



## **DESPITE GAINS, LGBTQ+ REPRESENTATION ON THE FEDERAL BENCH CONTINUES TO DECLINE**

In his first three years, President Biden has made diverse, historic nominations to the federal courts that will positively impact the federal judiciary for years to come. But he's also continued to miss opportunities to close the gap in representation of LGBTQ+ people and people living with HIV on the federal bench. Lambda Legal has been tracking the Biden Administration's federal judicial nominations and reporting on its progress to diversify the courts each year. [Since our last report](#) in April 2023, one openly gay federal judge (nominated in 2022) and two openly lesbian judges (nominated in 2023) have been confirmed.<sup>i</sup> Lambda Legal celebrates these confirmations, all which have historical importance for the federal judiciary. However, for a second year, the gap in representation between the percentage of LGBTQ+ federal judges and the percentage of LGBTQ+ people in United States has grown slightly.<sup>ii</sup> President Biden's nomination of only two openly lesbian judges in the Administration's third year is a step backward from his first two years in office. In 2021, he nominated four openly lesbian judges and in 2022, five openly lesbian and gay judges to the federal courts.<sup>iii</sup> And despite the influx of litigation related to the rights of transgender and nonbinary people, President Biden has still not nominated a single transgender or nonbinary judge to the federal bench, let alone championed any through successful confirmation.

As of April 1, 2024, with only nine months left to fill every vacant seat on the federal courts, there are still 51 current and future federal judicial vacancies without nominees and 26 vacancies with nominees who have not yet been confirmed by the Senate.<sup>iv</sup> If President Biden nominates and the Senate confirms a judge for each of these seats, Biden would surpass the total number of confirmed judges during the Trump Administration. Lambda Legal, among many other organizations, [has called on the Senate](#) to focus on filling these vacancies as expeditiously as possible with well-qualified, fair-minded judges who are committed to civil rights and would contribute meaningfully to the diversification of the federal bench.

We also ask President Biden to step up his efforts by promptly identifying similar nominees for all open vacancies. President Biden is currently tied with President Obama for the most openly LGBTQ+ judges confirmed during any administration.<sup>v</sup> He's accomplished that in just over three years. He can make history, again, by nominating and having confirmed additional LGBTQ+ judges this year, including the first transgender, nonbinary, and bisexual judges, and the first judge living openly with HIV to the federal bench before the end of this term. The time is now to finish the Administration's work to diversify the federal courts and bring the bench closer to being representative of people in the United States.



## FEDERAL COURTS: WHAT'S AT STAKE FOR LGBTQ+ PEOPLE AND PEOPLE LIVING WITH HIV?

Federal courts are often the final authority on the civil rights of underrepresented groups, including LGBTQ+ people and people living with HIV. Right now, there are cases in our federal courts, challenging bans on gender affirming care for youth and bans on transgender youth playing sports with their peers, defending people living with HIV from discrimination in employment and protecting access to health care, challenging state laws that prohibit drag performances and those that seek to remove LGBTQ+ themed books from schools and libraries, among many others. The rights of everyone in the community are under attack. If we hope to defend our legal protections and build upon our victories, ensuring that fair judges, who don't hold biases against LGBTQ+ people and people living with HIV, are the only judges that get a seat on the federal judiciary must be a priority.

As Lambda Legal [has reported on previously](#), nearly 40% of all federal appellate judges confirmed during Donald Trump's presidency demonstrated a history of hostility toward LGBTQ+ people. Their impact, and that of district court judges appointed by former President Trump, has already been felt in cases across the country. We've seen their hostility at play in cases involving the rights of LGBTQ+ people, people living with HIV, and anyone who can become pregnant and seeks an abortion.<sup>vi</sup> These judges will continue to make decisions about our rights for years to come. Perhaps the most obvious impact Trump had on the federal judiciary was his nomination of three justices to the U.S. Supreme Court. These three justices quickly shifted the Court in a radically conservative direction, ultimately, in 2022, delivering Trump's campaign promise to overturn *Roe v. Wade and Planned Parenthood v. Casey*. Other members of the Court have made clear that they also wish to overturn LGBTQ+ rights cases like *Obergefell v. Hodges*, which brought marriage equality to the entire U.S.<sup>vii</sup> Most recently, Supreme Court Justice Samuel Alito, who dissented from our winning decision in *Obergefell*, claimed that the "dangers" of marriage equality that he predicted in this dissent occurred in a case about sexual orientation bias expressed by potential jurors. The dangers he's concerned with are "namely, that Americans who do not hide their adherence to traditional religious beliefs about homosexual conduct will be 'labeled as bigots and treated as such' by the government."<sup>viii</sup>

