

# ACTIVE ENGAGEMENT: THE FINAL STAGE OF THE ELECTION GRIEVING PROCESS

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## I. INTRODUCTION

This Essay is about engagement. It is not, however, the first Essay that I wrote for this symposium. It is the third. The first Essay was written as the country was witnessing the presidential campaigns of Donald Trump and Kamala Harris. It was a “proper” sort of Essay examining the legal landscape for LGBTQIA+ people in light of the United States Supreme Court’s recent precedents.<sup>1</sup> After the election, it no longer seemed to reflect where the country was situated politically, legally, and culturally.<sup>2</sup>

So, I started again. The second Essay was a response to Donald Trump’s win and Republican control of both the United States House and Senate.<sup>3</sup> I searched for inspiration in the traditional scholarly places and I even asked queer teenagers about the issues that were important to them. Nothing seemed right. The second Essay turned into a more philosophical piece about

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1. See, e.g., *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020) (holding that Title VII’s language prohibiting discrimination “because of sex” includes gay and transgender individuals); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (overruling Supreme Court precedent and holding there is no constitutional fundamental right to abortion); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding state public accommodation law violated business owner’s First Amendment right because it compelled her to engage in speech she opposed).

2. After the election, “twenty-nine percent of Americans polled said that they were satisfied with the way things were going in the [United States], while seventy percent [ ] sa[id] they [were] dissatisfied.” PEW RSCH. CTR., PUBLIC NARROWLY APPROVES OF TRUMP’S PLANS; MOST ARE SKEPTICAL HE WILL UNIFY THE COUNTRY 20 (2024), [https://www.pewresearch.org/wp-content/uploads/sites/20/2024/11/PP\\_2024.11.22\\_post-election\\_REPORT.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2024/11/PP_2024.11.22_post-election_REPORT.pdf).

3. See *Election Results, 2024: U.S. Congress*, BALLOTPEDIA, [https://ballotpedia.org/Election\\_results\\_2024:\\_U.S.\\_Congress](https://ballotpedia.org/Election_results_2024:_U.S._Congress) (last visited Jan. 19, 2025).

the concept that the arc of the moral universe is not a rainbow arc but more of a geometric sine wave that moves up and down.

Since the Rev. Dr. Martin Luther King, Jr. began stating that “the arc of the moral universe is long, but it bends towards justice,”<sup>4</sup> people have used this quote to evince a positive mind-set towards social change. Social change, however, is not inevitable. Even the abolitionist and Unitarian Minister, Theodore Parker, who is thought to be the originator of this concept stated:

Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends towards justice.<sup>5</sup>

President Obama often referenced Dr. King’s quote,<sup>6</sup> and he also noted that “[t]he arc of the moral universe may bend towards justice, but it doesn’t bend on its own. To secure the gains this country has made requires constant vigilance, not complacency.”<sup>7</sup>

This last refrain has gained relevance for many people since the 2024 presidential election. People who care about LGBTQIA+ equality have witnessed significant legislative and judicial victories in the last twenty years.<sup>8</sup> Yet, a feeling of apprehension has settled in, particularly for transgender people due to: the United States Supreme Court’s recent decisions, which may undermine efforts to protect the rights of LGBTQIA+ individuals;<sup>9</sup> the significant amount of legislation targeting transgender

4. Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, Speech at the National Cathedral, Washington, D.C. (Mar. 31, 1968), in 114 CONG. REC. 9397 (1968).

5. THEODORE PARKER, *TEN SERMONS OF RELIGION, OF JUSTICE AND THE CONSCIENCE*, 84-85 (Forgotten Books 2018) (1853).

6. President Obama even had the quote embroidered on a new rug for the oval office. Peter Maer, *Obama’s Oval Office Gets a Makeover*, CBS NEWS (Aug. 31, 2010, 4:03 PM) <https://www.cbsnews.com/news/obamas-oval-office-gets-a-makeover>.

7. Barak Obama, *Remarks by the President at the “Let Freedom Ring” Ceremony Commemorating the 50<sup>th</sup> Anniversary of the March on Washington*, WHITE HOUSE PRESIDENT BARACK OBAMA (Aug. 28, 2013, 4:03 PM), <https://obamawhitehouse.archives.gov/photos-and-video/video/2013/08/28/president-obama-marks-50th-anniversary-march-washington>.

