

FEAR AND HOPE FOR LGBTQ RIGHTS IN THE SECOND TRUMP ADMINISTRATION

Luke A. Boso*

During his 2024 comeback campaign for the presidency, then-candidate Donald Trump made opposition to transgender equality and the effective legal and social erasure of transgender and gender diverse people a central component of his quest to regain formal political power. For gay, lesbian, bisexual, transgender, and queer (“LGBTQ”) persons—and especially those with intersecting identities relating to race, national origin, poverty, and undocumented status—*fear*¹ has taken hold in private, interpersonal, and public reactions to Trump’s comeback rise.²

Simply and succinctly put, fear is an emotional response to a source or sources, often but not always external, that may impact well-being.³ Fear can sometimes negatively interfere with decision-making and inhibit action, but it can also heighten senses and motivate action.⁴ Naming and unpacking the external sources of this emotional response may help us “make sense of the present, connect it to the past, and potentially alter the future.”⁵ And by understanding what we fear and why, perhaps we can better deploy this powerful emotion in tandem with another: hope.

Hope is an emotional response often tied to future-oriented goals. These goals may be difficult to achieve but not impossible, and they can be obtained

*Professor of Law, Co-Associate Dean for Research, and 2024-25 Kenneth & Harle Montgomery Foundation Scholar at Southwestern Law School.

1. Fear may very well animate many of those who support Trump and his movement as well, albeit as a reaction to perceived losses of a different kind. The story of conservative fear, however, is one for a different article.

2. See Rachel F. Moran, *Fear: A Story in Three Parts*, 69 MO. L. REV. 1013, 1014-15 (2004) (using these three categories to explain how fear as an emotion may be understood and operationalized in socio-legal contexts).

3. See Dan M. Kahan & Martha C. Nussbaum, *Two Concepts of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 282-89 (1996) (parsing the differences between “mechanistic” and “evaluative” theories of emotions, using fear as an example).

4. See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 628-31 (2003) (discussing various theories on fear represented in psychological and philosophical literature).

5. Janine Young Kim, *Racial Emotions and the Feeling of Equality*, 87 U. COLO. L. REV. 437, 440 (2016).

through the powers of human agency and self-determination.⁶ While fear on its own can motivate action, hope may be particularly useful in activating a more productive response.⁷

This essay begins in the register of fear, given the overwhelming speed at which the landscape has become inhospitable for gender and sexual minorities. It identifies several key inflection points of hostile change to make sense of the new reality in which LGBTQ persons find themselves. As this reality is setting in, this essay and others from this symposium issue search for beacons, however faint, that can facilitate the navigation of fear alongside hope as a helpful companion. LGBTQ people and aligned political and legal action organizations must not let hope die if we are to survive and overcome this period of democratic erosion⁸ and state-sanctioned hostility for difference.

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In his most-aired television ad of the long campaign season, Donald Trump put anti-LGBTQ “culture war” issues front and center by closing the advertisement with the tagline: “Kamala is for they/them. President Trump is for you.”⁹ At his political rallies, Trump’s oft-repeated attack on gender-affirming policies, reflecting what he described as “transgender insanity,” regularly received raucous applause.¹⁰ If elected, Trump promised to issue sweeping anti-trans executive actions, including reinstating his first-term prohibition on openly transgender persons serving in the military and reversing the Biden Administration’s policies designed to provide legal protections for transgender youth in K-12 schools.¹¹

On the first day of his second term as president, Trump followed through on many of his most radical and incendiary campaign promises by issuing a series of far-reaching executive orders—many of which targeted the LGBTQ

6. Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319, 324-26 (2007).

7. See, e.g., Margaret Chon, *Emotions and Intellectual Property Law*, 54 AKRON L. REV. 529, 547 (2020) (characterizing hope as a positive and action-oriented emotion).

8. See Jenny Breen, *Democratic Erosion and the United States Supreme Court*, 2024 UTAH L. REV. 341, 343 (naming consensus factors for democratic erosion in scholarly literature as including “the strategic manipulation of elections, the aggrandizement of the executive, increasing income inequality, and the decline of civil rights”).

9. Michael C. Bender, *Inside a Trump Ad Ridiculing Harris Over Taxpayer-Paid Gender Transition Surgery*, N.Y. TIMES (Sept. 25, 2024), <https://www.nytimes.com/2024/09/25/us/politics/trump-ad-anti-trans-harris.html>.

10. Shane Goldmacher, *Trump and Republicans Bet Big on Anti-Trans Ads Across the Country*, N.Y. TIMES (Oct. 8, 2024), <https://www.nytimes.com/2024/10/08/us/politics/trump-republican-transgender-ads.html>.

11. Michael D. Shear & Michael Gold, *Donald Trump’s Promises*, N.Y. TIMES (Jan. 19, 2025), <https://www.nytimes.com/interactive/2025/01/19/us/politics/trump-president-promises.html>.

community and diversity, equity, and inclusion (“DEI”) initiatives in both public and private sectors. Notably, Trump announced that his administration will enforce all federal laws and regulations relating to “sex” according to a binary and “biological” definition that recognizes only male and female.¹² The tangible and symbolic effects of this Order will be vast, denigrating and humiliating transgender, gender nonbinary, and gender diverse individuals in wide swaths of life touched by the federal government. The Order will, for example, deny accurate and affirming identification on government-issued documents like visas and passports, and it will lead to exclusionary practices in gendered spaces like prisons and shelters designed for individuals who have been victims of sexual assault.¹³

Further, President Trump issued an Executive Order formally rescinding Biden-era actions designed to prevent sexual orientation and gender identity discrimination against students in schools receiving federal funds,¹⁴ ironically deploying the federal government in coercive efforts to conservatively shape educational policy despite running on a platform emphasizing parental rights and local control over education. LGBTQ students stand to not only lose federal anti-bullying and pro-inclusion protections but may face educational environments that condone hostile attitudes and behaviors due to educators’ fears of federal retribution. In his inaugural address, Trump emphasized that he plans to “end the government policy of trying to socially engineer race and gender into every aspect of public and private life,”¹⁵ sending a chilling message that the long-pursued conservative project to exclude and deny the very existence of queer people has entered a forceful new era.