Unfortunately, LGBTQ+ people and people living with HIV are the ones who regularly experience bias and discrimination in the courts. Lambda Legal and Black and Pink National's 2022 Community Survey of LGBTQ+ People and People Living with HIV, [Protected and Served?](#), found that 22.2% of LGBTQ+ respondents and respondents living with HIV who had recent experiences in court heard negative comments about sexual orientation, gender identity or expression, or HIV status by an attorney, judge, or other court employee.<sup>ix</sup> In addition, 30.1% of transgender respondents had their transgender status revealed inappropriately in court, with Black and Indigenous transgender people reporting higher rates of this negative experience.<sup>x</sup> There also were very high rates of misgendering and/or use of the wrong name to refer to transgender, nonbinary, or gender nonconforming court users reported in this survey.<sup>xi</sup>

With the significant experience of bias directed at LGBTQ+ people and people living with HIV in court settings, among other ethics concerns, trust in the courts is low.<sup>xii</sup> Of all respondents to the survey, 32.2% said they do not trust the courts at all. Only 8.5% of respondents said they have complete trust in the courts.<sup>xiii</sup> Continuing to build a diverse bench of federal judges committed to protecting constitutional and other civil rights is a necessary step to addressing the serious concerns of our community.



## **BUILDING THE BENCH: JUDICIAL DIVERSITY IN YEAR THREE OF THE BIDEN ADMINISTRATION**

During the Biden administration's third year, the President nominated seven judges to the Circuit Courts of Appeal, 48 judges to the District Courts, and two judges to the Court of International Trade.<sup>xiv</sup> This brings the total number of Article III federal judges nominated by President Biden to 215, as of January 10, 2024.<sup>xv</sup> As of April 1, 2024, the Senate has confirmed 190 judges.<sup>xvi</sup> Former President Trump had a total of 234 judges confirmed by the end of his time in office.<sup>xvii</sup> With 26 nominees waiting for confirmation and 51 vacant seats without nominees, President Biden has every opportunity to meet or exceed that number and continue to improve the makeup of the federal courts.<sup>xviii</sup>

Though there is more work to be done, the racial diversity among President Biden's nominees far surpasses past administrations. Of the 190 judges confirmed so far, nearly 65% are judges of color; 28% are Black, 15% are Latinx, 13% are Asian American, almost 6% are two or more races, and 1.6% are Native American.<sup>xix</sup> In comparison, of former President Trump's confirmed judges, 85% are white.<sup>xx</sup> In terms of gender diversity, 64% of Biden judges are women and 36% are men.<sup>xxi</sup> President Biden again did not nominate any transgender, nonbinary, or intersex judges to the courts in his third year.

In 2023, historic nominations and confirmations to the federal bench continued. Among many other firsts, Irma Carillo Ramirez became the first Latina confirmed to the Fifth Circuit Court of Appeals. Nusrat Jahan Choudhury became the first Muslim woman and first Bangladeshi American to serve on any federal court. The first Native Hawaiian woman to serve on the federal bench, Shanlyn Park, was confirmed as a federal judge for the District of Hawaii. Additionally, one judge with a known disability, Rita Lin, was confirmed to bench in 2023.<sup>xxii</sup>

Despite this progress, there have and continue to be efforts to stall certain Biden nominees from reaching confirmation. Two ongoing examples that began in 2023 include Adeel Mangi, a nominee who would be the first Muslim judge on any U.S. Court of Appeals and Mustafa Kasubhai, a Muslim nominee for the District Court of Oregon. Both nominees have already been favorably reported out of the Senate Judiciary Committee and await a full Senate vote on their nominations. However, in both cases there now are serious efforts to undermine the nominees' confirmations by the Senate, rooted in overt racism and Islamophobia. Notably from our perspective, Mustafa Kasubhai requires respect for transgender and nonbinary people in his courtroom in his current role as a U.S. Magistrate, something that also drew harsh criticism during his Senate committee hearing. For President Biden to continue the work of diversifying the bench in 2024, he must be a full-throated champion in support of his well-vetted nominees when they face bigotry-based opposition.