8. See generally Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143 (2015) [hereinafter Sobel, *Culture Shifting*] (detailing the evolution of the law surrounding LGBT issues since the 1990s); Stacey L. Sobel, *The Backlash Boomerang: Using Reverse Animus and Hostility to Limit LGBTQ Equality*, 22 U. PA. J. CONST. L. 1155 (2020) [hereinafter Sobel, *Backlash Boomerang*] (describing how LGBTQ legal victories has caused a new wave of discrimination suits filed by those who oppose LGBTQ rights).

9. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (holding that there is no fundamental right to abortion); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding that

people;<sup>10</sup> and the potential impact of a Trump presidency on courts, state and federal legislatures, and federal executive actions.<sup>11</sup> The combined effect of these efforts has even caused transgender individuals to question whether they should move to a different state or country.<sup>12</sup>

Then the United States Supreme Court held oral argument in the *United States v. Skrmetti*.<sup>13</sup> The case involves an Equal Protection Clause challenge to a Tennessee state law prohibiting gender-affirming care for transgender minors. The post-argument discussion about the case on a law professor list-serve, however, impacted my approach to this Essay.

The list-serve discusses a wide variety of constitutional law-related issues, and its treatment of LGBTQIA+ matters was not significantly different from its discussions on other topics, such as racial inequality or reproductive rights, among others. The discourse is often very theoretical, involves a myriad of hypotheticals to prove or disprove analytical proffers, and is typically disassociated from the reality of living as a person of color, woman, or LGBTQIA+ individual. As the list-serve dived deeper into whether or not transgender classifications warranted a higher standard of review for equal protection analysis, the conversation morphed into tangential discussions regarding issues completely unrelated to transgender people or their rights. Lost in all of the scholarly gymnastics were the very real teenagers who were deprived of the medical treatment that they, their parents, and their doctor thought was best for them.

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a service provider may not be compelled to provide wedding-related web services to same-sex couples due to her religious beliefs despite state public accommodations law prohibiting discrimination on the basis of sexual orientation).

10. In 2024, more than 600 pieces of anti-transgender legislation were introduced in forty-three states. *2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, <https://translegislation.com/bills/2024> [hereinafter *2024 Anti-Trans Bills Tracker*] (last visited Jan. 9, 2025).

11. See IAN THOMPSON ET AL., ACLU, TRUMP ON LGBTQ RIGHTS: ERASING LGBTQ FREEDOMS BY ROLLING BACK PROTECTIONS, MANDATING DISCRIMINATION, AND WEAPONIZING FEDERAL LAW AGAINST TRANSGENDER PEOPLE (2024), [https://assets.aclu.org/live/uploads/2024/06/Memo\\_TrumpOnLGBTQJustice-620pm.pdf](https://assets.aclu.org/live/uploads/2024/06/Memo_TrumpOnLGBTQJustice-620pm.pdf).

12. In 2022, forty-seven percent of transgender people surveyed said that they wanted to move to a different state because of anti-transgender laws. It is possible that number has increased due to the significant amount of discriminatory legislation that has passed and been introduced in the last two years. See SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY 23 (2024), [https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report\\_FINAL.pdf](https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf).

13. *L.W. v. Skrmetti*, 83 F.4th 460, (6th Cir. 2023), *cert. granted*, 144 S.Ct. 2679 (U.S. 2024). The Court heard oral argument for this matter on December 4, 2024. See *Supreme Court Adjourns Oral Arguments in Historic Transgender Rights Hearing*, ACLU (Dec. 4, 2024, 2:30 PM), <https://www.aclu.org/press-releases/supreme-court-adjourns-oral-arguments-in-historic-transgender-rights-hearing>.

These “scholarly” discussions demonstrated that some of the legal and social progress I had taken for granted was not as well-moored as I thought. Out of this realization rose the third version of this Essay. In some ways, the three Essays represent an evolution or a form of the stages of grief. Typically, these stages include denial, anger, bargaining, depression, and acceptance.<sup>14</sup> My journey was one of apprehension, loss, grudging acceptance, and finally, engagement.

This Essay is about the need to engage people who are not knowledgeable about LGBTQIA+ issues on a variety of levels. Decades have been spent working to move LGBTQIA+ issues forward, sometimes incrementally and sometimes in larger leaps. Those who support equality and justice for queer people cannot merely accept that we live in a divided country. We must actively engage those who are unaware of the efforts to limit LGBTQIA+ rights and those who actively oppose LGBTQIA+ equality. We must continue to move towards justice, even if it is not rainbow-shaped.

