundamental rights and freedoms. When President Joe Biden and Vice President Kamala Harris took office, the ACLU released a [wish list](#) that called on the Biden-Harris administration to do two things: reverse Trump-era policies and protect and extend our freedoms as part of a vision for our country that included justice, fairness, and equality for all.

Since then, the Biden-Harris administration has made progress toward this vision by expanding voting rights and abortion protections, as well as advocating for equal access for transgender individuals and for students' right to receive an inclusive education. We remain concerned, however, that the administration has not fulfilled its critical civil rights and civil liberties responsibilities across a range of issues, including:

- Fully banning racial and other profiling. The Biden-Harris administration has permitted profiling for national and homeland security purposes, and at the border. These contexts can be pretexts for law enforcement to target Muslims, communities of color, and immigrants.
- Ending suspicionless surveillance of Americans under Section 702 of the Foreign Intelligence Surveillance Act (FISA). The Biden-Harris administration instead pressured Congress to dramatically expand Section 702, resulting in legislation that creates new ways for the government to spy on us without a warrant.
- Restoring the Voting Rights Act of 1965 to its full strength. While restoring the Voting Rights Act requires congressional action that has been blocked, the Biden-Harris administration has yet to fully implement its executive order promoting access to voting.
- Ending the federal death penalty — a commitment Biden-Harris campaigned on in 2020 — and fully implementing the reforms promised in his executive order on policing.

If Harris wins, we stand ready to work with her administration but also hold it accountable for, among other things, protecting the right to abortion and contraception, preserving our asylum system and providing a path to citizenship, safeguarding the right to vote for all Americans, and bringing necessary reforms to our criminal legal system. The ACLU's commitment to this work remains unchanged now, and for years to come.

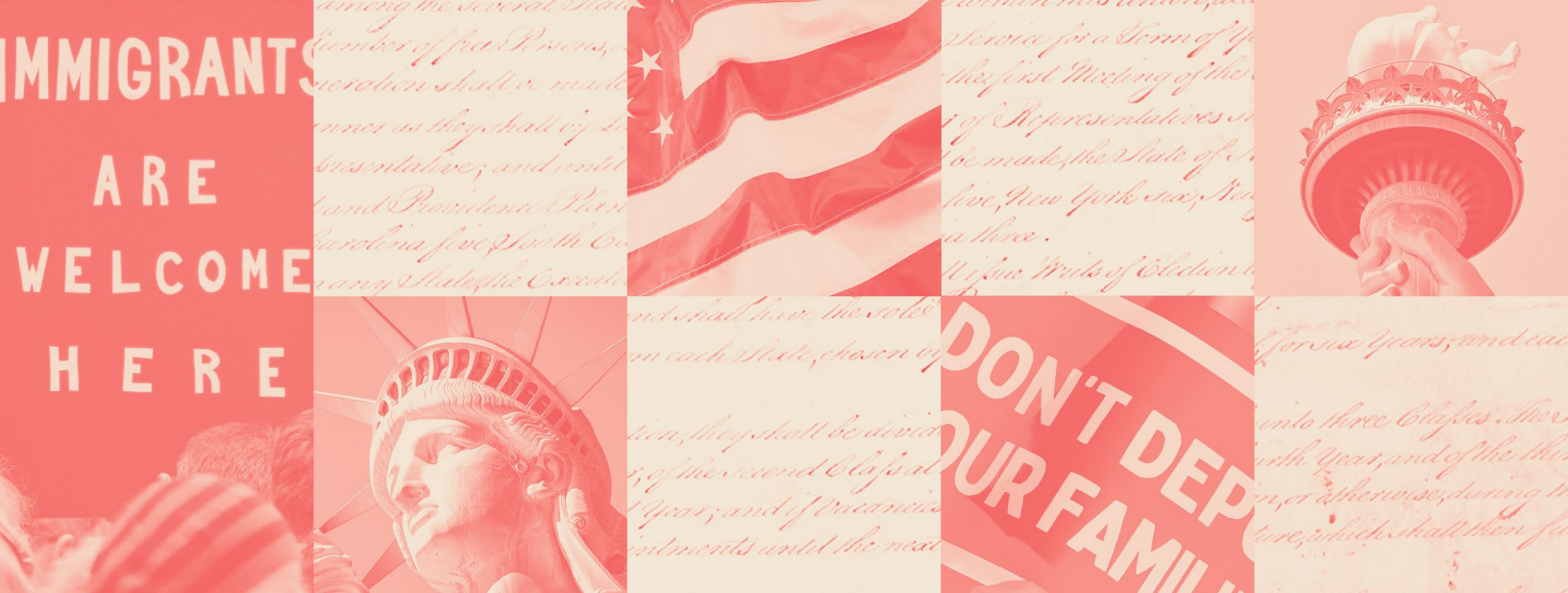
In November, our nation will send one candidate to the White House. At the ACLU, we're prepared to use all the tools at our disposal to ensure that our nation lives up to the promise of the Constitution no matter who is elected.

Sincerely,



**Anthony D. Romero**

Executive Director of the  
American Civil Liberties Union



# TRUMP ON IMMIGRATION

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The “Trump on Immigration” memo outlines how the ACLU would respond to former President Donald Trump’s promises of **mass deportation, targeting children and families, and dismantling our nation’s asylum protection system** if he’s elected in November. The ACLU is prepared to challenge Trump’s proposed mass deportation program in court and in Congress, and mobilize local and state governments now to protect communities nationwide from other extreme anti-immigrant policies.

## TRUMP PROPOSED POLICIES

- **Mass deportation:**

Trump has promised the “largest domestic deportation operation in American history.” If re-elected, Trump plans to quickly and vastly expand deportation operations on “day one” in the interior of the United States, deporting and detaining millions of people a year.

- **Targeting the core rights of children and families:**

A second Trump administration risks an attack on birthright citizenship, barring undocumented children from schools, and again forcibly separating children from their parents at the border.

- **Dismantling our immigration system:**

Trump is reportedly planning to kick off his second term with a major bill on “border security and immigration.” In addition to limiting or effectively ending access to asylum, it could eliminate other pathways for humanitarian protection that have proven vital to our nation’s response to unfolding wars and crises, including in Ukraine, Cuba, Haiti, Nicaragua, and Venezuela.

## ACLU RESPONSES

- **Litigation:**

In response to a mass deportation program, the ACLU is prepared to litigate cases to protect people’s rights under the Fourth and Fifth Amendments, as well as other legal provisions. In addition, we’ll use the full power of the Fourteenth Amendment and Supreme Court precedent to protect birthright citizenship and ensure immigrant children have equal access to education. Lastly, should a second Trump administration try to bring back family separation at the border, we’ll take them to court for violating our settlement agreement.

- **Legislation:**

The ACLU will call on legislators to pass measures that prevent Immigration and Customs Enforcement (ICE) from conducting mass deportations and shrink the ICE detention machine.

- **Mobilization:**

The ACLU and its nationwide network of affiliates will also work with states and localities to build a civil rights firewall to protect residents to the full extent possible and ensure that a Trump administration can’t hijack state resources to carry out its draconian policies. And, if Trump sends a bill to Congress that effectively ends asylum, we’re prepared to mobilize our supporters nationwide to stop it because we know that a strong majority of voters support the U.S. asylum system.

**“These policies have no place in a democracy that protects or respects civil liberties and the rule of law.** From the courts to the halls of Congress, we will use every tool at our disposal, including litigation, to defend the rights of immigrants and protect all members of our communities from the widespread damage these policies would cause.”

— **Omar Jadwat,**  
Director of the ACLU’s  
Immigrants’ Rights Project

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**“Xenophobia and racism would become the touchstones of American immigration policy under a second Trump administration, if he is re-elected.** That’s why we must begin mobilizing with local and state governments now to protect communities nationwide from extreme anti-immigrant policies.”

— **Naureen Shah,**  
Deputy Director of Government  
Affairs at the ACLU

## TRUMP ON IMMIGRATION

### Tearing Apart Immigrant Families, Communities, and the Fabric of Our Nation

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If given a second term, Donald Trump promises to decimate American communities by targeting immigrants who are already contributing members of society and blocking new immigrants from coming lawfully to the United States. Trump has made clear that he will double down on what he did during his presidency — without regard for the law, decency, or common sense.

Indeed, Trump has promised to be far *more* aggressive in a second term, emboldened by close advisers, like Stephen Miller, to launch a “shock-and-awe blitz” of executive orders and actions that will target millions of immigrants and their families and threaten the freedom and security of everyone in the United States. “Trump will unleash the vast arsenal of federal powers to implement the most spectacular migration crackdown,” Miller told *The New York Times* in November 2023.<sup>1</sup> Former senior Trump officials helped write Project 2025, a detailed plan to overhaul federal agencies that includes more than 175 immigration actions.<sup>2</sup>

In this paper, we focus on three areas of significant threats to immigrants and the U.S. communities and families they are a part of, should Trump be elected to a second term. The first is mass deportation: A central promise of Trump’s 2024 campaign is to “carry out the largest domestic deportation operation in American history” once in office.<sup>3</sup> Second, we explore some of Trump’s and his surrogates’ plans to target the core rights of children and families: attacking birthright citizenship, barring undocumented children from schools, and again forcibly separating children from their parents at the border. Finally, we will turn to the Trump team’s strategy to dismantle our nation’s asylum protection system and attack human rights at the border.

These threats — among many others — underscore the need for elected officials in Congress, state and local

governments, and the American people, to come together now to begin planning a sustained and coordinated response. We outline that response below. In the coming months, the ACLU and our partner organizations will continue to sound the alarm about and plan for the full panoply of Trump’s threats on immigration and beyond.

In cataloging the many potential threats, we cannot lose sight of the big picture: A second Trump administration will claim a mandate to decide immigration policy based on xenophobia and racism — flouting principles of fairness, human dignity, and the rule of law. In his campaigning over the last year, Trump has further escalated his anti-immigrant demagoguery, saying for example:

“They’re poisoning the blood of our country. That’s what they’ve done. They poison — mental institutions and prisons all over the world. Not just in South America. Not just the three or four countries that we think about. But all over the world they’re coming into our country — from Africa, from Asia, all over the world. They’re pouring into our country.” — Dec. 16, 2023, New Hampshire rally<sup>4</sup>

“They’re rough people, in many cases from jails, prisons, from mental institutions, insane asylums. You know, insane asylums — that’s ‘Silence of the Lambs’ stuff.” — March 4, 2024, interview with Right Side Broadcasting Network<sup>5</sup>

“The Democrats say, ‘Please don’t call them animals. They’re humans.’ I said, ‘No, they’re not humans, they’re not humans, they’re animals’ ... Nancy Pelosi told me that. She said, ‘Please don’t use the word animals when you’re talking about these people.’ I said, ‘I’ll use the word animal because that’s what they are.’” — April 2, 2024, Grand Rapids, Michigan, campaign event.<sup>6</sup>



Chillingly, the cruelty, overt racism, and deeply damaging policies of the Trump administration from 2017 to 2021 reportedly could have been even worse, because many officials refused to implement some of Trump’s most extreme plans, such as a suggestion to electrify a border wall, and add “spikes on top that could pierce human flesh,” and a “water-filled trench, stocked with snakes or alligators.” We don’t know if those pronouncements were real threats or mere saber rattling, but Trump reportedly also suggested to aides that officials should shoot migrants in the legs.<sup>7</sup> In assessing the credibility of such threats, we need only recall the actual implementation of a family separation policy that literally wrenched children from their parents’ arms — creating lasting and irreversible harm. Many would have thought the design and implementation of that policy unthinkable, and yet Trump did it, separating about 6,000 families, whom the ACLU successfully represented in litigation.<sup>8</sup>

Trump and his advisors are now working assiduously to make sure that the second time around, career officials will not stand in the way of his plans. Instead, they will install Trump loyalists across the White House and Department of Homeland Security (DHS).<sup>9</sup> If they succeed, we may see a second Trump administration take actions that seem — even after four years of his first term — beyond the pale. For example, a former senior Trump administration official foresees “the regular use of tear gas to repel migrants, the deployment of heat-ray technology to make asylum-seekers feel like their skin is on fire, or shoot-to-kill orders for anyone who rushes the U.S. border.”<sup>10</sup> The Niskanen Center, cataloging Project 2025’s immigration proposals, foresees 700,000 holders of Temporary Protected Status, 500,000 young adults known as Dreamers, and more than 175,000 Ukrainians all losing their legal protections — “pushing them out of status or the country”<sup>11</sup> — a fate that might be shared by tens of thousands of Afghans, Venezuelans, Cubans, and Haitians, all facing dangerous conditions at home.<sup>12</sup>

## OVERALL RESPONSE

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### Courts

As we detail below — and as Trump and his advisors well understand — he simply cannot accomplish his immigration agenda without violating the Constitution and federal laws. Thus, just as it was from 2017 to 2021, litigation will be a critical component of the response.

The experience of the previous Trump years underlines the practical importance of legal action. Lawsuits stopped many illegal Trump administration policies, including those that aimed to separate families at the border,<sup>13</sup> arbitrarily cut off access to asylum,<sup>14</sup> strip hundreds of thousands of people of protection under Temporary Protected Status (TPS),<sup>15</sup> and Deferred Action for Childhood Arrivals (DACA),<sup>16</sup> add a citizenship question to the Census to chill participation by immigrant and mixed-status families,<sup>17</sup> and prevent abortion access for unaccompanied immigrant minors.<sup>18</sup> Even in cases that did not ultimately result in a legal victory, litigation significantly mitigated harms. For example, while injunctions against the Muslim ban were ultimately reversed by the Supreme Court, challengers succeeded in forcing the administration to narrow its scope twice and setting the conditions for its later revocation.<sup>19</sup>

To be sure, Trump has made a significant mark on the judiciary, and it is not difficult to find recent examples where the courts have failed to protect rights.<sup>20</sup> But those facts should not be overstated: It is also true that Trump-

appointed judges have found Trump policies unlawful,<sup>21</sup> and time and again, courts that are sometimes assumed to be skeptical of immigrants’ rights have instead acted to protect them.<sup>22</sup> Below, we outline ways in which Trump’s policies are illegal and unconstitutional, and point to prior litigation that has succeeded in pressing relevant claims.

### Congress

The gravity of Trump’s threats and the possibility of robust court action should not obscure the need for other leaders in our democracy to act. We anticipate that in a second term, Trump will send a draconian anti-immigrant bill to Congress, framed as needed for “border security,” but in fact expanding the anti-asylum policies of his first term and attacking both immigrant communities and legal immigration pathways.

Instead of negotiating on these terms, Congress can and must use the power of the purse, and its oversight authorities, to constrain a second Trump administration’s anti-immigrant agenda. If the opposition controls either or both chambers of Congress in a Trump administration, members of Congress who are pro-immigrant can use the appropriations process to effectively thwart Trump’s ability to carry out mass detention and deportations. The aggressive use of oversight hearings, grilling of Trump officials, and issuing of subpoenas for information and documents will also all be critical.

Moreover, Trump's announced assault on our nation's immigrant communities should prompt members of Congress to make a path to citizenship for millions of long-standing U.S. residents a non-negotiable, central demand in negotiations over immigration reform legislation. These members of Congress should also go on the offense with their own package of solutions to effectively manage the border through, for example, increased capacity for screening and receiving people seeking entry. Polling shows that the public supports that approach<sup>23</sup> — not the Trump campaign's xenophobic agenda.

## States & Municipalities

Likewise, at the state and local level, we need elected officials to begin coordinating and planning *now* to protect their communities from Trump's attempts to

ravage them. Collective and coordinated action among committed officials will be vital to anticipating, revealing, and quickly responding to the Trump administration's blitz of anti-immigrant actions, particularly in major cities. States can take affirmative measures to protect their residents right now by funding legal counsel and other supports that help immigrants and mixed status families continue contributing and thriving in American communities. In addition, states can expand existing cooperation among themselves to provide legal representation, track and monitor a massive expansion of deportation and detention actions, and document and address abuses such as racial profiling and illegal stops and punitive use of immigration detention. Legislatures and city councils can enact and update their protections, including by erecting a firewall between state and local resources and federal immigration enforcement.

## SPECIFIC RESPONSES

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### Mass Deportations

If reelected, Trump plans to quickly and vastly expand deportation operations on “day one” in the interior of the United States, deporting millions of people a year and detaining untold numbers of people in massive camps pending deportation.<sup>24</sup> While Trump made similar promises in his first term, he was never able to carry out deportations on that scale.<sup>25</sup> That is because doing so is an enormous project that would entail restrictions on basic freedoms core to American life.

Consider the mechanics of the planned deportation effort. To deport immigrants who lack legal status on the scale Trump envisions, he would need to arrest *millions* of individuals; place them in removal proceedings before immigration judges; litigate those cases in the immigration courts; resolve any appeals; and then actually remove them from the United States — *every year*.<sup>26</sup> Each stage of this process has its own requirements and procedures under the Constitution and the immigration statutes — and no part of it has ever operated at anything approaching the scale and speed that Trump's plan requires. There can be no doubt that Trump would attempt to defy constitutional and other legal protections in service of his draconian goal.

Trump has also mischaracterized any decision not to detain an individual as a “catch and release” policy,<sup>27</sup> and he will almost certainly seek to detain everyone he arrests through all of the stages of the removal process, in part to coerce them into giving up their rights to fight deportation. The federal deportation system is already

massive; the Department of Homeland Security oversees more than 66,000 federal law enforcement officers, by far the largest of any single federal agency and half of all federal law enforcement officers across the country.<sup>28</sup> Trump's threats will require a vast expansion of this massive police force and huge sums of taxpayer money.

But even if significantly enlarged, the existing removal system will not even begin to approach the scale that Trump and his advisors will require. Instead, making America into a deportation nation will require extraordinary, unprecedented, and often illegal steps.

For example, mass deportations will require far more agents than Immigration and Customs Enforcement (ICE) has or could rapidly hire. So, Trump and his associates plan to build a new deportation force out of the military, federal agents, and state and local police.<sup>29</sup> Trump and his advisor, Stephen Miller, have described plans to federalize state National Guard personnel and deploy them for immigration enforcement — arresting people in their homes and workplaces in communities across the nation and deploying National Guard troops, in some cases against the will of local officials and communities: “[i]f you're going to go in an unfriendly state like Maryland, well, there would just be Virginia doing the arrest in Maryland.”<sup>30</sup> Trump has also indicated that state and local police would also be deputized to make arrests and to identify targets — and granted “immunity” for any civil rights violations they commit.<sup>31</sup> These officers would not only arrest specific, identified targets, but would “carry[] out workplace raids and other sweeps in public places aimed at arresting scores of unauthorized immigrants at once.”<sup>32</sup>

It is tempting to regard these threats as overblown and calculated merely for political campaign purposes. But in recent months, Trump has repeatedly sought to rationalize his plans for mass deportation, blending military and national security rhetoric with xenophobia. When asked about the legality of using the military against civilians, Trump retorted that, in his view, “these aren’t civilians.”<sup>33</sup>

Trump’s deportation dystopia, if realized despite all of the legal, practical, and moral barriers, would fundamentally reshape American life. People across the country would experience armed military personnel, federal agents of all stripes, state and local police, and potentially even police from other states conducting raids and sweeps in their neighborhoods and at their workplaces. People of all immigration statuses, including U.S. citizens and lawful permanent residents, could be investigated, questioned, and even arrested by these agents if they are at a location that the deportation force decides to “hit.”<sup>34</sup>

And that is only the first stage of the process — arrest. Actually processing and deciding all of the resulting cases is an administrative and judicial process that cannot practically be farmed out to other agencies. Carrying it out on Trump’s scale will require bloating the removal system beyond all reason.

The Trump team is therefore looking for any excuse, no matter how improbable, to *avoid* the legally required procedures for determining whether an individual can be removed. For example, Trump’s advisors have suggested that they might implement an extremist theory, invoking the Alien Enemies Act — an obscure law that has rarely been used since it was enacted in 1789 — to override these procedures.<sup>35</sup> Trump will also likely seek to massively expand the use of a fast-track deportation procedure called “expedited removal,” even though applying that procedure in the interior would violate constitutional guarantees.<sup>36</sup> And he could encourage or pressure states to create their own independent arrest and deportation systems separate from the federal one, as Texas has attempted with SB 4.

In anticipation of the massive scale of arrest and detention these plans will require, Trump’s advisors are already trying to get Americans used to the idea that the landscape will be dotted with “vast” immigrant detention camps.<sup>37</sup> Trump could again attempt to divert funds from other purposes in order to build these camps, just as he did when building his wall.<sup>38</sup>

## Legal Analysis & Litigation Response

Trump’s plan would require his administration to trample on numerous fundamental protections set out in the Constitution and laws passed by Congress. It would

therefore be vulnerable to legal challenge from multiple angles.

**The Fourth Amendment prohibits unreasonable searches and seizures, including arrests and detentions without individualized suspicion.**<sup>39</sup> And the Fifth and Fourteenth Amendments guarantee the equal protection of the laws, including freedom from racial discrimination by law enforcement.<sup>40</sup> There is no exception for immigration enforcement.<sup>41</sup> Whether officers belong to ICE, Customs and Border Protection (CBP), military, police, or other agencies, they are required to abide by these basic rules.

Yet, experience from previous, more localized efforts at draconian, “zero-tolerance” interior immigration enforcement shows that these programs result in racial profiling, suspicionless interrogations and arrests, unjustified and pretextual traffic stops, and warrantless searches of workplaces and homes — all of which violate the Constitution.<sup>42</sup> These kinds of violations are rampant in dragnet-style operations because there is no inherent mark that separates citizens and people with authorization to remain in the United States from undocumented people: not language, not place of birth, not even the manner of their entry into the United States.<sup>43</sup> Accordingly, officers frequently resort to stereotypes or intuition in lieu of the factual basis that the law requires.

Perhaps the best-known recent example is Sheriff Joe Arpaio’s reign of terror in Maricopa County, Arizona. In the 2000s, Sheriff Arpaio launched an “operation ... to go after illegals” and began to conduct “saturation patrols” to stop people, investigate their immigration status, and arrest them if officers suspected them of being undocumented.<sup>44</sup> As litigation by the ACLU and its partners established, Arpaio’s immigration-enforcement sweeps racially profiled Latine residents of Maricopa County, in violation of the Fourth and Fourteenth Amendments.<sup>45</sup> The Trump immigration plan promises to replicate this unconstitutional conduct on a massive scale.

**The Fifth Amendment guarantees due process of law, and the Constitution’s Suspension Clause safeguards access to the writ of habeas corpus — a key protection against unlawful government action.**<sup>46</sup> The Trump deportation machine would violate these guarantees in at least two fundamental ways.

First, an across-the-board policy refusing to release anyone swept up by the machine pending their removal would violate Fifth Amendment protections against arbitrary or punitive civil detention. The ACLU has brought many cases asserting the rights of immigration detainees.<sup>47</sup> And the Supreme Court has recognized that even noncitizens who have no “legal right to live at large in this country” have a liberty interest in “freedom

from imprisonment.<sup>48</sup> While the Supreme Court has on occasion allowed “narrow detention polic[ies]” affecting discrete categories of noncitizens to stand,<sup>49</sup> the broad Trump detain-everyone rule would go much further and could not be squared with fundamental constitutional protections.

Second, trying to sidestep the procedural protections embedded in the removal process would violate the Fifth Amendment and the Suspension Clause. The Trump administration took one step in this direction in 2019, issuing a rule that attempted to expand fast-track “expedited removal” procedures — which drastically curtail the ability of immigrants to defend against deportation — from the border into the interior of the country.<sup>50</sup> As a result of litigation by the ACLU and its partners, the expanded authority went almost entirely unused, and the rule was later revoked by the Biden administration.<sup>51</sup> Renewed efforts to end-run deportation procedures, whether through the expedited removal authority or otherwise, will meet renewed resistance.

There are even more legal barriers the deportation machine would have to overcome. **Efforts to have states spin up their own deportation systems would violate 150 years of Supreme Court precedent establishing that only the federal government has that power — as courts have recently re-affirmed in litigation by the ACLU and partners that has blocked Texas’s SB 4 law.**<sup>52</sup>

**Attempting to deploy the Alien Enemies Act in service of a mass deportation effort would run headlong into the limits built into the statute itself**, which gives the President only limited authority to detain and deport “enemy aliens” during a “declared war” or an “invasion or predatory incursion” involving a “foreign nation or government.”<sup>53</sup> **And diverting funds to build detention camps could violate funding statutes**, as did Trump’s 2019 diversion of funds to build a border wall.<sup>54</sup>

**Finally, federalizing the National Guard and deploying military personnel for immigration enforcement would raise grave legal concerns.** Since the founding of our nation, American institutions have carefully guarded against military involvement in domestic affairs.<sup>55</sup> In addition to the Constitution itself, the Posse Comitatus Act generally forbids the use of federal military personnel for civilian law enforcement unless authorized by Congress.<sup>56</sup> Congress strengthened the Act in 2022 and 2023 in response to the Trump administration’s use of active-duty military to respond to protests against police violence.

Trump’s team has suggested that they may try to circumvent these strong legal protections and norms by invoking the extraordinary authority in another law, the Insurrection Act.<sup>57</sup> But that Act has never been used for a deportation machine like this before, and allowing this

maneuver would essentially erase the critically important line between military and civilian affairs, with effects that could reach far beyond the deportation context.<sup>58</sup>

In short, Trump’s threatened actions on immigration run counter to protections in the Constitution and statutes enacted by Congress. And we will make him answer for his lawlessness in the courts.

## Congressional Action on Trump’s Deportation Force and Mass Detention

Trump’s aggressive plans are impossible without a massive funding increase. And despite the recent congressional acquiescence to expanded detention and unfair, ineffective enforcement policies, what we saw from congressional leaders during the first Trump administration gives us reason to believe advocacy can produce resistance in Congress during a second Trump term. Trump’s vicious anti-immigrant rhetoric, coupled with his threats of raids on major cities, catalyzed serious political opposition in Congress — including members of Congress demanding access to immigrant detention sites, pressing for action on individual deportation cases, and calling out Trump’s anti-immigrant policies on social media and in press conferences.<sup>59</sup> History suggests that congressional Democrats are more likely to stand against anti-immigrant policies when a Republican is in the White House and that the more Trump pursues his extremist agenda, which threatens longstanding U.S. residents and mixed-status families, the more likely members of Congress will be to assert their powers to thwart his ability to create a deportation police state.

Even in a divided Congress, pro-immigrant justice legislators can use Congress’ appropriations powers to deny ICE the operational resources necessary to launch the indiscriminate mass raids Trump surrogates have threatened. Congress can aggressively limit ICE Enforcement and Removal Operations’ budget through the annual congressional appropriations bill and deny supplemental funding requests that have historically led to waste and misuse of funds. Congress can prohibit the use of funds to detain families and either limit or completely defund the kinds of mass detention camps the Trump campaign has touted. Congress can also prevent the Trump administration from rapidly expanding ICE and CBP detention sites by requiring congressional notification and review as a condition of detention funding. Likewise, Congress can condition appropriations on members’ access to conduct regular, unannounced detention site visits, which will enable them to uncover and bring to light the abuses suffered by people trapped in detention.<sup>60</sup> Finally, Congress can prevent the improper diversion of other appropriated funds, especially defense appropriations, by placing limitations on the reprogramming or transfer of federal funds.

The ACLU will work with coalition partners to leverage the appropriations process to resist the deportation machine.

In addition, we will seek aggressive congressional oversight of ICE's tactics and actions on American streets — including through hearings, investigations, and subpoenas — to detect abuse.<sup>61</sup>

As further discussed below, we expect Trump to send a bill to Congress on immigration and the border early in a second term. In any negotiation over comprehensive immigration reform, we will lobby Congress to expand funding and ensure meaningful access to legal representation for immigrants, who currently have no right to government-provided counsel in immigration court even though they have a constitutional right to due process and the right to counsel.<sup>62</sup> We have cause for optimism: The Senate's major bill on the border and asylum, a "bipartisan" compromise with Republican support when it was voted on in early May, would have codified the right to counsel for certain applicants for asylum for the first time and required the government to provide counsel to unaccompanied children under 13.<sup>63</sup> This is a crucial due process safeguard: Studies show that detained immigrants with counsel are far more likely to win their immigration cases and secure release from detention.<sup>64</sup>

If the Trump administration seeks to expand expedited removal to the interior, we will work with our partners to bring impacted families and community members to Capitol Hill to demand congressional action and spur a congressional backlash. Congress enacted expedited removal through the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Short of a full repeal of expedited removal across the board, we will urge Congress to use its appropriations powers to prevent ICE from conducting expedited removal against long-standing residents.

### Congressional Action on CBP

Trump is likely to employ some of his harshest tactics at the border. Historically, Congress has done little to constrain Customs and Border Protection's expansive policing or to create meaningful accountability for agents who abuse their authority, and Trump has suggested he will build on this legacy of impunity, expanding CBP's operations through the use of the National Guard.<sup>65</sup> Congress has acceded to ever more bloated budget requests, to the tune now of \$19 billion in FY 24, making CBP by far the largest law enforcement agency in the United States.<sup>66</sup>

We will lobby Congress to put meaningful constraints on CBP by limiting where border patrol forces can operate and restricting which law enforcement units

can participate in these operations. We will also lobby for restrictions and reporting on racial profiling and unlawful detentions of residents within the 100-mile zone, and for mandatory reporting on the location of any new soft-side, temporary, or open-air detention facilities utilized by CBP to round up and hold people along the U.S. border. We will urge Congress to require CBP to report on checkpoints and roving patrols, including the number of U.S. citizens stopped and families separated at checkpoints or by these patrols.

### State & Local Government: Protect Communities from Mass Deportation Drive

The Trump administration will have difficulty executing its mass deportation plans without the acquiescence and participation of states and localities, and the ACLU is already identifying ways pro-civil liberties jurisdictions can ensure they are not complicit in tearing apart their communities.

We expect that in a second term, Trump will once again seek to expand ICE's capacity through the 287(g) program, which taps law enforcement agencies across the country to identify and locate immigrants.<sup>67</sup> Trump continues to spread lies about immigrants, touting a "new category of crime...called migrant crime" and blaming "Democratic-run cities."<sup>68</sup> In fact, numerous studies show that immigrants commit fewer crimes than U.S.-born people.<sup>69</sup> Immigrants are less likely to be incarcerated for criminal offenses,<sup>70</sup> and increases in immigration rates are related to a decrease in crime rates.<sup>71</sup>

We are also concerned that Trump will solicit volunteers from law enforcement agencies in anti-immigrant jurisdictions to join in federal immigration enforcement operations and even participate in raids on so-called "sanctuary" cities, stoking animosity and partisan division along the way.

As part of a comprehensive strategic engagement with blue state governments, we will urge state governments to deny the federal government access to their law enforcement agencies and other state-held resources for purposes of immigrant detention and deportation — governors can act through executive orders, state attorneys general can issue guidance to law enforcement agencies, and legislatures can enact new measures or update existing law.

We know that many law enforcement leaders, concerned that open collaboration with ICE will diminish community trust and deter people from coming forward to report serious crimes, will decide not to collaborate in anti-immigrant enforcement measures. Short of prohibiting anti-immigrant collaboration altogether, states can enact measures requiring that prior to entering into an

agreement to assist in immigration enforcement, state and local law enforcement agencies seek advance permission from the governor or other state officials, and that they notify the public and provide an opportunity for public comment.

On the other hand, Trump's anti-immigrant rhetoric is likely to embolden racist and abusive local law enforcement officers, who will effectively act as badge-wearing vigilantes intent on assisting in the mass deportation drive. Many will engage in pretextual policing — using traffic stops and arrests for minor offenses to book people into local custody and funnel them into deportation, decreasing community-law enforcement trust and resulting in civil rights violations.<sup>72</sup> State attorneys general and other elected officials can respond by robustly enforcing state laws against racial profiling, and launching their own civil rights investigations into state and local law agencies that show a pattern of traffic stops and arrests disproportionately targeting Black and Brown residents.

