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JUDGING OUR FUTURE

WHAT'S AT STAKE FOR LGBTQ+ AND HIV RIGHTS IN THE FEDERAL COURTS

Lambda Legal is standing up and fighting back in the courts against the second Trump administration by again filing a series of lawsuits to stop its attacks on LGBTQ+ people and people living with HIV—attacks that are focused on transgender, nonbinary, and intersex people and people of color.

For all of us fighting to defend the Constitution, a fair and impartial judiciary with judges on the bench who are committed to civil and human rights and to upholding the rule of law is essential. Lambda Legal, in addition to fighting *in the courts*, also works *on the courts* by monitoring federal judicial nominees and working to promote a fair and impartial judiciary that accurately reflects diversity in the United States. The work of our Fair Courts Project to protect LGBTQ+ rights and the rights of people living with HIV from being eroded by judges who hold our identities against us is more important than ever.

Lambda Legal has long maintained that the federal judiciary should reflect the population it serves because increasing judicial diversity leads to improved public confidence in the courts and enriched decision-making among judges.¹ In his administration, President Biden showed the way presidents can substantially improve the makeup of the federal bench by nominating and having confirmed by the Senate the most diversely representative group of federal judges in U.S. history and bringing the federal judiciary closer to mirroring the population it serves. From the first Muslim federal judge and the first openly lesbian judge confirmed to an appellate court seat to the first Black woman and former public defender confirmed to the Supreme Court, his confirmations were extraordinarily well-qualified and historic. President Biden appointed more lesbian and gay judges to the bench than any other president: 12. These judges along with others without histories of bias and prejudice are now a bulwark against the illegal actions of the current Trump administration. But to make the bench truly representative of the people it serves, there is still more work to do.



Despite progress during Biden's term, there is currently a 6.6% gap between the percentage of the public that identifies as LGBTQ+ (9.3%) and the percentage of federal judges who do (2.7%).

Unfortunately, with history as our guide, the second Trump administration is very unlikely to add to the diversification of the federal bench. To the contrary, in Trump's first term as president, 76% of the judges nominated and confirmed were cisgender men and 84% were white.ⁱⁱ He appointed only two openly gay or lesbian judges.ⁱⁱⁱ In addition to being overwhelmingly male and white, many of the judges Trump appointed in his first term had [explicit histories of anti-LGBTQ+ bias](#).

Lambda Legal fought the first Trump administration not only by taking on their policies, rules, and laws that threatened LGBTQ+ people and people living with HIV in the courts, but also by calling out the records of judicial nominees who should not be on the bench due to their overt anti-LGBTQ+ bias and/or bias against people living with HIV. We will continue to do the same during this Trump administration.

WHAT IS AT STAKE:

LGBTQ+ PEOPLE AND EVERYONE LIVING WITH HIV IN THE COURTS

Like everyone else, LGBTQ+ people and those living with HIV need and deserve for their cases to be heard by fair and impartial judges. Lambda Legal works to reduce bias in the justice system, in part, by tracking federal judicial nominees.

The new Trump Administration has just announced its first judicial nominee, Whitney Hermandorfer. Unfortunately, she is exactly the type of nominee we expected and are deeply alarmed by; one who has actively argued against equal rights for transgender people. We expect to see more nominees comparable to and worse for our rights than those nominated and confirmed during the first Trump administration. Between 2017 and 2020, [Lambda Legal found](#) that 34 of Trump's judicial nominees had explicit records of anti-LGBTQ+ writings, speeches, cases they litigated, etc. We opposed all of them. Of those 34, 30 were confirmed despite the public pushback and became judges. Many of these judges have already made [horrible anti-LGBTQ+ rulings](#) in cases before them, with some including gratuitous misgendering of transgender people in their decisions. Some also have a record of anti-voter, anti-abortion, and pro-gun decisions at odds with the rights of LGBTQ+ people and everyone living with HIV. However, Lambda Legal was part of a successful coalition that stopped four of the most egregious nominees from proceeding forward.

These candidates for the federal bench are nominated by the President and must be confirmed by the Senate. Once confirmed, these judicial appointees have lifetime roles as judges or justices and preside over many types of cases from criminal to civil rights.

There are many cases related to LGBTQ+ rights and the rights of people living with HIV winding their way through the federal courts, including significant cases by Lambda Legal and others challenging Trump's anti-LGBTQ+ actions in the first three months of his term. The civil and human rights of everyone in the LGBTQ+ community are under attack by the new Trump administration with transgender, nonbinary, and intersex people being targeted specifically with attempts to end affirming



health care, ban access to facilities consistent with gender identity, and prohibit obtaining accurate federal identity documents just to name a few. 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 selected for and seated on the federal bench is a priority. As the current administration continues to push out overtly discriminatory and multiply illegal Executive Orders, the federal litigation against them will continue to expand. Lambda Legal has already filed cases challenging the administration's Executive Orders that seek to ban transgender people from serving in the military, to prevent transgender and nonbinary youth under the age of 19 from receiving medically necessary gender-affirming care, to end valid, affirming DEI programs, and generally to exclude transgender and nonbinary people from public life.