While recent trends may create a sense that the progress on LGBTQIA+ issues is at risk of reversal, ultimately, progress will continue. It just may need to take different forms. Many of the more recent victories for LGBTQIA+ people have occurred in the courts.<sup>15</sup> LGBTQIA+ equality proponents may need to engage in older advocacy techniques that focused on large-scale public advocacy that occurred when advancement was more difficult.

This Essay will first examine the litigation threats currently facing the LGBTQIA+ community and review some of the legislative efforts to subordinate LGBTQIA+ people. It will then look at how advocacy efforts can limit the impact of these threats and propose that advocates forge significant outreach efforts to move the community toward greater equality.

## II. THREATS TO LGBTQIA+ EQUALITY

A Trump presidency and increased negativity towards LGBTQIA+ people pose a potential number of threats from all three branches of government on both the federal and state levels.<sup>16</sup> After years of increasing

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14. Psychiatrist Elisabeth Kübler-Ross originated the theory regarding the stages of grief in *ELISABETH KÜBLER-ROSS, ON DEATH AND DYING* (1969).

15. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015); *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

16. President Trump has already signed a number of Executive Orders that may negatively affect LGBTQIA+ people, including limiting federal gender recognition to male or female as assigned at birth; assigning individuals to federal prisons or shelters based on a person’s gender assigned at birth; and prohibiting taxpayer money from funding “transition services.” Geoff

public support on LGBTQIA+ issues, recent GALLUP polling shows decreases in support of gay and lesbian relationships from a high of seventy-one percent of people finding them morally acceptable in 2022 to sixty-four percent support in 2023 and 2024.<sup>17</sup> Additionally, in 2021, forty-six percent of people polled believed that changing one's gender was morally acceptable, with only forty-three and forty-four percent support in 2023 and 2024, respectively.<sup>18</sup> For the first time, people were asked if they favored or opposed laws banning gender-affirming care for minors, and thirty-four percent favored such legislation while sixty-two percent opposed it.<sup>19</sup>

LGBTQIA+ rights have been a political hot-button issue since the 1970s. As LGBTQIA+ people became more visible and demands for equality increased, anti-LGBTQIA+ efforts followed.<sup>20</sup> A notable example was Anita Bryant, an entertainer, and Miss America runner-up, who launched a successful campaign to repeal a Dade County, Florida, ordinance prohibiting sexual orientation discrimination in 1977.<sup>21</sup> Some say that her rhetoric echoes in today's anti-LGBTQIA+ war in Florida.<sup>22</sup> Despite the negative rhetoric<sup>23</sup> and political tactics used by some politicians, progress moved towards equality through court decisions, legislation, and administrative actions. As legal progress was being made, there were corresponding increases in support of LGBTQIA+ equality among the general public.<sup>24</sup>

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Mulvihill et al., *Trump Orders Reflect His Promises to Roll Back Transgender Protections and End DEI Programs*, AP, (Jan. 20, 2025, 5:41 PM), <https://apnews.com/article/trump-sex-gender-transgender-dei-order-245350b97e0c4dce221f49ef44699>.

17. Megan Brenan, *Same-Sex Relations, Marriage Still Supported by Most in U.S.*, GALLUP (June 24, 2024), <https://news.gallup.com/poll/646202/sex-relations-marriage-supported.aspx>.

18. Compare Jeffrey M. Jones, *More Say Birth Gender Should Dictate Sports Participation*, GALLUP (June 12, 2023), <https://news.gallup.com/poll/507023/say-birth-gender-dictate-sports-participation.aspx> (reporting public views on gender identity in 2023), with Megan Brenan, *Slim Majority of U.S. Adults Still Say Changing Gender Is Morally Wrong*, GALLUP (June 7, 2024), <https://news.gallup.com/poll/645704/slim-majority-adults-say-changing-gender-morally-wrong.aspx> (reporting public views on gender identity in 2024).

19. Brenan, *2024 Gender Identity Data*, *supra* note 17.

20. Sobel, *Backlash Boomerang*, *supra* note 8, at 1160-65.

21. *Id.* at 1161-62.

22. See Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida's LGBTQ Culture War*, NBC NEWS, (Apr. 14, 2022, 9:21 AM), <https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215>.

23. For example, House Speaker, Rep. Mike Johnson (R-LA), has previously called marriage equality "a dark harbinger of chaos" and argued that it could lead to people legally marrying their pets. Matt Laviates, *New House Speaker's Views on LGBTQ Issues Come Under Fresh Scrutiny*, NBC NEWS (Oct. 26, 2023, 1:08 PM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/mike-johnson-house-speaker-lgbtq-views-scrutiny-rcna122317>.