We will also urge governors, other state officials, and legislatures to act decisively to protect people from Trump's mass deportation drive:

- Governors can issue pardons to immigrants for state criminal convictions that make them deportable, in consideration of their record of rehabilitation, contributions, and roots in the state.
- State legislatures can pass legislation that allows people to obtain a driver's license without regard to their citizenship — ensuring they are not arrested and convicted of the offense of driving without a valid license, which would put them at higher risk for deportation.
- States can increase visa certifications for victims of certain crimes and human trafficking and, using the new deferred action process, for exploited workers.<sup>73</sup> State legislatures can also pass so-called 364-day bills, which reduce people's vulnerability to deportation by redefining the maximum penalty for a misdemeanor under state law — thereby avoiding a trigger for mandatory deportation under a draconian provision of federal law.<sup>74</sup>
- State attorneys general can issue guidance to local prosecutors on considering the immigration consequences of the charges they are bringing to avoid inadvertently triggering deportation.
- States can also fund legal representation for immigrants facing deportation, and coordinate with community organizations and legal aid groups to ensure support for communities facing mass deportation raids.

We will also urge states and municipalities to refuse to take part in new mass detentions of immigrants. We will work in legislatures to pass measures prohibiting government contracts with ICE for detention. We will also support local movements against new detention sites and the leasing of county jail space to ICE.

Unfortunately, we know that governors of populous states like Texas, Florida, and Georgia — home to at least 2.9 million people who are undocumented<sup>75</sup> — are eager to participate in arrests, deportations, and detention. And we expect the Trump administration will once again seek to punish so-called “sanctuary” cities for partisan reasons and to stoke fear in immigrant communities. We also expect a Trump administration to go after legal services and humanitarian services organizations that provide assistance to immigrants, further chilling advocacy and adding practical and financial barriers for nonprofit groups that normally provide representation and basic services to noncitizens.<sup>76</sup> We will work with city officials to coordinate across state lines and provide support to residents and mixed-status families before and after deportation raids occur. It will be vital for local governments to help ensure that families can find their loved ones when arrested; community and faith groups can come together to deliver assistance in the form of child-care and food to families torn apart; and lawyers are on the ground and properly resourced to support impacted people. We will urge cities to band together to fund and coordinate deportation defense and assistance for people — even as they are torn from their community and shipped across state lines to ICE detention sites in other states.

### Reclaiming the Narrative on American Support for Fair and Humane Immigration Policies

Finally, we recognize that winning policy fights requires winning the narrative battle over how America should think about immigrants and immigration, and the ACLU has been building a narrative shift campaign to that end. We will continue to use detailed new public opinion research and organizing tactics around major news events — which a Trump administration will create with some frequency — to create a strong counter-narrative to the Trump administration's xenophobia and racism.

We will urge members of Congress, other elected officials, and influencers to play offense and reclaim the narrative on immigration in our country. They must debunk and forcefully reject the premises of Trump's deportation drive while calling out the xenophobia and white supremacy underlying his policy proposals.<sup>77</sup> The way that Trump is proposing we treat our neighbors and loved ones who are immigrants is completely out of step with our values and who we aspire to be as a nation. Congress should instead plan a series of hearings on the vast contributions of immigrants, including how

they have helped strengthen our economy and American communities, and why immigrants deserve a fair process to become citizens.<sup>78</sup>

Polls show that voters do not support cruel enforcement-only measures that betray core American values and put vulnerable people in danger. Proposals to ban asylum and separate families at the border are widely rejected by voters. A March 2024 Immigration Hub / GSG poll shows that 66 percent of voters in battleground states reject banning asylum, and 79 percent oppose reinstating family separation.<sup>79</sup> Recent research conducted by the ACLU also showed that when candidates, regardless of party affiliation, adopt a balanced, solutions-focused approach to immigration that includes both managing the border and providing a road to citizenship for long-term residents, they outperform their opponents' fear-based messages.<sup>80</sup>

Instead of negotiating with the Trump administration on a so-called “border security” bill, we will push members of Congress to embrace the better policy and politics of putting forward their own vision for immigration reform. Sixty-eight percent of voters want a balanced approach to immigration that includes both border management — adequately staffing ports of entry and increasing processing capacity of people seeking protection — and pathways to citizenship for Dreamers and other longtime residents.<sup>81</sup>

## Attacks on Children & American Families

### Birthright Citizenship

Trump has said that if reelected, he will issue an executive order instructing federal agencies to stop recognizing birthright citizenship, a bedrock American civil right.<sup>82</sup> This would reportedly involve, among other things, ordering agencies to stop issuing Social Security cards and passports to the U.S.-born children of undocumented parents.<sup>83</sup> Members of Congress have also introduced legislation parroting Trump's rhetoric and purporting to limit citizenship to children born in the United States to parents who are U.S. citizens and certain legal immigrants.<sup>84</sup> If successful, the impact would be massive; almost 4 million school-aged children live with at least one undocumented parent, according to a 2016 study.<sup>85</sup>

More than 150 years ago, as a fundamental part of rebuilding the nation after the Civil War and the end of slavery, the Fourteenth Amendment guaranteed citizenship to people born in the United States, without regard to parentage, skin color, or ethnicity. That guarantee ensures that we will never again consign certain groups

of people, generation after generation, to a legal underclass. The Supreme Court confirmed, more than 100 years ago, that the citizenship guarantee applies fully to U.S.-born children whose parents have no right to citizenship.<sup>86</sup> Moreover, history and tradition — including English common-law rules and early American jurisprudence — strongly support the standard, broad understanding of the Fourteenth Amendment guarantee.<sup>87</sup> Originalists, textualists, and living constitutionalists should all agree on this result.

**Theories that attempt to carve children out of this guarantee based on the immigration status of their parents are legally wrong, morally repugnant, and dangerous attacks on a core civil right. But, of course, those facts alone will not stop Trump from moving forward with his pledge. If he does, he will be challenged in court.**

### Equal access to education

In 1982, the U.S. Supreme Court held in *Plyler v. Doe* that the Constitution guarantees all children, regardless of immigration status, equal access to a basic public education.<sup>88</sup> This principle is directly in the cross hairs of a second Trump administration, as it seeks to make life in the United States unbearable for undocumented and mixed-status families in the hopes they will “self-deport.”

At issue in *Plyler* was a 1975 Texas law withholding funds to educate kids who were not “legally admitted” into the United States and allowing school districts to deny them enrollment. Some school districts took up the invitation to kick their students out of school, while others — like the district in Tyler, Texas — decided to charge them tuition (in Tyler's case, a fee of \$1,000 per year). The fallout was immediate, as students who were poor, Latine, and English language learners were driven from the classroom.<sup>89</sup>

In a watershed decision, the Supreme Court struck down the law as violating the Equal Protection Clause of the Fourteenth Amendment. As the court recognized, education was crucial to preventing a permanent underclass of undocumented immigrants in the United States and ensuring immigrants' future membership in society. Citing *Brown v. Board of Education*, the court recognized that “denying these children a basic education” would “deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>90</sup>

While he was president, Trump reportedly made multiple attempts to undermine *Plyler* and equal access to education. Miller, his aide, reportedly ordered the Department of Education to cut off school funding to states that allowed undocumented students to enroll in public

schools.<sup>91</sup> Trump’s former Education Department chief of staff has described the idea to undermine *Plyler* as a “cockroach that wouldn’t die” and predicts that in a second Trump term, the decision would be “ignored.”<sup>92</sup> Obviously, that would be illegal and inappropriate — and profoundly harmful to U.S. national interests. In fact, even governors and legislators who have targeted immigrant families in other ways have not forcefully pushed to undo *Plyler*, presumably because they recognize the tremendous practical harm that would cause to their own states.

If Trump goes after *Plyler*, we have the tools to fight back. In addition to the Fourteenth Amendment, Titles IV and VI of the Civil Rights Act of 1964 also prohibit discrimination. Alongside our partners, we will work to defend *Plyler* itself in the courts. We will also work with Congress to demand that the Department of Justice Civil Rights Division and Department of Education Office for Civil Rights continue their work to ensure that the law is followed in schools across the nation.<sup>93</sup> The Department of Justice must continue to emphasize, as it does now, that K-12 public schools must be open to all students, regardless of their immigration status or that of their parents, guardians, or sponsors: “It is a violation of federal law for districts to prohibit or discourage children from enrolling in public schools because the children or their parents or guardians are not U.S. citizens or do not have immigration documentation.”<sup>94</sup>

Moreover, many states have laws prohibiting discriminatory actions in schools and guaranteeing equal access to education — and other states could pass such measures. Officials in these states will have ample alternate grounds to defend undocumented students’ access to public schools even if *Plyler* comes under attack. We will work with state attorneys general to advise school districts of their legal obligations and ensure they are prepared for the Trump administration’s assaults on students — especially federal requests for information that federal agents could use to identify and track students and their parents. We will advise schools to prevent the abuse of their data by not collecting it in the first place, where it is not necessary for student services or accountability; and we will work with state legislatures to empower schools to protect student data.

We will also work with schools to limit invasive surveillance technologies that subject students to around-the-clock monitoring, and which could be weaponized by an anti-immigrant administration. If schools are targeted, we will work with partners to ensure school leaders and other education officials know they can refuse to assist immigration agents in locating students and can limit their access to campuses without a specific and valid judicial warrant.<sup>95</sup>

## Preventing the return of family separations

After years of litigation, the ACLU last year settled its landmark *Ms. L v. ICE* case, which challenged the Trump administration’s policy of separating children from their families at the border.<sup>96</sup> While work continues to find and reunite separated families, and to address the trauma suffered by thousands of families torn apart during the first Trump administration, Trump has, shockingly, defended and praised it during the current campaign and has refused to rule out reinstating the policy.<sup>97</sup> An attempt to reinstate the policy would not only be morally repugnant; critically, it would also violate the legally binding, court-ordered settlement agreement that has been entered in successful litigation brought by the ACLU. If Trump endeavors to reinstitute his failed and flawed family separation policy, we would immediately bring the issue to court.

In addition, we believe a return to family separation will backfire on Trump and galvanize public opinion against the entire Trump immigration agenda. The practice of tearing apart families prompted a bipartisan, and even worldwide, outcry, and we will lay the foundations for a national campaign to mobilize public sentiment once again if this immoral practice is resurrected.

## Trump’s Assault on Asylum and Human Rights at the Border

Trump has made the demonization of people seeking asylum at the southern border a key element of his campaign this year. We expect his administration to renew and expand attempts to destroy our nation’s system of protection for people seeking safety from violence and persecution — a system born of the horrors of World War II and the Holocaust, and which is enshrined in both international and U.S. law.<sup>98</sup> In particular, we anticipate Trump will attack the right of people to request asylum when they arrive at the border — both through executive action and legislation.

Trump is reportedly planning to kick off his second term with a major bill on “border security and immigration.”<sup>99</sup> In addition to limiting or effectively ending access to asylum, it could eliminate other pathways for humanitarian protection that have proven vital to our nation’s response to unfolding wars and crises, including in Ukraine, Cuba, Haiti, Nicaragua, and Venezuela.

We also expect that in a second Trump term, the border will become a more dangerous place for residents and newcomers alike. Trump will recommit to expansion of the border wall and attempt to militarize the border. Trump has wanted to treat the border as a war zone,<sup>100</sup>



and reportedly sought to emulate Israel and South Korea, citing the latter’s barbed wire and landmines.<sup>101</sup>

Trump has outlined plans for massive policing and patrolling of the entire border region. In the final year of the Trump administration, the president’s team reportedly asked to deploy 250,000 troops to the border.<sup>102</sup> We expect Trump to renew that request — even though military deployments at the border have proven damaging to military servicemembers, resulting in “rampant drug and alcohol abuse” and poor living conditions.<sup>103</sup> At least five people died by suicide and three died in separate alcohol-related accidents in just 13 months between September 2021 and October 2022.<sup>104</sup>

Finally, a second Trump administration will likely embolden vigilantism. Former DHS Chief of Staff Miles Taylor reports that “President Trump was eager to permit roaming bands of armed citizens” to engage in immigration enforcement.<sup>105</sup> He will have willing participants — particularly in states like Texas — where vigilantes have already been operating, illegally detain and then deliver migrants to CBP.<sup>106</sup> Vigilante groups have already targeted migrant shelter staff, and this is likely to increase if the federal government is supporting them.<sup>107</sup>

## Legal Response

Attempts to shut down the asylum system face a number of serious legal problems, starting with the asylum law itself, which provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section.”<sup>108</sup> Our immigration system also provides other humanitarian protections, such as withholding of removal;<sup>109</sup> additional safeguards for unaccompanied children;<sup>110</sup> and the requirement that, even in expedited removal, individuals are screened for protection claims.<sup>111</sup> What’s more, the Administrative Procedure Act sets forth procedural requirements for agency rulemaking and prohibits agencies from adopting arbitrary and capricious rules.<sup>112</sup>

The ACLU and its partners challenged numerous Trump anti-asylum policies, pressing these legal claims and more. Courts held many of the policies illegal, and some were suspended or never went into effect. Further attempts to eviscerate the asylum system will also be vulnerable to legal challenge.

Abusive border patrol tactics also run afoul of the law, including the Fourth Amendment’s search and seizure protections and its prohibition on the excessive use of force. Here too, the ACLU has repeatedly sought and

obtained accountability for unlawful conduct by Customs and Border Protection,<sup>113</sup> and we will expand that work, if necessary, to encompass the acts of border vigilantes as well.

## Congressional Action: Threats on Asylum and the Border

If Trump sends a bill to Congress that effectively ends asylum, we will fight to make sure it does not become law — mobilizing our supporters across the nation and amplifying the credible voices of experts who have explained why Trump’s solutions would actually “break the border” and are “counter-productive.”<sup>114</sup>

Although congressional Democrats and others have been willing to authorize counter-productive and anti-asylum measures at the border under the false rubric of “national security” and drug interdiction, the politics will be different in a second Trump administration. For one thing, the realities of partisan politics mean Democrats in Congress are more likely to vocally oppose policies pursued by a Republican president than a Democrat. Moreover, a further militarization of the 100-mile zone will force border residents — including U.S. citizens and mixed-status families — to live in a de facto war zone.<sup>115</sup>

We will work with members of Congress to push for hearings, investigations, and oversight of this aggressive policing and militarization, and to expose and limit CBP and the military’s activities. We will also work to prevent any legislation or related appropriations that would expand the role of the military in policing or surveilling border communities, and/or collaborating with state programs (like Governor Abbott’s new military base for migrant detention)<sup>116</sup> that encourage collusion between state and federal actors to detain asylum seekers, border residents, and immigrants in the name of border security.

Although short-term legislative advances will be nearly impossible with Trump in the White House, there is both a political imperative and opportunity to push a different vision in Congress. To continue toward our long-term goal of achieving meaningful immigration reform, we will urge immigrant justice-minded members of Congress to counter the Trump agenda with a proposal for balanced legislation that will actually help manage the border — investments in processing capacity at ports of entry, processing options in other countries, and immigration courts and legal representation — and for resources for receiving communities, particularly in border areas where the brunt of Trump’s militarization will be most acutely felt. We will also continue to work with congressional allies to document how people with strong asylum claims are being deported to their deaths, and how our anti-asylum policies, like a “cap,” are being reproduced and cited to justify equally or more harmful measures

around the world. This work may not achieve short-term legislative success, but revulsion at Trump administration excesses will create openings where policymakers are looking for other answers. Advocacy around a proactive vision even as we fight off extremist policies is necessary to ensure that we can reclaim our humanitarian protection system under a future administration and do not continue to cede ground on core human rights.

We will also lobby Congress not to appropriate more funds to an expanded border force (run by DHS, the Defense Department, or any other entity) or to allow CBP to further reduce the criteria for hiring of Border Patrol agents. We will also lobby for more oversight and accountability for individual agents, and transparency and congressional hearings regarding the location and nature of CBP policing efforts.

## CONCLUSION

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During the Trump presidency, immigrants and their loved ones, advocates, state and local officials, and ordinary Americans from all walks of life roundly rejected Trump's demagoguery, as demonstrated by the massive show of support at U.S. airports in response to the Muslim ban,<sup>117</sup> and the many court orders blocking it and other Trump policies. Most Americans see immigrants — our neighbors, loved ones, co-workers, and caregivers — as contributors to American communities and the economy. Americans

### State & Local Responses

We will work with local officials to resist collusion with the Trump administration's anti-immigrant efforts through federal partnership programs, like Operation Stonegarden, or state-led initiatives, like Texas's SB 4 and Operation Lone Star. We will work with state and local officials to document and track abuses by U.S. Customs and Border Protection, including unlawful arrests, racial profiling, excessive use of force, and expanding surveillance of border community residents. We will also need to encourage pro-immigrant jurisdictions to do their own documentation and oversight, particularly as detention camps open; States may not affirmatively have access to inspect these sites but should push for it, especially given the likelihood that U.S. citizens and other longtime residents will be swept up in these expansive deportation arrests.

want practical border management solutions that include adequate staffing to screen and welcome people who are seeking entry, and we want an immigration system with clear rules and a fair process for people to immigrate and seek safety. The ACLU will stand among this American majority to stop Trump's hate-based plans and achieve our vision for a fair, sensible, secure, and welcoming U.S. immigration system.

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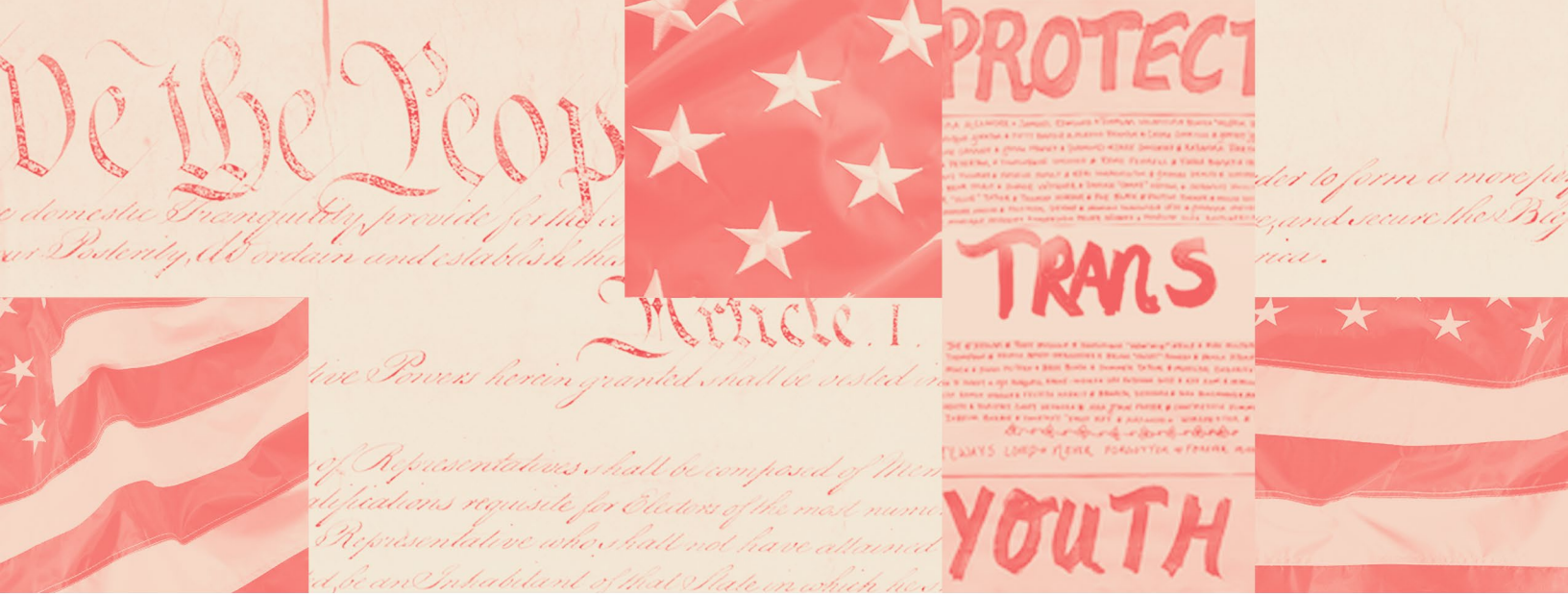
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# TRUMP ON LGBTQ RIGHTS

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The “Trump on LGBTQ Rights” memo outlines how the ACLU would respond to a possible second Trump Administration’s plans to **cancel discussions about race, gender, and systemic oppression, abandon civil rights enforcement, and dismantle educational, employment, and economic opportunity initiatives.** The ACLU is prepared to use the courts to affirm that LGBTQ people are protected from discrimination under federal law, lobby members of Congress to pass measures that help fight anti-LGBTQ discrimination, and advocate for states and school boards to protect LGBTQ students.

## TRUMP PROPOSED POLICIES

- **Rolling back protections for LGBTQ people:**

A potential Trump administration could diminish protections, including regulations prohibiting discrimination in health care, ensuring the safety of LGBTQ students in school, and establishing full protections from workplace discrimination.

- **Mandating discrimination against transgender people by the federal government:**

A second Trump administration would likely exclude gender-affirming medical care from federal health care programs, withhold federal funding from hospitals that provide gender-affirming care for adolescents, and reinstate the ban on transgender people serving in the military.

- **Weaponizing federal law to require states and private actors to discriminate against transgender people:**

If president, Trump could pressure or sue schools that protect the rights of trans students for allegedly violating federal civil rights law, or tell hospitals that they would lose their Medicaid funding if they provide gender-affirming medical care to trans adolescents. Far-right advocates have advised a second Trump administration even to criminalize gender nonconformity.

## ACLU RESPONSES

- **Litigation:**

The ACLU will use the courts to affirm that LGBTQ people are protected from discrimination under federal law, to invalidate policies mandating discrimination across the federal government, and to shut down a second Trump administration's expected efforts to weaponize the Constitution and federal laws to require discrimination against LGBTQ people by state and local governments and private entities.

- **Legislation:**

The ACLU will aggressively lobby members of Congress who support the transgender community to use the appropriations process, in particular, to hinder a second Trump administration's ability to mandate anti-trans discrimination and weaponize federal law against LGBTQ rights.

- **Mobilization:**

The ACLU will work with its nationwide network of affiliates to advocate for states and school boards to protect LGBTQ students by enacting guidance regarding updating student names and pronouns, and by creating inclusive rules on gender-based activities, best practices for school records, and ways to support transgender students living under a federal government that discriminates against them. We'll also urge states to support policies that prevent their governments from being complicit in a second Trump administration's efforts to attack the legitimacy of transgender people in our world. Lastly, we will mobilize public support on behalf of vulnerable children and youth to deter further draconian policies and help reshape the political narrative around transgender justice.

**“We have seen the disastrous consequences of a hateful campaign targeting LGBTQ people and their families with discriminatory laws, forcing many from their home states and denying many more the freedom to get the health care they need to live their lives openly, and even to decide what name to go by. **We are determined to use every tool at our disposal to oppose any attempt to deny LGBTQ people the freedom to live and love freely and openly.**”**

— **Mike Zamore,**  
National Director for Policy &  
Government Affairs at the ACLU

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**“For four years, President Trump and his administration left no stone unturned in their effort to attack the right of LGBTQ people to live and work as who we are. We fully expect a second Trump administration to go further, weaponizing federal law to override state level protections and mandate discrimination by schools and health care providers nationwide. Regardless of the election’s outcome, we stand ready to fight to uphold the fundamental freedom we are guaranteed by the Constitution to live our lives as we choose.”**

— **James Esseks,**  
Director of the ACLU’s  
LGBTQ & HIV Project

## 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 access.<sup>1</sup>

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 2025<sup>2</sup> — 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.<sup>3</sup> 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 health care 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 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

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## 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.<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup> 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 the 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 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<sup>7</sup> 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 Act. 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<sup>8</sup> — 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

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### 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.<sup>9</sup> 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 as federal government employment.<sup>10</sup> Rescinding regulations that interpret federal civil rights laws to apply to anti-LGBTQ discrimination<sup>11</sup> — and likely promulgating new regulations taking the position that they don’t<sup>12</sup> — would convey the message to school districts, landlords, employers, health care providers, and others that discrimination against LGBTQ people is lawful and, thus, embolden more discrimination.<sup>13</sup>

Transgender people, in particular, already face discrimination across nearly every aspect of their lives. The 2022 U.S. Transgender Survey found they faced higher rates of poverty and homelessness than their cisgender peers,<sup>14</sup> and data from the Human Rights Campaign found a persistent wage gap between transgender and cisgender people.<sup>15</sup> The U.S. Census Bureau found that transgender people report higher rates of hunger.<sup>16</sup> Numerous studies also found that they face higher rates of disability,<sup>17</sup> long-term health risks<sup>18</sup> — including HIV<sup>19</sup> — and substance-use disorders,<sup>20</sup> all of which contribute to a mortality risk twice that of their cisgender peers.<sup>21</sup> 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 discrimination in the workplace, also covers anti-LGBTQ discrimination, rejecting arguments from the Trump administration.<sup>22</sup> 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.<sup>23</sup>

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”<sup>24</sup> 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* that discrimination based on sexual orientation or gender identity is discrimination based on sex,<sup>25</sup> which is unconstitutional unless the government can prove that the discrimination is substantially related to an important government interest.<sup>26</sup> *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”<sup>27</sup> — applies equally to equal protection claims involving sex discrimination, as some courts have already recognized.<sup>28</sup> 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.<sup>29</sup> If such discrimination were to occur, it would violate not only the Equal Protection Clause for the reasons discussed above, but also the 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.<sup>30</sup> 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 Health Care Programs

A second Trump administration would ban gender-affirming medical care for transgender people in federal health care programs, including Veterans' Administration health care and Medicare.<sup>31</sup> 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.<sup>32</sup>

Categorically denying such health care would violate the Constitution and section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of sex in health care programs. This has been recognized by several courts,<sup>33</sup> while others have disagreed.<sup>34</sup> 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.<sup>35</sup> In April 2022, Maryland created an Abortion Clinical Training Program and allocated a \$10.6 million training grant over three years.<sup>36</sup> In April 2024, the Illinois Department of Public Health awarded \$2 million in grants for abortion training.<sup>37</sup> 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.<sup>38</sup> This would push out many active-duty transgender service-members 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 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.”<sup>39</sup> 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 transgender<sup>40</sup> and gay and lesbian service-members<sup>41</sup> that their stories of service and sacrifice<sup>42</sup> 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 identity<sup>43</sup> or by allowing transgender girls to play on sports teams with other girls,<sup>44</sup> or acknowledging the existence of transgender people in the school.<sup>45</sup>

Such actions would coerce school districts to discriminate against transgender students and 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, 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.<sup>46</sup>

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,<sup>47</sup> 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.

## Health Care

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.<sup>48</sup> 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.<sup>49</sup> 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 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.<sup>50</sup> This could be implemented as an executive order from the president or 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,<sup>51</sup> 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 people,<sup>52</sup> 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."<sup>53</sup>

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 a 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.

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

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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.

# ENDNOTES

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- 1 Shannon Doyle, “Transgender” Could Be Defined Out of Existence Under Trump Administration, N.Y. Times (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.
- 2 Daren Bakst et al., *Mandate for Leadership: The Conservative Promise*, The Heritage Foundation, 562-64 (Paul Dans & Steven Groves eds., 9th ed. 2023), [https://static.project2025.org/2025\\_MandateForLeadership\\_FULL.pdf](https://static.project2025.org/2025_MandateForLeadership_FULL.pdf).
- 3 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/>.
- 4 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).
- 5 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).
- 6 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).
- 7 *Supra n. 3*; See *supra n. 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 ...”).
- 8 See *Americans’ Support for Key LGBTQ Rights Continues to Tick Upward: Findings from the 2021 American Values Atlas*, PRRI (2021) <https://www.prrri.org/wp-content/uploads/2022/03/PRRI-Mar-2022-LGBTQ-AVA.pdf>.
- 9 *Supra n. 3*; See *supra n. 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 ...”).
- 10 See, e.g., 89 FR 37522, *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>; Press Release, HHS, HHS Issues Final Rule to Prevent Discrimination in Health and Human Services Grant Programs (April 3, 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](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); Exec. Order No. 13988, 86

- C.F.R. 7023 (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/>.
- 11 See, e.g., 89 FR 37522; Press Release, 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>.
  - 12 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.
  - 13 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.
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  - 28 See, e.g., *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (en banc).
  - 29 See e.g., *supra* n. 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.”).
- 30 See, e.g. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982).
  - 31 *Supra* n. 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.”).
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  - 41 See, e.g., *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).
  - 42 Juliet Eilperin, *Transgender in the Military: A Pentagon in Transition Weighs Its Policy*, Wash. 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](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).
  - 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 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**.”).
  - 44 *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**.)
  - 45 *Supra* n. 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* n. 2 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.”).
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- 48 *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 health care 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* n. 2 at 5 (“Allowing parents or physicians to “reassign” the sex of a minor is child abuse and must end.”).
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- 51 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).
- 52 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.”).
- 53 *Supra* n. 2 at 5.



# TRUMP ON ABORTION

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The “Trump On Abortion” memo outlines how the ACLU will respond to a possible second Trump administration’s impact to reproductive rights. Trump is responsible for overturning *Roe v. Wade*, which **took away our right to abortion and allowed states to ban abortion**. If he takes office again, he will use all the tools at his disposal to **prevent people from getting an abortion anywhere in the United States**. This includes misusing a law from the 1800s (the Comstock Act) as a backdoor way to ban abortion nationwide; pushing the Food and Drug Administration to revoke approval of mifepristone — a medication used in almost two-thirds of abortions; and decimating access to birth control. The ACLU has plans to fight these attacks in court and to organize and mobilize to protect and expand access to reproductive health care wherever we can.

## TRUMP PROPOSED POLICIES

- **Misusing the Comstock Act to ban abortion nationwide:**

Trump's allies have made clear that if Trump is reelected, he will attempt to misuse a 150-year-old anti-obscenity statute called the Comstock Act to create a backdoor ban on all abortions nationwide without any need for congressional action.

- **Directing attacks on medication abortion:**

A second Trump administration will seek to take mifepristone, a medication that is used in almost two-thirds of abortions and is part of the gold standard treatment for miscarriages, off the market.

- **Targeting birth control access:**

A second Trump administration endangers access to birth control by defunding the nation's family planning program and taking away people's right to insurance coverage for contraception under the Affordable Care Act.

## ACLU RESPONSES

- **Litigation:**

If the Trump administration attempts to improperly use the Victorian Era Comstock Act to outlaw abortion nationwide, we will fight him in court. We will likewise sue to block any effort by Trump to attack access to medication abortion. The ACLU has a long history of fighting for access to mifepristone against both Democratic and Republican administrations. And our prior litigation led to the removal of unnecessary restrictions on the medication, including one that forced people to travel — sometimes hundreds of miles — just to pick up pills that can safely be used at home.

- **Legislation:**

The ACLU is already working alongside members of Congress on legislation to prevent the misuse of the Comstock Act and to safeguard access to contraception. We will continue to work with elected officials to sound the alarm on Trump's threats to force a backdoor national abortion ban through congressional hearings and getting political opponents on the record about their stance on taking away our reproductive health care. Creating strong contrasts and political costs for anti-reproductive health care policies is important to deter further aggression. We will also work alongside state officials to apply their "shield laws" to prevent state employees from voluntarily assisting federal officials in carrying out Trump's assault on abortion care.

- **Mobilization:**

Building on an undefeated track record on abortion ballot measures, the ACLU and our nationwide network of affiliates are actively engaged in eight 2024 ballot initiative efforts to enshrine abortion rights in state constitutions. We will continue to mobilize in response to attacks should anti-abortion politicians control Congress and the White House.



“Trump and the anti-abortion politicians supporting him told us they wanted to overturn *Roe v. Wade*, then they did, leaving millions of people without access. **Now they want to ban abortion in all 50 states, and they’ve told us exactly how they plan to do it** — by misusing a law from 1873 as a backdoor national abortion ban. This threat is serious. We will continue working with members of Congress to prevent Trump from misusing the outdated Comstock Act as a national abortion ban and to pass legislation that safeguards abortion access nationwide.”

— **Madison Roberts**,  
Senior Legislative Counsel  
for Reproductive Freedom  
at the ACLU

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“Trump appointed the justices who overturned *Roe v. Wade*, resulting in millions of people losing the right to abortion. A second term would make things exponentially worse. **Trump’s allies are quietly promising to twist a law from 1873 to ban abortion nationwide, even in states where it is protected today. We will continue to expose their scheme and won’t let them pull the wool over voters’ eyes.** And should Trump return to the White House, we will be there every step of the way to galvanize efforts to stop him and to fight him in court wherever possible.”

— **Jennifer Dalven**,  
Director of the ACLU’s  
Reproductive Freedom Project

## TRUMP ON ABORTION

Threatening to Ban Abortion Nationwide and Take Away Our Reproductive Freedom

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A second Donald Trump presidency would present an existential threat to abortion access nationwide, imperiling the ability of anyone to get an abortion anywhere in the country under any circumstance.