Because of the experienced, impartial and fair-minded judges who are committed to the rule of law – judges appointed by presidents of both parties – we are already seeing the Trump administration's bigoted and cruel agenda being slowed or paused by their decisions. For example, Judge Adam Abelson, a Biden appointee, issued a [preliminary injunction](#) in *National Association of Diversity Officers in Higher Education, et al. v. Trump, et al.*, temporarily preventing enforcement of two Executive Orders which would terminate all federal equity-related grants or contracts and require federal contractors to certify they do not operate DEI programs. A preliminary injunction was issued by Judge Brendan Hurson, another Biden appointee, in [PFLAG, et al. v. Trump, et al.](#), a case Lambda Legal, the ACLU, and ACLU of Maryland brought challenging Trump's Executive Order seeking to end federal funding to any healthcare entity that provides gender-affirming healthcare to people under the age of 19. Judge Benjamin H. Settle, a George W. Bush appointee, issued a [preliminary injunction](#) in *Shilling, et al. v. Trump, et al.*, a case brought by Lambda Legal and the Human Rights Campaign. This injunction prevented the Trump administration from implementing the president's ban on transgender people serving in the military.

WHAT WE'RE DEFENDING:

DIVERSITY OF JUDGES CONFIRMED DURING PRESIDENT BIDEN'S TERM (2021-2024):

Over his four years in office, President Biden nominated and had confirmed by the Senate 235 judges to the federal courts.^{iv} This is one more judge than President Trump had confirmed in his first term in office. Of the 235, one is a Supreme Court Justice, 45 are Circuit Court judges, 187 are District Court judges, and two are judges for the International Court of Trade. Biden's judicial appointees now hold more than a quarter of all 870 federal judgeships. They are also the most diverse group of judges appointed to the federal bench in U.S. history.^v

Of the 235 judges confirmed, 150 or 64% are women.^{vi} This is the highest percentage of women appointed to the bench by any president in our history.^{vii} The racial diversity among President Biden's nominees also far surpasses any past administration. Of the 235 judges confirmed, nearly 63% are judges of color; nearly 27% are Black, 17% are Latinx, 17% are Asian American, Native Hawaiian, or Pacific Islander,^{viii} and 1.7% are Native American.^{ix} President Biden also focused on professional diversity, moving away from many prior presidents' common practice of primarily nominating



prosecutors or corporate attorneys and, instead, having confirmed nearly 100 judges with experience as civil rights attorneys, public defenders, or labor attorneys.^x

Over the course of President Biden's term there were many historic firsts made to the federal bench. In his second year in office, he nominated and had confirmed by the Senate the first Black woman, Ketanji Brown Jackson, to the U.S. Supreme Court in our country's history, who also was a former public defender. He also appointed the first Muslim judge^{xi} to the federal courts in U.S. history and three additional Muslim judges over the course of his term.^{xii} President Biden appointed the first Black woman and first Latina to the Fifth Circuit Court of Appeals which covers states with high populations of Black and Latinx people: Louisiana, Texas, and Mississippi. Texas, for example, has a population that is 13.6% Black and nearly 40% Hispanic or Latinx (of any race).^{xiii}

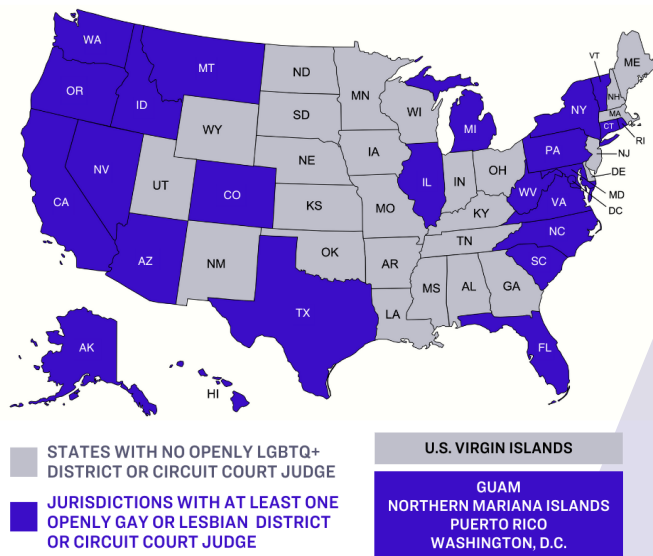
LGBTQ+ diversity in the federal courts

In terms of LGBTQ+ diversity on the federal bench, President Biden made history by having 12 openly lesbian and gay judges confirmed by the Senate - the most of any president. In total, 5.1% of Biden's appointees are openly lesbian or gay. Since our last report in May 2024, one openly lesbian judge was confirmed to the bench. Judge Mary Kay Costello joined another openly lesbian judge, Nitza Quiñones Alejandro, on the District Court for the Eastern District of Pennsylvania this past September.