24. Sobel, *Backlash Boomerang*, *supra* note 8, at 1164-65.

In the last few years, however, opponents to LGBTQIA+ equality appear to be emboldened by the increased negativity and divisiveness expressed by some socially conservative politicians and advocates. This is particularly evident in efforts to limit the rights and protections of transgender people through policies on bathroom use, gender-affirming care, and athletic activities.

There might be a temptation to say that this negativity is a result of backlash towards the rapid movement towards equality over the last fifty years. Empirical research, however, does not support that conclusion.<sup>25</sup> This current negativity is part of a larger societal issue against equality and justice by those who feel threatened by an increasingly diverse country<sup>26</sup> and who will utilize all of the legal and political tools at their disposal to prevent or limit protections for LGBTQIA+ individuals.

#### A. *Litigation Threats*

In the last few decades, LGBTQIA+ advocates have utilized litigation tactics to advance rights and protections related to sexual orientation and gender identity. In the last decade, however, opponents to LGBTQIA+ equality have engaged in their own litigation strategy of competing interests to argue that they do not have to comply with non-discrimination laws.<sup>27</sup> Additionally, other litigation that is not directly LGBTQIA+ related has resulted in case decisions that may be used in the future to limit or prohibit protections that are already recognized, or pro-equality advocates are currently working towards.<sup>28</sup>

##### i. *Attacks on Fundamental Rights*

A potential litigation strategy that is likely to occur is an effort to limit fundamental rights recognition for LGBTQIA+ people. This tactic is particularly likely to be used by marriage equality opponents. When the Supreme Court found that same-sex couples had the fundamental right to marry, it relied on numerous precedents, finding fundamental rights existed

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25. *Id.* at 1174-77.

26. See Ariel Edwards-Levy, *A Growing Share of GOP Voters See Diversity as Threatening to American Culture*, *CNN poll finds*, CNN (Sept. 25, 2024, 7:52 PM), <https://www.cnn.com/2024/09/25/politics/diversity-poll-voters-american-culture/index.html>.

27. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210-12 (Wash. 2019), *reh'g denied*, 142 S. Ct. 521 (U.S. 2021); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018), *cert. denied*, 586 U.S. 1241 (2019); *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108 (Or. Ct. App. 2022), *vacated and remanded*, 143 S. Ct. 2686 (U.S. 2023); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

28. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

even though they were not enumerated in the Constitution.<sup>29</sup> The Court's decision in *Dobbs v. Jackson Women's Health Organization*,<sup>30</sup> places at risk those prior decisions protecting unenumerated fundamental rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>31</sup>

The *Dobbs* Court overturned decades of precedent when it held that there was no constitutionally-protected right to abortion.<sup>32</sup> The Court repeatedly distinguished abortion from other rights in its decision<sup>33</sup> and stated that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."<sup>34</sup> Justice Kavanaugh's concurring opinion agreed and added that "[o]verruling *Roe* does *not* mean the overruling of these precedents, and does *not* threaten or cast doubt on those precedents."<sup>35</sup> Justice Thomas agreed that *Dobbs* didn't overturn non-abortion precedents, but he urged the Court to reexamine and overrule other substantive due process precedents, including the right for same-sex couples to marry.<sup>36</sup> Despite the majority's assurances, the dissenters raised significant concerns that those who were interested in rolling back the gains made for LGBTQIA+ people would leverage *Dobbs*' reasoning to also eliminate marriage equality.<sup>37</sup>

This exchange is reminiscent of Justice Kennedy's decision in *Lawrence v. Texas*, stating that the decision did not involve formal recognition of relationships for same-sex couples, among other things,<sup>38</sup> and Justice Scalia's dissenting response to not believe it.<sup>39</sup> It is likely that Justice Kennedy, like the *Dobbs* Justices, was well-meaning, but Justice Scalia correctly interpreted the situation, and within hours of the *Lawrence* decision, LGBTQIA+ advocates were already discussing how to best employ the decision in other cases.<sup>40</sup>

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29. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

30. 597 U.S. at 231.

31. U.S. CONST. amend. XIV, §1.

32. 597 U.S. at 231.

33. *Id.* at 262.

34. *Id.* at 290.

35. *Id.* at 346 (Kavanaugh, J., concurring).

36. *Id.* at 332-33 (Thomas, J., concurring).