In 2016, Trump promised to appoint Supreme Court justices who would overturn *Roe v. Wade*.<sup>1</sup> Over the course of his presidency, he followed through on this catastrophic commitment, stacking the federal judiciary with staunch abortion opponents, including three Supreme Court justices who voted in 2022 to overturn *Roe* and with it the federal right to abortion in a case called *Dobbs v. Jackson Women's Health Organization*.<sup>2</sup>

That decision resulted in a devastating civil liberties and public health crisis. Fourteen states have banned abortion altogether, and others have rendered abortion care practically unavailable by criminalizing the provision of abortion care after the earliest weeks of pregnancy.<sup>3</sup> Millions of people of reproductive age now live hundreds of miles from the closest abortion provider,<sup>4</sup> forcing more than 171,000 people to travel outside of their home state to secure access to abortion care in 2023 alone.<sup>5</sup> Attorneys general in some states have threatened to criminally prosecute those who help pregnant people get the care they need.<sup>6</sup> Countless other people are being forced to continue their pregnancies against their will.<sup>7</sup> States have also criminalized abortion care even in medical emergencies where the inability to get an abortion puts the pregnant person's health, life, and future fertility in danger — all with the approval of Trump-appointed Supreme Court justices.<sup>8</sup>

Trump is responsible for this harm. Indeed, he wears it as a badge of honor. Last year, he bragged that he was the “guy [who] ended *Roe v. Wade*.”<sup>9</sup> In a recent *Time* magazine interview,<sup>10</sup> Trump said that, under the *Dobbs* decision he orchestrated, states could monitor pregnancies and prosecute women for obtaining abortions — a

disturbing callback to his 2016 assertion that “there has to be some form of punishment” for women who obtain abortions after the care is outlawed.<sup>11</sup>

As difficult as it may be to fathom, a second Trump presidency would exponentially increase the damage done to reproductive rights. We know that overturning *Roe* was not the last stop for Trump and his anti-abortion allies; they want to ban abortion nationwide and will not hesitate to try to do so if Trump secures a second term. Trump and his allies would seek to impose on everyone — including those living in states that have sought to protect abortion — the pain and chaos that people living in states that have banned abortion are now experiencing.

To be sure, Trump's public position on whether Congress should pass a national abortion ban shifts with the political winds.<sup>12</sup> The reason for his equivocation is obvious: In the wake of *Dobbs*, there has been a groundswell of public support for abortion rights and a backlash against bans and other political interference with access to abortion care. Public opinion polls show strong public support in the two years since *Dobbs*, with almost two-thirds of Americans supporting abortion rights.<sup>13</sup> Since *Roe* was overturned, the ACLU, our affiliates and our allies have helped protect abortion access in six states through ballot measures as well as through electoral victories in Pennsylvania, Virginia, and Wisconsin, where abortion rights was a central campaign issue. As a result of this backlash, Trump has equivocated and obfuscated on whether Congress should pass a national abortion ban.

Still, his politically expedient waffling on this question is merely a ruse. According to Trump's anti-abortion strategists, Trump does not need Congress to pass a new law to shut down abortion access in every state across the country. Instead, a second Trump administration plans to use a 150-year-old law called the Comstock Act to effectively ban abortion *in every state, with no exceptions*

— without any involvement from Congress.<sup>14</sup> Due to the political toxicity of banning abortion, Trump and his allies have intentionally kept these plans close to the vest: According to Jonathan Mitchell, Trump’s lawyer before the Supreme Court and the architect of Texas’ abortion bounty-hunter law, S.B. 8,<sup>15</sup> Trump will attempt to enforce the Comstock Act as a backdoor nationwide abortion ban if he returns to office — solidifying his place as the most anti-abortion president in American history.<sup>16</sup>

While misusing the Comstock Act is the most sweeping threat to abortion posed by a second Trump presidency, it is by no means the only one. For example, if he assumes the presidency again, Trump will attempt to eliminate medication abortion, which accounts for almost two-thirds of abortions nationwide,<sup>17</sup> by ordering the Food and Drug Administration (FDA) to rescind approval of one of the drugs, mifepristone, used for such care.<sup>18</sup> Anti-abortion activists recently brought a case seeking to take mifepristone off the shelves nationwide all the way to the Supreme Court. Indeed, a rabid anti-abortion judge appointed by President Trump initially did just what they asked, rescinding the approval of this medication used in most abortions in the U.S. today.<sup>19</sup> Fortunately, in June, the Supreme Court turned these particular litigants away, finding that they did not have enough at stake to bring

the lawsuit.<sup>20</sup> But that very narrow ruling did not touch on the merits of those plaintiffs’ claims. Concerningly, the case has now been sent back to the lower courts and to the same anti-abortion Trump-appointed judge who initially ordered mifepristone off the market. That judge, Matthew Kacsmayk, has already let three state attorneys general join the case,<sup>21</sup> and they have vowed to pick up where the other litigants left off.<sup>22</sup>

The threats to people’s ability to control their bodies and their reproductive lives don’t stop with attempts to outlaw abortion. For example, Trump recently admitted that he was looking at ways to restrict access to contraception.<sup>23</sup> While electoral realities forced him to attempt to walk back that statement, as one of the leading anti-reproductive-health members of Trump’s administration recently explained, Trump’s “track record is the best evidence, I think, you could have of what a second term might look like if Trump wins.”<sup>24</sup> That track record includes, among other things, changing federal rules that decimated access to birth control for low-income people by forcing Planned Parenthood and other providers of high-quality family planning services out of federal programs.<sup>25</sup> If Trump has a second term, we will see these and other attacks on birth control and other family planning services continue.

## OVERALL RESPONSE

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### Courts

As a result of Trump’s impact on the makeup of the federal judiciary, and the Supreme Court’s unprincipled decision to overrule *Roe v. Wade*, federal litigation to protect reproductive health care is a more daunting prospect today than it was during the first Trump administration. Nonetheless, litigation remains a vital tool in our strategy to stop Trump and his extremist allies from interfering with — and banning outright — the critical reproductive health care services to which we are entitled. Indeed, were it not for litigation brought by the ACLU and others in the wake of *Dobbs*, abortion would be banned in another half-dozen states,<sup>26</sup> and even more heavily restricted in others.<sup>27</sup>

In particular, as we lay out below, Trump’s plan to weaponize the Victorian-era Comstock Act into a nationwide abortion ban is flatly unlawful. Decades of federal precedent establish that the Act simply does not apply to the distribution of abortion-related drugs and articles for use in otherwise lawful abortion care.<sup>28</sup> This long-standing precedent has been ratified both by Congress and the Department of Justice.<sup>29</sup> Using this settled caselaw, we will go to court to stop any effort by a Trump

administration to enforce the Comstock Act to ban abortion nationwide.

We will likewise sue to block any effort by Trump to rescind FDA approval for mifepristone or otherwise attack access to medication abortion. The ACLU has a long history of going to court to protect access to medication abortion.<sup>30</sup> Our prior litigation, based on robust scientific research and leading medical authorities, contributed to the removal of unlawful and medically unnecessary restrictions on mifepristone, including a restriction that forced people to travel — sometimes hundreds of miles — simply to pick up the medication.<sup>31</sup> Building on that success, we are continuing litigation to remove the remaining unnecessary restrictions on this critical medication and to ensure that the FDA’s regulation of mifepristone is based on science and not anti-abortion ideology.<sup>32</sup>

Finally, we will use the Administrative Procedure Act to challenge Trump’s anticipated misuse of the administrative agencies to restrict other reproductive health care, including efforts to withdraw coverage for birth control under the Affordable Care Act.

## Congress

Our strategy for responding to the threat Trump poses to abortion and contraception is not confined to the courtroom. Trump’s plans to impose nationwide restrictions on abortion and contraception are not only legally deficient; they are extraordinarily unpopular, with polls and election results consistently demonstrating strong public opposition to his plans to impose abortion bans and restrictions on contraception.<sup>33</sup> It is imperative that Congress leverage all of its available tools to push back against and publicize Trump’s efforts to strip us of our right to access reproductive health care.

The ACLU, our affiliates and our allies have been working tirelessly to remedy the harms the Trump administration caused, with the ultimate goal of enacting federal legislation that would ensure access to abortion nationwide. While federal legislative victories will be out of reach under a Trump administration, congressional action can nonetheless be an important tool to frame political fights and deter abuses. To this end, the ACLU is working alongside members of Congress on legislation to prevent the misuse of the Comstock Act and to safeguard the right to contraception. We will work with lawmakers to sound the alarm on Trump’s threats to force a backdoor national abortion ban. We will shine a light on these threats through congressional hearings, and by getting abortion-opponents on the record about their stance on taking reproductive health care away.

## States and Municipalities

Additionally, we are working with state officials to enact protections against Trump’s planned attacks on people providing, seeking, or assisting with reproductive health care. We are calling on state officials to expand their “shield laws” to prevent state employees from voluntarily assisting federal officials carrying out Trump’s assault on abortion. While state officials cannot prevent a Trump Department of Justice from misusing the Comstock Act, they can create friction by refusing to participate in improper federal enforcement efforts. To counteract Trump’s twin attacks on funding for reproductive health care and health-data privacy related to that care, states must work to ensure funding for abortion and contraception, as well as to pass state-level health care data privacy protections.

## Organizing and Electoral

In 2022, the ACLU led, and won, all five ballot measures involving abortion rights. With our partners, we spearheaded the ballot measure in Michigan — the first-ever proactive reproductive freedom constitutional amendment — ultimately investing over \$7.5 million total and delivering a decisive 57-43 vote in favor of enshrining the right to reproductive freedom in the state’s constitution.<sup>34</sup>

Building on these victories, in 2023, we invested deeply in an affirmative reproductive freedom measure, Issue 1, in Ohio.<sup>35</sup> The campaign faced a variety of obstacles, including a cynical ploy by anti-abortion Ohio legislators to raise the voting threshold for passing citizen-initiated constitutional amendments from 50 to 60 percent. However, more than 3 million Ohioans soundly defeated that measure in August, demonstrating their support for abortion rights. By November, campaign participants had knocked on thousands of doors and called thousands of voters to educate them about what was at stake. Ultimately, Issue 1 passed by over 57 percent — a resounding victory, particularly in a so-called “red” state.<sup>36</sup> Our voter education pushes also made a real impact: In 2022, our mobilization had a “coattail” effect in a number of states. Many people who went to the polls to vote for abortion ballot measures also voted for abortion-protective state representatives. For example, in Michigan, these efforts helped to flip both chambers to pro-abortion rights majorities.

In 2023, the ACLU also invested more than \$1 million in voter education around Virginia’s General Assembly elections. The General Assembly members who campaigned on abortion rights won sweeping victories, which will keep the Governor’s attempted 15-week abortion ban at bay.<sup>37</sup> The ACLU was also one of the top spenders in Pennsylvania’s state Supreme Court race, spending over \$1.8 million to educate voters about the two candidates’ positions on abortion.<sup>38</sup>

The ACLU and its affiliates are actively engaged in 2024 ballot initiative efforts to enshrine abortion rights in state constitutions in states like Florida, Colorado, and Montana. Voters have made it abundantly clear that they overwhelmingly support the right to abortion and are prepared to use their voices and their votes at every opportunity to defend access to this essential health care. We will continue to fight right alongside them and use every tool available to resist the ongoing attacks on our rights by Trump and his allies.

# SPECIFIC THREATS & POSSIBLE RESPONSES

## Comstock

Trump’s allies have made clear that if Trump is re-elected, he will attempt to misuse the Comstock Act to create a backdoor ban on all abortions nationwide without any need for congressional action.<sup>39</sup> The Comstock Act is an 1873 anti-obscenity statute that regulates the use of the mails and common carriers concerning sending and receiving anything that is “indecent, filthy, or vile” or “intended for producing abortion ...”<sup>40</sup> Its namesake, Anthony Comstock, was an infamous Victorian-era anti-vice crusader who, as the Supreme Court explained, “believed that anything remotely touching upon sex was ... obscene.”<sup>41</sup> Comstock lobbied Congress to enact legislation that would allow the Postal Service to seize lewd or indecent items, and he became the law’s specially appointed enforcer.<sup>42</sup> He took credit for arresting thousands and driving at least 15 people to suicide through his anti-vice crusades.<sup>43</sup> As his biography — aptly titled “The Man Who Hated Women” — explains, Comstock’s name has become synonymous with “prudishness, control, censoriousness, and repression of thought.”<sup>44</sup>

Even though this law has long been understood not to apply to the lawful provision of health care, Trump’s anti-abortion strategists have stated that the Department of Justice in a second Trump administration would seek to enforce the Comstock Act to effectively ban abortion in every state in the country. As Jonathan Mitchell told *The New York Times*, “[w]e don’t need [Congress to pass] a federal ban when we have Comstock on the books.”<sup>45</sup> The plan to enforce the Comstock Act to stop abortions nationwide is echoed by Project 2025’s “Mandate for Leadership,”<sup>46</sup> a blueprint of “actions to be taken in the first 180 days of the new Administration.”<sup>47</sup> According to the anti-abortion extremists drawing up plans for Trump’s administration, the Comstock Act can be operationalized as a national abortion ban because the medication and equipment used in abortion care has to be transported to health care providers via mail and common carrier.<sup>48</sup> If it were a federal crime to send and receive the medications and supplies needed to perform abortions, then health care providers would be unable to provide abortion services. Moreover, because the Comstock Act contains no exceptions whatsoever, it could also prevent people from getting care in medical emergencies where the inability to obtain abortion care would endanger the pregnant person’s health or life.<sup>49</sup>

The ACLU’s response to this existential threat to abortion will be multi-pronged. *First*, we will go to court to fight any effort by a Trump administration to weaponize this antiquated law to ban abortion. Both the historical context and decades of federal precedent contravene

the argument that the Comstock Act functions as a nationwide ban on sending and receiving medication and supplies used for otherwise lawful abortion care. To the contrary, beginning in the early 20th century, federal appellate courts reached a consensus that the Comstock Act only addresses sending and receiving materials to be used for *otherwise unlawful* abortion and contraception.<sup>50</sup> The courts’ uniform conclusion was that the Act does not apply to drugs and articles sent and received for lawful abortion care.<sup>51</sup> And as the Department of Justice recently explained, “[o]n several occasions, Congress reenacted and amended the Comstock Act against the backdrop of the judicial precedent in a manner that ratified the federal courts’ narrowing construction.”<sup>52</sup> In short, the argument by Trump’s allies that the Comstock Act can be enforced to ban abortion nationwide flies in the face of the settled determination by courts, Congress, and the Justice Department that the law does not apply to lawful abortion care.

*Second*, the ACLU is sounding the alarm on the threat of this backdoor national abortion ban and demonstrating overwhelming public opposition to such a threat. Key to Trump’s and his advisors’ plan to use the Comstock Act is keeping Americans in the dark, given the public’s strong opposition to abortion bans. Jonathan Mitchell, Trump’s lawyer before the Supreme Court, told *The New York Times*, “I hope [Trump] doesn’t know about the existence of Comstock, because I just don’t want him to shoot off his mouth... I think the pro-life groups should keep their mouths shut as much as possible until the election.”<sup>53</sup> The ACLU is working with elected officials and stakeholders at every level to shine a light on this strategy and ensure that people in every state, including states that have sought to protect abortion access, understand the dire threat posed to reproductive freedom nationwide. We are also working alongside members of Congress to elevate the threat of Comstock in congressional hearings, getting Trump’s allies on the record about their stance on misusing Comstock as a backdoor national abortion ban, and supporting the introduction of legislation in Congress to repeal the Comstock Act to prevent it from being misused.

*Third*, the ACLU will support patients, health care providers, and anyone else who faces prosecution related to abortion care under a new administration, including a Trump DOJ federal prosecution under the Comstock Act. In addition to developing practice resources and litigation tools to arm public defenders and criminal defense attorneys in addressing the potential threat of abortion-related federal prosecutions, the ACLU’s Abortion Criminal Defense Initiative<sup>54</sup> is expanding its criminal defense network, which currently includes attorneys in 26 hostile states,

to amplify federal defense power. Together with our nationwide network of criminal defense attorneys, we will work to ensure a robust, zealous defense of anyone facing the threat of criminal prosecution or investigation related to abortion care. In addition to defending against criminal prosecutions, we will leverage our deep litigation expertise to hold government officials accountable when they abuse their power to criminalize pregnant people and those who support them, as we are doing in our representation of Lizelle Gonzalez, who was wrongfully jailed by Texas officials for having an abortion.<sup>55</sup>

*Fourth*, we will work with state legislatures and governors to pass state laws that would prevent state employees from voluntarily assisting federal agents in unwarranted Comstock enforcement actions and would arm state employees to challenge such actions. While many states have already enacted “shield laws” aimed at minimizing legal risks for abortion providers, patients, and helpers, most of these provisions are designed to act as buffers against proceedings initiated by other states, not by a hostile federal administration. By working to pass expanded shield-law protections, we will attempt to stop a future Trump administration from forcing state officials to cooperate in its effort to weaponize the Comstock Act.

## Direct Threats to Medication Abortion

In addition to the threat of Comstock enforcement, a second Trump administration could decimate abortion care in every state in the country by responding to calls from Trump’s allies to withdraw the FDA’s approval of mifepristone,<sup>56</sup> a safe and effective medication used in most abortions and miscarriage<sup>57</sup> care in the U.S. today<sup>58</sup> Revoking FDA approval would mean that mifepristone could no longer be legally provided anywhere in the U.S., including in states with affirmative protections for abortion access. Even if a Trump administration allowed mifepristone to remain on the market, it would almost certainly reinstate medically unnecessary restrictions that prevent mifepristone from being mailed to patients,<sup>59</sup> forcing them to travel, often hundreds of miles, to an abortion provider for the sole purpose of picking up their medication and depriving many patients of abortion access altogether.<sup>60</sup>

The FDA approved Mifepristone in 2000<sup>61</sup> and it has since been used in the U.S. by six million people to end their pregnancies safely and effectively, or for miscarriage care.<sup>62</sup> Today, mifepristone is used in almost two-thirds of abortions in this country.<sup>63</sup>

For that reason, and because it can be safely mailed to people seeking abortion care, Trump’s supporters consider mifepristone to be the “single greatest threat” to their vision of a nation without abortion care.<sup>64</sup> That’s why anti-abortion politicians in Congress have repeatedly attempted to ban mifepristone.<sup>65</sup> Trump’s allies have no intention of waiting for Congress; they are calling on a second Trump administration to revoke the drug’s FDA approval and pull it from the market in every state in the country.<sup>66</sup> At a minimum, they want a Trump FDA to severely limit access to the medication by reinstating outdated restrictions that would prevent mailing it and require people to pick up their medication in person at a medical facility<sup>67</sup> — restrictions that scientists at the FDA and leading medical organizations have determined are medically unnecessary and result in harmful interference with the public’s ability to access this critical medication.<sup>68</sup> Trump’s allies have not been shy in trumpeting their plans for his administration to unilaterally impose such restrictions.<sup>69</sup>

The ACLU has sued under multiple administrations — Democratic and Republican — to protect the public’s access to medication abortion.<sup>70</sup> For example, during the height of the COVID-19 pandemic, we went all the way to the U.S. Supreme Court to fight the Trump administration’s insistence that people seeking mifepristone must appear in-person at a clinic — subjecting themselves and their families to the risk of a deadly virus — for the sole purpose of picking up a pill that could be safely used at home.<sup>71</sup> Ultimately, the FDA, under the Biden administration, reviewed the evidence and determined that requiring people to pick up their pills in person was medically unnecessary, as we had advocated.<sup>72</sup>

We are not finished. We are pressing forward with litigation to remove all medically unnecessary restrictions on mifepristone that are impeding the public’s access to this critical medication.<sup>73</sup> And, if Trump is re-elected and attempts to remove mifepristone from the market, or otherwise further restrict access contrary to scientific evidence that overwhelmingly demonstrates the drug’s safety and efficacy, we will see him in court. We will use the Administrative Procedure Act, 5 U.S.C. § 706, to force the FDA to act within congressionally mandated parameters designed to protect the American public and foster access to safe and effective, life- and health-saving medication.

We will also fight in the court of public opinion. If Trump attempts to block access to this medication or ban people from receiving it by mail, we will mobilize public support to block his attempts. The latest polls are clear: The American public supports access to medication

abortion by overwhelming margins and expects to be able to receive this medication by mail as they do with other safe drugs.<sup>74</sup> We will also work with our allies to mobilize the broader medical community, patient groups, the drug industry, and other stakeholders with a vested interest in defending the scientific integrity of the drug approval processes.

## Threats to Birth Control

While threats to abortion care received the most public attention during Trump's presidency, the Trump administration also decimated access to birth control and family planning services for people living on low incomes. And Trump's allies in Congress have repeatedly threatened access to contraception, proposing legislation that would defund the nation's family planning program (Title X),<sup>75</sup> attempting to repeal the ACA<sup>76</sup> and opposing legislation that would codify the right to contraception.<sup>77</sup>

In addition, if Trump is re-elected, we can expect that he would attempt to take away people's right to insurance coverage for contraception guaranteed by the ACA. The ACA requires health insurance companies to provide coverage for essential, preventive health care for women, including the "full range of contraception," without a co-pay. According to the federal government, in 2020, "58 million women benefited from the ACA's preventive services and birth control coverage, which has saved billions of dollars in out-of-pocket spending on contraception since the ACA was passed."<sup>78</sup>

Since its passage, the ACA's birth control benefit has been under attack, notably from employers who objected, on religious grounds, to providing insurance plans that employees could use to cover the cost of the birth control method that was right for them.<sup>79</sup> But if Trump assumes office again, we are likely to see a full-frontal attack on birth control coverage. Indeed, Project 2025 explicitly calls for certain methods of contraception to be eliminated from the coverage requirements.<sup>80</sup> In light of Trump's recent comments on attacking birth control, there is every reason to think that a new Trump administration would go much further and allow employers and insurance plans to deny people coverage for all forms of contraception. If it does, the ACLU will be ready to sue under the Administrative Procedure Act, alleging, among other things, that such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>81</sup>

Outside of the courtroom, we will fight back against attacks on contraception by mobilizing our supporters and raising the political cost of enacting these extreme and widely unpopular policies. Birth control is extremely popular; 91 percent of Americans support it.<sup>82</sup> The ACLU

will use our political power to demonstrate just how far out of step the Trump administration is with the American people. We will also use our organizing power to mobilize activists in support of protecting the right to contraception, and against any action taken to restrict access to birth control. Additionally, we will advocate for states to allocate additional resources for access to reproductive health services, like California's Reproductive Health Equity Fund, to help mitigate the harm caused by a federal government attack on access.

Together, we will use our political power on Capitol Hill to urge members of Congress to prioritize and advance critical legislation like the Right to Contraception Act, which would codify and safeguard the right to contraception as recognized in *Griswold v. Connecticut*, a U.S. Supreme Court case brought by the ACLU in 1965 establishing that right.<sup>83</sup>

## Other Regulatory Threats

In addition to launching direct attacks on abortion and contraception, a second Trump administration would abuse its regulatory power to target reproductive health care in numerous other ways.

- A Trump administration would rescind the Department of Health and Human Services' June 2022 rule implementing HIPAA, the Health Insurance Portability and Accountability Act, which provides important protections against the disclosure of private health information related to reproductive health care to hostile officials or individuals trying to penalize people for seeking, providing, or assisting with reproductive health care.<sup>84</sup> Trump's anti-abortion allies object to the protections that this rule affords because they want to encourage and facilitate investigations into people's reproductive health care.<sup>85</sup>
- A Trump administration would also rescind the Equal Employment Opportunity Commission's (EEOC) April 2024 rule interpreting the Pregnant Workers Fairness Act to provide protections for workers requiring time off to travel to access abortion care.<sup>86</sup> In the wake of *Dobbs*, the number of people who must travel across state lines for abortion care has doubled to nearly one in five, and the EEOC's rule entitles them to reasonable accommodations from employers as they do so.<sup>87</sup> States hostile to abortion have already challenged these rules and the ACLU has submitted friend of the court briefs in support of the rule.<sup>88</sup> A second Trump administration would attempt to take these protections off the books.

- A Trump administration would likewise seek to block federal family planning money from going to Planned Parenthood and other organizations that refer for abortion services. Trump’s anti-abortion strategists have also drawn up plans to bar abortion providers from receiving federal Medicaid and other funds despite the fact that, even now, none of the federal dollars can be used to provide abortion care.<sup>89</sup> Doing so will deprive people of access to cancer screening, contraception, and other vital health care.

The ACLU will use every tool available to oppose these and other regulatory attacks on access to reproductive health care. While the prospects for any legal challenge

under the Administrative Procedure Act would largely depend on the process by which a Trump administration tries to rescind and replace these regulations and the exact terms of the new rule, the ACLU would closely monitor the administration’s actions for abuses and explore a challenge to any regulatory assault on reproductive health care access. In the meantime, we are working with pro-reproductive freedom states to adopt state-level privacy protections for personal health information and data, and to ensure adequate state funding for reproductive health care services that is insulated from attacks by a hostile Trump administration to the greatest extent possible.

## CONCLUSION

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The Supreme Court’s decision overturning *Roe v. Wade* sparked a public outcry and made abortion rights a central issue in American life. The public overwhelmingly supports abortion access and has consistently and repeatedly demonstrated that support at every opportunity.

Because of the public’s outrage over losing our reproductive rights, Trump has attempted to downplay his plans to further decimate access to ban abortion and other critical reproductive health care. Yet his unguarded statements, his allies’ public playbook, and most importantly his prior actions — including nominating Justices to the Supreme Court for the purpose of overturning *Roe* — make his

intentions clear. We continue to see Trump’s allies in the state governments and in Congress threaten reproductive health — from threatening people’s ability to use IVF to start a family, to the refusal to support people’s ability to get contraception — and prove just how far out of step they are with the American people.

The ACLU will continue our work to ensure that Americans know the truth and to thwart Trump’s attempts to pull the wool over the public’s eyes. Should Trump regain the presidency, we will be there every step of the way to expose his efforts, galvanize efforts to stop him, and fight him in court whenever possible.



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# TRUMP ON DEI AND ANTI- DISCRIMINATION LAW

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The “Trump on DEI and Anti-Discrimination Law” memo outlines how the ACLU would respond to a possible second Trump administration’s anti-DEI policies — such as **censoring academic discussions of race, gender, and systemic oppression, roll back civil rights protections and intensifying right wing attacks on educational, employment, and economic opportunity initiatives**. The ACLU is prepared to challenge these policies in court, push Congress to vote against anti-DEI bills, and mobilize states to advance civil rights protections in the public sector.

## TRUMP PROPOSED POLICIES

- **Censoring academic discussions about race, gender, and systemic oppression:**

A second Trump administration jeopardizes academic discussion about race, gender, and systemic oppression thereby violating the First Amendment and civil rights. Such censorship would likely mean the elimination of federal funding for schools with curricula that touch on these subjects, as well as school administrator positions that oversee DEI initiatives. Such censorship would also likely mean the reinstatement of the discredited 1776 Commission, which was a presidential advisory committee created in September 2020 by then President Trump that was tasked with restoring “patriotic education in schools.”

- **Abandoning civil rights enforcement on behalf of individuals from historically marginalized groups:**

A second Trump administration will narrow the availability of disparate impact liability and creating new legal hurdles for those who challenge policies and practices that disproportionately harm people of color and other protected groups in the areas of housing, education, health care, and other essential resources.

- **Intensifying right wing attacks on educational, employment, and economic opportunity initiatives:**

A second Trump administration would likely encourage federal agencies to investigate frivolous “anti-white” civil rights violations, and scale up “reverse discrimination” cases against equal opportunity efforts aimed at remedying historical discrimination at local and state levels, and the private sector.

## ACLU RESPONSES

- **Litigation:**

The ACLU will challenge these policies in federal court. Legal challenges brought by the ACLU during the first Trump administration stopped illegal policies designed to undermine anti-discrimination efforts and laws, such as his unconstitutional ban on federal training on systemic racism and sexism, and his administration’s efforts to undermine the Fair Housing Act.

- **Legislation:**

The ACLU will push Congress to consistently vote against anti-DEI bills and efforts to strip federal funding from such programs, and to amplify through hearings and public statements how these programs work and why they remain critical.

- **Mobilization:**

The ACLU and its nationwide network of affiliates will work with states and municipalities to advance civil rights protections in the public sector and defend inclusive curricula and the right to learn at the K-12 level, and providing critical, constitutionally-sound guidance and support to institutions and school districts to combat historical discrimination, despite aggressive messaging to the contrary.

**“Trump and his supporters leveraged last year’s Supreme Court decision on affirmative action to undermine and create confusion around DEI initiatives** — even though DEI and affirmative action are two different issues. The ACLU is determined to educate the public on this racist agenda, and continue to defend vital efforts that counteract historical discrimination and unequal access to opportunities.”

— **ReNika Moore,**  
Director of the ACLU’s  
Racial Justice Program

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**“It’s important for Americans to realize that Trump’s plans to intensify efforts to eliminate inclusive education practices and policies is a First Amendment issue, as much as it is a civil rights issue. Trump and his supporters are proposing to control what we think and learn by using the government to censor a viewpoint it doesn’t like out of existence.”**

— **Kim Conway,**  
Senior Policy Counsel  
at the ACLU



## TRUMP ON DEI AND ANTI-DISCRIMINATION LAW

### Rolling Back the Clock on Racial Justice

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When Donald Trump's administration left office in 2020, two-thirds of surveyed Americans agreed that Trump had increased racial tensions in the United States.<sup>1</sup> The backdrop for that widespread sentiment was the Trump administration's sustained assault on political, civic, and legal efforts to promote racial justice; Trump's consistent use of inflammatory racist rhetoric; and his transparent pursuit of a white supremacist agenda rooted in racial grievance.

Fulfilling promises made during the 2016 presidential campaign, the Trump administration engaged in a wholesale attempt to roll back the clock on racial justice by dismantling efforts to address systemic racism and promote a more equitable and just society. Trump's legacy on these issues is encapsulated by the "1776 Report," published by the White House in the administration's waning days. The report advanced a dystopian vision that demonized attempts at achieving racial equality. Designed to "restore patriotic education in schools," the "1776 Report" compared progressivism to fascism, claimed that the civil rights movement embraced ideas similar to those held by defenders of slavery, and sought to downplay the legacy of racism in U.S. history.<sup>2</sup> Historians uniformly condemned the report, pointing out that it was littered with factual inaccuracies and partisanship, and lacking serious scholarship.<sup>3</sup>

But the "1776 Report" was not simply a far-right musing; it captured the political and legal agenda the Trump administration pursued for four years. In that time, the administration ordered federal agencies to cease all trainings on systemic racism and unconscious racial bias<sup>4</sup> and, by executive order, banned the U.S. Armed Forces, federal agencies, federal contractors, and recipients of federal grants from providing employees with trainings related to race and gender discrimination.<sup>5</sup> As described in further detail below, the administration also abandoned enforcement of civil rights laws on behalf of

historically marginalized groups, and marshaled federal power to ramp up right-wing attacks on equal opportunity initiatives led by both local and state governments as well as the private sector.

Meanwhile, the administration alternated between openly vilifying and woefully neglecting communities of color. Trump used racialized, xenophobic dog whistles to attack Black, Middle Eastern, South Asian, Latine, and other immigrants of color, and to justify his exclusionary immigration policy.<sup>6</sup> Trump studiously referred to COVID-19 as "the Chinese virus," just as bias-motivated attacks against Asian Americans were spiking.<sup>7</sup> He ignored public health experts' urgent advice to make COVID-19 testing widely available, especially in Black, Latine, and Indigenous communities, despite the dramatic disparities in mortality rates experienced in those communities.<sup>8</sup> He also refused to unambiguously condemn white supremacist groups, telling the Proud Boys to "stand back and stand by" at a televised election debate.<sup>9</sup>

The 2024 Trump campaign has doubled down on this commitment to racial grievance. The campaign has promised, for example, to eradicate both public and private diversity, equity, and inclusion (DEI) policies. This attack on DEI is part of a larger backlash against racial justice efforts ignited by the 2020 killings of George Floyd, Ahmaud Arbery, and Breonna Taylor, and the nationwide protests — unprecedented in size and diversity — that followed. In the wake of those protests, workplaces, schools, and other institutions announced plans to expand DEI efforts and to incorporate anti-racism principles in their communities.<sup>10</sup> The opposition to these efforts from far-right actors has been dramatic, with anti-DEI activists and political operatives framing their attacks as a strike against "identity politics" and weaponizing the term "DEI" to mean any ideas and policies they disagree with — especially those that address systemic racism and sexism.<sup>11</sup> More broadly, however,

the anti-DEI backlash is part of a larger effort by right-wing foundations, think tanks, and political operatives to dismantle civil rights gains made in recent decades.<sup>12</sup>

Even though most of the country supports efforts to address racial inequality,<sup>13</sup> Trump promises to eradicate many of those efforts and thereby worsen racial disparities. To understand the threat posed by a second Trump administration — and plan our response — we examined three strategies Trump will continue to deploy as president to upend and reverse course on racial equality. We also outlined strategies and tactics to fight against such policies and mitigate their harm.