### **LGBTQ+ CONFIRMATION HIGHLIGHT:**

## **MELISSA R. DUBOSE**

**DuBose was confirmed to the U.S. States District Court for the District of Rhode Island on March 12, 2024. She is the first person of color and first openly lesbian judge to serve on this court. She is the 100th Black woman to be confirmed to a lifetime federal judgeship.**

## LGBTQ+ Nominations and Confirmations in Year Three

During President Biden's third year in office (Jan. 20, 2023 to Jan. 19, 2024), the U.S. Senate confirmed five openly lesbian or gay judges. Additionally, President Biden nominated two openly lesbian women to the federal bench. As we reported in our last federal judicial report, Judges Gina Méndez-Miró, Ana C. Reyes, Daniel Calabretta, and Jamar K. Walker, all openly gay or lesbian judges, were confirmed to their seats in Feb. 2023. The Senate also confirmed Judge P. Casey Pitts to the District Court for the Northern District of California on June 14, 2023.

President Biden nominated Nicole Berner to the U.S. Court of Appeals for the Fourth Circuit on November 27, 2023, and she was confirmed on March 19, 2024, as the first openly LGBTQ+ person to serve on that circuit. On January 10, 2024, President Biden announced the nomination of Melissa DuBose to the U.S. District Court for the District of Rhode Island, and she was confirmed by the Senate on March 12, 2024. She is the 100th Black woman to be

confirmed to a lifetime federal judgeship.<sup>xxiii</sup> She will be the first openly LGBTQ+ person and first person of color to ever serve on the District Court for Rhode Island.<sup>xxiv</sup> She takes the bench in January 2025, when the sitting judge takes senior status.<sup>xxv</sup> These two historic confirmations bring LGBTQ+ representation, and in Rhode Island, representation of Black women, to states that have never had this before.<sup>xxvi</sup>

As of the date of publication, President Biden has nominated a total of twelve openly gay or lesbian attorneys to the federal courts. Unfortunately, the pace at which he was nominating LGBTQ+ judges (4-5 per year) decreased in his third year when he only nominated the above-mentioned two. While the Senate has confirmed 11 of those nominees to their judgeships, one nominee, William Pocan, never received a hearing in the Senate Judiciary Committee.<sup>xxvii</sup> President Biden never renominated him after his nomination expired at the end of 2022. Currently, there are no additional LGBTQ+ judicial nominees awaiting confirmation.

## QUEERING THE BENCH: CURRENT REPRESENTATION OF LGBTQ+ JUDGES

Recent polling shows that 7.6% of the population is LGBTQ+, up from 7.2% in 2023.<sup>xxviii</sup> With 23 openly LGBTQ+ judges currently on or soon to take the bench (one of the judges, Melissa DuBose, will not become an active judge until the beginning of 2025, when her predecessor will take senior status) out of 870 judgeships, only 2.6% of federal judges are LGBTQ+, all of whom are either gay or lesbian. The percentage of the U.S. population openly identifying as bisexual has increased from 3.1% to 4.4% between 2021 and 2024.<sup>xxix</sup> Yet, there are no openly bisexual judges on the federal courts. While there has been a slight increase in LGBTQ+ judges on the federal bench since last year, the gap between the percentage of LGBTQ+ federal judges and the LGBTQ+ population of the U.S. grew slightly again this year. With a current gap in representation of 5%, it has increased by .1% from [Lambda Legal's 2023 report](#).

In terms of geographic representation, the confirmation of Judge Nicole Berner to the Fourth Circuit Court of Appeals created a chance for residents in four states: Maryland, North Carolina, South Carolina, and West Virginia, to have their case heard by an openly queer judge when they had never had openly LGBTQ+ representation on the federal courts before.<sup>xxx</sup> Judge DuBose will add LGBTQ+ representation in the District of Rhode Island. Additionally, Judge P. Casey Pitts' confirmation added LGBTQ+ representation to the Northern District of California, which currently does not have any other openly LGBTQ+ judges. However, California already had openly LGBTQ+ judges on the bench in other districts when he was confirmed. This still leaves 26 states in the U.S. without any LGBTQ+