37. *Id.* at 363, 385-86 (Breyer, J., dissenting) (raising similar analytical concerns about the majority's language stating that *Dobbs* would not be extended to other rights).

38. 539 U.S. 558, 578 (2003).

39. *Id.* at 605 (Scalia, J., dissenting) The *Dobbs* dissenting opinion also drew a similar comparison with *Lawrence*. *Dobbs*, 597 U.S. at 385-386.

40. In 2003, the author was the Executive Director of the Center for Lesbian and Gay Civil Rights, later known as Equality Advocates Pennsylvania, a statewide LGBTQIA+ legal aid and advocacy organization and was involved in strategy sessions with state, local, and national organizations after the *Lawrence* decision was handed down. For a short biography of the author,

It would be shocking if anti-LGBTQIA+ cases attempting to limit the fundamental right to marry do not rise through the court system in the next few years. Those cases will likely argue that there is no textual support for marriage in the United States Constitution and that there is insufficient history and tradition to support marital rights for same-sex couples. Whether individual justices continue to support the distinctions between abortion and marriage equality remains to be seen.

After *Dobbs*, the United States Congress passed the Respect for Marriage Act.<sup>41</sup> This law may give federal protections, but it does not prevent a Constitutional challenge from entering the Courts. Were the Court to change its view on the issue, marital rights could once again become dependent on state constitutional and statutory provisions.<sup>42</sup>

## ii. Attacks on Public Accommodations Laws

Another litigation strategy involves claims presented by businesses asserting a First Amendment right to refuse goods or services to LGBTQIA+ people despite laws prohibiting discrimination on the basis of sexual orientation or gender identity. These types of cases became more frequent as more jurisdictions passed LGBTQIA+ inclusive laws, and courts recognized the equal and fundamental rights of LGBTQIA+ people, such as the right to marry.

In *303 Creative LLC v. Elenis*, the Supreme Court addressed the issue of whether the business owner, Lorie Smith, could provide wedding website services to the public but refuse to create them for same-sex couples because it would be inconsistent with her belief that marriage should be reserved to one man and one woman.<sup>43</sup> Ms. Smith argued she should not be compelled to speak in contradiction to her views.<sup>44</sup>

Justice Gorsuch delivered the Court's 6-3 opinion.<sup>45</sup> The Court's decision examined the underpinnings of the First Amendment's Free Speech Clause including the fact that the government cannot compel people to engage in speech or force them to express views they do not share.<sup>46</sup> The

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see Stacey Sobel, *Associate Dean for Research & Faculty Development and Professor*, W. STATE COLL. OF L., <https://www.wsulaw.edu/faculty-and-staff/full-time-faculty/stacey-sobel/>.

41. Pub. L. No. 117-228, 136 Stat. 2305 (2022) (codified as amended to 1 USC § 7 and 28 USC § 1738C) (repealing the Defense of Marriage Act).

42. Sydney Jackson, *Dobbs' Impact on LGBTQ+ Rights: Where Do We Go from Here*, 101 U. DET. MERCY L. REV. 43, 63 (2023).

43. 600 U.S. 570, 579-80 (2023).

44. *Id.* at 580.

45. *Id.* at 577.

46. *Id.* at 584-87.

Court concluded that Smith's websites were "pure speech,"<sup>47</sup> but noted that even though governments have a compelling interest in creating and enforcing laws preventing discrimination in public accommodations, those laws must also meet the demands of the Constitution.<sup>48</sup> Ultimately, the Court found that Colorado was not seeking to impose an incidental burden on Smith's speech but that it was attempting to compel her speech, which is not tolerated by the First Amendment.<sup>49</sup> Justice Gorsuch concluded by stating, "The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."<sup>50</sup>

According to the majority opinion, "[i]t is difficult to read the dissent and conclude we are looking at the same case."<sup>51</sup> Justice Sotomayor's dissent declared that "the breadth of [Smith's] pre-enforcement challenge [wa]s astounding" and that she was not entitled to an exemption to the law's requirements under the First Amendment.<sup>52</sup> The dissent stated that for the first time, the Supreme Court announced that businesses open to the public had a constitutional right to deny goods or services to protected classes.<sup>53</sup> Justice Sotomayor added that the decision created the symbolic effect of marking LGBTQIA+ people with a second-class status by stating, "Some services may be denied to same-sex couples."<sup>54</sup>

The Court did not provide any limitations to its decision and left open a number of issues. Businesses will test the parameters of the Court's decision in future cases. In the meantime, people who belong to protected classes will wonder if they will face illegal discrimination without recourse if they are denied services at a store or restaurant.<sup>55</sup>

### iii. Discrimination on the Basis of Sex

One type of legal challenge that pro-equality advocates continue making is bringing federal law causes of action. These claims typically focus on the application of federal statutes to discriminatory conduct, while other claims

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47. *Id.* at 587.