### **1. Censoring Academic Discussions of Race and Sex-Based Discrimination**

A second Trump administration would supercharge efforts to censor discussion of any concepts deemed “divisive” from the nation’s classrooms, by which it means classroom discussions about race, gender, and systemic oppression with which it disagrees. Trump has promised to cut federal funding for schools with curricula that touch on these “disfavored” subjects,<sup>14</sup> eliminate school administrator positions that oversee DEI initiatives,<sup>15</sup> and resuscitate the discredited 1776 Commission.<sup>16</sup>

These policies would, of course, trample on students’ and educators’ constitutional rights. They would also cause palpable harm to educational outcomes and the basic civil liberties of both students and teachers. Research has shown that an inclusive K-12 and college curriculum and environment is a significant contributor to the retention and academic success of not just students of color, but *all* students.<sup>17</sup> Policies eradicating DEI programming and curricula are not only unlawful; they also actively undermine students’ ability to thrive.

### **2. Abandoning Civil Rights Enforcement on Behalf of Historically Marginalized Groups**

The Trump administration consistently subverted traditional legal tools and principles designed to combat unlawful discrimination. It ceased to pursue — and attempted to dismantle — disparate impact liability,<sup>18</sup> a bedrock tool for effective civil rights enforcement.<sup>19</sup> The administration also revoked federal guidance designed to address race- and disability-based discrimination in student discipline policies and practices;<sup>20</sup> imposed a sweeping ban on trainings on race and gender discrimination by federal agencies, contractors, and grant recipients;<sup>21</sup> and weakened protections against unlawful discrimination through regulatory action.

A second Trump administration threatens to altogether stop enforcement of civil rights on behalf of individuals from historically marginalized groups. In the regulatory

context, the administration would weaken protections in the areas of housing, education, health care, and other essential resources by narrowing the availability of disparate impact liability; adding new legal hurdles to challenging policies and practices that disproportionately harm people of color and other protected groups under major civil rights laws, such as the Fair Housing Act (FHA); and gutting federal rules designed to increase access to housing and other community assets for people of color and other vulnerable and marginalized groups.

### **3. Marshalling Federal Power to Ramp up Right-Wing Attacks on Equal Opportunity Initiatives**

From 2017-2021, the Trump administration utilized federal legal and policy authority to bolster far-right attacks on educational and economic opportunity initiatives, including efforts led by local and state governments and the private sector. For example, the administration weaponized its investigative and legal authority to target efforts by the private sector and institutions of higher education — including, for example, Microsoft<sup>22</sup> and Yale University<sup>23</sup> — to address inequality, which had a predictably chilling effect across sectors, including government, academia, and corporate America.<sup>24</sup>

A second Trump administration would intensify these attacks by abandoning any efforts to advance and legally defend affirmative action policies at military academies, federal minority contracting programs, and other federal programs proven to open opportunities unfairly denied to people of color. The Trump campaign has also promised to charge the Department of Justice (DOJ) and Department of Education (DOE) with investigating “anti-white” civil rights violations in schools while removing so-called “Marxists” from the DOE;<sup>25</sup> direct the DOJ’s civil rights division to investigate private sector programs designed to “boost the number of people of color in the workplace” (a dramatic departure from its traditional role of protecting marginalized groups);<sup>26</sup> and order the Equal Employment Opportunity Commission (EEOC) to use Title VII of the Civil Rights Act to attack DEI programs and trainings.<sup>27</sup>

These attacks would not be restricted to federal government agencies. A second Trump administration would also target local and state government, as well as private sector efforts, to remedy historical discrimination and ongoing inequality. It would also scale up “reverse discrimination” cases to further chill public and private institutions’ efforts to expand access to Black, Latine, Indigenous, and other people of color. Such efforts would build on current attacks from the private bar, including challenging school desegregation efforts and grant, scholarship, and fellowship programs<sup>28</sup> intended to open access to career fields.<sup>29</sup>

Since 2023, emboldened by the Supreme Court’s blow to affirmative action, state lawmakers have introduced over 80 anti-DEI bills seeking to dismantle minority- and women-owned business diversity programs; prohibit certain discrimination and anti-bias training for employees, school staff, and students; prohibit programs to attract a diverse pool of employees, faculty, and students; preclude student scholarships, grants, or financial aid based upon sex, race, and national origin; and/or eliminate DEI programs on college campuses that aim to create inclusive and supportive environments for all students.<sup>30</sup> If Trump is reelected, his administration would intensify this landscape by trying to force diversity programs within local school districts, post-secondary institutions, places of public and private employment, and public contracting to end by using not just DOJ investigations and lawsuits, but also threatening to revoke federal funding. Campaign advisors have promised that a second Trump administration would withhold federal

money from any schools, companies, or charities that use DEI principles in their curricula or hiring practices.<sup>31</sup>

The administration’s ultimate goal would be the eradication of all programs designed to address profound and persistent inequalities in American life — with the effect of further entrenching, and indeed worsening, systemic inequalities in access to education, health care, and economic opportunity. And, perversely, a Trump DOJ would employ the 14th Amendment’s Equal Protection Clause, along with landmark civil rights statutes such as the Civil Rights Act of 1964 — including Title VI, which prohibits recipients of federal funds from discriminating based on race, color, or national origin, and Title VII, which prohibits employment discrimination based on race, color, religion, sex and national origin — in its efforts.

At this critical juncture in our country’s commitment to equality and equitable access to vital resources, the ACLU stands ready to act.

## THE ACLU’S OVERALL RESPONSE

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**The ACLU will resist a second Trump administration’s retreat from civil rights enforcement and attacks on efforts to promote racial justice with litigation and legislative and policy advocacy in progressive states and localities.**

### Courts

A second Trump administration would undoubtedly pose sobering and multifaceted legal threats to efforts to promote racial equality. However, many components of Trump’s radical “anti-DEI” agenda, rooted in racial grievance rather than fact, cannot be achieved without violating the Constitution and federal laws. As was the case in the prior Trump administration, litigation and regulatory advocacy will be indispensable for both stymying these threats and advancing an affirmative vision of racial justice.

The Trump years underlined the practical importance of legal action and engagement. Lawsuits stopped many illegal Trump administration policies designed to undermine anti-discrimination efforts and laws, such as Trump’s unconstitutional ban on federal trainings on systemic racism and sexism,<sup>32</sup> and his administration’s efforts to undermine the FHA.<sup>33</sup> Furthermore, since Trump was voted out of office in 2020, federal courts have already enjoined or struck down the kinds of classroom censorship and anti-DEI policies that he promises

to pursue more broadly,<sup>34</sup> and upheld efforts to promote access to educational opportunity that have been challenged by far-right advocates.<sup>35</sup> These court victories will be crucial building blocks to our legal strategy under a second Trump administration.

Even though Trump has made a significant mark on the judiciary, and it is not difficult to find recent examples where the courts have failed to protect efforts to build a more racially inclusive society,<sup>36</sup> there are still lawful avenues to promote equal educational opportunities and advance racial justice. We must both defend and build upon this precedent.<sup>37</sup> Below, we outline ways in which we will engage in litigation and legal advocacy to oppose unlawful attacks on educational access, classroom censorship, rollbacks of critical federal anti-discrimination protections, and assaults on state and local DEI policy interventions.

### Congress

The Trump administration would push Congress to pass anti-DEI bills restricting access to education, employment, and public contracting opportunities. Members of Congress who support racial justice must consistently vote against anti-DEI bills and efforts to strip federal funding from such programs. Committees and caucuses should also utilize subpoenas and hearings to strengthen the factual record and ascertain the status of DEI

programs in the public and private sectors, as well as the harmful impacts of current anti-DEI legislation. This information can be used to build the necessary factual predicate for legislation advancing DEI goals, and to educate Congress members about the benefits of lawful DEI practices.

Congress members should also counter the anti-DEI movement by publicly and vigorously pushing back against propaganda that DEI is inherently “racist” and stifles freedom of speech. They must refocus the conversation on the origin of DEI programs and amplify, through hearings and public statements, how such critical programs work.<sup>38</sup> DEI programs became prevalent in public and private sectors following the civil rights movement as a way to combat racism and sexism<sup>39</sup> — two pervasive problems that persist today. A key political aim of the extreme right in their anti-DEI efforts is to divide voter coalitions and advance a partisan agenda. The anti-DEI movement labels DEI programs as discriminatory publicly, but it is the extreme right’s proposed anti-DEI policies and legislation that will make workplaces, schools, and public contracting more discriminatory and less inclusive and welcoming for persons based upon their race, gender, sexual orientation, socioeconomic status, and religious identity.

While arguing that DEI programs inhibit free speech, the anti-DEI movement itself stifles speech and whitewashes discussions concerning the inconvenient truths of systemic discrimination in U.S. history and society by banning books, censoring classroom discussions, and erasing facts from curricula. Congress members should coordinate to build a vigorous offensive strategy to reveal the false attacks made against DEI programs.

## SPECIFIC RESPONSES

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### **The ACLU will continue to challenge unconstitutional classroom censorship and Trump administration executive actions targeting “divisive concepts.”**

Using Trump’s Executive Order 13950, which unconstitutionally banned federal trainings on systemic racism and

## State & Municipalities

Particularly in the wake of a federal government turning hostile to civil rights, state and local governments must step in to limit discrimination and defend and promote DEI programs and inclusive curricula at the K-12 level. Public and private sector entities created DEI programs in direct response to the Civil Rights Act of 1964 to combat racism and sexism, and to remedy resulting harms by building workplaces, educational environments, and public contracting programs that reflect and benefit the demographics of this country.<sup>40</sup> As DEI programs have evolved, public and private sector entities have sought to create inclusive and welcoming environments where people of all races, genders, sexual orientations, socioeconomic statuses, and religious identities can thrive. Now, far-right actors seek to roll back gains achieved during the civil rights movement and deprive a large population of Americans of equal access to education, employment, and economic opportunities under the law. Ultimately, these attacks strike at a core principle of democracy: equality under the law.

State and local officials can mobilize to protect democracy and continue civil rights gains in the face of a hostile Trump administration. Indeed, since July 2023 state attorneys general have issued two opinions as a coalition to “condemn attempts to correlate diversity measures with racial discrimination, and to remind companies of their obligations to ensure equitable and inclusive environments for their employees and clients.”<sup>41</sup> Governors and mayors can also continue the advancement of civil rights protections in the public sector by issuing executive orders to create and expand state- and locally-funded DEI programs. Finally, state legislators and city council members should thwart attacks on DEI by voting against proposals to restrict funding for DEI programs, holding hearings concerning public and private sector DEI programs and the negative impacts of dismantling them, and proposing bills that advance DEI goals.

sexism,<sup>42</sup> as their template, far-right legislators around the country have introduced scores of bills to ban the teaching of so-called “divisive concepts” in K-12 public schools and in public colleges and universities.<sup>43</sup> While these laws vary in their details, they typically censor classroom instruction on race and gender. The Trump campaign has promised to intensify these efforts by cutting federal funding for schools whose curricula touch on these “disfavored” subjects.<sup>44</sup>

## Legal Analysis/Litigation Response

### **These assaults on academic freedom violate the First and 14th Amendments, which prohibit suppression of specific viewpoints and vague legal restrictions.**

Indeed, in every case where the ACLU has challenged classroom censorship and the teaching of “divisive concepts,” we have prevailed. In November 2022, a federal court granted our request for a preliminary injunction blocking Florida from enforcing HB 7/SB 148, the so-called “Stop W.O.K.E. Act.”<sup>45</sup> The Act is a classroom censorship law championed by Governor Ron DeSantis<sup>46</sup> that severely restricts Florida educators and students from learning and talking about issues related to race and gender in higher education classrooms.<sup>47</sup> Similarly, in May 2024, a federal court agreed that New Hampshire’s classroom censorship law, the “Banned Concepts Act,”<sup>48</sup> is unconstitutional.<sup>49</sup> The law actively discouraged public school teachers from teaching and talking about race, gender, sexual orientation, disability, and gender identity inside and outside the classroom.<sup>50</sup> And, in June 2024, a federal court granted a partial preliminary injunction that prevents Oklahoma’s classroom censorship law, HB 1775, from going into effect in university classrooms.<sup>51</sup> The law sought to severely restrict teachers and students in K-12 public schools and public universities from learning and talking about race and gender.<sup>52</sup>

Should a second Trump administration increase its attacks in this area, we will commensurately increase our litigation challenging such efforts, building on the successful blueprint we have already created. These classroom bans do not simply violate students’ and educators’ constitutional rights: they undermine student safety, academic achievement, and student retention. Researchers and educators have recognized that a school-wide approach involving education and training is, for example, necessary to combat harassment and bullying on the basis of race and gender.<sup>53</sup> Laws banning conversations about race jeopardize this important work and create educational environments that are unwelcoming to students of color and other marginalized students.

Additionally, for students of color, the ability to learn about the experiences and viewpoints of people of color and America’s legacy of racism is critical to feeling connected and equally valued. Further, research shows that an inclusive K-12 and college curriculum and environment is a significant contributor to the retention and academic success of not just students of color, but *all* students. Studies have found that learning about racism and its implications has a positive impact on the development of critical thinking skills and critical consciousness, and contributes to a more complex issue analysis. For example, both white college students and students of color in a racial justice course demonstrated growth

in their problem-solving and analytical skills.<sup>54</sup> Other researchers have noted an increase in math standardized test scores of middle school students following implementation of anti-bias education programs.<sup>55</sup> The inclusion of an ethnic studies course for ninth-graders in California was also found to significantly increase student attendance and GPA by 1.4 points.<sup>56</sup> These educational efforts, in other words, can have marked positive effects on educational outcomes, which are critical given persistent retention and achievement gaps between students.

Considering these important goals and constitutional principles, the ACLU will neutralize threats to diverse, inclusive campuses dedicated to creating vibrant educational experiences that are foundational to our multi-racial democracy. We will build on our successful legal challenges<sup>57</sup> to unconstitutional state laws in Florida,<sup>58</sup> Oklahoma,<sup>59</sup> and New Hampshire<sup>60</sup> — and to similar unconstitutional crackdowns on academic freedom — we will continue to establish strong precedent, applicable across jurisdictions, that we will use to strike down Trump’s efforts to stifle speech and DEI activities around issues of race and gender in U.S. schools and college campuses.

## Advocacy Response

Education is primarily a state and local responsibility, and each state constitution mandates the creation of a free K-12 public education system with distinct requirements concerning the quality of education. As a result, states and communities, as well as public and private organizations operating on behalf of those entities, develop curricula concerning what students should learn by each grade level.<sup>61</sup> Because state and local education agencies play a lead role in K-12 education policy and best understand the needs of and climate within their own schools, they are uniquely positioned to effectively mobilize against any efforts by a Trump administration to mischaracterize inclusive education and its value to schools and students. Consequently, the ACLU will lobby state assembly members to enact laws mandating inclusive curricula, and prohibiting the banning, removal, or restriction of books at the K-12 level. In addition, in states where there are constitutional mandates for a minimum quality of education, the ACLU will request opinions from state attorneys general concerning state constitutional mandates for inclusive curricula and/or curricula that accurately reflect historical events and government policies in K-12 schools. On the federal level, the ACLU will work with coalition members to lobby against bills that seek to prohibit inclusive curricula in post-secondary institutions and professional schools.

## The ACLU will intensify its role defending access to educational opportunities for students of color, mitigating the impact of a Trump DOJ’s retreat from that role.

Educational access continues to be a key driver of socioeconomic success and stability, and yet educational opportunity in the U.S. too often depends on race and ethnicity, wealth, and geography. Even as our student population across the nation is more diverse than ever, *all* students — irrespective of race<sup>62</sup> — are more likely to attend racially segregated schools, with Black and Latine students more likely to attend schools that are highly racially segregated and economically under-resourced.<sup>63</sup> In fact, both Black and Latine students are *increasingly* educated in intensely segregated schools.<sup>64</sup> The confluence of housing segregation and growing income inequality means that, in addition to attending racially segregated schools, Black and Latine students are significantly more likely to attend high-poverty schools.<sup>65</sup> This double segregation occurs because Black and Latine families are disproportionately concentrated, at all income levels, in segregated neighborhoods with fewer resources than predominantly white communities with similar income demographics.<sup>66</sup> Thus, public schools with higher densities of Black and Latine students receive fewer resources on average, despite higher needs.<sup>67</sup> Double segregation of this kind disadvantages students academically, creating performance gaps that have long-lasting effects on Black and Latine students’ future career prospects.<sup>68</sup>

These facts illustrate the critical importance of proactively and aggressively desegregating schools around the country. In the K-12 setting, school districts are pursuing constitutionally sound, race-neutral efforts to make access to education more equitable. And, even after the U.S. Supreme Court’s curtailment of affirmative action programs in 2023, institutions of higher education *can* still lawfully strive to pursue a diverse student body, as the ACLU and our partners have made clear in the wake of that decision.<sup>69</sup>

Nevertheless, the conservative legal movement has targeted even these efforts, and Trump promises to steer the DOJ away from its historical role of defending such policies and programs. This threatens to exacerbate educational disparities across the country and deepen economic and professional inequality.

## Legal Analysis/Litigation Response

We will continue to provide critical guidance and support for efforts by institutions and school districts around the country to combat these forms of segregation that are still constitutionally sound, despite aggressive messaging to the contrary. In June 2023, in two cases brought by Students for Fair Admissions (SFFA), the Supreme Court struck down longstanding affirmative action admissions policies at both Harvard University and the University of North Carolina.<sup>70</sup> Nonetheless, the court left open a number of pathways to increase access to educational opportunity. We will continue to build on our inclusive education assistance for educational institutions, highlighting the tools that still remain available.<sup>71</sup> We will defend the ability of local and state actors to ensure that educational opportunities are open to all, and that addressing societal discrimination remains a legitimate objective under the governing law. At the K-12 level, for example, the ACLU will defend local efforts to address segregation and exclusion based on past and present discriminatory practices — including redlining, predatory lending, and steering — by both state and private actors.

Two illustrative examples are worth unpacking. School districts in both Virginia and Massachusetts have adopted race-neutral efforts to promote equitable access to competitive high schools, and courts have thus far upheld their efforts, consistent with the *SFFA* decision.<sup>72</sup> For instance, in 2020, in an effort to expand access to the highly competitive Thomas Jefferson High School for Science and Technology (TJ), a prestigious public magnet school that serves part of Northern Virginia, the Fairfax County School Board revised the admissions process. They eliminated the need for a standardized test, removed a \$100 application fee, and allocated a small number of seats in the incoming class of 2025 to each public middle school in the region, while evaluating students on their grades, essays, and experience factors, including students who are economically disadvantaged, English language learners, special education students, or students who are currently attending underrepresented middle schools.<sup>73</sup> These efforts eliminated barriers to admission for many students across Fairfax County schools.<sup>74</sup>

Despite the fact that the admissions policy was racially neutral, a right-wing group challenged the policy as a form of racial discrimination under the 14th Amendment’s equal protection clause. The challengers contended that “the [School] Board adopted it with a racially discriminatory purpose” — that is, “to racially balance TJ.”<sup>75</sup> With our partners, the ACLU weighed in on the case

before the Fourth Circuit, laying out how and why school communities can and should be able to lawfully consider the impacts of admissions policies on diversity and access as schools across the country are increasingly racially segregated and unequal.<sup>76</sup>

Following hotly contested litigation, the Fourth Circuit upheld the admissions policy, finding that its “central aim is to equalize opportunity for those students hoping to attend one of the nation’s best public schools, and to foster diversity of all stripes among TJ’s student body.”<sup>77</sup> In light of the school board’s careful balancing of relevant factors, the court was “satisfied that [its] adoption of the challenged admissions policy fully comports with the Fourteenth Amendment’s demand of equal protection under the law.”<sup>78</sup> The Supreme Court subsequently declined to hear the case, leaving the Fourth Circuit’s decision intact.<sup>79</sup>

Similar strategies to expand access to crucial education resources have survived attacks in Massachusetts. In 2023, the First Circuit upheld an admissions plan for three selective Boston public schools that was based on grades and zip code — with preference given to students with top grades from lower-income zip codes — which was adopted to address persistent racial disparities in admissions.<sup>80</sup> The challengers have requested that the Supreme Court review the First Circuit’s decision, and if the court takes the case, we will weigh in, as we did in the First Circuit,<sup>81</sup> to ensure that equal protection standards are not distorted and that the court is well-informed of the multitudinous importance of diversity and open opportunity in education.

These cases demonstrate courts will still uphold meaningful and effective tools to tackle unequal educational access in order to remedy historical discrimination. As Justice Brett Kavanaugh, who joined the majority in the affirmative action cases, has acknowledged, “governments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’”<sup>82</sup> The Supreme Court has been clear that government actions undertaken to ensure that opportunities are “equally open” to people of all races are still permissible.<sup>83</sup> Indeed, even race-conscious approaches should be upheld if they are designed to remediate “specific, identified instances of past discrimination,”<sup>84</sup> and where they are necessary to “avoid imminent and serious risks to human safety” in specific contexts.<sup>85</sup>

Further, in *SFFA*, the court left affirmative action policies at military academies intact “in light of the potentially distinct interests that military academies may present.”<sup>86</sup> Seeking to expand on the *Harvard/UNC* decision, *SFFA* subsequently filed two new lawsuits challenging race-conscious admissions policies at the U.S. Naval

Academy and West Point. While the Biden administration has strongly defended those admission policies, the Trump campaign has promised to abandon the federal government’s defense of both lawsuits.<sup>87</sup> Given the Supreme Court’s observations about potential distinct interests at these two institutions, that retreat is unwarranted and the ACLU is prepared to mitigate its effects. We filed amicus briefs in both military academy lawsuits on behalf of Black women military veterans, and we will work closely with current and former military members of color to ensure that their interests are represented in the litigation and any related changes to admissions. The Trump campaign’s promise to abandon military academies’ use of affirmative action would be more restrictive of opportunity than the Supreme Court’s ruling requires.<sup>88</sup> To respond to this unwarranted dismantling of a key tool advancing diversity in military academies, the ACLU and our allied organizations will consider engaging Congress for fairer opportunities for potential military academy applicants of color at other points in the pipeline to admission.<sup>89</sup>

In this new legal landscape, the ACLU will continue to defend vital efforts to counteract historical discrimination and unequal access to educational opportunity around the country in the face of a Trump administration assault. We will continue to pursue litigation on behalf of K-12 students and other stakeholders to defend *SFFA*-compliant steps taken by school districts to increase access for disadvantaged students, including those disadvantaged by race, and support public high schools offering unique resources and opportunities that are working to redress the systemic racial exclusion caused by deeply flawed, test-only admissions policies.<sup>90</sup> And we will do so even if the DOJ abandons its historical commitments, and itself attacks these programs and policies.

## Advocacy Response

The ACLU will also advocate on the state and federal level to permit post-secondary institutions to utilize lawful programs and practices to advance diversity goals amongst students and faculty. The ACLU will work with coalition partners to aggressively lobby against state and federal bills that would preclude those institutions from requiring, requesting, or considering any “diversity statements” from current or prospective students or faculty members, given that the Supreme Court has explicitly found that higher education institutions may consider “an applicant’s discussion of how race affected the applicant’s life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute” to the institution.<sup>91</sup> Similarly, statements from prospective or current faculty members explaining how their teaching, research, or service has or would promote diversity are clearly relevant to a faculty member’s professional experiences and scholarship.

## The ACLU will challenge aggressive and unlawful rollbacks of critical federal anti-discrimination protections.

Trump also threatens to double down and even expand on his prior administration's attempts to roll back critical federal protections designed to combat discrimination in, and ensure access to, housing, education, health care, and other essential resources.

### Legal Analysis/Litigation & Advocacy Response

In 2020, for example, the Trump administration U.S. Department of Housing and Urban Development (HUD) issued a rule that significantly narrowed disparate impact liability under the FHA by adding new pleading and proof requirements for parties pursuing FHA claims, and new defenses for actors and entities named in those challenges. These actions made it more difficult to establish that policies and practices that disproportionately harm people of color and other protected groups violate the FHA.<sup>92</sup>

The ACLU, with partners, served as counsel for the Open Communities Alliance and Southcoast Fair Housing to challenge the Trump administration's gutting of the disparate impact standard.<sup>93</sup> In companion litigation, a federal court enjoined the Trump administration's regressive rule, concluding that its key provisions could not be "found in any judicial decision" and were "inadequately justified."<sup>94</sup> Ultimately, in 2023, and after we commented on the critical need to do so,<sup>95</sup> HUD reinstated the 2013 discriminatory effects rule in the form of the Restoring HUD's Discriminatory Effects Standard Final Rule.<sup>96</sup> In so doing, HUD emphasized that the 2013 rule is more consistent with how the FHA has been applied in the courts and by HUD for more than 50 years, and that it more effectively implements the Act's broad remedial purpose of eliminating unjustifiable discriminatory practices from the housing market.<sup>97</sup>

Similarly, in 2018, the Trump administration suspended the 2015 Affirmatively Furthering Fair Housing (AFFH) Rule,<sup>98</sup> and in 2020 issued a new Preserving Community and Neighborhood Choice Rule, thus repealing the 2015 AFFH Rule.<sup>99</sup> The suspension and eventual repeal of the 2015 AFFH Rule undermined critical fair housing advancements and substantially weakened HUD's authority and ability to meet its AFFH obligation under the FHA.<sup>100</sup> The 2015 AFFH Rule represented a critical step to ensure that entities such as HUD, states, local jurisdictions, and public housing authorities fulfilled their AFFH obligations by creating a framework to remove unfair barriers to housing, dismantle housing

practices that entrench segregation, and increase access to housing and community assets for people of color and other vulnerable and marginalized groups. The 2015 rule required cities and towns to create a plan to address segregation and discrimination and to lay out concrete goals for bringing fair housing and opportunity to members of all the groups protected by the FHA.<sup>101</sup>

Examples of these goals included building affordable housing in areas well-served by transit and prohibiting landlords from discriminating against people who use a government subsidy to pay rent. In the first few years it was in effect, the AFFH Rule was instrumental in making strides in attacking deeply rooted segregation and expanding access to housing. The AFFH Rule also proved valuable in surfacing harmful fair housing issues that were often overlooked. For example, the city of Ithaca, New York used the AFFH process to prioritize addressing policies and practices that displace victims of domestic violence, sexual assault, and stalking.<sup>102</sup>

The ACLU, with partners, represented the National Fair Housing Alliance and other plaintiffs to challenge this suspension of the 2015 AFFH Rule.<sup>103</sup> Like our challenges to the Trump administration's 2020 disparate impact standard, this lawsuit provided an essential check on unlawful regulatory actions that gutted rules designed to root out discrimination in access to housing and undermined the fight for more inclusive communities – and are critical to ensure that unlawful actions to repeal or otherwise undermine regulations do not go into effect and harm the communities we serve. Should a second Trump administration renew its attacks on key fair housing protections and other essential civil rights protections through rulemaking or other executive action, the ACLU will again forcefully respond, building on the strategies we developed to oppose attacks on these rules and other actions under the prior Trump administration.

We will also file comments on any proposed notices of rulemaking or other federal regulatory action to explain the harms that these anticipated proposals will have on people of color, and other protected and historically marginalized groups, and why such actions are unlawful. These comments often play a critical role in forcing the federal government to consider the implications of their proposed actions on the communities we serve. They are also an essential step in creating the requisite record for successful challenges to these unlawful agency actions in any legal challenges brought under the Administrative Procedure Act (APA), which authorizes legal action to stop agency rules or other actions that are arbitrary, unsupported by substantial evidence, or otherwise contrary to law.<sup>104</sup> To ultimately defeat efforts to undermine civil rights protections, we must engage in this record-making process.



For example, during the first Trump Administration, the ACLU submitted comments opposing the gutting of the AFFH Rule,<sup>105</sup> and the proposal to substantially weaken HUD's ability to impose disparate impact liability on bad actors.<sup>106</sup> We have also submitted a comment in support of HUD's more recent Notice of Proposed Rulemaking that built on steps previously taken in HUD's 2015 AFFH Rule, while proposing critical improvements to requirements for states, local jurisdictions, public housing authorities, and other entities receiving HUD funding to create and implement equity plans — including with respect to community engagement — transparency, goal-setting, ways in which to measure progress, and accountability.<sup>107</sup> We will work tirelessly to ensure that the AFFH Rule is restored, and to ensure that federal government actors understand how critical it is to combatting segregation and creating more inclusive communities.

## **The ACLU will insulate state and local DEI policy interventions designed to remedy persistent inequalities in critical areas such as public health and employment from attack.**

In addition to fighting the rollback of federal anti-discrimination policies and attacks on racial justice efforts in court, the ACLU will work to insulate state and local policy interventions to address persistent inequalities in critical arenas and expand opportunity — policies that are often the fruits of considerable mobilization and advocacy by affected communities — from Trump administration attacks. In partnership with local affiliates on the ground, we can provide critical legal and strategic advice to ensure that such programs meet current legal standards.

DEI programs and initiatives date back to the civil rights movement. The landmark Civil Rights Act of 1964 enforced school desegregation, outlawed employment discrimination based on race, religion, sex, color, and national origin, and established the Equal Employment Opportunity Commission. In response, public and private sector entities began utilizing initiatives and trainings to recruit and retain more people of color and women, and to create inclusive and welcoming educational institutions and workplaces.<sup>108</sup> In addition, federal, state, and local governments used incentives and public contracting programs to expand opportunities for minority- and women-owned businesses.<sup>109</sup> Over time, these initiatives and programs expanded access to education, employment, and public contracting opportunities for women, communities of color, LGBTQ+ communities, active

military and veterans, and persons from low-income backgrounds.

These initiatives have also impacted critical fields, such as public health, and programs that provide critical interventions into persistent, deeply rooted inequalities. We know, for example, that there are significant racial disparities in health care that are closely linked to structural racism: According to the CDC, Black women are three times more likely to die from a pregnancy-related cause than white women due to variation in quality health care and implicit bias.<sup>110</sup> Meanwhile, there is a significant underrepresentation of Black and Latine people in the medical profession:<sup>111</sup> Research led by the Health Resources and Services Administration concluded that, on average, every 10 percent increase in the representation of Black primary care physicians in certain counties was associated with 30.6 days of greater life expectancy among Black people in those areas.<sup>112</sup> To remedy historical discrimination and address these health outcome disparities, public and private scholarship and fellowship programs have been set up to support pathways to the medical profession for underrepresented medical professionals. In response, an organization named Do No Harm has brought a series of legal challenges to these scholarship and fellowship programs, as well as implicit bias trainings in the medical sector.<sup>113</sup>

Similarly, guaranteed income programs, delivered alongside other material benefits like housing, childcare, and health care, have emerged as important tools to assist people struggling to make ends meet. A guaranteed income can come in a variety of forms such as a periodic cash payment or an expansion of already existing tax credits. The goal is to make these payments significant enough to put those who most need them on a path to economic security and self-determination; and these programs have had great success. Over 100 guaranteed income pilots have emerged in cities and counties nationwide to provide life-changing, direct assistance to over 38,000 households combined.<sup>114</sup> However, conservative legal activists have made increasing demands, backed by the threat of litigation, that local jurisdictions end guaranteed income programs that provide basic economic support for the most economically vulnerable, including people of color and LGBTQ+ people.<sup>115</sup>

### **Legal & Advocacy Response**

We anticipate these attacks would intensify under a Trump administration and be joined by the federal government itself. In partnership with our network of state affiliates and chapters in all 50 states, the District of Columbia, and Puerto Rico, we will seek to intervene in litigation to defend programs addressing racial disparities and fight further erosion of equal protection standards. We will also ramp up our existing work providing legal

and strategic advice on current legal standards to local and state actors administering such programs, making sure that they are in the best position to both advance their mission and defend their work against a potential challenge.