While this progress is cause for celebration, there is still a large gap in representation between the percentage of LGBTQ+ people in the general population and the percentage of federal

judges who are LGBTQ+. While 9.3% of the U.S. population now identifies as LGBTQ+^{xiv}, openly LGBTQ+ judges make up only 2.7%^{xv} of all federal judges, a 6.6% gap. Most notable is the absence of any openly transgender, nonbinary, intersex, or bisexual federal judges or judges living with HIV. Despite our repeated asks to do so, President Biden did not nominate any judges who hold these identities during his time in office. In his last year in office, President Biden slowed the rate of his nominations of lesbian and gay federal judges, nominating only two. Despite the addition of Judge Costello to the federal bench, geographic representation remains the same as last year as there was already an openly lesbian judge on the bench in Pennsylvania.

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



Judge Berner is the first openly LGBTQ+ judge on the Fourth Circuit Court of Appeals.

Judge Berner's appointment also shows President Biden's commitment to professional diversity on the bench, as she was a labor attorney working for the Service Employees International Union (SEIU) on behalf of workers before her appointment and prior to that she worked at Planned Parenthood Federation of America as a staff attorney.

WHERE WE ARE:

STATE OF THE FEDERAL COURTS

At the time of completion of this report there are currently 59 vacancies on the federal courts that are open for President Trump to fill; six are on the Circuit Courts of Appeal and 53 on the District Courts.^{xvi} There are no open seats on the U.S. Supreme Court.

U.S. Supreme Court

While there are no current vacancies on the U.S. Supreme Court, there is a potential for a vacancy to open during Trump's second administration. Justices Clarence Thomas and Samuel Alito are both in their mid-70s and may wish to retire before President Trump's term is over. Justice Thomas is 76 years-old and has been sitting on the Supreme Court for 33 years. Justice Alito is 74 years-old and has been on the Court for nearly 20 years. President Trump has already appointed one-third of the justices on the Supreme Court. If he were to get an additional seat, he will have selected four out of the nine justices and could appoint a younger person who would then be entitled to lifetime tenure.



District Courts

There are 677 authorized district court judgeships.^{xix} President Biden appointed 187 district court judges or nearly 28% and had 49 additional district court vacancies left at the end of his term. The main block to moving forward with additional nominations was that many Republican senators would not return their "blue slips," a document indicating whether a senator approves or disapproves of a nominee from their state, for President Biden's nominees. In the case of district court nominees, senators must return favorable blue slips for the nominee to move forward according to a longstanding Senate policy kept in place by Senate Judiciary Committee leadership during Biden's presidency.

Circuit Courts of Appeal

Because the U.S. Supreme Court hears under 100 cases per year, the Circuit Courts of Appeal are frequently the courts of last resort for federal cases and hear thousands of cases a year. There are 179 authorized Circuit Court judgeships.^{xvii} President Biden appointed 45 circuit court judges or 25% of all authorized federal appellate judgeships. There were an additional four well-qualified nominees for Circuit Court judgeships awaiting confirmation at the end of the Biden administration. However, at the end of 2024 Democratic senators made a deal with Republican senators that prevented these remaining circuit court nominees from receiving confirmation votes.^{xviii} In return, the Republicans agreed to allow confirmation votes for 14 remaining district court nominees, all of whom were confirmed. The senators' agreement meant that four important circuit vacancies were left vacant despite the top-quality, thoroughly vetted nominees ready to serve the public in those positions.



HOW WE FIGHT BACK:

LAMBDA LEGAL'S PLANS & WHAT YOU CAN DO

The Trump Administration has just begun to announce judicial nominees. Lambda Legal will review each of their records. As we did during the first Trump administration, we will oppose any nominees that have a clear record of anti-LGBTQ+ bias. We will do this by writing letters of opposition to the Senate Judiciary Committee encouraging them not to confirm the nominee, engaging with senators, and creating campaigns to push back on the nominations of judges not committed to equal rights.