48. *Id.* at 590, 592.

49. *Id.* at 596.

50. *Id.* at 603.

51. *Id.* at 597.

52. *Id.* at 625 (Sotomayor, J., dissenting).

53. *Id.* at 637.

54. *Id.*

55. Stacey Sobel, 303 *Creative v. Elenis on Free Speech Versus LGBTQ+ Equality*, in *SCOTUS 2023: MAJOR DECISIONS AND DEVELOPMENTS OF THE US SUPREME COURT*, 63, 71-72, (Morgan Marietta & Howard Schweber eds., 2024).

may examine the constitutionality of discriminatory laws.<sup>56</sup> The Court addressed discriminatory conduct under a statutory interpretation issue in *Bostock v. Clayton County*.<sup>57</sup> Justice Gorsuch's majority opinion stated that sex played a "necessary and undisguisable" role in the firing of an LGBTQIA+ person for traits or actions the employer would not have questioned in members of a different sex and this is forbidden by Title VII's prohibition on sex discrimination.<sup>58</sup> The Court found that "[a]n employer who fires an individual merely for being gay or transgender defies the law."<sup>59</sup>

That decision did not address the possible constitutional discrimination claims of whether discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination. It also left open the question of what type of Equal Protection analysis should be used when looking at discrimination against LGBTQIA+ people.<sup>60</sup>

The Supreme Court recently heard oral argument in *United States v. Skrmetti*, where it appears that it may finally address these subjects.<sup>61</sup> At issue in the case is whether a Tennessee law<sup>62</sup> prohibiting gender-affirming care for transgender minors violates the Equal Protection Clause of the Fourteenth Amendment.<sup>63</sup> The oral argument focused in large part on which standard of review should be used in the case.<sup>64</sup>

The Supreme Court has developed different levels of review for Equal Protection claims based on the classification of the affected group. Gender classifications are analyzed under intermediate scrutiny.<sup>65</sup> Classifications that do not warrant a heightened level of scrutiny fall under rational basis

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56. See, e.g., *L.W. v. Skrmetti*, 83 F.4th 460, (6th Cir. 2023), cert. granted, *United States v. Skrmetti*, 144 S. Ct. 2679 (U.S. 2024); *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

57. *Bostock*, 590 U.S. at 644.

58. *Id.* at 650-52.

59. *Id.* at 683.

60. See *id.* at 733-34 (Alito, J., dissenting) (criticizing the majority for neglecting to reconcile its Title VII analysis with the Court's equal protection jurisprudence); see also Stacey L. Sobel, *When Windsor Isn't Enough, Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 494-99 (2015) [hereinafter Sobel, *When Windsor Isn't Enough*] (criticizing the Court for failing to clarify the level of scrutiny in equal protection claims by instead relying on a hybrid "liberty and animus approach[]").

61. Transcript of Oral Argument, *Skrmetti*, 144 S. Ct. 2679 (No. 23-477).

62. Tenn. Code. Ann. § 68-33-103(a)(1) (2023).

63. U.S. CONST. amend. XIV, § 1.

64. See generally Transcript of Oral Argument, *supra* note 61.

65. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976). Under intermediate scrutiny a valid restriction "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* The burden of proof is placed on the government in intermediate scrutiny cases, and while it is not as fatal as strict scrutiny, it is still "demanding." *United States v. Virginia*, 518 U.S. 515, 532 n.6, 533 (1996) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

review.<sup>66</sup> Rational basis challenges typically fail due to the fact that courts are highly deferential to the government and that any legitimate interest suffices to meet the rational basis test, even if it was not an actual interest of the government when the law was passed.<sup>67</sup> Consequently, laws that are examined under the more rigorous intermediate test are more likely to be found unconstitutional.