At the federal level, the ACLU will work with organizations and policy researchers to explore and document the harmful impact of current anti-DEI laws. The ACLU

will also work with coalitions to lobby the congressional caucuses and committees to investigate and document the dismantling of DEI programs in the public and private sector and the resulting social and economic impact on families and state and local governments. And, at the state and local level, the ACLU will lobby state governors and mayors to issue executive orders to create and expand state and locally funded DEI programs and initiatives.

## CONCLUSION

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Should Trump take office for a second term, he will pose an immediate and sweeping threat to our multi-racial democracy. In an attempt to silence discussions about race and gender, his administration would attack academic freedom and students' constitutional right to learn. Foundational legal principles of civil rights and equal protection law would be in the crosshairs, as would

policies to reduce racial inequality. In the face of these threats, the ACLU stands ready to use all the tools available to us, including litigation and legislative and policy advocacy, to fight for the promise of our democracy and for full and equal freedoms for all of us, whether Black, Latine, Indigenous, Asian or white.

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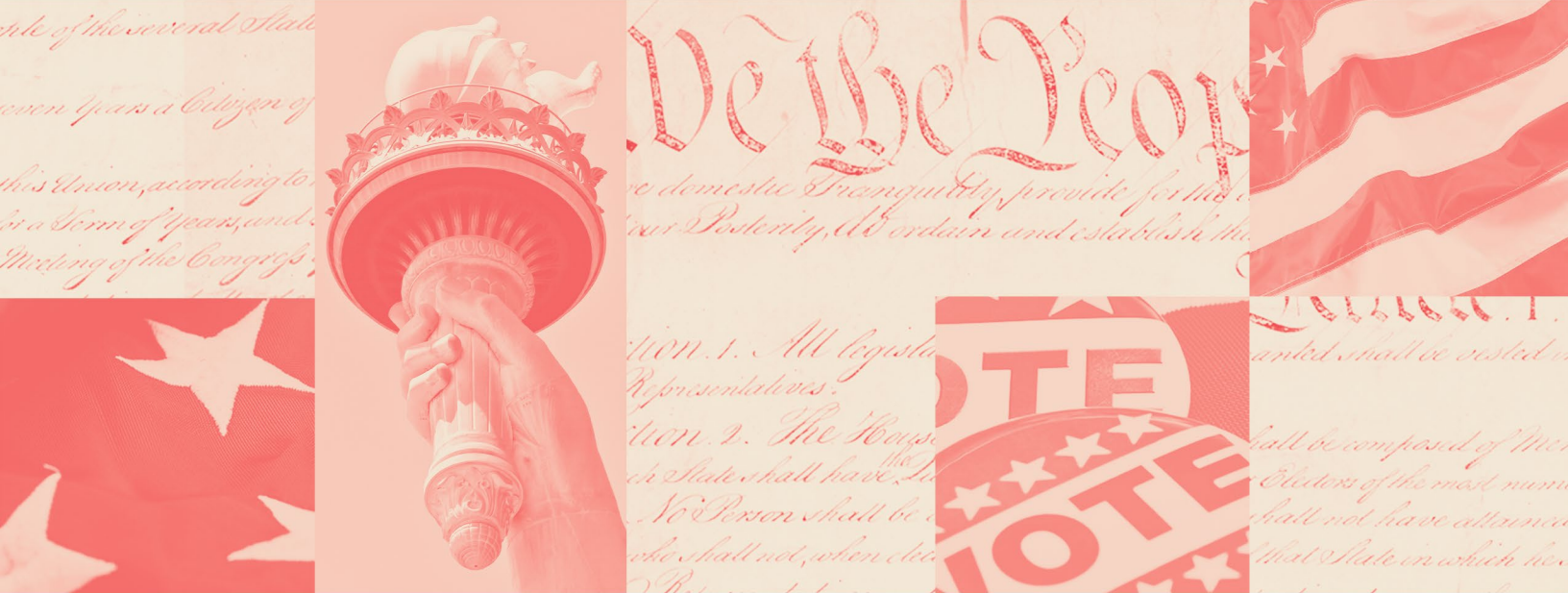
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# TRUMP ON VOTING RIGHTS

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The “Trump on Voting Rights” memo outlines how the ACLU would respond to a possible second Trump administration’s impact on voting rights and other building blocks of our democracy, including **abusing executive power to intimidate voters and election workers, adding a citizenship question to the census, and rolling back efforts to expand voting access.** The ACLU is prepared to challenge these policies in federal court, push Congress to pass voting rights protections, and demand that politicians advance voting rights.

## TRUMP PROPOSED POLICIES

- **Adding a citizenship question to the 2030 Census:**

A second Trump administration would try again to add a citizenship question to the 2030 census, which would significantly reduce response rates among immigrant communities and exclude noncitizens from population counts. This would also force states with diverse communities of immigrants to be underfunded and underrepresented.

- **Abusing executive power to suppress voting and interfere with elections:**

A second Trump administration risks suppressing voting and interference with election outcomes by disenfranchising, criminalizing, and intimidating voters and election administrators who challenge election outcomes that are adverse to him and his allies.

- **Rolling back federal progress on increasing voting access:**

A second Trump administration threatens to roll back federal progress on increasing voting access by rescinding Biden's Executive on Promoting Access to Voting, which encourages federal agencies to create opportunities to register to vote. A policy like this would suppress traditionally marginalized voters.

## ACLU RESPONSES

- **Litigation:**

The ACLU is prepared to challenge these policies in federal court, based on provisions of the Constitution and the Voting Rights Act. Legal challenges the ACLU brought during the first Trump administration stopped policies designed to undermine our democracy, such as his efforts to add a citizenship question to the decennial census.

- **Legislation:**

The ACLU will push Congress to pass crucial voting rights protections like the John Lewis Voting Rights Advancement Act, which restores and strengthens the Voting Rights Act to prevent racial discrimination in voting.

- **Mobilization:**

The ACLU and its affiliates will demand that state and local officials protect and strengthen voting rights through laws and policies that increase access to the ballot for every eligible voter, such as ample and consistent funding for updated equipment, election worker training, messaging campaigns to counter misinformation and disinformation, and measures to ensure election worker safety.

**“A second Trump term would be catastrophic for every aspect of our elections: from who is counted when it comes to allocating our political power and billions in federal funds, to who is able to cast a ballot, to whether our election administrators can perform their jobs and voters can have their voices heard free from intimidation. He has promised to end our democratic processes, but we are prepared to fight in the courts, the streets, and the halls of Congress to defend our democracy and protect our right to vote.”**

— **Sophia Lin Lakin,**  
Director of the ACLU’s  
Voting Rights Project

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**“Trump has already said the quiet part out loud: He will make it harder for you to vote. And then when he doesn’t win, he will discredit the election results. We at the ACLU stand ready with our volunteers across the country to demand Congress thwart Trump’s plans to undermine our democracy and focus on what our country needs, like the John Lewis Voting Rights Advancement Act and other federal voting rights protections.”**

— **Molly McGrath,**  
Director of Democracy National  
Campaigns at the ACLU

## TRUMP ON VOTING RIGHTS

Threatening Representational Equality, Restricting Voting Access, and Undermining the Integrity of Elections

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A second Trump administration will renew efforts to erode constitutional foundations of our democracy, make it harder for Americans to vote — particularly voters of color, voters with limited English proficiency, voters with disabilities, older voters, and other marginalized voters — and spread false, debunked theories designed to undermine confidence in the integrity of our voting system. Trump is already casting doubt on the 2024 election, saying he will not accept its outcome if he doesn't win and insinuating that violence would follow his defeat.<sup>1</sup> His ongoing lies about the election process<sup>2</sup> endanger the public's trust in the country's ability to carry out free and fair elections, and embolden and enable allies in state and local government to pursue similar tactics.

Here, we focus on three areas that pose significant threats to democracy and voting rights should Trump be elected to a second term. First, if re-elected, Trump is likely to renew efforts to add a citizenship question to the 2030 Census — a move that would catastrophically reduce response rates among immigrant communities and exclude noncitizens from population counts. Census population counts impact apportionment of representatives, funding, and other resource allocation. Adding a citizenship question and excluding noncitizens from the count is not only unconstitutional; it would also result in significantly undercounting historically vulnerable or underrepresented populations, specifically Latine and Asian communities and those living in urban areas, and would have reverberating negative impacts on district maps and allocation of funding.<sup>3</sup> We defeated the previous Trump administration's attempt to do this and will use every tool at our disposal to stop it again.

Second, if reelected, Trump is likely to abuse executive power in service of his relentless attacks on our election system. With an aim toward disenfranchising, criminalizing, and intimidating voters and election administrators, he would set the groundwork for questioning election outcomes that are adverse to him and his allies. This abuse of power may take several forms:

- ***Sham commissions or executive actions to fuel the false voter fraud narrative:*** Last time around, Trump convened a sham commission on so-called “election integrity,” an endeavor designed, in part, to spread a false narrative of widespread voter fraud and legitimize suppressive voting measures that disproportionately harm voters of color.<sup>4</sup> Trump established this commission insisting on the falsehood that he won the nationwide popular vote and the state of New Hampshire in 2016.<sup>5</sup> The commission was disbanded months later in response to the lawsuits following its creation,<sup>6</sup> including one brought by the ACLU.<sup>7</sup> Trump's claims that he actually won the 2020 election, which he still clings to four years later, and his and his allies' obsession<sup>8</sup> with the nonexistent problem of widespread noncitizen voting,<sup>9</sup> leave little doubt that he would again use the office of the president to generate grist for false narratives of illegal voting.
- ***Mass voter roll purges:*** Trump's nonstop, baseless claims about illegal voting are likely to be used to justify attempts to aggressively purge voters from the voter rolls. As we have seen too many times before, unreliable data and faulty procedures are often used to target eligible voters for removal from the rolls.<sup>10</sup> In addition to encouraging and empowering allies at the state and local level to act, Trump will likely deploy the Department of Justice (DOJ) and other federal agencies to force aggressive voter purges directly.
- ***Spurious criminal investigations and prosecutions:*** Trump is likely to use false, drummed-up allegations of voter fraud to deploy the DOJ and federal agencies to launch bad-faith investigations and prosecutions of voters and elections officials, and encourage state and local allies to follow suit — a go-to tactic for those intent on criminalizing the ballot box.<sup>11</sup> Indeed, Trump and his allies have promised to investigate and prosecute election administrators who have worked to expand access to the ballot on the false grounds

that these administrators “rigged” the 2020 election.<sup>12</sup> Efforts from a second Trump administration would fuel additional voter suppression measures at the state level and have the practical effect of intimidating and disenfranchising voters, targeting communities of color who typically bear the brunt of such actions. As in the past, we will sue to ensure compliance with federal law, stop voter purges, rise to defend people wrongly prosecuted, and sue government officials who attempt to illegally restrict voters’ ability to cast their votes and have those votes counted.

- **Federal law enforcement intimidation at the polls:** If re-elected, Trump may make good on earlier promises to send law enforcement officers to voting locations. This move would only intimidate voters and chill participation. In addition to his prior calls to send “sheriffs” and “law enforcement” to the polls,<sup>13</sup> Trump’s use of federal law enforcement to stifle civil unrest during the 2020 racial justice protests suggests a willingness to deploy federal police power in other contexts, including elections.<sup>14</sup> Trump is likely to make these deployments — or encourage and support state and local government allies to do so with the National Guard or state and

local law enforcement — in service of his false “voter fraud” narrative. He is likely to invoke false “national security” concerns to justify deploying federal officers in this way. Drawing on our expertise on both voting rights and national security, we will challenge any efforts to intimidate voters with an abusive show of military and police power at polling places.

Finally, a second Trump administration would mean a reversal of nonpartisan federal efforts to promote and expand access to voting, particularly for marginalized communities. As recent attacks by Trump surrogates and allies in Congress underscore, if re-elected, Trump would almost certainly rescind President Biden’s Executive Order 14019 on Promoting Access to Voting.<sup>15</sup> This Executive Order includes measures aimed at increasing language access, mitigating barriers for individuals with disabilities, and increasing voter education and registration opportunities under the National Voter Registration Act (NVRA).<sup>16</sup> Moreover, the DOJ under a Trump administration may also join in such reversals. Nevertheless, we will double down on holding violators of federal voting laws accountable in court and increase the pressure on Congress and states to enact more robust voting protections that strengthen our democracy.

## OVERALL RESPONSE

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### Courts

Many of Trump’s anticipated anti-voter policies would violate the Constitution and federal law. As always, litigation would be a key tool in the ACLU’s response. The ACLU has extensive experience challenging restrictive and discriminatory voting laws in court. Since 2013, we have filed or intervened in more than 100 cases to defend voting rights,<sup>17</sup> including leading successful litigation against the first Trump administration’s attempt to rig and weaponize the 2020 Census — twice defending its integrity at the Supreme Court.<sup>18</sup> Should a second Trump administration take office, we are ready to go to court to block efforts to undermine the census and representational equality. We would also work to shut down Trump’s expected efforts to use the office of the president to fuel the false voter fraud narrative that would justify and embolden others to engage in voter suppression, voter and election worker intimidation, and baseless attacks on election outcomes.

Litigation on behalf of marginalized communities has always been challenging. Many Americans are understandably concerned about the impact of Trump’s judicial appointments on civil rights and civil liberties litigation. But we have nonetheless succeeded, even

before conservative courts, in proving that restrictions on ballot access, which have proliferated since the Supreme Court’s *Shelby County v. Holder*<sup>19</sup> decision in 2013, unlawfully discriminate against voters from historically marginalized communities and interfere with their ability to participate in the political process. In fact, since 2016, we have secured important results in favor of voting rights — even from Trump-appointed judges in the lower courts.<sup>20</sup> And we achieved a landmark ruling at the Supreme Court in *Allen v. Milligan*, 599 U.S. 1 (2023), which held that Alabama’s 2021 congressional map likely violated Section 2 of the Voting Rights Act of 1965 (VRA) and affirmed the framework and constitutionality of that provision — a ruling joined in substantial part by a Trump appointee, Justice Brett Kavanaugh.

Litigation remains a tool with deep and meaningful impact. And even when we don’t win, litigation serves an important role: It publicly calls out unlawful policies and builds the kind of political and grassroots support that results in more just policies over time. A second Trump administration will no doubt renew its assaults on democracy; and we will answer in turn by bringing litigation where feasible.

## Congress

The grave threats that a second Trump presidency pose to American democracy demand robust defensive and proactive responses from Congress. First, we will utilize our political power on Capitol Hill to push Congress to serve as a firewall against any of Trump’s attempts to erode democracy or voting rights. We will work with lawmakers to advance legislation essential to protect our democracy, including the John Lewis Voting Rights Advancement Act,<sup>21</sup> which restores and strengthens the VRA to prevent racial discrimination in voting, as well as core provisions of the Freedom to Vote Act,<sup>22</sup> which increases access to the ballot. While these measures are unlikely to become law under a Trump presidency, congressional action, including regular committee and subcommittee hearings, is essential to maintain the saliency, immediacy, and relevance of the threats to democracy that these bills address. Historically, civil rights victories have often required years of advocacy with nonlinear progress; we will remain determined, even under a Trump presidency, to lobby and organize until these bills become law. We will hold Congress accountable to use every constitutional authority and legislative avenue available to stop Trump’s authoritarian,

anti-democracy policies and practices, including its investigative and oversight authority and the power of the purse.

## State & Municipalities

To fight back against expected federal attacks on voting rights under Trump, we will use our political power and presence in all 50 states to demand that state and local officials protect and strengthen the franchise through laws and policies that increase access to the ballot for every eligible voter. Funding for local elections is a shared responsibility, and we will fight to ensure that states provide local election officials with ample and consistent funding every appropriations cycle for updated equipment, election worker training, messaging campaigns to counter mis/disinformation, and measures to ensure election worker security. Finally, we will advocate for states to enact policies barring state and local law enforcement agencies from cooperating with federal law enforcement in any Trump-directed effort to intimidate voters through their presence at or near polling or ballot return locations.

## SPECIFIC THREATS & POSSIBLE RESPONSES

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### Citizenship Question & Census Manipulation

The results of each decennial census are used to apportion seats in Congress among the states, draw congressional and state legislative district lines within each state, and distribute billions in federal funding for essential services. As a result, ensuring a fair and accurate count was a crucial part of the ACLU’s work in the run-up to the 2020 Census, and we successfully halted two attempts by the Trump administration to rig the count. Going into the next census cycle, Trump’s allies have made clear that carving noncitizens out of the 2030 Census count would be a key priority for a second Trump administration. The ACLU would fight any attempts to do so.

Project 2025 — an influential conservative “Presidential Transition Project,” which former senior Trump officials helped write — has put forth several radical ideas to remake the census and disrupt a fair count. In addition to other proposals that a second Trump administration should take to reshape the Census Bureau “to execute a conservative agenda”<sup>23</sup>—measures that have alarmed former high-level officials, including some who served in the Trump administration<sup>24</sup> — Project 2025 proposes

adding a citizenship question.<sup>25</sup> As we know from the 2020 Census litigation, adding such a question would have catastrophically reduced 2020 response rates among immigrant communities.<sup>26</sup> In turn, it would have caused diverse communities in places like California, Illinois, and New York to lose representation<sup>27</sup> and cut their share of federal dollars — including public funding “used for hospitals, roads, schools, housing, supporting veterans, feeding children and families, economic development, and so much more.”<sup>28</sup>

Meanwhile, Trump’s allies in Congress have proposed legislation to dramatically remake the census and the resulting apportionment and allocation of funding. In May 2024, the Republican-led House passed a bill that would add a citizenship question to the census and exclude *all* noncitizens — *regardless* of lawful status — from the number used to divide House seats among the states.<sup>29</sup> At this time, these laws have no chance of passing the Senate — and would be met with an executive veto if they did — but a second Trump administration would no doubt quickly push the same legislation or unilaterally implement similar policies, even without a supportive Congress. Senator Bill Hagerty, a Trump ally who has sponsored a Senate version of the House bill, said of the foundational process of counting noncitizens

for apportionment purposes: “Why would we count people who are here illegally?”<sup>30</sup> The short answer to Senator Hagerty’s question is that the Constitution demands it, because “population is the true basis of representation.”<sup>31</sup> But the question ignores that the bill also indiscriminately targets millions of *lawfully* admitted noncitizens.

The consequences of not counting noncitizens would be dire. According to a Pew Research Center study, removing just undocumented immigrants from the apportionment count would result in California, Florida, and Texas each losing a House seat.<sup>32</sup> As noted earlier, experts anticipated massive effects on political representation and funding for important social services if a citizenship question was added to the 2020 Census. The Census Bureau predicted this would result in 9 million fewer people not responding — effectively the same as if the census skipped a state as populous as New Jersey. Meanwhile, the Census Bureau estimates that there are more than 46 million noncitizens in the United States<sup>33</sup> — meaning eliminating noncitizens from the apportionment process altogether would likely have exponentially worse consequences than even adding a citizenship question.

## Courts

Trump’s mission to remove noncitizens from the census count is not just un-American; it is unlawful. As we successfully did twice before, we would meet Trump in the courts. Efforts to exclude noncitizens from the census would be vulnerable to legal challenges for infringing on the fundamental rights of immigrant communities and communities of color, violating numerous laws and regulations, and abusing executive power.

Between 2018 and 2020, the ACLU successfully fought off two attempts from the Trump administration to rig the 2020 Census count. In 2019, the Supreme Court ruled in favor of ACLU-represented plaintiffs, blocking the first Trump administration’s attempt to add a citizenship question to the census.<sup>34</sup>

Before leaving office, the Trump administration again tried to rig the census by announcing it would exclude undocumented immigrants from the figures used to apportion seats in Congress. We sued again, but in *Trump v. New York*, 592 U.S. 125 (2020), the Supreme Court ruled that our case was premature. Our lawsuit, however, contributed to delaying the actions of Trump’s political appointees at the Census Bureau so this proposal was not implemented, and, on January 20, 2021, the day he took office, President Biden rescinded the policy.<sup>35</sup>

Fighting unilateral executive action to rig the census would be harder this time around. In 2019, the Supreme

Court did not say that a citizenship question was itself out-of-bounds. It only concluded that the Trump administration gave a “contrived” reason for its action<sup>36</sup> — that is, it lied. At the time, the administration claimed that adding a citizenship question to the census was needed to better enforce the VRA.<sup>37</sup> But the record showed that adding the question would not serve that purpose; it would only hurt the census count and data.<sup>38</sup> Given a do-over, Trump would likely lie better — or not at all. Recent proposals to carve noncitizen populations from the census count have not masked their true purpose, but they can still be challenged from many angles.

The Fourteenth Amendment provides that representatives in Congress are apportioned based on the “whole number of persons in each State.”<sup>39</sup> That language is clear: Noncitizens are “persons” and must be part of the apportionment count.<sup>40</sup> It is also foundational: Even at the founding, when voters were almost exclusively adult, white men, it was understood that Congress represented all persons, including children, women, and (most offensively) three-fifths of a state’s enslaved population.<sup>41</sup> Any attempt by Trump to bypass the requirement that *all* persons be included in the count by purposefully depressing response rates with a citizenship question, or by wholly removing noncitizens from the tabulation, would be unconstitutional.

The Census Act also instructs the Commerce Secretary to conduct the census every 10 years, and for the president to report to Congress “the whole number of persons in each state.”<sup>42</sup> It requires “the whole number of persons” — not citizens — whose “usual residence” is in the United States to be counted where they live.<sup>43</sup> Trump’s previous attempt to exclude noncitizens from being counted clearly violated these principles by excising noncitizens and aiming to submit something other than “the whole number of persons.” If Trump or his Commerce Secretary again pushed to exclude noncitizens — whether with lawful status or not — from the count, they would squarely violate their statutory duties.

Separately, the Fifth Amendment’s Due Process Clause bans the federal government from denying any person the equal protection of the laws.<sup>44</sup> This guarantee is not limited by a person’s immigration or citizenship status, and applies to “all persons” in the United States.<sup>45</sup> Any attempt by the Trump administration to exclude noncitizens from apportionment figures would violate the Due Process and Equal Protection Clauses by discriminating against noncitizens on the basis of national origin and citizenship. That is true whether Trump tries to exclude noncitizens by executive action or through legislation passed by Congress. Either way, it would be an unambiguous attempt to harm noncitizens by denying their personhood, limiting their access to political power, and draining resources from the communities they live in.

Adding a citizenship question to the census would similarly violate the Fifth and Fourteenth Amendments by purposefully dissuading immigrants or those who live with them from responding to the census. Since many major cities have sizeable immigrant communities, a citizenship question would lead to an inaccurate census that would ultimately result in the harmful effect of diminished representation for the urban areas where most Americans live as well as reduced federal funding for programs in those communities.

## Congress

In a Trump presidency, we will work diligently to thwart attempts to make good on the promise to manipulate the census. Knowing this is a top priority of Trump and his congressional allies, we are prepared to push Congress to reject any effort to move legislation that weakens the Census Act's requirement that "the whole number of persons" be counted in each decennial census or any attempt to mandate a citizenship question. Our expert lobbyists will brief members of Congress on the detrimental impact that an inaccurate census count would have on their home state and constituents, including decreases in federal funding and congressional representation. In addition, we will push Congress to exercise constitutional oversight over the Department of Commerce and Census Bureau to expose attempts to incorporate a citizenship question or otherwise politicize the census count. Lastly, the Senate should ensure that any nominee to the role of Census Bureau director is questioned carefully about their support for a citizenship question and whether they would exclude noncitizens from the count.

## State & Local

We will leverage our affiliate presence in all 50 states to enlist state-level elected officials and influential voices from the places most likely to be negatively impacted by excluding noncitizens from the census count. Because elected officials from across the political spectrum are from states poised to lose funding and congressional representation if noncitizens are removed from census apportionment, we will forge bipartisan alliances to vocalize opposition to any census manipulation. Our organizing arm is prepared to enlist our supporters in states across the country to raise awareness of any attempt to manipulate the census and demand that Congress stop any bill that would not count all persons. Trump's previous census manipulation attempts caused public confusion as to who should complete the census. That confusion is certain to return if Trump makes similar attempts in a second term. We will again use our nationwide reach to educate the public on the importance of all people completing the census.<sup>46</sup>

## Abuse of Executive Power to Suppress Voting and Interfere with Elections

The office of the president comes with the largest bully pulpit as well as a swath of substantive powers. A second Trump presidency is likely to make use of this wide array of powers to target voters and election workers. Such abuse of executive powers might take a variety of forms. If past is prologue, a second Trump presidency likely will institute sham commissions aimed at bolstering the false narrative of stolen elections and justifying voter suppression laws and unjustified mass purges of voters from the rolls that sweep in and cancel the registrations of eligible voters. A second Trump administration may abuse federal police and prosecutorial powers to launch sham investigations, attack voters and election officials, and encourage vigilantism.

### Using Federal Power to Criminalize Voting, Purge Voters, and Restrict Access to the Ballot

The Big Lie and Trump's false claim that he actually won the 2020 election are well known.<sup>47</sup> But Trump makes claims attacking electoral results not only in elections he lost, but also those he won.<sup>48</sup> Even before his 2017 inauguration, Trump publicly argued that "illegal" votes led him to lose New Hampshire and the nationwide popular vote.<sup>49</sup> With this animating concern in the background,<sup>50</sup> Trump used the office of the presidency to fuel his lies about illegal voting, with the apparent aim of targeting disfavored voters and making it more difficult to vote.

In May 2017, Trump established a presidential commission to "study the registration and voting processes used in Federal elections,"<sup>51</sup> the so-called "Pence-Kobach Commission." Rather than appointing known experts on election process and security, Trump tapped former Kansas Secretary of State Kris Kobach, known for his anti-immigrant and voter-suppressive efforts,<sup>52</sup> as Commission co-chair.<sup>53</sup> Four of the six Commission appointees were well known for making baseless claims about voter fraud or had implemented or supported policies that unlawfully disenfranchised voters.<sup>54</sup> From the start, the Pence-Kobach Commission sought to further the illegal voting narrative and undermine election outcomes.<sup>55</sup>

The Commission was quickly hampered by lawsuits — including one brought by the ACLU — because it failed to follow federal laws.<sup>56</sup> Still, Commission co-chair Kobach sought to collect the voter rolls from all 50 states and the District of Columbia,<sup>57</sup> in an effort to take failed voter-purge policies he had tried to implement in Kansas nationwide.<sup>58</sup> Specifically, the Trump



administration sought to compare state voter rolls against data housed in various federal databases to identify supposedly ineligible registrants.<sup>59</sup> But the Commission's requests for voting roll data were met with broad and bipartisan criticism. Experts stressed that this kind of "checking" would result in rampant false positives because of small differences in spacing or spelling on voter rolls, inconsistencies in data collection and formatting, and the reality of common names and birthdays.<sup>60</sup> Cybersecurity experts also decried the Commission's plans to aggregate voter data as a hacker "gold mine."<sup>61</sup> Ultimately, the Pence-Kobach Commission's attempt to gather all states' voter rolls was so concerning that 48 states partially or fully refused to comply.<sup>62</sup> By January 2018, less than seven months after the Commission was convened, Trump disbanded it, citing states' refusal to hand over their voters' data and the legal battles the Commission faced.<sup>63</sup> While other actors have rightfully undertaken serious efforts to ensure election security,<sup>64</sup> the Pence-Kobach Commission was a classic example of the wrong people with the wrong goals and wrong skills taking on an important and sensitive enterprise.

A second Trump administration would likely again lead to the politicization of election security, with true concern for protecting our electoral system and voters being wholly subordinated to political ends. Policy details from Project 2025 indicate that a second Trump administration would try to force states to allow the administration to gather their voter rolls by making federal funding contingent on such access.<sup>65</sup>

Sowing doubt about state voter list maintenance practices is an increasingly common tactic in the playbook to undermine voter confidence in elections. Under Section 8 of the NVRA, state election officials must conduct list maintenance of the voter rolls to ensure their accuracy by conducting "a general program that makes a reasonable effort to remove names of ineligible voters."<sup>66</sup> Most officials take their duties seriously and work in earnest to keep voter lists up to date. Still, numerous lawsuits have been brought to challenge officials' voter list maintenance practices as inadequate under the NVRA.<sup>67</sup> While everyone agrees that list maintenance — when done responsibly — is proper and needed, attempts to use Section 8 to force states and localities to take more aggressive action too often leverage unreliable data and faulty processes and procedures that would erroneously cancel the registrations of properly registered voters.<sup>68</sup> A Trump DOJ is likely to bring similar overreaching lawsuits — a tactic employed during the second Bush administration<sup>69</sup> — and use the DOJ's power to play into an election denial narrative and risk disenfranchising eligible voters through aggressive voter purges.

With its marching orders from influential Trump allies, a Trump DOJ could go even further, criminalizing voters

and election workers. In addition to efforts to gather statewide rolls to force purges of voters, a second Trump administration may also use such information to target voters for sham investigations and aggressive criminal prosecution, a known goal of Trump and his allies.<sup>70</sup> And Project 2025 has called for the DOJ to reassign responsibility to prosecute violations of 18 U.S.C. § 241 for alleged "voter registration fraud" and "unlawful ballot correction" from the Civil Rights Division to the Criminal Division — essentially, to criminalize the voting process.<sup>71</sup> The proposed change sets up the DOJ to use the threat of criminal prosecution to intimidate state and local election workers. 18 U.S.C. § 241 is a Reconstruction-era provision meant to prevent bad actors like the Ku Klux Klan from intimidating voters that makes it "unlawful... to injury, threaten or intimidate" a person in the exercise of their constitutional rights. Trump allies would have the DOJ pervert this criminal statute aimed at protecting voters to instead threaten election administrators who take actions that protect access to the ballot with criminal prosecution, criminalizing what are functionally election administration disputes.<sup>72</sup>

### Courts

As before, if a second Trump administration uses the president's authority to establish a body staffed with known vote suppressors aimed at fueling the false narrative of illegal voting or gathering information that can be weaponized against voters, the courts offer a path to stop or check its actions. Federal commissions must comply with federal law, including the Federal Advisory Committee Act (FACA)<sup>73</sup> and the Administrative Procedure Act (APA).<sup>74</sup> FACA requires commissions to be transparent about their work and give the public notice of their activities.<sup>75</sup> It also instructs that the president must "require the membership of [an] advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed" and "contain appropriate provisions to assure that [its] advice and recommendations...will not be inappropriately influenced..."<sup>76</sup> This law provides pathways to challenge inappropriately constituted presidential or executive commissions.<sup>77</sup> Likewise, the APA provides a mechanism for judicial review. Advisory commissions commonly do their work through federal agencies. For instance, the General Services Administration was tasked with providing funds, staffing, and other support to the Pence-Kobach Commission.<sup>78</sup> Agencies, in turn, must comply with federal law. When they do not, the APA provides a cause of action, including to enforce compliance with FACA.<sup>79</sup>

Actions to enforce privacy protections may also halt reckless attempts to gather and weaponize voter's sensitive information, as the Pence-Kobach Commission threatened to do. State court litigation to enforce existing state law protections is one path to stymie actions like those of the Pence-Kobach Commission. For example, litigation

brought in Texas state court resulted in an injunction preventing the state from transmitting large portions of voter roll data to the Pence-Kobach Commission.<sup>80</sup> These actions can also be stymied by federal suits seeking to ensure compliance with federal laws that lay out specific processes to follow before gathering sensitive data.<sup>81</sup>

The ACLU also stands ready to block efforts by a Trump DOJ or other emboldened allies to use manufactured voter fraud narratives as pretext to force aggressive voter purges. Efforts by the DOJ or Trump-aligned groups to compel jurisdictions to overzealously purge voter rolls by claiming that the NVRA requires aggressive list maintenance would, in fact, distort federal law. Courts have already rejected or dismissed these kinds of aggressive suits when states' or local election officials' maintenance efforts have been reasonable.<sup>82</sup> We have successfully defended against such overreach before<sup>83</sup> and are ready to do so again, representing impacted voters or community organizations and intervening in cases against elections officials to ensure that voter roll maintenance does not improperly remove eligible voters. Moreover, if state and local government Trump allies are emboldened to pursue more aggressive purge practices, we have substantial experience successfully challenging those actions in court<sup>84</sup> and will continue to meet those threats.

