

# Year One of the Biden Administration: A LGBTQ+ Progress Report

## Executive Summary

- The Biden administration took decisive action on a number of issues of tremendous importance to the LGBTQ+ community, including clarification of the scope of sex discrimination protections in federal law and the renunciation of the ban on open service by transgender people currently in the military, and those wishing to serve. The significance of these actions cannot be overstated.
- And yet, significant work remains to be done, particularly in areas affecting some of the most vulnerable members of the LGBTQ+ community. For example, the Biden administration must take more decisive action to ensure that all programs funded by federal dollars are operated in a nondiscriminatory manner even when services are provided by third parties, including religiously affiliated entities. And the federal government must end discrimination in its own programs and policies, ranging from barriers to transition-related health care in federally-run health care programs to its outdated and discriminatory blood donation policy, which limits the ability of many gay, bisexual, and transgender people to donate.
- With respect to restoring the integrity of our federal judiciary, the Biden administration still has a long way to go in addressing the gross underrepresentation of LGBTQ+ people on the federal bench. The administration must nominate more openly LGBTQ+ people, and particularly LGBTQ+ people of color, for judicial vacancies, focusing on the five circuits—D.C., First, Fourth, Eighth, and Tenth—that do not have a single openly LGBTQ+ judge on the bench of either the circuit court or the district courts in its jurisdiction. The administration must also nominate the country's first transgender or nonbinary judge and the first openly bisexual judge in order to ensure the judiciary reflects the society it serves.

# Year One of the Biden Administration

As we mark one year into the Biden administration, Lambda Legal reviews the progress made (or not) on our **ten asks** from a year ago to rectify the harms done by the Trump administration and to address the ongoing inequities experienced by LGBTQ+ people and people living with HIV.

## **Repair the Damage to Our Courts**

The Trump administration damaged the integrity of our federal judiciary by packing it with right-wing extremists who oppose LGBTQ+ rights, reproductive rights, and civil rights more broadly. We called on the Biden administration to make the restoration of fairness and impartiality to the courts one of its highest priorities.

### **WHAT THE ADMINISTRATION ACCOMPLISHED**

- The administration has worked with Senate Majority Leader Chuck Schumer to confirm more judges in its first year than any president since Ronald Reagan; a record-tying 40 lifetime appointments to the federal bench. Of these 40 judges confirmed, 32 are women; 27 are people of color; 21 are women of color; 27 add professional diversity, including 15 former public defenders; and one is the first openly gay or lesbian circuit court judge in the country.

### **WHAT MORE WE NEED**

- The administration must nominate more openly LGBTQ+ people, and particularly LGBTQ+ people of color, for judicial vacancies, focusing on the five circuits—D.C., First, Fourth, Eighth, and Tenth—that do not have a single

openly LGBTQ+ judge on the bench of either the circuit court or the district courts in its jurisdiction.

- Specifically, the administration should nominate the country's first transgender or nonbinary judge and the first openly bisexual judge. To be legitimate, the judiciary should reflect the society it serves.



## **Protect Marriage Equality from Assault**

With the new majority on the Supreme Court created by Trump and increasingly hostile lower court appointments, we have every reason to believe our opponents will seek to undermine marriage equality for same-sex couples. Now more than ever, we need a robust ally in the White House who will vigorously defend and fully implement marriage equality, including things like the right of LGBTQ+ widows and widowers to access Social Security survivor's benefits. The Biden administration must ensure that marriages between same-sex couples are respected and that LGBTQ+ families are treated like all other families.

### **WHAT THE ADMINISTRATION ACCOMPLISHED**

- Lambda Legal won victories that allow the surviving members of same-sex couples who

were barred from marriage in the past to access a key protection of marriage: Social Security survivor's benefits. The administration chose the right side of history in standing down from appeals of these victories, which **unlock millions of dollars in benefits** and give a piece of dignity to thousands.

### **WHAT MORE WE NEED**

- The vestiges of marriage discrimination still live on, and they have yet to be fully remedied. From survivor pension benefits to veterans' benefits, there are still ongoing inequalities that persist today because same-sex couples were barred from marriage in the past. We need to see a deeper commitment and proactive engagement throughout the federal government (including agencies like the IRS) to address these lingering inequities.



