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The Biden Administration's First Hundred Days: An LGBTQ Perspective

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THE BIDEN ADMINISTRATION'S FIRST HUNDRED DAYS: AN LGBTQ PERSPECTIVE

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On his first day in office, January 20, 2021, President Joseph Robinette Biden, Jr., returned to the White House after attending inauguration ceremonies and signed several executive orders that signaled some of the key priorities of his administration.

Executive Order 13985 of January 20, 2021, 86 Fed. Reg. 7009 (January 25, 2021), titled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," established a priority of ensuring that traditionally underserved communities receive the benefits of federal programs and services. Among those communities identified in the order as "underserved" were "lesbian, gay, bisexual, transgender, and queer (LGBQT+) persons." All Executive Branch Departments were directed to take steps to ensure that traditionally underserved communities, including the LGBTQ+ community, were able to benefits from services and benefits provided under federal law.

Also on his first day in office, President Biden signed Executive Order 13988 of January 20, 2021, 86 Fed. Reg. 7023 (January 25, 2021), titled "Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation," making clear that his administration would make preventing and remedying discrimination against LGBTQ+ people a priority, and would apply the Supreme Court's interpretation of "discrimination because of sex" articulated in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), to essentially all federal laws that prohibit sex discrimination, not just Title VII of the Civil Rights Act of 1964 (CRA). In *Bostock*, the Supreme Court ruled that Title VII's ban on discrimination "because of sex" necessarily extended to discrimination because of sexual orientation or gender identity, based on the Court's reading of the text without reference to legislative history or the expectations of the legislators who enacted the CRA. In addition to declaring policy, President Biden directed the Executive Branch departments to begin reviewing existing

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policies and rules and to take steps to make the necessary changes in line with policy announced in the Executive Order, setting a 100-day deadline for each agency to develop and plan to carry out the specified policies.

A few days later, the President ordered the Defense Department to end the policy of transgender exclusion from uniformed service that had been announced by President Donald John Trump in July 2017 in a series of Twitter messages, and subsequently concretized in a policy recommendation announced by Secretary of Defense James Mattis and put into effect on April 11, 2019, after the Supreme Court granted the government's motion to stay preliminary injunctions blocking implementation that had been issued by several federal district courts. In his Executive Order 14004 of January 25, 2021, 86 Fed. Reg. 7471 (January 28, 2021), titled "Enabling All Qualified Americans to Serve Their Country in Uniform," the President announced that "it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination." The President revoked President Trump's memorandum of March 23, 2018, which had authorized Secretary Mattis to implement the version of the transgender ban that he had recommended to the President the previous month, and directed the secretaries of Defense and Homeland Security to report back to the White House within 60 days on their progress toward reinstating the policies allowing transgender people to serve that had been adopted in 2016 by the Obama Administration.

On February 4, President Biden issued a Memorandum to the Heads of Executive Departments and Agencies titled "Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Queer, and Intersex Persons Around the World," revising the Obama Administration's mission for the United States to be a leading advocate globally for LGBT rights. The memorandum set forth a detailed agenda, most directly focused on the State Department but listing many other federal departments and agencies involved in international relations, and set a 100-day target to review and rescind any memoranda, directives, policy guidances or other documents issued during the Trump Administration that were inconsistent with this agenda. Later that day, Secretary of State Antony J. Blinken issued a Press Statement describing steps the State Department would take towards implementation of the President's policies.

The President issued two executive orders on March 8. In "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," Executive Order 14021 of March 8, 20201, 86 Fed. Reg. 13803 (March 11, 2021), the President reinforced the statement from Executive Order 13988 by charging the Education Department, in consultation with the Attorney General, to conform the Department's rules and policies to include combatting discrimination against students because of their sexual orientation or gender identity by, among other things, suspending rules and policies adopted by the Trump Administration which had opposed the *Bostock* decision's reasoning to interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. Sections 1681 – 1688, which prohibits discrimination

"on the basis of sex" by educational institutions that received federal funding. Also on March 8, the President signed Executive Order 14020 of March 8, 2021, 86 Fed. Reg. 13797 (March 11, 2021), establishing a White House Gender Policy Council, to "coordinate Federal Government efforts to advance gender equity and equality." The Order specifically states the administration's policy "to advance equal rights and opportunities, regardless of gender *or gender identity*, in advancing domestic and foreign policy," thus again reinforcing the holding in *Bostock* that policies prohibiting discrimination because of sex also prohibit discrimination because of gender identity.