### **Congress**

Congress can serve as an essential check to any Trump-convened commission or executive action. We will urge Congress to embrace its oversight authority to impede potential abuses of power. For one, depending on the scope of any such commission or other executive action, additional federal appropriations may be required to carry out its goal. We will insist that Congress reject appropriations for a Pence-Kobach-style commission or other similar executive activity aimed at spreading conspiracy theories to justify voter suppression and ensure that other federal dollars are not misappropriated to support it. We will also push congressional oversight committees to conduct investigations into any commission or executive action. Such oversight will provide the American people with a transparent view of the commission's activities and communications, exposing any political motivations driving the commission or its attacks on the right to vote. As we fight back in the halls of Congress, we will also organize a robust outside game with our members across the country who will not stand idly by if a sham commission proceeds, but will rather activate to raise awareness of the true intent of the commission, apply pressure to their congressional delegation, and work to combat false narratives aimed at justifying suppressive voting measures and undercutting faith and participation in our elections.

### **State & Local**

State and local elected officials must also serve as a firewall against any potential commission or executive action.

As we saw last time, election officials from both parties refused to turn over at least some portions of the Pence-Kobach Commission's requested information, stymieing its ability to undertake its planned scheme: To match voter rolls against federal databases to target voters for purges and prosecution, and provide fodder to justify discriminatory anti-voter measures. The success of any future attempts to conduct similar database matching or implement voter purges relies on state cooperation since each state maintains its own statewide voter database.<sup>85</sup> This is not information the federal government holds, and state election officials must deny any commission requests to share voter information.<sup>86</sup> Because public pressure will play a critical role in preventing compliance with any possible commission's data requests, we will activate our members and volunteers nationwide to pressure their state and local elected officials to protect their state's voter rolls and data.

Further, if Trump uses his federal office and megaphone to encourage suppressive policies that will impact marginalized communities, states can and must erect a strong defense. Immediately enacting state VRAs that are modeled after and supplement the federal VRA will provide a protective shield from Trump's agenda for traditionally marginalized voters. Generally, state VRAs prohibit election officials from implementing discriminatory voting policies and practices. We have already been working with our affiliates and allies in states across the country to pass these vital state-level protections,<sup>87</sup> and we will proactively double down on these pro-voter measures during a Trump presidency. Finally, we will hold election deniers accountable. Our voter education work in 2022 demonstrates that voters will choose Secretaries of State and election officials who believe in free and fair elections, not those who will use the office to spread the Big Lie.<sup>88</sup> We will continue to ensure voters know candidates' positions and what is at stake in elections for election officials.

### **Using Federal Police Powers to Intimidate Voters and Election Workers**

Past efforts to boost the false narrative of illegal voting, justify voter suppression, and undermine faith in our elections can also be used to level threats and false accusations against voters and election workers alike. Trump allies are specifically focused on using the mantle of the DOJ to endorse and spread false claims of widespread voter fraud in order to fuel these efforts.<sup>89</sup> Indeed, Jeffrey Clark, whom Trump considered installing as acting Attorney General in the waning days of his first term, has drafted an analysis charting a path for direct presidential control of federal law enforcement<sup>90</sup> — control that would enable Trump to actualize his threats to bring federal law enforcement to the polls and bring unwarranted investigations and prosecutions of voters, election workers, and

others to advance his political agenda. In the past, Trump has maligned election workers in key states to sow doubt in our electoral system and attempt to overturn results. Coupled with Trump's willingness to deploy federal law enforcement resources, these smears strongly suggest that he would use the same tactics to interfere in our elections and intimidate voters and election workers. Unfortunately, Trump has used federal law enforcement improperly before. Under the guise of protecting federal property and fighting crime, Trump deployed FBI, Drug Enforcement Administration, U.S. Marshals Service, and Department of Homeland Security agents to American cities during the 2020 racial justice protests.<sup>91</sup> Soon after, Trump's deployment of federal agents became a key campaign theme to convey his purported commitment to law and order: In a July 2020 interview, he said he was ready to dispatch 75,000 federal agents into American cities.<sup>92</sup>

Trump's focus on false "law and order" narratives,<sup>93</sup> interfering with election integrity<sup>94</sup> and threatening rhetoric has not waned. Indeed, Trump has suggested that whether there will be violence in the upcoming election depends on whether he wins and "on the fairness of the election" — phrasing he has invoked to mean the same thing.<sup>95</sup> Moreover, Trump contests elections both when he wins and when he loses.<sup>96</sup> In a second Trump administration, election workers and voters are vulnerable targets in any effort to bend electoral outcomes to Trump's will.

Trump's false accusations against two Fulton County election workers during the 2020 election underscore what's at stake. After Trump's campaign lawyer Rudy Giuliani falsely stated that Wandrea Moss and Ruby Freeman cheated Trump by adding fake ballots at a ballot-counting center, the two women received hundreds of threatening emails, text messages, and phone calls from Trump allies.<sup>97</sup> In a leaked January 2, 2021 phone call to Georgia Secretary of State Brad Raffensperger, Trump repeated these lies.<sup>98</sup> These election workers eventually won a defamation lawsuit against Giuliani, proving that their lives were recklessly upended by flat lies.<sup>99</sup> The damage wrought extended far beyond Moss and Freeman; faced with constant threats and harassment, other election workers for Fulton County quit altogether.<sup>100</sup>

Countless election workers have faced ongoing harassment and physical threats since the 2020 election. The latest edition of the Brennan Center's annual survey of election officials found that 38 percent of local election officials experienced threats, harassment, or abuse for doing their jobs and more than half were concerned about the safety of their colleagues and staff.<sup>101</sup> This abuse has fueled a mass exodus: More than one-third of local election officials know at least one person who resigned at least in part due to safety concerns; the Brennan Center estimates that about one in four will

be administering their first presidential election this year.<sup>102</sup> And according to a Bipartisan Policy Center report, turnover among top election workers — people in charge of administering voting — has grown from 28 percent in 2004 to 39 percent in 2022.<sup>103</sup> When viewed in the aggregate, the widespread abuse of election workers — driven by lies about election fraud — threatens the stability and functioning of our democracy.

Nowhere is this threat greater than in states with close elections.<sup>104</sup> According to the DOJ's Election Threats Task Force, 58 percent of the over 1,000 threats reviewed were in states that underwent 2020 post-election lawsuits, recounts, and audits, including Arizona, Colorado, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.<sup>105</sup> To date, 20 people have been charged with crimes relating to threatening election officials<sup>106</sup> and election officials anticipate that these threats will only increase.<sup>107</sup>

Voters are also at risk for intimidation driven by Trump's fixation on his 2020 loss. In the run up to the 2024 election, Trump has continued to advance his claim that the 2020 election was stolen, describing those who do not support him as "vermin" who "lie and steal and cheat on elections."<sup>108</sup> Beyond the intimidating rhetoric that characterizes the Trump campaign — including dehumanizing voters and opponents and calling for law enforcement at the polls — Trump and his allies have indicated they intend to increase criminal prosecutions related to voting.<sup>109</sup> Lies surrounding the 2020 election have also led certain states to create new investigatory arms aimed at voters.<sup>110</sup> These threats of criminal prosecution create an atmosphere of intimidation for voters seeking to exercise their constitutional right.

A second Trump administration would also have broad resources to turn this heated rhetoric into enforceable policy. Trump's use of federal law enforcement and the National Guard in response to the 2020 racial justice protests suggests he would be willing to similarly deploy agents to interfere in elections.<sup>111</sup> To respond to protests at or near polling locations or to purportedly protect the right to vote under the guise of false election fraud allegations, Trump might improperly deploy federal law enforcement agents to monitor the administration of elections in majority-minority communities,<sup>112</sup> stop the counting of mail-in ballots, or to create a hostile environment for voters or election workers. These actions would have a major suppressive effect on voting, especially in communities of color.

### *Courts*

Should a second Trump administration deploy federal law enforcement officers, the National Guard, or other military personnel to intimidate voters or election workers, the ACLU has legal tools and can meet the effort in the

courts. Several laws, including federal criminal law, make it unlawful for armed forces or other federal agents to interfere in any way with voting.<sup>113</sup> 18 U.S.C. § 592 bars deploying troops or federal civil agents to voting sites.<sup>114</sup> 18 U.S.C. § 593 prohibits the armed forces from interfering with voting or with election workers conducting their duties.<sup>115</sup> And 18 U.S.C. § 594 criminalizes actual or attempted voter intimidation.<sup>116</sup> Should a Trump administration attempt to justify such use of federal armed forces or law enforcement agents under the narrow statutory exception that such forces can be deployed to “repel armed enemies of the United States,”<sup>117</sup> grave legal concerns remain.

The notion that standing armed forces cannot be used for domestic security reflects a firmly rooted “resistance of Americans to any military intrusion into civilian affairs.”<sup>118</sup> By itself, military involvement in civil affairs undermines our democracy and threatens civil liberties.<sup>119</sup> In addition to certain constitutional principles,<sup>120</sup> the Posse Comitatus Act generally forbids the use of federal military personnel for civilian law enforcement unless authorized by Congress.<sup>121</sup> Congress strengthened the Act in 2022 and 2023 in response to the Trump administration’s use of active-duty military to respond to protests against police violence. A more fulsome discussion of the ACLU’s response to Trump’s use of federal law enforcement or military forces domestically is in our forthcoming memo, “Trump on Surveillance, Protest, and Free Speech.”

Deploying federal agents to intervene in elections violates numerous federal statutes, including 18 U.S.C. § 594, the Ku Klux Klan (KKK) Act,<sup>122</sup> and Section 11(b) of the VRA.<sup>123</sup> Section 594 criminalizes both actual and attempted intimidation, threats, or coercion related to the exercise of someone’s vote. Two provisions of the KKK Act protect against election interference.<sup>124</sup> First, the KKK Act’s “support or advocacy clause” protects voters’ “right to support candidates in federal elections” and prohibits “force, intimidation, or threat[s]” aimed at preventing the exercise of that right.<sup>125</sup> Second, the Act provides protection against the deprivation of “equal protection of the laws.”<sup>126</sup> Both clauses forbid the kind of intimidation of voters and election workers at issue. And Section 11(b) of the VRA explicitly proscribes voter intimidation by anyone, “whether acting under color of law or otherwise,”<sup>127</sup> providing another pathway for court intervention. The Supreme Court has “long held” that injunctive relief can be granted against federal officers “who are violating, or planning to violate, federal law.”<sup>128</sup> In addition to these statutes, a host of other federal and state laws prohibit interference with voting or other forms of voter coercion or intimidation.<sup>129</sup>

Defamation actions, which come with substantial monetary damages, also have the potential to serve as deterrents to bad actors spreading lies about election

workers. After lies were spread about them following the 2020 election, Fulton County election workers Freeman and Moss brought defamation actions against the One America News Network (OAN) and Giuliani, resulting in settlement with OAN<sup>130</sup> and more than \$145 million in damages against Giuliani.<sup>131</sup> Substantial damages awards can be a key tool to prevent similar bad actors in the future.<sup>132</sup>

### **Congress**

If Trump attempts to weaponize federal law enforcement to intimidate voters and election officials, we will activate our members and supporters to push Congress to fight back. This includes demanding that Congress leverages the appropriations process to hamstring this destructive and anti-democratic use of federal law enforcement or military resources. We will also demand that Congress use its oversight powers to expose any agency plans to violate federal law at Trump’s direction to intimidate voters and interfere with election administration.

### **State & Local**

State and local elected officials must also serve as a bulwark against the intimidation of election workers and voters. Election administration takes place at the local level, and the ACLU will continue advocating for states to provide local election officials with ample and consistent funding every appropriations cycle for election worker training, resources to counter Trump’s election lies, and ensuring the safety of election officials. Additionally, we will activate our supporters and work in broad coalition to push states to implement policies prohibiting state and local law enforcement agencies from assisting or cooperating with attempts to send federal law enforcement anywhere near voting locations to intimidate voters and election workers. We will also leverage our organizing resources to make sure states implement trainings and policies for local law enforcement on how to engage with polling locations to ensure they will not have a suppressive impact.

### **Rolling Back Federal Progress on Increasing Access to Voter Registration and Voting**

In March 2021, the Biden administration issued Executive Order 14019 on Promoting Access to Voting.<sup>133</sup> The Executive Order encourages federal agencies to promote nonpartisan voter registration opportunities for all eligible citizens pursuant to longstanding federal law — namely, the bipartisan NVRA.<sup>134</sup> The Executive Order directs the federal government to live up to the NVRA’s declaration that government at every level, including the federal government, has a duty to increase opportunities for all eligible Americans to register and vote. Since 2021, some agencies have taken steps toward offering voter registration services under the NVRA to the millions of eligible citizens that receive services directly from the

federal government. This progress includes adding voter registration opportunities in Indian Health Service clinics and Veterans Affairs medical centers that will increase access for tribal communities and veterans.<sup>135</sup> However, as indicated by the relentless attacks of Trump’s allies in Congress and elsewhere seeking to block implementation of this Executive Order,<sup>136</sup> Trump would likely rescind the Executive Order and direct agencies to reverse the progress that has been made to date.<sup>137</sup>

Such rollbacks on progress may also extend to rescinding invaluable, long-standing guidance issued by the DOJ through past administrations — a tactic employed by the first Trump administration.<sup>138</sup> DOJ guidance has helped to further proper implementation of federal civil rights statutes, ensuring access to registration and voting for eligible citizens who often face undue burdens while trying to vote, including persons with disabilities or in need of language assistance. For example, as part of the Executive Order 14019, the DOJ issued new guidance to the Federal Bureau of Prisons, a part of the DOJ, on ways to ensure that all eligible individuals in federal custody have access to voter registration.<sup>139</sup> This guidance will help ensure that eligible voters in federal custody are not disenfranchised and serve as a model for state election officials. Besides nullifying any progress made under the Executive Order, Trump will also attempt to push restrictive voting legislation through Congress and in the states. Already, Trump and his allies are promoting policies that make it harder to register to vote, like the Safeguard American Voter Eligibility (SAVE) Act.<sup>140</sup> The SAVE Act is proposed federal legislation that would require potential voters to produce documentary proof of citizenship. Given that all individuals must already swear under penalty of law to their citizenship when registering to vote, this burdensome step erects unnecessary — and in too many cases, insurmountable — additional barriers to voting. Indeed, a recent study found that a documentary proof of citizenship requirement to register to vote would exclude millions of Americans from the political process.<sup>141</sup> And when the ACLU challenged a similar requirement championed by Kobach in Kansas, it was struck down as an unconstitutional burden on the fundamental right to vote.<sup>142</sup>

### Courts

We will meet any reversals on federal progress on voting access by shoring up existing voter registration opportunities and continuing and intensifying our challenges to suppressive voting rules and policies. The ACLU is one of the few organizations that maintains a full and active docket on enforcing compliance with states’ mandatory obligations under the NVRA to provide voter registration opportunities through state motor vehicles agencies and certain other state and local agencies, including public assistance and disability offices.<sup>143</sup> If a second Trump administration and allies endeavor to rollback federal

progress on voter registration or encourage states to shirk their NVRA-mandated responsibilities, we will ramp up our enforcement efforts, and challenge in court attempts to circumvent these requirements. In addition to our litigation to stop voter suppression, we will also amplify our work to protect civic organizations and individuals who work on the ground to help voters navigate and overcome the many barriers to access, using all tools at our disposal, including federal protections like the First and Fourteenth Amendments, the Americans with Disabilities Act of 1990,<sup>144</sup> and VRA provisions that protect voter assistance and language assistance.<sup>145</sup> We will also continue to build on our state court practice, challenging barriers to voter registration and ballot access under state constitutions and state laws that may provide independent voting rights protections.<sup>146</sup>

### Congress

Although Trump will seek to undo federal progress on voting access via executive action, we will utilize our lobbying and organizing resources to push Congress to use the power of the purse to stop or delay these rollbacks. We will demand that, through each appropriations cycle, pro-voter members of Congress fight to secure policies that prohibit or discourage federal agencies from reversing major initiatives already in effect under the Executive Order, including defunding these reversals. Additionally, we will insist that legislators stand firm against any federal bills that erect new barriers to registration and voting, including any documentary proof of citizenship requirements. Furthermore, we will push congressional oversight committees to use their investigation and oversight authority to expose and slow down agency efforts to reverse actions implemented under the Executive Order.

### State & Local

The ACLU will activate our members and supporters around the country to push states and localities to mitigate the harm of any reversals of federal progress under the Executive Order or other attacks on voter registration access. Because voter registration and voting rules are primarily within states and local election officials’ authority, we will utilize our lobbying and organizing resources to ensure that states and localities do everything they can to increase registration opportunities and voter education across state and local government. For one, we will advocate for state legislation or executive orders that expand the state and local agencies that offer voter registration opportunities and voter education in interactions with the residents they serve. We also have a long history of spearheading successful campaigns<sup>147</sup> to secure impactful policies that expand voting access — like same-day registration, automatic voter registration, voting rights restoration, and no-excuse and permanent absentee voting<sup>148</sup> — and we will continue to push state legislation and ballot measures to increase voter access.

# CONCLUSION

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Since Trump's first successful election and presidency, American democracy has experienced sustained assaults that continue to test the strength of its foundations. And in the years since, Trump and his allies have continued to push the limits of our democratic institutions and values. But despite Trump's sustained efforts, democracy-supporting Americans and residents from every walk of life continue to fight tirelessly to counter Trump's election lies and preserve and strengthen our democratic

institutions and our right to vote. The ACLU stands stronger and more prepared than ever to counter Trump's authoritarianism, abuses of power, and anti-voter policies. We will not stop fighting in the courts, in Congress and statehouses, and alongside the most marginalized communities to strengthen our democracy for generations to come and secure equal, unimpeded access to the ballot for every voter.

# ENDNOTES

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- 19 570 U.S. 529 (2013).
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- 21 H.R.14, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/14/text>; S.4, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/4>.
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- 23 To meet that agenda, Project 2025 would, for example, abolish key guardrails on census integrity and accuracy, like the Census Scientific Advisory Committee, the Bureau’s demographic, economic, and statistical research arm. Thomas F. Gilman, *Mandate for Leadership 2025: The Conservative Promise*, The Heritage Foundation, 682 (Paul Dans & Steven Groves eds., 9th ed. 2023), [https://static.project2025.org/2025\\_MandateForLeadership\\_FULL.pdf](https://static.project2025.org/2025_MandateForLeadership_FULL.pdf) [hereinafter Gilman, Project 2025]. Project 2025 has also encouraged a second Trump administration to “take control” of proven surveys on data relating to race and ethnicity to ensure that those surveys elicit “conservative” results. *Id.* at 680.
- 24 Hermann Habermann, former Census Bureau deputy director, for example, warned against undermining “statistics agencies” that “produce reliable, unbiased, trustworthy information that the nation can use in making its decisions and in understanding itself.” Hansi Lo Wang, *A GOP plan for the census would revive Trump’s failed push for a citizenship question*, NPR (Oct. 28, 2023), <https://www.npr.org/2023/10/28/1204936155/republicans-census-project2025-trump-citizenship-question>. Terri Ann Lowenthal, former staff director on the U.S. House of Representatives Committee that oversaw the census, called the proposal to disband certain Bureau subcommittees “extremely troubling,” because it could “undermin[e] all of the principles and practices that federal statistical agencies should be following.” *Id.* And even former Commerce Secretary Wilbur Ross, who oversaw the agency under Trump and advocated for the citizenship question, criticized Project 2025’s call for a “conservative agenda,” making clear “the census should [not] try to shade things in any political direction.” *Id.*
- 25 Gilman, Project 2025 *supra* n.23 at 679-80.
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- 29 H.R. 7109, 118th Cong. (2024).
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- 36 *Dep’t of Com.*, 588 U.S. at 784.
- 37 *Id.* at 761.
- 38 See, e.g., *New York*, 351 F. Supp. 3d at 610-15.
- 39 U.S. Const. amend. XIV, § 2.; U.S. Const. art. 1 § 2, cl. 3.

- 40 *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term...”).
- 41 See *Evenwel*, 578 U.S. at 65 (“[T]he basis of representation in the House was to include all inhabitants . . . even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives.”); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (“The framers were aware that th[e] apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at later times, aliens.”).
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- 43 *Franklin v. Massachusetts*, 505 U.S. 788, 803-04 (1992).
- 44 U.S. Const. amend. V.
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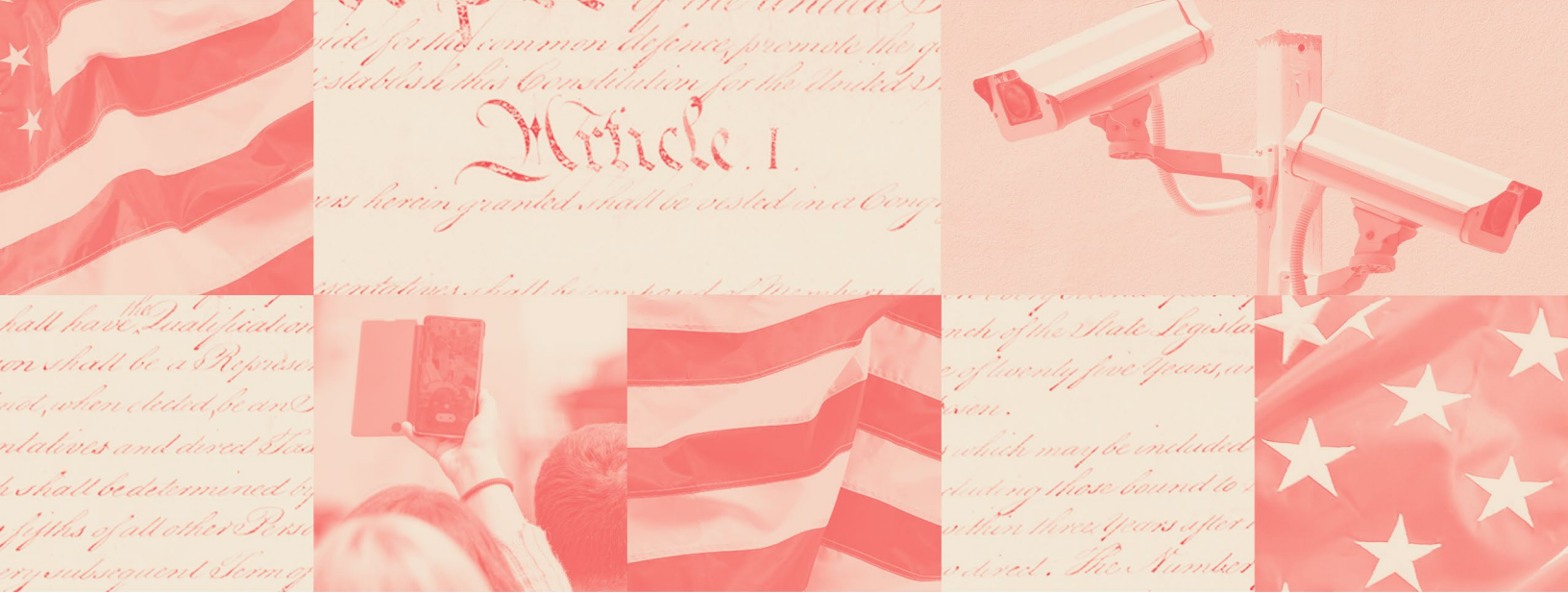
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- 75 5 U.S.C. app. 2 §§ 10(a)-(d), 11(a); 41 C.F.R. §§ 102-3.140, -3.150(a).
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# TRUMP ON SURVEILLANCE, PROTEST, AND FREE SPEECH

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The “Trump on Surveillance, Protest, and Free Speech” memo outlines how the ACLU would respond to abuses of executive power if faced with a second Trump administration. These impacts to our democracy include: **abusive deployment of the military and federal law enforcement agencies to quell protest and freedom of the press, targeting political opponents with investigations and prosecutions, and exploiting the government’s powers to secretly spy on Americans without a warrant.** If a second Trump administration follows through on any of these proposals, the ACLU will fight for our constitutional rights in court, defend against politically-motivated investigations, and push Congress, states and localities to proactively enact reforms that would limit potential abuses of executive power by the federal government.



## TRUMP PROPOSED POLICIES

- **Using executive power to greenlight the domestic deployment of the military and federal law enforcement agencies to quell protest:**

A second Trump administration would likely leverage federal law enforcement to attack protestors and the journalists covering these protests, in violation of our First Amendment rights. He has already announced plans to deploy the military to “inner cities” if he wins re-election.

- **Ordering politically-motivated investigations and prosecutions:**

As president, with federal law enforcement agencies under his control, Trump could carry out his own coercive attacks on advocacy organizations and individuals he opposes. Indeed, on the campaign trail, Trump has praised violent crackdowns on campus protests, aligning with his previous attacks on academic freedom. In particular, he has threatened reprisals against students who are not U.S. citizens, merging his attacks on free speech with his attacks on immigration.

- **Using the executive branch’s vast and unprecedented surveillance powers to spy on Americans:**

Although Trump has been a loud critic of the Foreign Intelligence Surveillance Act, as president, he ultimately reauthorized Section 702, which the federal government uses to search Americans’ private communications and information without a warrant and without notice. Given that track record, Trump could use these overbroad surveillance powers to target protestors, communities of color, people seeking abortions or gender-affirming care, or his political opponents.

## ACLU RESPONSES

- **Litigation:**

The ACLU will defend protestors, journalists, and others who are subjected to policing violations at protests, abusive investigations and prosecutions, or other wrongful law enforcement and intelligence agency actions.

- **Legislation:**

The ACLU will push Congress to proactively limit executive power, rein in the federal government’s overly broad surveillance and investigative powers, and strengthen oversight of the executive branch.

- **Mobilization:**

The ACLU will work with its nationwide network of affiliates to pass strong data protection and shield laws, which will limit the reach of the federal government in their jurisdictions and safeguard the privacy of protestors, journalists, and others who may find themselves in the crosshairs of a vindictive presidential administration.

“Donald Trump has made no secret of his **disregard for the rule of law and his intent to corrupt the immense powers of the federal government** to target his opponents and break the institutions that could pose checks and balances to presidential power. In a second term, unleashed and feeling invulnerable from legal and political repercussions, he would pose an unprecedented challenge to our constitutional values. But the ACLU is ready.”

— **Mike Zamore**,  
National Director for Policy  
& Government Affairs at the ACLU

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“The ACLU has always worked to stop the executive branch from abusing its power at the expense of individual freedom and vulnerable communities. The Trump presidency, with its false declarations of national emergencies in service of discrimination and total disregard for the rule of law, demonstrated what we’ve always known — that **relying on unwritten norms for presidential behavior is grossly insufficient. If there is a second Trump administration, we are prepared to defend the people it attacks, including protestors, dissenters, and journalists.**”

— **Cecillia Wang**,  
Deputy Legal Director  
of the ACLU

## TRUMP ON SURVEILLANCE, PROTEST, & FREE SPEECH

### Abusing Executive Power

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Enforcing the law is the central role of the executive branch, regardless of who is president, and that constitutional role entails exercising the government’s coercive powers to investigate and pursue sanctions, including by depriving individuals and organizations of property and freedom. That capacity, and the threat of force behind it, puts massive power in the hands of federal government officials. Many agencies and departments in the federal government have such power — including the Departments of Justice (DOJ) and Homeland Security, as well as a wide range of banking and economic regulators.

Even when a person targeted for a federal prosecution or enforcement action prevails or an investigation does not lead to prosecution, the consequences can be ruinous to the target’s reputation and livelihood. Executive branch officials therefore wield enormous discretion when they decide which investigations to pursue, with potentially devastating consequences for individual rights. This means that a president who flouts laws and norms governing the exercise of these executive powers can wreak havoc. Just as a police officer on traffic patrol can use pretextual stops to harass and discriminate, federal agents can abuse their power by directing accusations, surveillance, investigations, and prosecutions at the administration’s will to target political opponents or discriminate against vulnerable communities. Some of the most insidious abuses are exercises of legitimate powers in illegitimate ways or for illegitimate purposes.

Donald Trump has already threatened to abuse his power in these ways. He plans to leverage the DOJ and other governmental agencies to indict political opponents, replace civil servants and traditionally apolitical appointees with individuals willing to do his bidding regardless of legal and normative structures, and demand pledges of loyalty from civil service employees.<sup>1</sup>

Since President Richard Nixon was held accountable

for deploying the DOJ against his political enemies,<sup>2</sup> the department’s independence has been a fundamental norm preventing presidents from overstepping. Yet Trump has asserted that, as president, he has “an absolute right” to do what he wants with the DOJ.<sup>3</sup> The Supreme Court recently removed one guardrail in *Trump v. United States*, ruling that the president cannot be criminally prosecuted for “official acts,” including actions taken through the DOJ.<sup>4</sup> Trump can use a politicized DOJ by dropping civil rights enforcement cases and instead bringing abusive cases attacking voters, protestors, journalists, abortion care providers and patients, and others he perceives as enemies.

If we take Trump at his word, he will not stop with the DOJ. During his presidency, he instructed governors to deploy the National Guard to “dominate the streets”<sup>5</sup> in response to the 2020 racial justice protests, threatened to unleash the military on protestors, and called out the National Guard to disrupt peaceful protests in Washington, D.C.<sup>6</sup> He has threatened to do so again, repeatedly asserting that he will invoke the National Guard or the U.S. military to stop civil demonstrations in cities and states across the country. He has aimed his comments at major cities with relatively large populations of people of color and immigrants, including Washington, D.C., Chicago, and New York.<sup>7</sup> Trump has also indicated that he wants to do away with the existing limits on his ability to use the military at home to suppress and punish the people and places he views as his political enemies, asserting unilateral power to deploy the military domestically.<sup>8</sup>

Similarly, while Trump was president, federal law enforcement agents — including a militarized unit of U.S. Customs and Border Protection (CBP) and U.S. Marshals Service agents — were deployed in Portland, Oregon, to stifle protests. They unlawfully arrested journalists and legal observers.<sup>9</sup> CBP officials claimed that they were not

subject to the same constitutional limits as other law enforcement agents.<sup>10</sup> Trump's Attorney General William Barr used joint federal-state law enforcement partnerships to conduct "counterterrorism" investigations against protestors.<sup>11</sup>

In service of his agenda, Trump can also exploit the executive branch's vast and unprecedented powers to spy on Americans' lives with dragnet surveillance of our data. Through Big Brother surveillance programs like Section 702 of the Foreign Intelligence Surveillance Act (FISA) and Executive Order 12333, which result in mass collection of our private data, and the government's purchase of massive quantities of data from commercial brokers, the federal government can search our private communications and information without a warrant and without meaningful safeguards necessary to protect our rights. There is already a history of law enforcement and intelligence agencies' abuse of these tools.<sup>12</sup> It is all too easy

to foresee Trump using these overbroad and dangerous spying powers to surveil and discriminate against political opponents and people and communities already in his crosshairs — protestors, communities of color, immigrants, and people seeking abortions or gender-affirming care all face even greater risks to their privacy and rights.

This memorandum analyzes Trump's potential abuse of executive authority, as well as the ACLU's planned response, in three areas:

- Abusive deployment of the military and federal law enforcement agencies to quell protest and freedom of the press;
- Politically motivated investigations; and
- Big Brother surveillance and prosecutions.

## OVERALL RESPONSE

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**The ACLU will resist a second Trump administration's efforts to abuse executive power with litigation and legislative and policy advocacy at both the state and federal levels.**

### Courts

When Trump previously deployed federal agencies and the National Guard against protestors, the ACLU brought lawsuits challenging violations of protestors' and journalists' First and Fourth Amendment rights,<sup>13</sup> and we will do so again. We will ensure that Trump's efforts to silence dissenters — and the journalists who report on that dissent — will not go unanswered.

The ACLU will also rise to defend protestors, journalists, and others who are subjected to abusive criminal prosecutions or other law enforcement and intelligence agency actions, and we will seek redress through affirmative litigation when federal law enforcement agencies misuse their coercive powers in ways that illegally breach Americans' privacy, discriminate based on race or ethnicity, or retaliate against dissenters or seek to silence them.

### Congress

When the founders wrote the Constitution, constraining a

rogue executive and preventing a president from becoming a dictator were paramount concerns. The separation of powers was intended to impose limits on presidential power,<sup>14</sup> and Congress should play a key role in seeking to defend rights and freedoms in a Trump administration.