## **Stop the Granting of "Licenses to Discriminate"**

At every turn, the Trump administration granted licenses to discriminate to health care providers, social service agencies, and private businesses, but we know that religious freedom does not include the freedom to harm people because of those beliefs. The Biden administration must reassert protections for LGBTQ+ people when we are at our most vulnerable; in hospitals, homeless shelters, nursing homes, and foster care, and end the effort to grant a "license to discriminate" in the name of religion.

### **WHAT THE ADMINISTRATION ACCOMPLISHED**

- The administration's Department of Health and Human Services (HHS) withdrew **broad exemptions from nondiscrimination requirements** in federally-funded child welfare

programs granted by the Trump administration, based on the religious objections of child welfare agencies that did not want to have to work with same-sex couples. Lambda Legal is still **working to undo** some of the harms caused by these waivers.

### **WHAT MORE WE NEED**

- The administration must be a champion for robust nondiscrimination protections, including passing the **Equality Act**.

- The Biden administration must begin enforcing robust nondiscrimination requirements for HHS-funded programs, which provide health

and welfare services to millions of vulnerable people across the country. Lambda Legal filed suit to challenge **HHS's nonenforcement** of the Obama-era rule and to **stop the Trump grants rule** from going into effect. Every day that HHS fails to either enforce the previous rule or establish new protections, vulnerable LGBTQ+ youth, seniors, people living with HIV, and others who rely on grant-funded programs may face

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- The Biden administration must end discrimination against LGBTQ+ prospective foster parents in federal foster care programs for immigrant children. Rather than ending this discrimination, HHS has facilitated it, **authorizing the segregation of LGBTQ+ would-be foster parents** and sending them to alternative providers, regardless of the harm this causes to both the adults and the refugee children, who deserve the chance to be considered for placement in all homes that would best serve their individualized needs. It is well past time for HHS to stop enabling discrimination against LGBTQ+ people by agencies receiving federal tax dollars to carry

out functions on behalf of the government.

- The Biden administration must eliminate the so-called “Conscience and Religious Freedom Division” at HHS and issue new regulations that safeguard the ability of LGBTQ+ people and people seeking reproductive health care to access the life-saving care that they need.
- The Biden administration must revisit Trump-era rules lifting basic protections put in place by the Obama administration for people receiving federally funded social services from religious organizations. To protect the religious and other interests of people receiving services, those protections included requirements that the agencies post notices advising people receiving services that they are protected against discrimination and may request a referral to an alternate provider if they are

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uncomfortable receiving services in that religious setting. Lambda Legal and our partners **sued** the Trump administration to block those rules and the litigation is ongoing.

- In the final days of the Trump administration, the Department of Labor announced it was changing the rules that limit the freedom of companies receiving federal contracts to discriminate based on religion against their employees. The new Trump rules took effect in January 2021, and allowed nearly all such contractors to claim religious rights to discriminate, even large, for-profit companies with no evident religious aspects to the goods or services they wish to sell to the federal government. This type of contracting rule, which makes equal workplace opportunity a condition of receiving taxpayer-funded contracts, has

been critical to efforts to reduce many kinds of discrimination against workers, including discrimination against LGBTQ+ people. The Biden administration has proposed rescinding the Trump rules but has not yet done so.

- The Trump administration repeatedly relied on a distorted, legally mistaken interpretation of the Religious Freedom Restoration Act to justify many policies designed to facilitate special religious exemptions from rules that usually apply equally to everyone to protect others against many types of harm, including the harms of discrimination. The Biden administration should issue formal legal guidance correcting the prior opinions so that federal agencies and the general public have appropriate directions about the protections and limits of religious freedom under federal law.



## Reverse Racist Executive Orders

The Trump administration called efforts to train medical and other personnel on the pernicious effects of systemic racism “un-American” and issued an executive order banning the use of federal funds for such training. The Biden administration must reverse and repudiate this order and the many other racist directives and policies of outgoing President Trump, such as the Muslim travel ban and other attacks on Black and brown communities.