Through this series of executive orders issued during the administration's first two months, President Biden made a start on carrying out the promises of his campaign, whose website described a comprehensive agenda for advancing LGBTQ+ equality in America and promoting it abroad. The lengthy LGBTQ rights agenda ("The Biden Plan to Advance LGBTQ+ Equality in American and Around the World," http://www.joebiden.com/lgbtq-policy), specifically promised to

- Protect LGBTQ+ people from discrimination;
- Support LGBTQ+ youth;
- Protection LGBTQ+ individuals from violence and work to end the epidemic of violence against the transgender community, particularly transgender women of color;
- Expand access to high-quality health care for LGBTQ+ individuals;
- Ensure fair treatment of LGBTQ+ individuals in the criminal justice system;
- Collect data necessary to fully support the LGBTQ+ community;
- Advance global LGBTQ+ rights and development.

Some of these promises could be kept through administrative action within the purview of the President and the heads of Executive Branch departments and administrative agencies. Others would require enactment of legislation to bring the federal code in line with the President's policies.

Candidate Biden had made clear that passage of The Equality Act, a bill approved by the House of Representatives during the 116th Congress as H.R. 5 on May 17, 2019, but never acted upon by the Senate, would be a "top legislative priority" during his first 100 days in office. When he made that pledge during the 2020 campaign, of course, it was not known whether the Democrats would capture sufficient majorities in both houses of Congress to ensure passage, or whether the Republicans would win enough seats in the Senate to block a vote on the measure through the device of the filibuster. In the event, while the Democrats did win enough seats in the House to pass reintroduced H.R. 5 again, on February 25, 2021, the Republicans had won 50 seats in the Senate, enough to block a vote on the bill unless a majority of the Senate were to vote to end or modify the filibuster rule in a way that would enable enactment by vote of the 50 Democratic Senators and Vice President Kamala Harris.

Although the *Bostock* decision's logic (and President Biden's directive to federal agencies to interpret sex discrimination laws in harmony with it) might

appear to make passage of H.R. 5 a less pressing matter, there were at least two major reasons why its enactment remained important. First, some federal judges appointed by President Trump were resistant to applying the reasoning of *Bostock* to statutes other than Title VII, so the addition of "sexual orientation" and "gender identity" to the lists of prohibited bases for discrimination in other federal laws would solidify the protection against discrimination on those grounds. (For an example, see *Hennessy-Waller v. Snyder*, No. CV-20-00335-TUC-SHR, 2021 WL 1192842 (D. Ariz. March 30, 2021), in which a district judge appointed by President Trump refused to apply *Bostock* in a case involving the Affordable Care Act.) Second, the CRA's provisions other than Title VII do not list sex as a prohibited basis for discrimination, since the floor amendment that added "sex" to the list of prohibited grounds in the bill in 1964 only added that term to Title VII. Most significantly, in light of current legal controversies, Title II, which forbids discrimination by public accommodations, does not include "sex." H.R. 5 would add sex, as well as sexual orientation and gender identity, to Title II, empowering the federal government to address forms of discrimination particularly confronted by transgender people, as well as other titles of the CRA addressing issues of segregation.

Much of the Biden Administration's policy agenda requiring legislative action confronts the filibuster barrier, and there was no real progress during the first 100 days in getting enough Republican senators to signal support of S. 393 (the version of the identical bill pending in the Senate) to surmount that barrier. As of the end of the first 100 days of the Biden Administration, 48 Senators were listed as cosponsors of S. 393 (46 Democrats and 2 Independents), but none of them are Republicans, so the measure was unlikely to pass in the form introduced.

One of the main sticking points for Republicans has been a provision of The Equality Act that states: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title." This would effectively rule out attempts by entities that are obligated not to discriminate by the various federal civil rights laws to rely upon the Religious Freedom Restoration Act (RFRA) as a defense. RFRA provides that if any federal law "substantially burdens" a person's free exercise of religion, they can refuse to comply with the law unless the government proves that application of the burden to the person "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." This was Congress's attempt to revive the 1st Amendment free exercise jurisprudence that the Supreme Court rejected in *Employment Division v. Smith*, 494 U.S. 872 (1990).

During the first 100 days of the Biden Administration, the Supreme Court was considering a case, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020), that could potentially overrule or modify *Employment Division v. Smith* to allow petitioner-defendants, Catholic

Social Services (CSS), to assert a 1st Amendment free exercise of religion defense against the enforcement of a Philadelphia anti-discrimination law, which would in turn render RFRA superfluous while at the same time undermining potential applications of the anti-discrimination laws that would be amended by The Equality Act. In *Fulton*, the City had allowed CSS's contract to participate in the City's foster care system to expire, and had refused to renew it unless CSS agreed to include a provision forbidding it from discriminating against same-sex married couples who sought to be foster parents. The Trump Administration submitted an amicus brief in *Fulton*, supporting the Petitioner's argument that it could raise a constitutional free exercise claim in that case despite the precedent of *Employment Division v. Smith* because, as they alleged, the City had targeted CSS because of its religious beliefs and exhibited hostility to religion in the course of doing so. In supporting this argument, the government's amicus brief asserted it was not necessary for the Court to overrule *Employment Division v. Smith* in order to rule for the Petitioners. But the Petitioners specifically asked the Supreme Court to consider whether *Employment Division v. Smith* should be "revisited," and suggested reasons why the Court should abandon it as a precedent. After certiorari was granted, Petitioners made this argument in greater detail in its principal merits brief, arguing that *Smith* should be "replaced with a standard that is true to the text, history, and tradition of the Free Exercise Clause," and many amicus briefs filed in support of the Petitioners called for the Court to overrule *Smith* and restore the ability of defendants to invoke the 1st Amendment Free Exercise Clause as a defense to government policies that burden their religious freedom. The case was argued early in November 2020, but no decision had been announced by April 20, 2021.