Unfortunately for our system of checks and balances, Congress has for decades too often ceded authority to the executive branch, and congressional dysfunction has emboldened presidents of both parties to take expansive executive actions in order to deliver on policy priorities Congress has proven unable to address. This trend won't be easily reversed in a new administration, but Congress continues to wield important tools, particularly when it can use the threat of inaction as leverage. The Trump administration will need congressional action to avoid government shutdowns and to reauthorize key laws, and we will seek to use the appropriations process and reauthorization fights to put guardrails on executive authorities.

As we have done successfully in the past, we will push Congress to use its leverage to safeguard civil liberties. The ACLU has worked for years to build a bipartisan coalition both inside and outside of Congress to limit overly broad surveillance and investigative powers.<sup>15</sup> During the Trump administration, this coalition pushed Congress to allow two major surveillance authorities to expire.<sup>16</sup> In response to the Trump administration's

use of shadowy, unidentified federal law enforcement officers to attack protesters in 2020, the ACLU helped draft and push through a new law requiring federal law enforcement officers to display their agency's name, as well as their own name or badge number, when present at protests.<sup>17</sup> We also urged key congressional committees to step up their oversight over the executive branch.<sup>18</sup>

We will work to change the politics around the First Amendment and individual liberty so politicians are more likely to defend them. Members of both parties have been quick to empower the executive branch in the name of national and homeland security in the post-9/11 era.<sup>19</sup> The ACLU is already responding to current and promised attacks on students, nonprofits, and political opposition, and rallying allies around the need for robust separation of powers, strong due process protections, and limits on executive power.<sup>20</sup>

## States & Municipalities

In a second Trump administration, state and local leaders who value civil liberties must take a lead role in resisting abuses of federal executive power. States do not directly influence the federal surveillance and law enforcement infrastructure, but they can limit the reach of the federal government within their jurisdictions. For example, states

can limit — or eliminate — cooperation agreements between state and local law enforcement and federal law enforcement to minimize the grounds on which federal authorities can intervene in protests. They can also prevent voluntary data sharing that could be used for federal surveillance purposes or to support politically motivated investigations and prosecutions.

Perhaps most significantly, governors and mayors can present an important counternarrative to the Trump administration's pretextual excuses for its politically motivated abuses of executive power. The federal government's goal will be to divide and conquer — to persecute specific individuals, organizations, or groups that are unlikely to generate public sympathy but whose fate can serve as a warning to others and more broadly chill protest and dissent. We will need elected leaders to forcefully speak out in defense of freedom of speech, the right to organize and protest, and the validity of political opposition. Their words and actions, especially if coordinated, can blunt the dystopian narrative a Trump administration will try to build and provide an alternative vision of governance built on freedom and rights for people to rally around. The ACLU will push state and local leaders to champion civil rights and civil liberties in the face of a federal government seeking to silence dissent and attack political opponents.

## SPECIFIC THREATS & POSSIBLE RESPONSES

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### Abusive deployment of the military and federal law enforcement agencies to quell protest and freedom of the press

Early in his presidency, Trump sent National Guard troops to stop Black Lives Matter protesters in Washington, D.C., threatened to deploy the military more broadly to quell protests in U.S. cities, and sent federal law enforcement agents into cities around the United States to break up protests by force and by arresting protesters and journalists.<sup>21</sup> Trump particularly mounted a visible and threatening show of force in immigrant communities and municipalities and states that he deemed to be opposed to his extreme policies. We anticipate that he will do so again, and we are prepared to challenge his actions.

For example, in Portland, Oregon in 2020, federal agents deliberately attacked protesters and journalists — who were visibly identified as members of the press — by shooting them with rubber bullets, spraying their faces

with pepper spray, beating them with batons, throwing flash-bang grenades at them, and arresting them.<sup>22</sup> During other Black Lives Matter protests, similar attacks by federal agents were reported around the country.<sup>23</sup>

In response, the ACLU of Oregon brought multiple lawsuits against the U.S. Department of Homeland Security and U.S. Marshals Service for their violent attacks on Black Lives Matter protesters and journalists who were covering the protest in Portland.<sup>24</sup> The ACLU also brought two more lawsuits in Washington, D.C. and Minneapolis on behalf of protesters who were similarly violently attacked by federal law enforcement agents.<sup>25</sup>

This abuse is likely to recur and even escalate in a second Trump administration. Trump has already announced that he plans to deploy the military to “inner cities,”<sup>26</sup> sounding a racist dog whistle, should he win re-election. He might also use federal law enforcement agents at polling places during future elections,<sup>27</sup> ostensibly to prevent voter fraud, but really to intimidate voters and election workers, and particularly voters of color.

This anticipated escalation of abuses underscores the urgent need for robust legal and advocacy efforts to protect the rights to protest and press freedom.

## How the ACLU Is Preparing to Respond

### *Legal Analysis & Litigation Response*

The founders recognized that military interference in the government is a fundamental threat to freedom.<sup>28</sup> They ensured that the Constitution addressed that problem by separating the military from civilian government.<sup>29</sup> A long-standing criminal statute, the Posse Comitatus Act of 1878 (PCA), explicitly prohibits the use of federal military forces “to execute the law” unless “expressly” authorized by the Constitution or an act of Congress. Congress has enacted statutory exceptions to the PCA in the Insurrection Act, 10 U.S.C. §§ 251–55.

Through the Insurrection Act, which has existed in some form for 150 years, Congress has delegated to the president considerable power to suppress insurrection or to enforce federal authority. Historically, presidents have invoked the Insurrection Act to deploy either active-duty federal military units or “federalized” National Guard units (1) at the request of a state; or (2) on their own without a request from a state (and sometimes even over the state’s objections to federal intervention), including to counter state resistance to civil rights protections and court-ordered desegregation.<sup>30</sup> Still, if Trump were to invoke the Insurrection Act to suppress lawful protest it would be an unprecedented and unconstitutional abuse of power — with foreseeable violations of protestors’ and journalists’ rights under the First Amendment and Fourth Amendment.

The right to join with fellow citizens in protest or peaceful assembly is critical to a functioning democracy and at the core of the First Amendment. The First Amendment protects the right to protest irrespective of whether local or federal law enforcement officers are seeking to suppress it. The ACLU has been litigating protest cases for a century,<sup>31</sup> and we will be at the forefront of defending this most crucial right against any incursions.

Should the Trump administration again deploy the military and federal agents to quell peaceful protest and interfere with journalists reporting on protests, the ACLU and our affiliate network will be on the ground to fight back. As we did during Trump’s presidency the first time around, we will bring lawsuits on behalf of protestors<sup>32</sup> and the media,<sup>33</sup> likely raising both First Amendment claims (for violations of freedom of speech and association) and Fourth Amendment claims (for unlawful arrest and excessive force). Where the federal government follows up on policing violations at protests with abusive investigations and prosecutions, we will provide advice and counsel and, where feasible, legal representation

### *Legislative Advocacy*

Congress should amend the Insurrection Act, which is a loaded gun in the hands of a president like Trump. Historically, the American people have relied on presidents and other federal officials to act within norms of executive power. Like other authorities that Trump abused during his presidency, such as Section 212(f) of the Immigration and Nationality Act<sup>34</sup> and the National Emergencies Act,<sup>35</sup> which Trump used, respectively, to establish Muslim and refugee bans and illegally divert military construction funds to build border wall segments that Congress had refused to fund, the Insurrection Act should be narrowed to prevent such abuses from recurring. For example, there should be narrow, clearly defined conditions that must be met prior to invoking the Insurrection Act, and deployments under the Insurrection Act should be time-limited and subject to judicial review. There are proposals with bipartisan support<sup>36</sup> and the ACLU will be engaged with allies to pursue any legislative opportunity.

### *Local & State Advocacy*

The ACLU will urge states and localities to review and end or limit participation in joint federal and state and local task forces — like joint terrorism task forces and fusion centers — that enable federal authorities to coordinate with or mobilize state and local resources in abusive surveillance and investigations. We will also urge state and local governments to institute and follow best practices on the role of law enforcement during protests. If the administration inappropriately invokes the Insurrection Act to deploy the military in American cities, the ACLU will work with state and local authorities and allies to build a robust political defense of our constitutional freedoms.

## Targeting Political Opponents with Investigations & Prosecutions

Donald Trump has not been shy about threatening his perceived enemies. He’s threatened prosecution or violence towards President Joe Biden and Biden administration officials, poll workers, former generals, former officials in his own administration who fell out of favor, protesters, journalists, migrants, and many others.<sup>37</sup>

Trump made clear in his first term that he wanted to use the government’s powers to reward friends and punish enemies. As a candidate, Trump pledged to oppose a CNN-AT&T merger because “CNN was anti-Trump,”<sup>38</sup> and the Trump White House later pulled press passes for CNN and dozens of other media organizations.<sup>39</sup> In 2019, Trump pushed the DOJ to open investigations into four intelligence officials whom he accused of “treason” for their involvement in investigating the connections between Russia and the Trump campaign.<sup>40</sup> He even called on the

Postmaster General to double Amazon’s shipping rates to punish Jeff Bezos for The Washington Post’s coverage of Trump.<sup>41</sup>

Some of Trump’s efforts to exert such political or even personal control over the vast prosecutorial powers of the federal government were resisted by officials in his administration. For example, Attorney General Bill Barr declined to prosecute former FBI Director James Comey and others despite Trump’s urging.<sup>42</sup> But if Trump wins a second term, it is likely he will install officials who will put up no resistance to such abuses of power. Jeffrey Clark, who offered to use the DOJ to support the effort to steal the 2020 election,<sup>43</sup> is reportedly in the running to be attorney general.<sup>44</sup> The Heritage Foundation has suggested that Trump use an employment screening questionnaire to demand fealty to Trump’s lies about the 2020 election as a litmus test for White House employment.<sup>45</sup> And Project 2025 is openly proposing to take down existing guardrails aimed at strictly limiting White House influence at the DOJ.<sup>46</sup>

Even now, Trump allies in Congress are trying to use their investigative tools to chill free speech and target their opposition. In May 2024, two House committee chairs sent a letter to Treasury Secretary Janet Yellen seeking “Suspicious Activity Reports” on named organizations, including some major foundations, that have been or might have been involved in organizing or funding campus protests over the war in Gaza.<sup>47</sup> This fishing expedition was designed to divert these organizations’ time and money to deter their political advocacy.

As president, with federal law enforcement agencies under his control, Trump could carry out his own coercive attacks on advocacy organizations and individuals he opposes. Indeed, on the campaign trail, Trump has praised violent crackdowns on campus protests,<sup>48</sup> aligning with his previous attacks on academic freedom.<sup>49</sup> In particular, he has threatened reprisals against students who are not U.S. citizens, merging his attacks on free speech with his attacks on immigration. In mid-May, he said, “One thing I do is, any student that protests, I throw them out of the country. You know, there are a lot of foreign students. As soon as they hear that, they’re going to behave.”<sup>50</sup>

Trump is likely to attack online protest as well by forcing media companies and online platforms to carry conservatives’ preferred speech. In 2020, Trump sought to compel the Federal Communications Commission to overstep its legal authority and substantially overhaul the law<sup>51</sup> that allows platforms to take down hateful and “objectionable” speech without fear of frivolous litigation.<sup>52</sup> That effort attacked “ideologically driven content moderat[ion] decisions,” including decisions to remove “content pertaining to firearms,” “glorifying violence,” or “a controversial

paper about a potential therapy for COVID-19.”<sup>53</sup> Platforms’ decisions to restrict that content are well within their First Amendment editorial rights, but the Trump administration will almost certainly endeavor to force platforms to carry objectionable speech.

Trump may also abuse legal processes through the DOJ to attack the press and sources including whistleblowers. Current DOJ policy prohibits the use of subpoenas, search warrants, and other orders to obtain information collected by journalists during newsgathering, with narrowly tailored exceptions.<sup>54</sup> That guidance was issued in November 2022<sup>55</sup> and replaced an earlier policy that expressly *permitted* the use of subpoenas, warrants, and other orders, only requiring authorization from the attorney general.<sup>56</sup> The first Trump administration was “markedly more aggressive” than previous administrations in abusing that authority,<sup>57</sup> and it is likely a second Trump administration would seek to eviscerate these prudential constraints and use the full power of the DOJ to root out sources such as whistleblowers within the federal government, including by surveilling journalists.

Finally, we should expect to see stepped-up use of the Espionage Act of 1917 to prosecute government leakers and, in the worst-case scenario, reporters and publishers. The Trump DOJ under Jeff Sessions already broke with longstanding precedent when it brought felony charges against Wikileaks publisher Julian Assange for possessing and publishing secret government documents<sup>58</sup> — an activity that is central to investigative journalism. Media organizations have rightly warned that the Assange prosecution,<sup>59</sup> which recently resulted in a guilty plea,<sup>60</sup> will offer a blueprint for targeting more mainstream publications that routinely expose government malfeasance in the public interest.

The Supreme Court’s decision in *Trump v. U.S.* immunizing Trump (and any future president) from criminal prosecution for any “official” act, including his efforts to subvert the DOJ toward his own ends, makes it all the more important that civil society organizations and other potential targets of Trump’s vendettas be extra vigilant in holding him, and any abusive process brought by his DOJ, accountable.

## How the ACLU Is Preparing to Respond

### *Legal Analysis & Litigation Response*

The founders were committed to constraining executive power and enshrined the principle of due process and structural checks and balances in the Constitution. The Due Process Clause of the Fifth Amendment is a crucial bulwark against misuse of executive power. Unfortunately, litigation often comes too late to prevent the harms of an abusive investigation or prosecution and can only seek a retrospective remedy — clearing a target’s name in the

public eye and seeking redress for the damage already done. Even if a target for retaliation sues and ultimately wins, the stigma and more direct harms of a retaliatory federal investigation or prosecution can destroy a person's life or an organization's finances. Moreover, defending against a criminal case or seeking damages for abusive legal process requires meeting a stringent legal standard: Proving that the prosecution had an improper motive and a discriminatory impact. That is, the person who was unfairly prosecuted must prove retaliatory or discriminatory intent and that other people in the same situation were not prosecuted.<sup>61</sup>

Despite the challenging legal standard, the ACLU has stood up with and for people who were unfairly investigated or prosecuted for retaliatory or discriminatory reasons, or to try to silence their advocacy. We have represented individuals both in defending against criminal prosecution and in affirmative lawsuits seeking justice. For example, the ACLU has represented Asian American scientists who were wrongfully arrested by the FBI and falsely painted as Chinese spies during a wave of biased prosecutions that began under the Obama administration and grew into the Trump administration's discriminatory "China Initiative."<sup>62</sup> President Biden ended the China Initiative in February 2022, but there is a high likelihood that Trump would revive it.

The role of the free press in exposing these abuses will be vital and will often depend on courageous government whistleblowers sharing confidential information in the public interest. If Trump's prior presidency is any indication, we can expect aggressive attacks on both journalists and their sources. The ACLU stands ready to support and defend both journalists and whistleblowers who are subjected to overzealous investigation and prosecution.

#### *Strengthening Firewalls Against Political Influence*

There are longstanding norms and rules to shield the DOJ from political interference, but Trump has made clear since the early days of his first term that he is eager to shred those norms. In fact, he fired his first attorney general, Jeff Sessions, for failing to act in Trump's interest.<sup>63</sup> Project 2025 shows that Trump's supporters and enablers are eager to help politicize the DOJ should Trump become president.<sup>64</sup>

Norms will not protect us; we need to work for stronger firewalls between the White House and DOJ. While the prospects for legislative action with this Congress are slim, the ACLU has cultivated a bipartisan coalition of civil libertarians on Capitol Hill who recognize the danger of overly broad executive power. Republicans, in particular, during the Biden administration have claimed to be alarmed about political influence over prosecutorial decisions.<sup>65</sup> The ACLU will continue seeking legislative

opportunities to install stronger guardrails against political influence over the DOJ.

There are also steps the Biden administration can take to reduce the opportunities for political corruption of agency decision-making or at least raise the cost. A new collective bargaining agreement for Environmental Protection Administration employees includes a provision protecting employees from political interference in their work.<sup>66</sup> In May, media reported that the National Institutes of Health were putting in place new protocols to protect the scientific integrity of the Institutes' priority-setting and grantmaking.<sup>67</sup> Although a Trump administration could sweep away the new policies, doing so would catch the attention of advocates and the media, acting as something of a tripwire for political pushback. Similar steps can be taken at enforcement agencies.

#### *Bolstering Protections for Journalists*

The ACLU will also work now to get Congress to enact the Protect Reporters from Exploitative State Spying Act (PRESS Act), which would prevent the federal government from compelling journalists to reveal their sources and work product.<sup>68</sup> The PRESS Act also bars the government from spying on journalists' phone records and search histories through third parties, like internet service providers, as a work-around.<sup>69</sup> By preventing the government from compelling the disclosure of sources, or spying on journalists as a work-around, the PRESS Act ensures journalists across the country have the confidentiality they need to do their jobs. This bipartisan bill already passed the House of Representatives in early 2024 and must pass the Senate before the end of the year.<sup>70</sup>

#### *Shrinking Executive Authority*

Given the danger of targeted fishing expedition investigations and speculative enforcement actions, we need more rather than less oversight over executive branch enforcement. Congress is currently considering, for example, a bill that would empower the Treasury Secretary to designate an organization as "terrorist-supporting" and strip their nonprofit status unilaterally.<sup>71</sup> While the bill purports to require "notice," it does not require disclosure of all the reasons for designation or the evidence relied upon to support it — or evidence in the government's possession that might undermine the designation.<sup>72</sup> The legislation raises significant constitutional concerns and would give a Trump administration significant new powers to threaten dire consequences on any organization based on secret evidence without ever providing them a meaningful opportunity to defend themselves before a neutral decisionmaker. The ACLU is working to stop that bill<sup>73</sup> and ensure stronger due process protections in other contexts.

#### *Backstopping Oversight Bodies*

It can be hard for those without deep expertise to



distinguish pretextual prosecutions and investigations from legitimate enforcements of the law. Congress members and agency inspectors general must take a critical oversight role; they must probe and call out when political decision-making is infecting agencies. The ACLU will work to defend and strengthen inspector generals and to support congressional oversight where appropriate.

### *Strengthening State Defenses*

Targeted prosecutions can take the form of attacks on organizations or individuals who are conducting activities that the administration disfavors, such as prescribing abortion medications or providing support services to asylum seekers. As part of a comprehensive state planning effort, the ACLU is working with our affiliates to put in place the strongest data protection laws possible in civil-liberties-friendly states to reduce these dangers. Many states have already implemented shield laws to prevent assistance to other states' prosecutions targeting those seeking or providing reproductive health care or gender-affirming care. While the federal government has concurrent jurisdiction in states, the ACLU will be supporting state efforts to update their shield laws to ensure that their personnel and information systems are not complicit in aiding such prosecutions or aiding in federal mass deportation efforts to the maximum extent permitted by law.<sup>74</sup>

### *Regulatory Advocacy*

The ACLU may also leverage administrative advocacy to oppose many of these threats, especially efforts to roll back Section 230 and limit social media platforms' ability to address hateful speech or mis- and disinformation. The ACLU has long defended Section 230's protections in federal courts and on the Hill<sup>75</sup> and has experts on both Section 230 and wider telecommunications issues who would be able to underscore the limitations of the Federal Communications Commission's authority in upending nearly 30 years of precedent. Robust regulatory advocacy would serve as a foundation to challenging a Section 230 rollback in court.<sup>76</sup>

### *Organizing*

Ultimately, the power of the federal government is vast, and the capacity to misuse it for the purposes of locking in political power and undermining the rule of law is a substantial vulnerability. Fighting this threat requires mobilizing the public to value and defend freedom from a tyrannical government just as the founders did when they wrote the Constitution.

The ACLU has always stood for liberty in the face of government overreach, and that mission will arguably be more important in a second Trump administration than it has ever been. We are engaging in a broad

campaign within civil society to help key institutional partners, and eventually the public and the media, to recognize and mobilize around the danger. The best way to stop the threat of weaponized prosecutorial powers is to socialize the press, the public, and policymakers to the danger, to reduce the effectiveness of Trump administration pretexts, and to raise the political costs of taking abusive actions in the first place.

## **Big Brother Surveillance**

The government has vast, unprecedented powers to surveil and peer into people's private lives. It exploits three sources to conduct dragnet surveillance of Americans' data: (1) Section 702 of FISA, which authorizes the collection of communications between U.S. persons and people outside the United States; (2) Executive Order 12333, which allows the government to conduct bulk surveillance outside the United State and results in the collection of Americans' private data; (3) and the government's use of commercial data brokers to purchase massive quantities of Americans' private data.<sup>77</sup> Through these dragnet surveillance methods, the federal government searches Americans' private communications and information without a warrant and without notice or other significant safeguards necessary to protect our rights.

In addition, the information that the government purchases from data brokers without meaningful oversight and transparency can be highly sensitive, and could include:

- Information from individuals' visits to health clinics,<sup>78</sup> as well as reproductive tracking applications installed on people's phones;<sup>79</sup>
- Information regarding people's race, ethnicity, gender, sexual orientation, income, and political and religious affiliations;<sup>80</sup> and
- People's immigration status and related information for immigration enforcement.<sup>81</sup>

According to former deputy director of the CIA Michael Morell, "[t]he information that is available commercially would kind of knock your socks off. If we collected it using traditional intelligence methods, it would be top-secret sensitive. And you wouldn't put it in a database, you'd keep it in a safe."<sup>82</sup>

There are few checks on these surveillance powers. Federal agencies rely on them to collect sensitive information without providing a judicial warrant or even notice to individuals whose data has been captured. And the problem is only getting worse, as President Biden recently signed legislation dangerously expanding

Section 702.<sup>83</sup> Under that expansion, the government can conscript essentially any business that provides Wi-Fi to its customers into service for spying, unless it qualifies for one of Section 702's limited exceptions. The Biden administration has promised it will limit its use of this authority,<sup>84</sup> but that does not bind any future administration from doing so.

Each of these tools has a history of abuse by law enforcement and intelligence agencies, and a future president could take advantage of any or all of them for his own ends. Trump could use these overbroad surveillance powers to target immigrants, protestors, communities of color, people seeking abortions or gender-affirming care, or his political opponents. Indeed, although Trump has been a loud critic of FISA,<sup>85</sup> as president, he ultimately signed legislation to reauthorize Section 702 surveillance. Given that track record and Trump's more recent assertions, there is serious concern that he will try to harness the government's dangerous spying powers for his own ends.

## How the ACLU Is Preparing to Respond

### Legal Analysis & Litigation Response

Because the government uses mass warrantless surveillance authorities (Section 702 of FISA and Executive Order 12333) in secret and without disclosure to the people who are surveilled, it is challenging to identify when someone has been subjected to warrantless surveillance. In practice, people whose privacy rights are violated have had very little legal recourse due to the government's refusal to disclose even basic information about this surveillance and the government's repeated use of the "state secrets privilege" to thwart court review of its most intrusive spying programs. The government used the latter tactic in our lawsuit on behalf of the Wikimedia Foundation and eight other organizations that challenged the National Security Administration's (NSA) Upstream surveillance program.<sup>86</sup> Even people who are criminally charged at least in part on the basis of evidence derived via Section 702 and Executive Order 12333 are hard-pressed to understand whether and to what extent their private communications have been intercepted and searched.

Although it can be difficult to challenge Section 702 and Executive Order 12333 surveillance, we have done so in the past, and will continue to do so by carefully monitoring (1) criminal cases where the government has disclosed its use of other types of sensitive surveillance that are often used in parallel with these secret surveillance methods, (2) publicly available government documents such as DOJ press releases, (3) legislative testimony about purported surveillance "successes," and (4) media reports that provide additional information

about the government's use of controversial surveillance tools. We will work in collaboration with criminal defense attorneys around the country to file motions that seek to compel the government to provide notice to criminal defendants in investigations where agents relied on Section 702 or Executive Order 12333 surveillance. And in cases where criminal defendants have a basis to believe the government used Section 702 or Executive Order 12333 surveillance to intercept and search their communications without a warrant — as in cases like *United States v. Muhtorov*, *United States v. Moalin*, *United States v. Hasbajrami*, and *United States v. Russell*, where we have served as co-counsel or amicus — we will support defendants in filing motions challenging the lawfulness of that surveillance under the Fourth Amendment and in seeking to suppress the resulting evidence.

By representing defendants who are accused of crimes based on illegally obtained private data, we shed light on the ways in which the government is engaging in mass surveillance of Americans — the vast majority of whom may never know that their privacy has been breached by their government.

### Legislative Advocacy

The ACLU has built a durable bipartisan coalition of advocacy organizations and former and current policy-makers to push for limits on government surveillance. Before the end of this Congress, the ACLU will continue to work with congressional allies to narrow the recent expansion of the definition of "electronic communications service providers" that would allow the government to force a wide range of U.S. businesses to give the NSA access to their Wi-Fi routers, phones, and other communications equipment.<sup>87</sup> As a part of this process, the ACLU will also work to reverse the changes made under this year's reauthorization that weaken the FISA Court's ability to obtain independent input from experts on civil rights, civil liberties, and privacy when the government secretly seeks permission to conduct novel forms of surveillance.

Looking forward, given that Congress only reauthorized Section 702 for two years, there will be another opportunity in April 2026 to address the ACLU's longstanding concerns regarding mass warrantless surveillance. We will continue to work with the bipartisan surveillance coalition to limit the federal government's vast ability to search Americans' private communications without a warrant, whether with Section 702, Executive Order 12333, or the purchase of data the government would otherwise need a warrant to obtain. For instance, this year, the ACLU and allies successfully advocated for House passage on a wide bipartisan basis of the Fourth Amendment Is Not For Sale Act, a bill that would prevent the government from purchasing data that would

otherwise require a warrant to obtain, although the Senate failed to pass an amendment to the same effect as part of the Section 702 reauthorization law.<sup>88</sup> The ACLU will continue to build up support for this legislation to get it passed in the Senate.

If a second Trump administration raises concerns about abuses from “deep state” surveillance as Trump and his allies have done in the past,<sup>89</sup> the ACLU will seize on the opportunity to curtail the expansive surveillance powers that the federal government already possesses.

## CONCLUSION

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Donald Trump’s presidency demonstrated the perils of unconstrained executive power — and particularly the risks of a president’s power to declare “emergencies” to justify attacks on individual liberty. The potential of a second Trump term, with Trump’s promises that he will be even more unconstrained, poses a unique danger to our rights and freedoms. As we’ve repeatedly stressed in our memo series, Trump threatens to endanger a broader array of our civil rights and civil liberties. Some of his harmful policies may be reversed when new leaders take office, though with lingering harms to the people he targets. But by punishing political enemies and stifling protest and dissent, a second Trump administration would break many of the checks and balances on the executive branch and undermine the foundations of a functioning democracy.

Trump has made plain his admiration for strongman leaders in other countries who have come to power through democratic elections and used the power of the state to exact revenge, sideline political opponents, and rule by force.<sup>91</sup> He has promised that in a second term, unlike the first, he will prioritize appointing supporters and enablers who will place loyalty to Trump over all else, including the oath of office and the rule of law.<sup>92</sup> Our nation’s institutions may be stronger than those in other countries, but they are not without their limitations —

### *Local & State Advocacy*

In addition, the ACLU will urge states and cities to restrict the information they provide to federal agencies and departments. For example, the ACLU has successfully advanced state and local laws to increase community control over policing and championed legislation to restrict “reverse” warrants and end purchases of personal information from data brokers.<sup>90</sup> These efforts would reduce the pool of data available to law enforcement, including federal law enforcement. In addition, the ACLU will urge state and local government to end, or sharply limit, their participation in fusion centers and other state-federal data sharing arrangements that have been rife with abuse.

as we’ve seen in recent years. Institutions are only as strong as the will of the people within them, and norms that once constrained abuses are rapidly falling away.

The power of the federal government to surveil, investigate, prosecute, and intimidate is vast — but the ACLU exists to ensure those powers are constrained, and we will rise to meet this challenge. A second Trump administration would pose a dangerous threat to the democratic ideal of robust, open political competition marked by spirited dissent and the foundational notion of government by the people and for the people, with respect for the rule of law. As we have for over a century, the ACLU will fight those threats in the courtroom, in Congress, and in the halls of power in states and cities across the country. Trump has stated his intent to trample historical checks and balances on the office of President, and there is an apparent willingness of many within and outside of government to help him do so. When the people disagree with the policies and actions of the president, it will be more critical than ever for the American people to exercise their rights of free speech — including through protest and dissent — so that Trump’s excesses are met with the direct power of the people. When our civil rights and civil liberties are in danger, the ACLU will always be there to lead the defense.

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# TRUMP ON THE CRIMINAL LEGAL SYSTEM

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The “Trump On The Criminal Legal System” memo outlines how the ACLU would respond to a possible second Trump administration’s impact like **fueling mass incarceration, encouraging police use of force, and expanding the death penalty**. The ACLU stands ready to combat these threats by using the courts to challenge unlawful re-incarceration of people in home confinement, advocating for Congress to constrain use of military equipment by police, and continue our work ending the death penalty, state by state.

## TRUMP PROPOSED POLICIES

- **Fueling authoritarian policing:**

A second Trump administration will fuel authoritarian policing by encouraging the use of deadly force, supplying local law enforcement agencies with military equipment, and overturning federal checks on law enforcement abuse.

- **Accelerating mass incarceration:**

A second Trump administration risks accelerating mass incarceration by directing federal prosecutors to seek the most serious charges and maximum sentences, pressuring local prosecutors to take a similarly draconian approach, and reincarcerating thousands of people on home confinement.

- **Expanding the use of the death penalty:**

A second Trump administration threatens to expand the use of the death penalty by broadening the category of crimes punishable by death, sentencing more people to die, and killing every person on federal death row.

## ACLU RESPONSES

- **Litigation:**

The ACLU will challenge unlawful attempts by a Trump administration to reincarcerate people on home confinement, fight against the return of torturous methods of execution, and defend the health, safety, and dignity of incarcerated people.

- **Legislation:**

The ACLU will advocate for Congress to constrain the funneling of military equipment to local police, fight for legislation to end sentencing disparities, and, under any administration, continue to push for the full implementation of the First Step Act.

- **Mobilization:**

The ACLU will work with states to reduce opportunities for violent encounters with police, including by advocating for state use of force standards and the de-prioritization of non-safety related traffic stops. We will continue our work exposing the racist roots of capital punishment and ending the death penalty, state by state.

**“Trump threatens to drown out millions of voices across the country demanding transformative change to our criminal legal system and a new approach to achieving safe communities.** But the ACLU will not let these voices be silenced. We will make clear to elected officials on the federal, state, and local levels that Trump’s extremist approach to the criminal legal system is ineffective, cruel, and against the will of the people – and we will resist at every level of government.”

— **Ellen Flenniken,**  
Deputy Director of Campaigns  
at the ACLU’s Justice Division

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**“Trump has told us what he wants to do with a second term: fuel mass incarceration, encourage law enforcement to engage in unconstitutional policing practices, and expand the death penalty.** We know from this country’s history that these extreme and immoral policies harm communities and infringe upon our rights and humanity. The ACLU is prepared to meet the Trump administration with the same fierce response as we did during his last term in office should he be reelected.”

— **Yasmin Cader,**  
Director of the ACLU’s Trone  
Center for Justice and Equality

## TRUMP ON THE CRIMINAL LEGAL SYSTEM

Threatening a New Era of Mass Incarceration

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A second Trump administration threatens to accelerate mass incarceration, further dehumanize people in our criminal legal system, engage in a death penalty “killing spree,”<sup>1</sup> and reverse many reforms gained over the last two decades.

Trump’s proposals are dangerous on two levels. First, with respect to the federal system, Trump will seek to double down on the failed policies of the past: encouraging brutal policing practices, pursuing extreme sentences, and expanding the use of the death penalty. Second, Trump’s racist and extremist rhetoric may embolden states that have previously embraced reform to return to failed crime policies, fueling mass incarceration and widening racial inequality.

While Trump will have a singular impact on the federal system, ultimately, many of his plans will have a trickle-down effect in states, cities, and localities. State and local governments control most of the substantive parts of state criminal legal systems, including policing, prosecution, sentencing, and conditions in prisons and jails. Today, there are over 1.6 million people in state and local jails and prisons, compared to just over 200,000 in federal jails and prisons.<sup>2</sup> For this reason, much of the ACLU’s work on criminal justice is focused on the state and community level.