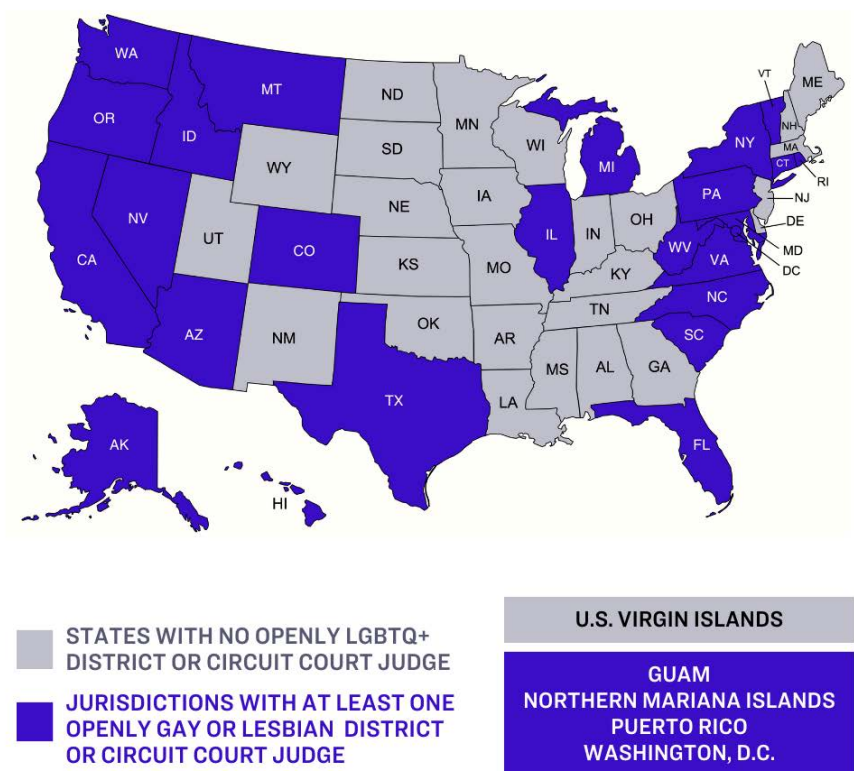


judges on either the district or circuit courts.<sup>xxxii</sup> Most of the Midwest and the South still have never had an openly LGBTQ+ nominee to the federal bench. And no jurisdiction in the country has ever had an openly bisexual, transgender, non-binary, or intersex federal judicial nominee or nominee openly living with HIV. The federal judiciary, as it stands today, does not reflect the diverse country it serves, and more queer judges are needed for it to do so.

## **CONTINUED OPPORTUNITIES FOR CHANGE: CURRENT AND FUTURE FEDERAL JUDICIAL VACANCIES**

As of April 1, 2024, there are 30 current and 21 future vacancies without pending nominees at the federal district and circuit courts.<sup>xxxiii</sup> Therefore, President Biden has 51 judicial seats available for his nominees. There are also 26 vacancies with nominees that are awaiting confirmation by the Senate.<sup>xxxiii</sup> Of the 51 open vacancies, 21 are in jurisdictions that have never had an LGBTQ+ federal judge. These vacancies are on the First Circuit Court of Appeals, Eleventh Circuit Court of Appeals, and district courts in Alabama, Arkansas, Indiana, Kansas, Louisiana, Maine, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.<sup>xxxiv</sup> Several of these vacancies have been open for two or more years. If President Biden nominates and the Senate confirms judges to each of these open seats, President Biden will surpass the total number of judges confirmed during the Trump Administration. These seats are Biden’s to fill. He must nominate and champion new judges or risk losing the opportunity to fill these seats.

# **26 STATES WITH NO OPENLY LGBTQ+ DISTRICT OR CIRCUIT COURT JUDGE**



## **EVERY SEAT FILLED: THE TIME IS NOW FOR LGBTQ+ JUDGES AND JUDGES LIVING WITH HIV**

We thank the Biden administration for nominating two well-qualified lesbian attorneys to the federal bench in the past year who are bringing LGBTQ+ diversity to jurisdictions that don't currently have it. However, much more work remains to be done if we are to approach an adequate level of representation on the federal bench of LGBTQ+ people and of people living with HIV. With the continued increase in the population of openly LGBTQ+ people in the U.S. and the pace of LGBTQ+ nominations slowed, the gap in representation on the federal bench continues to grow rather than shrink.