While a legislative agenda for LGBTQ rights could not advance during the first 100 days, the Biden Administration has not backed down from its support for the Equality Act, and federal agencies have responded to President Biden's mandates in his early executive orders to reconsider policies adopted during the previous administration.

Within the first 100 days, the Department of Housing and Urban Development (HUD) had issued a memorandum by Acting Assistant Secretary for Fair Housing & Equal Opportunity Jeanine M. Worden concluding that the Fair Housing Act's sex discrimination provision would apply to discrimination because of sexual orientation or gender identity. "Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act," February 11, 2021 (www.hud.gov). During the Obama Administration, the agency had instructed regional offices to consider whether such claims might be actionable "when motivated by perceived nonconformity with gender stereotypes," but, wrote Worden, under the mandate of EO 13988, the agency would now accept and investigate all sexual orientation and gender identity discrimination claims, without reference to any gender stereotype issues. The memo made clear that it would also affect state and local agencies that have agreements with HUD to process discrimination claims under the Fair Housing Assistance Program, and would

also apply to agency grantees. Presumably this would put the Biden Administration on a course to oppose policies that exclude transgender people from single-sex homeless shelters.

On March 26, 2021, Principal Deputy Assistant Attorney General Pamela S. Karlan, writing on behalf of the Civil Rights Division of the Department of Justice, issued a memorandum titled "Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972," concluding that sexual orientation and gender identity discrimination claims would be covered under Title IX. Beyond the application of *Bostock*, the Biden Campaign's promise to "restore transgender students' access to sports, bathrooms, and locker rooms in accordance with their gender identity," would reverse the position taken by the Department of Education during the Trump Administration, which maintained that gender identity discrimination was not forbidden by Title IX.

The interpretation of Title IX is significant beyond the education realm, because Title IX's ban on discrimination "on the basis of sex" is incorporated by reference into Section 1557 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C.A. § 18116 (2010). Although Ms. Karlan's memorandum did not mention this specifically, just focusing on the question whether there was anything in Title IX that would merit a contrary conclusion regarding *Bostock*'s application to Title IX, Section 1557 clearly provides that the ACA prohibits discrimination on grounds specified in Title IX. The application of Title IX is thus embroiled in the controversial question whether insurers (including state Medicaid and public employee health insurance programs) must cover gender transition procedures to comply with the ACA's non-discrimination requirements, which has been or is being litigated in several courts around the country.

On March 31, the Defense Department announced its new policies and procedures for military service by transgender individuals. A press release was accompanied by two formal DoD Instructions: 6130.03 and 1300.28, which established medical standards for military service as applied to transgender people seeking appointment, enlistment, or induction, and specified procedures for "in-service transition for transgender service members." (The transition procedures were particularly notable, as a controversy about the Defense Department providing gender transition procedures for transgender personnel may have been the stimulus for President Trump's decision to ban all military service by transgender people.) DoD Instruction 1300.28 also includes an Equal Opportunity statement that includes gender identity and sexual orientation. These new Instructions would become effective on April 30, 2021.

And, as noted above, the State Department moved quickly on February 4 to outline steps it would take to implement the policies announced in President Biden's Memorandum on advancing the rights of LGBTQ people globally.

In addition to issuing Executive Orders, applying the *Bostock* ruling to federal sex discrimination laws beyond Title VII, and supporting passage of The Equality Act, the Biden Administration has made history with President Biden's appointment of LGBTQ people to significant policy-making positions, including the first "out" gay man to serve as Secretary of an Executive Branch Department

(Pete Buttigieg as Secretary of Transportation) and the first transgender person to serve in a Senate-confirmed subcabinet position (Dr. Rachel Levine as Assistant Secretary for Health in the Department of Health and Human Services). There were high level appointments of LGBTQ people to the White House staff and in several of the Executive Branch departments as well. In short, the Biden Administration was doing during its first 100 days what could be done administratively to restore and expand upon Obama Administration policies protective of LGBTQ rights and equality, while continuing to ponder whether the President will support efforts to alter Senate rules and make it possible to achieve further gains legislatively.