In *Skrmetti*, the United States Solicitor General, Elizabeth Prelogar, argued that the law was a facial sex classification that drew distinctions on sex-based lines and as a result, it deserves a more exacting form of scrutiny than the rational basis test urged by the state.<sup>68</sup> She also noted that there was no difference between the Court's analysis in *Bostock* and its Equal Protection Clause precedents; in both contexts, sex needs to be one of the but-for causal factors.<sup>69</sup> The United States also asserted that it did not matter whether the law was analyzed as a sex-based classification or transgender status discrimination because both would warrant heightened scrutiny.<sup>70</sup>

"It is important to note that the last time the Court granted heightened scrutiny to a new classification was 1977, long before any of our current Justices were sitting on the Supreme Court."<sup>71</sup> It is possible that the Court will determine which standard of review to apply and remand the case back to the Sixth Circuit for further consideration as urged by the U.S. Solicitor General.<sup>72</sup>

### B. Legislative Threats

Another avenue that equality opponents may continue to pursue is limiting or prohibiting LGBTQIA+ rights through legislative activities. The number of anti-LGBTQIA+ bills introduced has been increasing every year.<sup>73</sup> A record number of more than 500 anti-LGBTQIA+ bills were introduced in state legislatures in 2023.<sup>74</sup> This number was outdone in 2024, with 533 active anti-transgender bills in forty-three state legislatures and

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66. Sobel, *When Windsor Isn't Enough*, *supra* note 60, at 501 (citations omitted).

67. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (citations omitted) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

68. Transcript of Oral Argument, *supra* note 61, at 5-6.

69. *Id.* at 22.

70. *Id.* at 34-35, 70-71.

71. Sobel, *When Windsor Isn't Enough*, *supra* note 60, at 502 (citations omitted).

72. Transcript of Oral Argument, *supra* note 61, at 14, 43.

73. Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN (Jan. 22, 2024, 5:04 PM), <https://www.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html> (collating ACLU data on anti-LGBTQ+ legislation from 2018 to 2023).

74. *See id.*; *Mapping Attacks on LGBTQ Rights in State Legislatures in 2023*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> (last visited Jan. 18, 2025).

forty-eight bills becoming law.<sup>75</sup> 2025 has seen even more anti-transgender legislation, with 895 bills already filed in state legislatures.<sup>76</sup> Much of the anti-LGBTQIA+ legislation can be grouped into several areas, including restrictions or barriers to accurate identification, free speech and expression, health care, public accommodations, student and educator rights, and civil rights.<sup>77</sup>

While it is unlikely that pro-LGBTQIA+ legislation will pass in state legislatures controlled by Republican majorities, most equality advocacy will be focused on halting the legislative efforts of equality opponents. As the 2024 numbers indicate, most of these bills will not become law.<sup>78</sup> A significant amount of resources will be used by equality advocates to merely hold the status quo in many of these states.

### III. PUBLIC ENGAGEMENT LEADS TO EQUALITY

In 1986, the Supreme Court held that there was no right to “homosexual sodomy” in *Bowers v. Hardwick*.<sup>79</sup> The decision had a significant impact on LGBTQIA+ advocates with many attempting to avoid the courts as a method of achieving equality.<sup>80</sup> Many advocates began engaging in public education activities to change perceptions about gay and lesbian people, particularly those in same-sex relationships.<sup>81</sup> This active engagement was necessary to pass state legislation often involving hate crimes or non-discrimination laws focusing on housing, employment, and public accommodations.<sup>82</sup> Public engagement also became necessary after the Hawai’i Supreme Court ruled that denying same-sex couples marriage equality was a form of sex discrimination, and a wave of legislation and ballot initiatives limiting

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75. 2024 Anti-Trans Bills Tracker, *supra* note 10; see also *Mapping Attacks on LGBTQ Rights in State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> [hereinafter ACLU, 2024 Map of Anti-LGBTQ Proposed Legislation] (last visited Jan. 18, 2025) (ACLU reports tracking 533 anti-LGBTQ bill in U.S.).

76. 2025 Anti-Trans Bills Tracker, TRANS LEGIS. TRACKER, <https://translegislation.com> (last visited May 17, 2025).

77. ACLU, 2024 Map of Anti-LGBTQ Proposed Legislation, *supra* note 75.

78. See 2024 Anti-Trans Bills Tracker, *supra* note 10 (50 bills passed out of 673 introduced).

79. 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

80. See Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lan Guinier’s Demosprudence through Dissent*, 89 B.U. L. Rev. 589, 589 (2009) (citing WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 250–52, 269–98 (2008)).

81. See, e.g., Elizabeth Sheyn, *The Shot Heard Around the LGBT World: Bowers v. Hardwick as a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE, GENDER & ETHNICITY, May 2009, at 2, 13–14, 14 n.76, 18–19.