### WHAT THE ADMINISTRATION ACCOMPLISHED

- In September 2020, then-President Trump issued an Executive Order prohibiting Federal contractors and grantees from instituting diversity training programs that discuss implicit bias or other such “divisive concepts.” Understanding that there cannot be any LGBTQ+ equality without race equity, Lambda Legal obtained the only nationwide injunction prohibiting enforcement of this racist executive order. On January 20, 2021, as one of his first acts in office, President Biden rescinded

Trump's racist executive order and **replaced** it with a new one, the *Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.

- Also, on January 20, 2021, President Biden **revoked** then-President Trump's Muslim Ban Executive Order, referring to it as a "stain on our national conscience," and "inconsistent with our long history of welcoming people of all faiths and no faith at all." Lambda Legal participated in multiple challenges to the Muslim Ban, because the LGBTQ+ community knows all too well that official government discrimination against a persecuted group contributes to irrational prejudice and violence.

- On January 25, 2021, President Biden issued an **Executive Order** on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.

### **WHAT MORE WE NEED**

- The Biden administration must do all it can to encourage the Senate to pass the NO BAN Act, which would prohibit discrimination on the basis of religion in numerous immigration-related decisions.



## **End the Trans Military Ban**

As commander-in-chief of the military, one of the world's largest employers, President Biden must end the ban on open service by transgender people and ensure that Pentagon leadership understands that our patriotic transgender service members have a right to serve their country openly, as who they are, and free from discrimination.

### **WHAT THE ADMINISTRATION ACCOMPLISHED**

- President Biden **rescinded** the Trans Military Ban on January 25, 2021 with an **Executive Order**. This action, taken in coordination with Secretary of Defense Lloyd Austin, ended the

years-long nightmare for the thousands of brave transgender people who were already serving or who wish to serve our country.

### **WHAT MORE WE NEED**

- The Biden administration should **champion legislation** prohibiting discrimination in the Armed Forces that would prohibit future administrations from reimposing a ban on open service.



## **Stop Attacks on Trans Kids**

School is tough enough without bullying from the federal government. The Biden administration must get the Department of Education back in the business of protecting the educational opportunities of all students, and in particular, should end its relentless assault on the ability of transgender students to be their authentic selves and to have equal opportunity.

### **WHAT THE ADMINISTRATION ACCOMPLISHED**

- Consistent with the Supreme Court's ruling and analysis in *Bostock v. Clayton County*, the Department of Education published a **notice of interpretation** to clarify that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. In addition, the Departments of Justice and Education issued a resource for students and families entitled "**Confronting Anti-LGBTQI+ Harassment in Schools.**" The notice of interpretation and fact sheet are currently the subject of ongoing **litigation**.

- The Department of Education held public hearings regarding Title IX in June 2021 and invited students, educators, and members of the public to provide comments on steps the agency can take to address discrimination based on sexual orientation and gender identity in educational environments.

- The Department of Education's Office for Civil Rights updated its website to provide

resources for LGBTQI+ students and provided information about how schools can support transgender students.

- In August 2021, the Departments of Justice, Education, and Health and Human Services issued a “Federal Government Back-to-School Address for Transgender Students.”
- The Department of Justice filed statements of interests or briefs in cases challenging laws or policies discriminating against trans youth in schools, including in Lambda Legal’s challenges to West Virginia’s ban on sports participation by trans youth and a Florida school district’s discriminatory restroom policy.

### WHAT MORE WE NEED

- President Biden needs to speak out forcibly, and often, in staunch defense of trans and gender nonconforming youth. This administration should use all tools available, including the bully pulpit, to stem the tide of anti-trans laws.

*The Biden administration’s Department of Health and Human Services should be fighting for quality health care, free from discrimination or harassment.*

- The Department of Education is scheduled to issue proposed nondiscrimination Title IX rulemaking in April 2022. Proposed rules should revoke the 2020 Title IX final regulations on sexual harassment and sexual assault on college campuses and propose regulations expressly clarifying Title IX’s prohibition on sex discrimination protects transgender and gender nonconforming students in educational programs and activities.
- Additionally, the proposed rules should add a new regulation clarifying that Title IX prohibits discrimination on the basis of sex in the application of any rules of appearance; that

dress and grooming codes shall not be written or enforced in a manner that disproportionately impacts LGBTQI+ students; and that dress and grooming codes shall not be written or enforced based on gender stereotypes.