Even without direct control of state criminal legal systems, the president can play an important role in setting the tone for policy. According to Trump’s campaign, “There is no higher priority than quickly restoring law and order and public safety in America.”<sup>3</sup> Mirroring former President

Richard Nixon’s calls for “law and order” during his 1968 campaign, Trump’s tough-on-crime rhetoric can be seen as a “shorthand message promising repression of the Black Community.”<sup>4</sup>

In this memo, we describe how the ACLU will oppose the specific threats that Trump poses to the federal legal system. Trump is likely to roll back hard-fought reforms to federal and state law enforcement, pursue extreme sentences, reincarcerate people currently under home confinement, exacerbate horrendous conditions in overcrowded jails and prisons, and expand the use of the death penalty. Through litigation, congressional action, and state and local advocacy, we will combat these efforts.

At the same time, we will continue to work to transform the criminal legal system and advance proven solutions. For example, we are challenging the use of law enforcement to respond to mental health emergencies in Washington County, Oregon and Washington, DC;<sup>5</sup> we have put the death penalty on trial in Kansas and North Carolina;<sup>6</sup> and we are challenging the Phoenix Police Department’s abuse of unhoused people.<sup>7</sup> If Trump is re-elected, this critical criminal legal reform work becomes all the more urgent.

**The ACLU stands at the ready to wield litigation, advocacy, and community mobilization to combat a second Trump administration’s attempts to exacerbate inequities in our criminal legal system and continue the critical work of building safe communities.**

# OVERALL RESPONSE

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## Courts

Litigation will play a critical role in our fight against Trump's attempt to reinvigorate the politics of mass incarceration.

We will use the courts to halt the Trump administration's likely attempt to carry out one of the largest — if not the largest — carceral events in our nation's history: the senseless return to prison of nearly 3,000 individuals released on federal home confinement during the pandemic. Doing so would violate both Congress's clear purpose in authorizing those releases under the CARES Act,<sup>8</sup> and the fundamental constitutional right to due process before being deprived of liberty.

We will also meet any efforts by Trump to expand the use of the federal death penalty. In the last six months of his presidency, Trump's administration carried out an unprecedented killing spree in which 13 federal prisoners were executed, despite troubling evidence of the torturous methods of execution used and important constitutional defenses raised by those prisoners.<sup>9</sup> In light of this evidence, Attorney General Merrick Garland ordered a halt to any future federal executions and a review of the rushed policies and procedures adopted during the Trump administration.<sup>10</sup> If Trump is re-elected, the ACLU will be ready to challenge the constitutional and statutory violations of another proposed execution onslaught.

If Trump's administration adopts a new federal execution protocol, we will use public record laws and, if necessary, the courts to secure information about the protocol. We will challenge any efforts to return to unconstitutional methods of execution. Through this litigation, we will continue exposing the racism and cruelty inherent in the death penalty as we continue to seek its total abolition.

## Congress

We will continue to advocate for changes to the criminal legal system in Congress and oppose any federal legislation that threatens civil liberties under any administration, including a second Trump administration. We will continue to advocate for federal agencies to invest in public safety measures during the annual appropriations process. And we will increase federal advocacy efforts to constrain the practice of providing military equipment to local police.

If past is prologue, fighting against the potential for rapidly escalating threats to the criminal legal system under a second Trump administration will require intensive coordination among members of Congress. To that end, the ACLU has expertise and readily available resources to advise and assist members of Congress on how to fully exercise their oversight rights and responsibilities. The ACLU can provide guidance for congressional hearings, congressional testimony, and engagement in and demand for oversight actions, such as sending letters to agencies to constrain authoritarian activities and requesting Government Accountability Office (GAO) reporting.

The ACLU will fight to ensure that Congress works to mitigate potential harm should Trump be re-elected.

## States & Municipalities

States and localities control the bulk of the American criminal legal system.<sup>11</sup> While the federal government does not have direct authority over these localized systems, Trump's rhetoric could influence the agenda for state and local elected officials.

State governors and legislatures must increase transparency and strengthen legal checks throughout their criminal legal systems. From adopting use-of-force standards for law enforcement that prohibit the use of carotid restraints or chokeholds and no-knock warrants, to developing robust transparency standards, such as reporting deaths in custody, states must act to protect communities.

The ACLU and our affiliates will continue our work nationwide to hold state actors accountable for their actions. Under a second Trump administration, the ACLU's commitment to ensure constitutional protections at every level of government will be stronger than ever and we will continue advocating for safeguards to be implemented immediately.

# SPECIFIC THREATS & POTENTIAL RESPONSES

## Law Enforcement

A second Trump administration threatens to roll back recent progress on policing and exacerbate the racial injustices of our criminal legal system. Efforts to achieve meaningful accountability for police abuse — including the killings of Black people such as George Floyd, Duante Wright, Elijah McClain, Breonna Taylor, William Green, and countless others — and to implement lasting policing reform face serious obstacles under any administration. These efforts will only become more difficult under a Trump administration given his open endorsement of authoritarian and violent policing.

In 2017, then-President Donald Trump spoke openly about his support for police abuse and violence on the part of government actors:

“When you see these thugs being thrown into the back of a paddy wagon, you just see them thrown in, rough. I said, ‘Please don’t be too nice.’...When you guys put somebody in the car and you’re protecting their head you know, the way you put their hand over [their head]? Like, ‘Don’t hit their head,’ and they’ve just killed somebody, ‘Don’t hit their head.’ I said, ‘You can take the hand away, OK?’”<sup>12</sup>

Trump appointed Jeff Sessions as attorney general, the top law enforcement position within the federal government. Sessions mandated that the Department of Justice (DOJ) “pull back” on the practices of investigating police abuse and misconduct and abandon civil rights abuse litigation.<sup>13</sup>

In a second Trump administration, we expect Trump will again use all the tools at his disposal to empower abusive law enforcement and discourage state and local efforts to reform policing. Trump’s rhetoric risks exacerbating police violence. For example, his calls for further protections for abusive police at the expense of community safety<sup>14</sup> and his description of use of force on protesters as a “beautiful thing to watch”<sup>15</sup> could embolden state actors to take a similar approach.

Beyond rhetoric, Trump will also likely exercise his executive power to overturn federal checks on local law enforcement abuse, including by immediately rescinding President Biden’s 2022 executive order on policing.<sup>16</sup> Doing so would eviscerate one of the most substantial federal actions on police reform since George Floyd’s murder and roll back important changes to use of force standards, including restrictions on chokeholds and carotid restraints.

In 2017, Trump rescinded President Obama’s executive order limiting the Pentagon’s 1033 program, which allows the Department of Defense to give state, local, and federal law enforcement agencies military weapons.<sup>17</sup> We expect a second Trump administration will similarly embrace increased militarization of local departments by providing local police with military equipment, tanks, and mine-resistant vehicles that have no place in local communities.

The ACLU has addressed additional threats to civil liberties through the weaponization of the criminal legal system in prior memos.<sup>18</sup> In addition to encouraging the militarization of state and local police, Trump has threatened to bring the National Guard into major cities to quell violence,<sup>19</sup> a clear violation of our democratic laws and norms.<sup>20</sup> Enlisting law enforcement in this manner risks dangerously escalating tensions and exposing peaceful protestors to excessive or deadly force.<sup>21</sup> In a second Trump administration, we will also likely see attempts to deputize local law enforcement to aid an unprecedented mass deportation effort that would decimate communities.<sup>22</sup>

These expected law enforcement policies will have an outsized impact in marginalized communities. Black people are far more likely to experience police use of force and police misconduct, and three times more likely to be killed by police than white people.<sup>23</sup> And, as our research shows, militarized policing is aggressively used against people of color.<sup>24</sup> Trump has consistently downplayed these racialized harms of policing.<sup>25</sup>

### Our Response

The ACLU will use our advocacy and litigation expertise to challenge a second Trump administration’s attempts to empower, arm, and immunize police violence. We will chronicle and illuminate the injustices of a second Trump administration, as we did with the first Trump administration.<sup>26</sup>

We will also continue to advocate for evidence-based solutions to public safety,<sup>27</sup> and stand unwavering in our support for data-driven alternatives to incarceration should Trump be re-elected.

If Trump is re-elected, our state-level advocacy is more critical than ever, and we will work to protect communities from the police abuse encouraged by Trump. States can protect against police violence by proactively reducing opportunities for contact with police. The most common way members of the public encounter the police is via police-initiated stops, whether of drivers or

pedestrians.<sup>28</sup> The ACLU and our affiliates will work to end the abusive and racially biased use of traffic stops, in part by continuing to revamp traffic stop policy to deprioritize non-safety related stops to minimize overall contact with police. These non-safety related stops can escalate to violent, and even deadly encounters that disproportionately harm Black and Brown people.<sup>29</sup>

Where police contact does take place, we will work to diminish its harms by continuing to push states and localities to establish use of force standards and require de-escalation training to prevent lethal encounters with police. States should ensure guardrails that provide police transparency, oversight, and accountability are in place and enforced. Wherever possible through litigation or legislative advocacy, the ACLU will also encourage robust mechanisms for civilian oversight and police accountability.

## Mass Incarceration

The United States maintains the dubious title of the world's largest known incarcerator<sup>30</sup> in large part because of sentencing practices, like mandatory minimums, that keep far too many people in prison for far too long. On the campaign trail, Trump threatens to return to many of the ineffective and cruel policies that drove our carceral epidemic, undermining progress and fueling mass incarceration.

Below, we outline the ways in which a second Trump administration would further exacerbate our already overcrowded jail and prison system. We focus our analysis on four topics:

- Escalating punitive, draconian sentencing and incarceration approaches;
- Incentivizing dramatically worse conditions for the nation's 1.9 million incarcerated people;
- Reincarcerating nearly 3,000 people released to federal home confinement during the pandemic; and
- Undermining recent reforms, including the First Step Act.

**The ACLU is ready to challenge a second Trump administration's efforts to further increase the size of our incarcerated population and violate the rights of those currently incarcerated.**

## Charging and Sentencing Practices

A second Trump administration would use federal prosecutorial power to increase mass incarceration. The policies of Trump's first administration leaned towards a tough on crime approach. Trump's attorney general instructed prosecutors to seek the most serious charges,<sup>31</sup> increasing the likelihood of lengthy sentences and further fueling the nation's mass incarceration crisis, especially in low-income communities and communities of color. Trump has made it clear that, with a second term, his administration will be far more aggressive in its approach to prosecution and sentencing, even usurping the authority of state and local prosecutors to use their discretion.<sup>32</sup>

While Trump cannot control the charging decisions of state and local prosecutors, he will likely use his bully pulpit to pressure them to take a draconian approach. He has already declared his intention to "take on the radical Marxist prosecutors who have abolished cash bail and refuse to charge criminals" and direct the DOJ to prosecute civil-rights-minded prosecutors in major cities.<sup>33</sup> The Heritage Foundation's policy agenda for the next conservative administration calls for the "use [of] applicable federal laws to bring federal charges against criminals when local jurisdictions wrongfully allow them to evade responsibility for their conduct."<sup>34</sup>

We expect Trump's attorney general will direct federal prosecutors to pursue the most serious possible charges and generate the longest possible sentences, broadly seeking mandatory minimums and sentences at the top of the Federal Sentencing Guidelines. Simultaneously, Trump's administration will "support legislative effort to provide further tools" for prosecution, like the restoration of a 1984 bill that mandates severe sentences and mandatory minimums, including for non-violent crimes.<sup>35</sup> This approach would likely result in excessive sentences without effectively deterring crime or improving public safety.

Trump's plans include an aggressive revival of the severe approach to drug-crime prosecution introduced during the war-on-drugs era. Proposals from Trump and his allies include intensifying federal crackdowns on individuals at the lowest level of the drug distribution chain by "rigorously prosecut[ing] as much interstate drug activity as possible including simple possession of distributable quantities."<sup>36</sup> These measures will not make communities safer but instead exacerbate racial disparities and fail to address the root causes of the overdose crisis.

### Our Response

We will combat any efforts to expand mandatory minimums or lengthen sentences. While we understand it will be a challenge given the current makeup of Congress, we will continue to fight for legislation to end sentencing disparities for crack and powder cocaine, reduce sentences for many other drug offenses — and apply these changes retroactively — and grant judges greater discretion in sentencing for lower-level drug crimes.

As we have done for decades, we will also use our research publications, communication channels, and wide supporter base to educate the public, candidates, and lawmakers on the urgent need for and impact of sentencing reform in a second Trump administration.

Since much of the American criminal legal system takes place at the state and local level, our state-level work will be more critical than ever with Trump in office. The ACLU and our affiliates will continue our state and local advocacy for sentencing reform to make our system more humane, such as by supporting policies that eliminate mandatory minimums, expand judicial discretion for low-level offenses, and reclassify and reduce sentences for drug crimes.

We will continue to advocate for clemency at the state level, urging governors to use their executive authority to provide pardons and commutations to reduce our overreliance on mass incarceration and lessen collateral consequences of convictions.

### Conditions of Confinement

In addition to potentially increasing the number of people incarcerated through aggressive prosecution and harsher sentencing, a second Trump administration promises to worsen conditions for incarcerated people. Trump's future attorney general would likely block the critical role the DOJ's Civil Rights Division has historically played in fighting dangerous, degrading, and often lethal conditions in state prisons and local jails.<sup>37</sup> The Federal Bureau of Prisons (BOP), which is part of the DOJ, would almost certainly ban abortions as well as appropriate care for incarcerated transgender people, among other marginalized communities.<sup>38</sup> And we believe that a second Trump administration would overturn President Biden's executive order phasing out the use of private, for-profit prisons and jails, just as the first Trump administration revoked a similar order issued under President Obama.<sup>39</sup>

### Our Response

The ACLU stands ready to defend the health, safety, and dignity of detained and incarcerated people throughout the United States. Mistreatment of prisoners based on race, sex, gender identity, or disability remains far too common. Through education, advocacy when we can,

and litigation when we must, we will continue to fight for a criminal legal system in which incarceration is a last resort, rather than a first response.

The ACLU and our affiliates have been engaged in this work for decades, remaining vigilant for abuses of civil liberties across the country and defending the rights of those incarcerated. We will fight in the legislature and the courts to end the use of solitary confinement,<sup>40</sup> especially for juveniles.<sup>41</sup> We will fight to remove youth from adult prisons,<sup>42</sup> advocate for legislative reforms to support incarcerated survivors of sexual abuse and seek proper mental health and medical care — including reproductive<sup>43</sup> and gender-affirming care<sup>44</sup> — for all individuals who are incarcerated. We will continue this fight across the country, regardless of attempts by the Trump administration to make an already inhumane system worse.

### CARES Act Releases

Notably, under the first Trump administration, one of the most successful federal programs during the COVID-19 pandemic was the CARES Act program. Congress passed the Act in March 2020, expanding the BOP's authority to allow people to serve the remainder of their federal sentences in the community on home confinement during the "COVID-19 emergency period."<sup>45</sup> Since then, over 13,000 people have been released to home confinement, and about 2,600 remain on home confinement.<sup>46</sup> The overwhelming majority of people released under this Act successfully reintegrated into their communities without committing new offenses.<sup>47</sup> Their success demonstrates that we hold far too many people in jails and prisons, and that we can significantly reduce mass incarceration, provide a second chance for incarcerated individuals, and ensure public safety.

If re-elected, Trump will likely re-imprison thousands of people living and working safely within the community on home confinement — without any legal authority. This senseless return to federal prison of nearly 3,000 individuals would be one of the largest — if not the largest — carceral events in our nation's history.

Near the end of his term, Trump's DOJ issued a memo concluding that the BOP "must recall prisoners in home confinement to correctional facilities...unless they would otherwise be eligible for home confinement[.]"<sup>48</sup> Under the Biden administration, the DOJ announced that those released on home confinement from federal prison under the CARES Act could continue in the program subject to all the same rules and requirements of their release.<sup>49</sup> A second Trump administration will form a new DOJ, and that DOJ may reverse course and require the BOP to reincarcerate all remaining individuals on home confinement under the CARES Act.<sup>50</sup>



The return of nearly 3,000 individuals to federal prisons without any violation of the rules of release and without a new charge does not improve public safety. Individuals living, working, and caring for children or dependents in their communities should be given the opportunity to continue their successful rehabilitation and re-entry.

### *Our Response*

The ACLU is prepared to challenge a second Trump administration's attempt to reincarcerate those released under the CARES Act. We will publish a report analyzing the success of CARES Act releases and build support for the expansion of this program among key congressional members, administration officials, and the public. We will continue working with bipartisan criminal justice reform coalitions to engage elected officials and administration stakeholders on the legal and public policy imperative for allowing CARES Act home confinement recipients to remain at home.

If those efforts fail, the ACLU is prepared to file a lawsuit on behalf of all people currently on home confinement pursuant to the CARES Act, challenging any potentially unlawful decision by the Trump administration to reincarcerate individuals on home confinement.

Mass home confinement revocations are contrary to the CARES Act. Under 18 U.S.C. § 3624(c)(2), Congress intended for early placement on home confinement to last for the remainder of an individual's sentence. Requiring people on home confinement to return to prison would destroy their progress towards reintegration, separating them from the jobs, housing, relationships, and family responsibilities they have acquired.<sup>51</sup>

Mass home confinement revocations would violate the Fifth Amendment Due Process Clause. The Supreme Court has made clear that a person conditionally released from prison lives a life far different than one who remains incarcerated,<sup>52</sup> and those released rely on an "implicit promise" that they will remain free as long as they comply with their conditions of release.<sup>53</sup> They are therefore entitled to basic procedural protections before the government can remove them from the program.

The CARES Act is a critical measure, reducing mass incarceration by providing people an opportunity to reintegrate into their communities, and the ACLU is ready to use litigation and advocacy to challenge any attempts at mass revocation from another Trump administration.

### **First Step Act**

In 2018, the ACLU helped secure the bipartisan First Step Act, which then-President Trump signed into law.<sup>54</sup> The First Step Act was significant legislation intended to

improve federal prison conditions, reform overly harsh federal sentencing provisions, and provide increased programming and re-entry transition services to people incarcerated in federal prisons.

Despite the promise of the Act, Trump's record on the First Step Act is mixed and many of its key reforms were undermined by Trump's own administration. The risk assessment tool known as PATTERN, which was developed as part of the Act, was flawed and racially biased, overcalculating the risk for Black, Hispanic, and Asian individuals to be released.<sup>55</sup> In response to the concerns raised by the ACLU and other reform advocates, Trump's DOJ announced purported changes to the risk assessment tool in 2020; however, the changes actually made it harder for individuals to qualify as "low risk" and be released during the COVID-19 pandemic.<sup>56</sup> The Trump administration also drastically underfunded the educational and vocational programs necessary for reducing sentences, initially allocating only \$14 million of the \$75 million required annually for these programs, impeding peoples' ability to reduce their sentences by completing necessary programming.<sup>57</sup>

While the First Step Act did see some success — 3,100 people were released based on "good conduct time" and 2,300 received retroactive sentence reductions in its first year,<sup>58</sup> — a second Trump term poses the risk of undermining these reforms.

### *Our Response*

Under any administration, the ACLU will strive to preserve criminal justice reforms, implement legislative victories, and advocate for policies to end mass incarceration. In a second Trump term, the ACLU will advocate for full implementation of the First Step Act's rehabilitative and re-entry programming.<sup>59</sup> We will also endeavor to mobilize Trump allies — like his son-in-law Jared Kushner — to marshal support for full implementation of the Act.

The ACLU will also advocate for solutions to problems with the First Step Act's implementation, such as the flawed risk assessment tool, PATTERN, which has been criticized for racial bias and perpetuating systemic issues, ultimately making it more difficult for people incarcerated to fully benefit from the Act.<sup>60</sup> For example, as reported, it is "mathematically impossible for men under the age of 26 to qualify as 'minimum' risk" — the lowest possible risk category.<sup>61</sup> Specifically, we will advocate for adjustments to the definition of "recidivism,"<sup>62</sup> and to expand considerations for individuals to qualify as minimum or low risk by adjusting the relative weight of various inputs.

Given the fact that Trump advocated for and signed the First Step Act, if his second administration is open to further reforms toward the same goals, the ACLU will work with the administration and Congress to expand

the First Step Act's sentencing provisions retroactively, particularly for those affected by racially disparate drug policies. Ultimately, the First Step Act was just that — a *first step* towards meaningful, necessary changes to our criminal legal system, and the ACLU will push Congress to reject any threats to the progress this bill has made and build on its successes through robust and necessary funding.

## Death Penalty

Buried deep in the Heritage Foundation's "Mandate for Leadership" is a single paragraph that forewarns the future of capital punishment under a new Trump regime: He will seek to expand the categories of crimes punishable by death, sentence more people to die, and then kill every person on federal death row.<sup>63</sup>

**BRING BACK THE DEATH PENALTY. BRING BACK OUR POLICE!**

What has happened to our City over the past ten years? What has happened to law and order, to the neighborhood cop we all trusted to safeguard our homes and families, the cop who had the power under the law to help us in times of danger. Keep us safe from those who would prey on innocent lives to fulfill some distorted inner need. What has happened to the respect for authority, the fear of retribution by the courts, society and the police for those who break the law, who wantonly respect on the rights of others? What has happened to the complete breakdown of life as we knew it.

Many New York families — White, Black, Hispanic and Asian — have had to give up the pleasure of a leisurely stroll into the Park at dusk, the Saturday visit to the playground with their families, the bike ride at dawn, or just sitting on their stoops — given them up as hostages to a world ruled by the law of the streets, as roving hands of wild criminals roam our neighborhoods, dispensing their own vicious brand of twisted hatred on whomever they encounter. At what point did we cross the line from the fine and noble pursuit of genuine civil liberties to the reckless and dangerously permissive atmosphere which allows criminals of every age to beat and rape a helpless woman and then laugh at her family's anguish? And why do they laugh? They laugh because they know that soon, very soon, they will be returned to the streets to rape and maim and kill once again — and yet face no great personal risk to themselves.

Major Koch has stated that hate and rancor should be removed from our hearts. I do not think so. I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed for their crimes. They must serve as examples so that others will think long and hard before committing a crime or an act of violence. Yes, Mayor Koch, I want to hate these murderers and I always will. I am not looking to psychoanalyze or understand them, I am looking to punish them. If the punishment is strong, the attacks on innocent people will stop. I recently watched a newscast trying to explain the "anger in these young men". I no longer want to understand their anger. I want them to understand our anger. I want them to be afraid.

How can our great society tolerate the continued brutalization of its citizens by crazed misfits? Criminals must be told that their **CIVIL LIBERTIES END WHEN AN ATTACK ON OUR SAFETY BEGINS!**

When I was young, I sat in a diner with my father and witnessed two young bullies cursing and threatening a very frightened waitress. Two cops rushed in, lifted up the thugs and threw them out the door, warning them never to cause trouble again. I miss the feeling of security New York's finest once gave to the citizens of this City.

Let our politicians give back our police department's power to keep us safe. Unshackle them from the constant chant of "police brutality" which every petty criminal hurls immediately at an officer who has just risked his or her life to save another's. We must cease our continuous pandering to the criminal population of this City. Give New York back to the citizens who have earned the right to be New Yorkers. Send a message loud and clear to those who would murder our citizens and terrorize New York — **BRING BACK THE DEATH PENALTY AND BRING BACK OUR POLICE!**

*Donald J. Trump*  
Donald J. Trump

1989, J. Amy Henson, SUNSHINE NEWS

Figure 1. Trump's Personal \$85,000 Central Park Five Advertisement, 1989.

Guided by the long-debunked myth<sup>64</sup> that capital punishment deters crime,<sup>65</sup> and with no regard for decades of Supreme Court precedent,<sup>66</sup> Trump seeks to expand the range of crimes that are punishable by death. He has

reportedly called for the death penalty as punishment for treason for those who leak information against him in the press<sup>67</sup> or undermine him politically.<sup>68</sup> He will attempt to expand the death penalty to non-homicide crimes, such as drug sale,<sup>69</sup> human trafficking,<sup>70</sup> and child rape,<sup>71</sup> a move the Supreme Court found to be unconstitutionally cruel and unusual punishment in *Kennedy v. Louisiana*, 554 U.S. 407 (2008). As the ACLU argued in our amicus brief in *Kennedy*, our country almost exclusively reserved its executions for non-homicide crimes for people of color, most frequently for cases with white victims.<sup>72</sup> Trump's insistence on actively pursuing death in non-homicide crimes threatens to drive extreme sentencing across the board, making every sentence less than death (falsely) seem comparatively lenient.

As for manner of execution, Trump has "privately mused" on bringing back firing squads,<sup>73</sup> the guillotine, and hangings by noose<sup>74</sup> — a symbol and tool of our country's sordid legacy of lynching and racial terror.

Trump's embrace of capital punishment is longstanding. In the 1980s, as a private citizen, he paid \$85,000 from his own funds to publish a page-wide advertisement calling for the execution of five Black and Latine boys wrongfully accused as the "Central Park Five."<sup>75</sup> Even before his first presidential run, he repeatedly called for death in highprofile cases via his private Twitter account.<sup>76</sup> As Trump has shown, again and again, when given the chance to use the death penalty, he will.

We know Trump's threat is real, because it is the continuation of his unprecedented killing spree in his final six months in office.<sup>77</sup> Even amid the chaos of his attempts to overturn the 2020 election and his supporters' raid of the Capitol, Trump continued to rush executions, ultimately executing 13 people on federal death row. Trump executed two Black men for crimes they committed as teenagers.<sup>78</sup> He executed a woman with mental illness who had survived a lifetime of horrific sexual abuse and torture.<sup>79</sup> He executed a man with intellectual disabilities and a 67-year-old man whose Alzheimer's disease left him unaware of the reason he was sentenced to die.<sup>80</sup> Ultimately, a majority of those executed during Trump's killing spree were people of color, including seven Black men and one Native American man.<sup>81</sup> These executions put clear disregard for the Constitution on full display.

Trump was able to execute these people so swiftly because of the Supreme Court's complicity. With its three Trump appointees, the court cast aside lower-court rulings — often in the dead of night — that called for review of critical, life-saving legal claims.<sup>82</sup>

During Trump's killing spree, the ACLU defended the rights of a medically vulnerable priest who sought, after an 11-year relationship with Wesley Purkey, to witness

and minister to Mr. Purkey at his July 2020 execution, but feared COVID exposure and illness.<sup>83</sup> We secured improved death watch conditions for the last days of Lisa Montgomery; after enduring a history of horrific sexual abuse, Montgomery was subjected to 24/7 monitoring by male prison guards (even when using the toilet) preceding her execution. The ACLU's lawsuit put a stop to this demeaning practice and allowed her a measure of dignity in her final days.<sup>84</sup>

Finally, taking a page from the lessons of Justice Thurgood Marshall, who famously stated that the American people only support the death penalty because they do not understand what it entails,<sup>85</sup> the ACLU has previously sought to expose the federal death penalty's fatal flaws and inherent racism. We successfully fought in court for the release of federal records revealing some of the costs of the federal executions — both dollars and human lives. The disclosures revealed the inadequacies of the federal government's COVID-19 contact tracing and testing during executions, and how this recklessness resulted in severe illness and death.<sup>86</sup> The ACLU played a central role in communicating other injustices of the execution spree, including its inherent racism, and the use of executions against people with mental illness, intellectual disabilities, and those that have endured great trauma.<sup>87</sup> And we showed the continuing trauma that executions cause throughout low-income and marginalized communities.

The ACLU's execution lawsuits and public education efforts brought immense value to the fight against unlawful executions, and we will double down on these efforts should Trump attempt to repeat these actions.

## Our Response

### **The ACLU stands ready as ever to fight Trump's dangerous and illegal attempt to expand the federal death penalty.**

#### *Legal Analysis & Litigation*

If Trump is elected and attempts to expand the use of the death penalty, the ACLU will challenge his unconstitutional and unlawful plans in court. Many of Trump's announced plans would flout the Eighth Amendment's bar on cruel and unusual punishment.<sup>88</sup>

Trump's proposal to expand the application of the death penalty to non-homicide crimes like drug trafficking or child rape would be barred under nearly 50 years of settled Eighth Amendment jurisprudence.<sup>89</sup> Expansion of the death penalty to non-homicide cases is just as disproportionate of a punishment today as it was in 1977 when the Supreme Court rejected it,<sup>90</sup> and just as likely to result in racially discriminatory application. The ACLU will challenge any effort by Trump to bring back this unlawful punishment.

The ACLU will also ensure that any effort by Trump to carry out another execution spree is met with intense scrutiny and opposition. While the lawyers appointed to represent the condemned will focus their efforts on the legal claims specific to their individual clients, the ACLU is prepared to uncover and litigate systemic challenges to Trump's plans.

The ACLU will challenge any future effort by Trump to bring back torturous methods of execution.<sup>91</sup> Every federal execution since Congress authorized executions in 1988 has been carried out by lethal injection. All of the executions under Trump were carried out under a new protocol addendum adopted during his administration. This protocol called for a drug that was shown to inflict excruciatingly painful flash pulmonary edema during the federal executions.<sup>92</sup> Recognizing the likelihood that these executions violated the federal government's obligation to avoid extreme pain and suffering, Attorney General Garland ordered the federal protocol suspended and a placed moratorium on executions while the Office of Legal Policy conducted a full review.<sup>93</sup>

Perhaps in recognition of the problems with lethal injection during his administration, Trump has called for the use of hanging and guillotine as alternative methods.<sup>94</sup> A number of states have introduced or proposed other torturous methods such as lethal gas, the electric chair, and the firing squad.<sup>95</sup> We stand ready to fight back against any unnecessarily cruel new execution methods by invoking twin lines of Eighth Amendment jurisprudence that forbid specific applications that have fallen so out of the norm that only a few jurisdictions retain them,<sup>96</sup> or that involve terror, pain, or disgrace in excess of what is necessary.<sup>97</sup>

#### *Federal & State Level*

Equally true of Trump's other attempts to shred the Constitution, congressional oversight remains important with the federal death penalty. Drawing on our technical expertise, the ACLU will push for such oversight to ensure transparency in the execution process, including with respect to the lethal-injection drugs used (which frequently come from unregulated compounding pharmacies).

While Trump would have no authority over the dwindling number of states that retain the death penalty, his influence from the bully pulpit cannot be ignored. The ACLU will double down on our ongoing work against the death penalty in the states. We will continue our litigation efforts that put the death penalty "on trial" in the states by leveraging state laws that are more protective than the U.S. Constitution — like state Racial Justice Acts and constitutions — to invalidate the death penalty based on its racist administration, including in the selection of juries.<sup>98</sup>

The ACLU's legislative and other advocacy efforts to abolish the death penalty in the states will continue. In close partnership with our affiliates, we will continue our work to pass legislation abolishing the death penalty, restricting its use, and preventing efforts to either expand offenses eligible for the death penalty or permissible execution methods. Through our advocacy and litigation in recent years, multiple states have abolished the death penalty, imposed a moratorium, or condemned the punishment due to its inherent links with our nation's history of racism and lynching. This includes states

as varied as Virginia,<sup>99</sup> California,<sup>100</sup> Connecticut,<sup>101</sup> and Washington.<sup>102</sup> As the number of states willing to abandon this failed government experiment continues to grow, the movement will expose the Trump administration's attempt to revive the federal death penalty as an immoral break from our evolving standards of decency.

Ultimately, all of these efforts aim to repeal both the federal death penalty and its imposition in every state jurisdiction.

## CONCLUSION

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While criminal legal policy is primarily a state and local issue, an undeniable lesson of the era of mass incarceration is that the federal government plays a pivotal role in setting the tone. A new Trump administration threatens to drown out millions of voices across the country demanding investments in their communities that address the root causes of crime. Trump instead promises a return to the tough-on-crime, failed politics of mass incarceration.

The ACLU will defend against Trump's efforts to bring in a new wave of mass incarceration, including by fighting against his attempts to encourage police abuses, grow

our federal prison population – going so far as to reincarcerate people in home confinement – and expand the federal death penalty. We will advocate for congressional oversight to prevent potential harms threatened by Trump. And we will take a Trump administration to court if necessary to protect our civil liberties.

While we defend the hard-won reforms from the last few years to improve the system, we will also continue our long-term fight to end the country's carceral epidemic and advocate for our long-term vision of public safety.

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- 92 *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 131 (D.C. Cir. Nov. 18, 2020) (death row prisoners presented “evidence of pulmonary flash edema, causes “respiratory distress and ‘sensations of drowning and asphyxiation,’ which in turn induce ‘extreme pain, terror and panic’ comparable to death by drowning”)(quoting expert testimony in the factual record).
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