82. Sobel, *Culture Shifting*, *supra* note 8, at 156–58.

marriage recognition to heterosexual couples came crashing across the country.<sup>83</sup>

Even though pro-equality advocates lost every ballot initiative until the last one in 2012,<sup>84</sup> an amazing change in public opinion occurred as advocates and ordinary people told their stories to their friends and family, and the public.<sup>85</sup> The losses may have devastated members of the community and their allies, but the public engagement led to social change.

In 2013, the Court decided *United States v. Windsor*,<sup>86</sup> where it held that the federal Defense of Marriage Act (“DOMA”),<sup>87</sup> which limited marriage to a man and a woman, was unconstitutional under the Fifth Amendment.<sup>88</sup> The *Windsor* decision was used to bring challenges to state or mini-DOMA laws, and state and federal courts began to strike down the marital limitations.<sup>89</sup> By the time the Court heard *Obergefell*, only thirteen states did not recognize marital equality.<sup>90</sup> Marriage equality would have occurred eventually, but public engagement made it occur more quickly.

After *Obergefell*, however, it appeared as if the public engagement work of the LGBTQIA+ community was not as invigorated or visible as before. While marital rights are important, they do not prevent an employer from firing a person or protect other vital rights. Since *Bostock*, the federal government has taken the position that Title VII prevents discrimination in “any aspect of employment.”<sup>91</sup> It is unclear how *Skrimetti* or a new Trump administration will interpret the language in Title VII related to discrimination on the basis of sex.

Transgender people were at the forefront of the so-called “gay rights” movement.<sup>92</sup> Now is the time for the non-transgender members of the

83. Sobel, *Backlash Boomerang*, *supra* note 8, at 1162-63 (citing *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (“[I]nterpreting the Hawai’i statute, which denied same-sex couples access to marital status and its rights and benefits, as discrimination based on the basis of the applicant’s sex.”)).

84. Sobel, *Culture Shifting*, *supra* note 8, at 160-61.

85. *Id.* at 176-78 (current polling number have increased since the article’s publication).

86. 570 U.S. 744 (2013).

87. Definition of “Marriage” and “Spouse”, 1 U.S.C.A. § 7 (West 1996) *amended by* 1 U.S.C.A. § 7 (West 2022).

88. *Windsor*, 570 U.S. at 775.

89. Sobel, *Backlash Boomerang*, *supra* note 8, at 1163-64.

90. *Id.* at 1164 n.35 (citing *Same-Sex Marriage Laws*, NCSL (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>).

91. See *Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination> (last visited Jan. 9, 2025).

92. See Kyle C. Velte, *The Mattachine Society to Megan Rapinoe: Tracing and Telegraphing the Conformist/Visionary Divide in the LGBT-Rights Movement*, 54 U. RICH. L. REV. 799, 807, 823 (2020).

community and allies to step-up the advocacy efforts for transgender or gender queer identifying people. A dedicated strategy of public engagement on transgender legal issues will help to protect transgender rights and the rights of the greater LGBTQIA+ community because so much discrimination targeted towards LGBTQIA+ people is based on gender-based stereotypes. This is why it is also logical to collaborate with old and new allies who face discrimination or challenges brought on by the new presidential administration or advocates for limited rights or government. Allies who face potential legal limitations related to their gender and groups of people who may be affected by narrow interpretations of fundamental rights affecting reproductive rights after *Dobbs* are obvious allies. Less obvious ones include veterans or military organizations, for example, who advocate for a wide variety of protections for those who have served our country, including LGBTQIA+ service members.

#### IV. CONCLUSION

Legal change for LGBTQIA+ people has occurred relatively quickly over the past fifty years. In the last few years, however, equality opponents have been pushing back. This is occurring at the same time as our country appears to be more politically, culturally, and socially divided than ever. Equality advocates have a choice: we can limit our world to those who support us and our goals, or we can do something uncomfortable and engage the “other side.”

This Essay encourages people to engage with others who may not be close with a member of the LGBTQIA+ community, might be reluctant to ask questions about, queer issues, or even oppose legal equality. Active engagement means not avoiding your “weird” uncle at the holidays, having a conversation with people who continuously call your spouse your “friend,” or explaining why people should refer to someone by their preferred pronoun. These can be uncomfortable conversations, but they are also opportunities for social change. Breaking down the dividers between groups or individuals through active engagement is one of the best ways to move public opinion and garner support for LGBTQIA+ equality. It is also necessary at a time when so much disinformation is provided to equality opponents.