- With respect to school-based policing, the Department of Education should gather examples of quality, effective training for school-based police on child development, implicit bias, and reducing the disparate impact of school policing on: youth of color, youth with disabilities, LGBTQI+ and GNC children and youth, and children and youth at the intersection of those identities.



### Defend Our Health (Care)

Every American needs access to affordable, quality health care. And the COVID-19 global pandemic has exposed how barriers to health care can put vulnerable communities at great risk. The Trump administration was relentless in its efforts to undermine the Affordable Care Act and to restrict the ability of many—including LGBTQ+ people and people living with HIV—to access care, regardless of who they are. The Biden administration’s Department of Justice should stop trying to undermine health care in our courts, and its Department of Health and Human Services should be fighting for quality health care, free from discrimination or harassment.

### WHAT THE ADMINISTRATION ACCOMPLISHED

- The Biden administration appointed Rachel Levine, the highest-ranking and first Senate-confirmed openly transgender U.S. government official in U.S. history, to the post of Assistant Secretary for Health.
- HHS announced that, consistent with the Supreme Court’s decision in *Bostock*, it would interpret the health care nondiscrimination law, enacted as Section 1557 of the Affordable Care

Act, to prohibit discrimination on the basis of sexual orientation or gender identity in health care programs that received federal funding.

- The Biden administration issued proposed **rules** that prohibit qualified health insurance plans sold in the health exchanges set up under the Affordable Care Act from discriminating based on sexual orientation or gender identity, or from adopting designs that exclude coverage of gender-affirming health care for transgender people.

- President Biden issued an **Executive Order** on Strengthening Medicaid and the Affordable Care Act, which orders HHS and other federal agencies to examine policies or practices that may present unnecessary barriers to individuals and families attempting to access Medicaid or ACA coverage.

- President Biden also issued an **Executive Order** on Ensuring an Equitable Pandemic Response and Recovery, which establishes a COVID-19 Health Equity Task Force to develop recommendations for mitigating the health inequities caused by the COVID-19 pandemic and for preventing future inequities.

- President Biden **revoked** Executive Order 13828, which created barriers for low-income people to access federal benefit assistance including Medicaid and SNAP (Supplemental Nutrition Assistance Program).

- The Biden administration's Department of Justice filed a statement of interest in a case challenging Arkansas's dangerous and discriminatory ban on the provision of medically necessary gender-affirming health care to transgender minors suffering from gender dysphoria.

- The Biden administration supported access

to abortion by **suing** Texas to strike down its unconstitutional abortion ban; **defending** the right to access abortion in *Dobbs v. Jackson Women's Health Organization*, **calling for** passage of a federal law that would protect access to abortion; and **removing** the in-person requirement for dispensing mifepristone.

### **WHAT MORE WE NEED**

- In 2020, amid the COVID-19 pandemic, the Trump administration finalized a rule eliminating protections for LGBTQ+ people and people with limited English proficiency, among others, under the health care nondiscrimination law, enacted as Section 1557 of the Affordable Care

Act. Lambda Legal **successfully stopped** some parts of the Trump health care rule from taking effect. However, other parts remain in effect and the administration must issue new regulations reversing the Trump health care rule without delay.

- As previously stated, HHS must rescind the notice of nonenforcement of the 2016 rule prohibiting discrimination by recipients of HHS funding, and it has not replaced the 2021 rulemaking. The administration must move quickly to clarify that grant

recipients are prohibited from using federal funds to discriminate against LGBTQ+ people in need of those services.

- We need the federal government to eliminate all discriminatory barriers to transition-related health care in the systems that it operates, including the VA health system, the federal employee health benefits program (FEHB), and TRICARE, the military health system. For example, in June of 2021, VA Secretary McDonough **announced** a process to remove the bar on surgical gender-affirming care

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for transgender veterans. There has been no movement and advocates are **pushing** for action. The VA expects to move forward with rulemaking in **July 2022**. It is important for the VA to implement this policy as soon as possible to ensure that transgender veterans can obtain the care they are currently being denied and to create sufficient infrastructure to withstand future partisan attacks. Across all of its programs, the federal government should operate at the gold standard, and use its position as a key provider of health care and insurance coverage to raise the bar for the health care industry as a whole.