YOU CAN HELP BY:

- 1. Contacting both of your senators. Every senator has a vote on who will become a federal judge with lifetime tenure.**
- 2. Voting in every election. Those who represent you in the Senate hold power over who becomes a federal judge.**
- 3. Telling President Trump - we won't accept any more anti-LGBTQ+ judicial nominees.**
- 4. Sharing your engagement on this issue with people in your life – in friendly conversations, via your social media, and however you communicate.**
- 5. Staying engaged with Lambda Legal by visiting our website, subscribing for our email alerts, and following our social media.**



- ⁱ For example, see Yuvraj Joshi, *Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It*, (2017), Lambda Legal and American Constitution Society, available at https://lambdalegal.org/wp-content/uploads/2017/06/20170607_diversity-counts.pdf.
- ⁱⁱ American Constitution Society, *Diversity of the Federal Bench*, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> (last visited March 5, 2025).
- ⁱⁱⁱ Brooke Sopelsa, *Trump appoints openly gay conservative to federal appeals court*, NBC News, (Oct. 16, 2018, 1:15PM PDT), <https://www.nbcnews.com/feature/nbc-out/trump-nominates-openly-gay-conservative-federal-appeals-court-n920831>.
- ^{iv} This report covers only Article III judges, which includes federal judges on the district courts, the circuit courts of appeal, the U.S. Supreme Court, and the International Court of Trade. These judges must be nominated by the President and confirmed by the U.S. Senate.
- ^v Kit Yona, *Biden's Numerous Judicial Confirmations Were the Most Diverse in U.S. History*, FindLaw, (January 24, 2025), <https://www.findlaw.com/legalblogs/practice-of-law/bidens-numerous-judicial-confirmations-were-the-most-diverse-in-u-s-history/>.
- ^{vi} Alliance For Justice, *Our Courts, Our Rights: Defending Justice Beyond 2024*, 9 (2024), <https://afj.org/wp-content/uploads/2025/01/Our-Courts-Our-Rights-Report-2024-Report.pdf>.
- ^{vii} John Gramlich, *How Biden's judge appointments compare with other presidents*, Pew Research Center, (Jan. 9, 2025), <https://www.pewresearch.org/short-reads/2025/01/09/how-biden-compares-with-other-recent-presidents-in-appointing-federal-judges/>.
- ^{viii} *Supra*, note vi at 10.
- ^{ix} The Leadership Conference on Civil and Human Rights, *Memo: Judicial Diversity Milestones During the Biden Administration*, (Dec. 20, 2024), <https://civilrights.org/2024/12/20/memo-judicial-diversity-milestones-biden/>.
- ^x The Leadership Conference on Civil and Human Rights, *President Biden's judicial appointees who were public defenders or civil rights lawyers (or both) or who otherwise have significant experience protecting people's civil and human rights*, <https://civilrightsdocs.info/pdf/Biden-Judicial-Appointees-Professional-Diversity.pdf> (last visited March 5, 2025).
- ^{xi} Daniel Wiessner, *Senate confirms first federal Muslim Judge in U.S. history*, Reuters, (June 10, 2021, 6:06PM PDT), <https://www.reuters.com/legal/government/senate-confirms-first-federal-muslim-judge-us-history-2021-06-10/>.
- ^{xii} *Supra*, note vi at 8.
- ^{xiii} U.S. Census Bureau, *Quick Facts: Texas*, (2024), <https://www.census.gov/quickfacts/fact/table/TX/PST045224> (last visited March 5, 2025).
- ^{xiv} Jeffrey M. Jones, *LGBTQ+ Identification in U.S. Rises to 9.3%*, Gallup, (Feb. 20, 2025), <https://news.gallup.com/poll/656708/lgbtq-identification-rises.aspx>.
- ^{xv} There are a total of 24 LGBTQ+ federal judges currently active. 24 out of 870 judgeships is 2.7% of total federal judgeships.
- ^{xvi} *Current Judicial Vacancies*, United States Courts, <https://www.uscourts.gov/data-news/judicial-vacancies/current-judicial-vacancies>, (last visited April 17, 2025); *Future Judicial Vacancies*, United States Courts, <https://www.uscourts.gov/data-news/judicial-vacancies/future-judicial-vacancies>, (last visited April 17, 2025).
- ^{xvii} *U.S. Court of Appeals Authorized Judgeships*, United States Courts, <https://www.uscourts.gov/sites/default/files/2025-01/appealsauth.pdf>, (last visited March 6, 2025).
- ^{xviii} Kevin Freking, *Democrats strike deal to get more Biden judges confirmed before Congress adjourns*, AP News, (Nov. 21, 2024, 6:51 PM PST), <https://apnews.com/article/biden-trump-judges-confirmation-battle-schumer-senate-ecf59aed90804a53d436dc154a2ee14>.
- ^{xix} *U.S. District Courts Authorized Judgeships*, United States Courts, <https://www.uscourts.gov/sites/default/files/2025-01/districtauth-with-endnotes.pdf>, (last visited March 6, 2025).

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