If we are to move toward representation that reflects the LGBTQ+ population, we need record numbers of openly LGBTQ+ people being nominated to the bench in the next 6 months. In particular, the first openly bisexual, transgender, non-binary, or intersex nominees are still long overdue, as well as the first nominee living openly with HIV. LGBTQ+ attorneys, state court judges, and law professors committed to protecting everyone's constitutional and statutory civil rights, are out there litigating cases, presiding over trials, and teaching the next generation of legal professionals. And they're ready for the federal bench.

Now is the time to make more historic nominations for LGBTQ+ people, particularly LGBTQ+ people of color, who are extremely underrepresented.

**| If the Biden administration waits any longer, there will not be enough time to ensure judicial nominees will be able to be confirmed by the Senate.**

We call on Senators with open vacancies in their states to identify a diverse group of well-qualified LGBTQ+ attorneys and state court judges to bring forward to the White House for consideration. We ask the White House to select nominees from among these candidates and ensure that the Administration works hard to get these federal vacancies filled this year. With every seat filled by judges who are diverse in race, gender, sexual orientation, religion, professional background, etc., the federal courts will be fairer institutions of justice for everyone. There is no other time to push forward than in this moment.

## **WHAT CAN YOU DO TO IMPACT THE FEDERAL JUDICIARY?**

Tell President Biden to Queer the Bench! Call your senators! And get your friends to do the same. Even hearing a little bit of interest from their constituents about judges can make an impact. Your senators play a large role in helping to select and confirm federal judges from your state. But they also vote on every single federal judicial nominee. So, your senators could potentially impact a vote on whether to confirm a judge from another state too.

Vote in federal elections! And in every other election too! Since the President gets to choose who to nominate to the federal courts, the Presidential election determines who gets to choose federal judges for the next four years. As the entire Senate votes on confirming all federal judges, who you vote for in your state's U.S. Senate races will also impact the future of the federal judiciary.

**Right now, there is still time to call on our leaders to fill all the open vacancies and increase LGBTQ+ representation on the federal courts!**