## Stop the Separation of Families

The Trump administration showed total disregard for family ties when it did not approve of the families involved—such as immigrant families and those headed by LGBTQ+ people—and used the power of the government to separate and undermine such families. The Biden administration must respect—not target and persecute—all families by immediately reuniting families separated at the border, by creating a pathway to citizenship that allows families to stay together, and by ensuring that LGBTQ+ families are treated the same in the eyes of the law as all others.

### WHAT THE ADMINISTRATION ACCOMPLISHED

- Lambda Legal and Immigration Equality won **victories** declaring as unlawful the U.S. Department of State's policy of treating the marital children born abroad to U.S. same-sex couples as "born out of wedlock" because they were not biologically related to both parents and therefore ineligible for recognition as U.S. citizens at birth. The administration ended this unlawful policy in May 2021. With the policy change, children born abroad to married parents, at least one of whom is a U.S. citizen, are citizens at birth if they have a biological

relationship to any one of their parents.

- The Biden administration rescinded the Trump "Zero Tolerance" policy of separating immigrant and asylum-seeking families and **established** a task force to reunite separated families.

### WHAT MORE WE NEED

- The families separated by the Trump administration's "Zero Tolerance" policy are entitled to damages. The Department of Justice should **cease arguing** that the government does not owe these traumatized families compensation for the harms inflicted upon them.



## End HIV Discrimination in the Military

President Biden must direct the Pentagon to end its discrimination against our patriotic service members living with HIV and ensure that our military's policies are informed by science and not outdated and stigmatizing views about who can serve our country safely, with honor and distinction.

### WHAT THE ADMINISTRATION ACCOMPLISHED

- President Biden appointed a number of strong leaders in the spaces of HIV-related medicine and policy including Harold Philips, Director of The White House Office of National AIDS Policy, to the administration. These expert advisors to the President know that major scientific and medical advances have transformed HIV into a chronic, manageable condition that presents essentially no risk to the health or safety of other service members.

### WHAT MORE WE NEED

- The Biden administration needs to address, with an inclusive policy based on health metrics, the Department of Defense Instructions that prohibit the **enlistment** or **commissioning** as officers and exclude service members who are diagnosed with HIV in the course of their

military careers from **deployment** opportunities, which, in turn, impacts eligibility to maintain a career in the military.

- President Biden must rescind the discriminatory restrictions on the military service of people living with HIV by permitting them to enlist or commission in any branch of the U.S. Armed Services. Both **President Biden** and **Vice President Harris** committed to eliminating this type of discrimination within the military.



## Provide Safe Harbor for LGBTQ+ Refugees

LGBTQ+ people from around the world come to the United States, sometimes literally running for their lives. But the Trump administration tarnished our reputation as a safe harbor by making it virtually impossible for people to seek refuge in the United States and enacted historically low ceilings on the number of refugees that can be admitted. The Biden administration must reestablish asylum rules to ensure those seeking safety from persecution because of their sexual orientation, gender identity, or HIV status can find refuge in the United States.

### WHAT THE ADMINISTRATION ACCOMPLISHED

- In January 2021, just before the Biden administration took office, Lambda Legal won a nationwide injunction **stopping** the Trump administration's "Death-to-Asylum" rule from taking effect. The "Death-to-Asylum" rule would have made it virtually impossible for LGBTQ+ people and people living with HIV

fleeing persecution to secure asylum in the United States, as well as eliminated eligibility for asylum to anyone with a gender-based claim. Since then, the administration proposed a rule reversing some aspects of the rule in Fall 2021 and announced plans to issue a proposed rule addressing the remainder of the "Death-to-Asylum" rule in 2022.