## FOOTNOTES

- i. Hon. P. Casey Pitts (N.D. CA) confirmed June 14, 2023; Hon. Melissa DuBose (D. R.I.), confirmed March 12, 2024; Hon. Nicole Berner (4th Cir.), confirmed March 19, 2024.
- ii. With 23 openly LGBTQ+ judges on or confirmed to the federal courts and 870 Article III judgeships, approximately 2.6% of federal Article III judgeships are held by openly LGBTQ+ people. 7.6% of the population is LGBTQ+, leaving a 5% gap in representation on the bench. In 2023, Lambda Legal reported at 4.9% gap in representation.
- iii. In 2021, President Biden nominated openly lesbian judges Hon. Beth Robinson, Hon. Alison Nathan, Hon. Charlotte Sweeney, and Hon. Nina Morrison to the federal courts. He also nominated William Pocan, whose nomination was never confirmed. In 2022, President Biden nominated openly gay and lesbian judges, Hon. Jamar Walker, Hon. Daniel Calabretta, Hon. Ana Reyes, Hon. Gina Méndez-Miró, and Hon. P. Casey Pitts.
- iv. Current Judicial Vacancies, United States Courts, (last visited March 31, 2024), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>; Future Judicial Vacancies, United States Courts, (last visited March 31, 2024), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies>.
- v. Nicole Chavez and Annette Choi, Biden administration ties record for number of confirmed LGBTQ judges in federal courts, CNN, (March 19, 2024), available at <https://www.msn.com/en-us/news/us/biden-administration-ties-record-for-number-of-confirmed-lgbtq-judges-in-federal-courts/ar-BB1kbnZn>.
- vi. Lindsay Whitehurst and Alanna Durkin Richer, Abortion pill order latest contentious ruling by Texas judge, AP News, (April 8, 2023), available at <https://apnews.com/article/texas-judge-matthew-kacsmayk-abortion-pill-fda-75964b777ef09593a1ad948c6cfc0237>.
- vii. Harper Neidig, Thomas calls for overturning precedents on contraceptives, LGBTQ rights, The Hill, (June 24, 2022), available at <https://thehill.com/regulation/court-battles/3535841-thomas-calls-for-overturning-precedents-on-contraceptives-lgbtq-rights/>; Nina Totenberg, Justice Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights, NPR, (October 5, 2020), available at <https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights>.
- viii. Maureen Groppe, Alito says he was right to fear that opponents of gay marriage would be treated as bigots, USA Today, (February 20, 2024), available at <https://www.usatoday.com/story/news/politics/2024/02/20/alito-jurors-homosexuality-sin/72672733007/>.
- ix. Frazer, S., Saenz, R., Aleman, A., & Laderman, L. (2023). Protected and Served?. Lambda Legal and Black and Pink National, 37, available at <http://protectedandserved.org/2022-report-full-report>.
- x. Id. at 37-38.
- xi. Id.
- xii. Megan Brenan, Views of Supreme Court Remain Near Record Lows, Gallup, (September 29, 2023), available at <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx>.
- xiii. Supra note ix at 13.
- xiv. Lambda Legal is counting judicial nominees for each full year of a President's term. This report includes nominations announced from January 20th, 2023 – January 19th, 2024, to reach 57 total Article III judicial nominees for the third year of the Biden administration.
- xv. President Biden Names Forty-Fourth Round of Judicial Nominees, The White House, (Jan 10, 2024), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/01/10/president-biden-names-forty-fourth-round-of-judicial-nominees/>.
- xvi. On the Bench: Week of March 28, 2024, American Constitution Society, available at <https://www.acslaw.org/on-the-bench-week-of-march-28-2024/> (last visited April 9, 2024).
- xvii. Sahil Kapur, Biden secures landmark 100th judge, outpacing Trump, NBC News, available at <https://www.nbcnews.com/politics/congress/biden-posed-secure-100th-judge-outpacing-trump-rcna61924>.
- xviii. Current Judicial Vacancies, United States Courts, (last visited March 31, 2024), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies>; Future Judicial Vacancies, United States Courts, (last visited March 31, 2024), available at <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies>.
- xix. Diversity of the Federal Bench: Current statistics on the gender and racial diversity of the Article III Courts, American Constitution Society, (Last visited March 31, 2024), available at <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/>.
- xx. Id.
- xxi. Id.
- xxii. Lifetime Judges Confirmed During the Biden Administration Through 2023, The Leadership Conference on Civil and Human Rights, (2), available at <https://civilrightsdocs.info/pdf/Judicial-Confirmations-2023.pdf>.
- xxiii. Maya Wiley, The Leadership Conference Celebrates Confirmation of 100th Black Woman to Lifetime Judgeship, (March 12, 2024), available at <https://civilrights.org/2024/03/12/the-leadership-conference-celebrates-confirmation-of-100th-black-woman-to-lifetime-judgeship/>.
- xxiv. Edward Fitzpatrick, US Senate confirms Melissa DuBose as first Black and first openly LGBTQ judge on US District Court in R.I., The Boston Globe, available at <https://www.msn.com/en-us/news/us/us-senate-confirms-melissa-dubose-as-first-black-and-first-openly-lgbtq-judge-on-us-district-court-in-ri/ar-BB1jMS7W>.
- xxv. Id.
- xxvi. Id.; Supra note xxii.
- xxvii. Rose Wagner, Judiciary Committee pivots after GOP senator opposes home-state nominee, Courthouse News Service, (Feb. 16, 2022), available at <https://www.courthousenews.com/judiciary-committee-pivots-after-gop-senator-opposes-home-state-nominee/>.
- xxviii. Jeffrey M. Jones, LGBTQ+ Identification in U.S. Now at 7.6%, Gallup, (March 13, 2024), available at <https://news.gallup.com/poll/611864/lgbtq-identification.aspx>.
- xxix. Id.; Jeffrey M. Jones, LGBTQ Identification Rises to 5.6 percent in Latest U.S. Estimate, Gallup (Feb. 24, 2021), available at <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.
- xxx. The Fourth Circuit also includes Virginia. Judge Jamar K. Walker, an openly gay Black judge was confirmed to the Eastern District of Virginia in 2023.
- xxxi. Alabama, Arkansas, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Ohio, South Dakota, Tennessee, Utah, Wisconsin, Wyoming.
- xxxii. Supra note iv.
- xxxiii. Id.
- xxxiv. Id.



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