### WHAT MORE WE NEED

- The Biden administration must issue new regulations to fully reverse the "Death-to-Asylum" rule and improve the ability of refugees, including those who are LGBTQ+ or living with HIV, to seek asylum within our borders.
- The administration needs to end the "Remain in Mexico" Policy and stop deporting immigrants who are otherwise entitled to asylum or other forms of relief.
- The administration must release **people living with HIV** and all **transgender and gender nonconforming people** currently held in detention because the government has proven it cannot guarantee their safety.
- The administration must **release** from custody or detention people with underlying health conditions that make them susceptible to COVID-19. As the COVID-19 global pandemic continues, prisons, jails, and detention facilities are dangerous centers for the spread of the deadly virus.
- There must be accountability when federal immigration officers and their agents engage in dangerous, dehumanizing, and often blatantly racist behavior, whether targeting LGBTQ immigrants in custody or Haitian refugees fleeing disaster.

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## YEAR TWO

**A new year brings new concerns and goals. Therefore, in addition to the above, Lambda Legal calls upon the Biden administration to prioritize these five critical issues in Year Two.**



### Protect Voting Rights

Voter suppression tactics used in hostile states silence the most vulnerable members of the LGBTQ+ community, minimizing our **political power** and ability to inform conversations around policies that directly affect us. President Biden must convince Congress to pass the For the People Act, the John Lewis Voting Rights Restoration Act, and the Washington, D.C. Admission Act to ensure the integrity of our democracy, restore the efficacy of the Voting Rights Act, and enfranchise D.C. citizens, ten percent (10%) of whom identify as LGBTQ+. ■



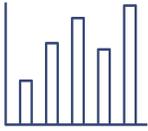
### Protect Black Trans Women

Hate crimes continue to rise and each subsequent year is the deadliest year on record for transgender people. The vast majority of transgender victims are Black and brown transgender women. To help ensure their safety, the Biden administration needs to champion legislation that works to decriminalize sex work; push Congress to repeal SESTA and FOSTA; invest in research showing the harms inflicted on transgender women of color as a result of criminalizing sex work; appoint Department of Justice leadership who will investigate the **epidemic of violence against Black trans people** and take guidance and direction from local and state LGBTQ+ anti-violence groups on how to begin to address the epidemic; and **implement** the Khalid Jabara and Heather Heyer NO HATE Act, which was included in the COVID-19 Hate Crimes Act, by adopting a community-based approach that is inclusive of LGBTQ+ communities. ■



### Protect the Constitutional Rights of Trans People in Federal Custody

Being in federal custody does not mean one loses *all* of one's rights. The Biden administration must reverse the Trump administration's changes to the Federal Bureau of Prisons' Policy Manual regarding the housing of incarcerated trans people. Furthermore, it should establish policies and procedures ensuring that incarcerated trans people have access to gender-affirming health care, including surgical care, and establish policies and procedures that address names and pronouns, search protocols and housing determinations. And finally, the administration must ensure that the constitutional and statutory rights of LGBTQ+ people in federal custody are protected in re-entry programs. ■



## Collect Data on LGBTQ+ People and People Living with HIV

Systemic inequities in our society disproportionately impact LGBTQ+ people and people living with HIV in a myriad of ways, but the government does not have enough data on sexual orientation, gender identity, HIV status, and the intersection of other identities to adequately understand and address these inequities. The administration must collect additional data, provide analysis, and release to the public findings on HIV-related disparities in stigma, discrimination, new infections, knowledge of status, and more among marginalized segments of our society. Additionally, the administration should initiate new rulemaking to reinstate the **national collection of data** on tribal and LGBTQ+ foster youth and foster and adoptive parents and guardians; reinstate the collection of information about **trans older adults** in the National Survey of Older Americans; and develop best practices and technical assistance for schools for collecting sexual orientation, gender identity, and gender expression-related demographic information of youth in the child welfare and juvenile justice systems, and of youth experiencing homelessness or school arrests, and prioritize the safety and well-being of these youth, especially LGBTQ+ youth of color, in the data collection process. ■



## Update HIV Policies to Reflect Science and Reject Stigma

Although we welcomed the FDA's change in 2020 from a 12-month to a 3-month deferral for blood donations from men who have sex with men as a **step in the right direction**, the FDA can and should implement a policy that is based on a person's actual risk behaviors instead of their sexual orientation or gender identity. For years, Lambda Legal has urged the FDA to adopt an approach that looks to actual risk factors based on a person's sexual activity and safer sex practices rather than blanket approaches that disqualify gay men along with many trans people and others in our community who would welcome the opportunity to donate in light of our nation's blood shortage. ■