Only one full week into the second Trump Administration, the President issued a new round of executive orders purporting to end DEI in the military¹⁶ and purging transgender servicemembers based on the unsupported factual assertion that their “mental and physical health conditions” are “incompatible with active duty.”¹⁷ Later that same day, President Trump issued arguably the most draconian anti-trans Executive Order amidst this early chaotic barrage, characterizing puberty blockers as “chemical and surgical

12. Exec. Order No. 12,168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (defending women from gender ideology extremism and restoring biological truth to the federal government).

13. See Erica L. Green & Zach Montague, *Trump Signs Two Orders to Dismantle Equity Policies*, N.Y. TIMES (Jan. 20, 2025), <https://www.nytimes.com/2025/01/20/us/politics/trump-transgender-race-education.html>.

14. Exec. Order No. 12,148, 90 Fed. Reg. 8273 (Jan. 20, 2025).

15. President Donald J. Trump, Inaugural Address (Jan. 20, 2025), <https://www.whitehouse.gov/remarks/2025/01/the-inaugural-address/>.

16. Exec. Order No. 12,185, 90 Fed. Reg. 8763 (Jan. 27, 2025).

17. Exec. Order No. 12,183, 90 Fed. Reg. 8757 (Jan. 27, 2025).

“mutilation,” thus setting the foundation for future national restrictions on gender-affirming care for minors.¹⁸ The federal mission to eliminate transgender and gender diverse people from civic life is here. Fear springs from external threats, not merely hypothetical and abstract but vividly real.

Trump’s anti-trans rhetoric coincided with, and likely inspired, an alarming uptick of anti-LGBTQ legislative activity in statehouses across the country. Tapping into inflammatory, demonizing, and false stereotypes about queer grooming and predation, first nationally deployed by anti-gay rights activist Anita Bryant through her “Save Our Children” campaign,¹⁹ much of this proposed and enacted legislation centers on children and the manufactured need to protect them from allegedly harmful LGBTQ influences.²⁰ While the precise object and scope of these legislative efforts vary, their general flavor reflects a conservative desire to roll back hard-won equality gains and prevent the further legal and cultural encroachment of progressive values regarding gender and sexuality—specifically, by targeting a younger generation that empirical data suggests is more free-thinking on these issues than older generational cohorts.²¹

For example, classroom oriented bills restricting or prohibiting speech, expression, and educational materials regarding sexual orientation and gender identity have been proposed or signed into law in over twenty states.²² A similar number of states have entertained and in some cases enacted restrictions on drag performances,²³ particularly those that might be seen by

18. Exec. Order No. 12,187, 90 Fed. Reg. 8771 (Jan. 27, 2025).

19. “To show that gays harm children, the ‘Save Our Children’ campaign used four basic arguments: gay men recruit children because they cannot have children of their own, they want to teach children that homosexuality is acceptable, they cause physical harm to others, and they seduce and molest children.” Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL’Y 125, 145 (2013).

20. Dylan Jones, *Anita Bryant Is Dead. Her Ideology Is Alive and Well.*, POLITICO (Jan. 14, 2025), <https://www.politico.com/news/magazine/2025/01/14/anita-bryant-anti-gay-00198232> (suggesting that Anita Bryant’s political strategy of “appealing to parental fears” about the perceived threat queer people pose to children is “more politically potent than at any time since” Bryant first entered the anti-gay political discourse).

21. See generally, JEAN M. TWENGE, GENERATIONS: THE REAL DIFFERENCES BETWEEN GEN Z, MILLENNIALS, GEN X, BOOMERS, AND SILENTS—AND WHAT THEY MEAN FOR AMERICA’S FUTURE, 345-451 (2023) (describing empirical findings showing that Gen Z is unique among generational cohorts to believe in the existence of more than two genders and understand gender as more fluid).

22. Nicholas Serafin, *Born to Equality: Minor Children, Equal Protection, and State Laws Targeting LGBTQ+ Youth*, 75 U. CAL. L.J. 411, 413 (2024).

23. See Joel Timmer, *Anti-Drag Laws and Free Speech: The First Amendment Case for Protecting Drag*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 949, 954-59 (2024) (discussing four cases in which federal judges have found various states’ enacted drag restrictions unconstitutional).

children at drag brunches or drag queen story hours.²⁴ And between 2021 and the end of 2024, twenty-four states “passed laws prohibiting most or all provision of medication (and surgery) to youth for gender transition.”²⁵ This contemporary legislative assault on LGBTQ equality goes beyond many of the containment and exclusion efforts common in the past, and instead seems designed to censor, suppress, and ultimately preclude queer identity formation at its early outset. Again, the war on LGBTQ existence is here, and fear reasonably follows from concrete external threats.

The rapid tonal shift to the right regarding the legal treatment of gender and sexual identities may suggest an emboldened conservative movement no longer hastened by a Supreme Court that once served as a barrier against the most animus-fueled state actions. In past decades, the Court delivered a series of landmark pro-LGBTQ victories that effectively brought queer people out of the shadows despite strong objections from the religious right. Beginning in 1996 with *Romer v. Evans*,²⁶ in which the Court struck down a voter-enacted referendum prohibiting the state of Colorado and localities within from enacting sexual orientation inclusive anti-discrimination protections, the judicial wins for gay and trans rights continued to mount for nearly twenty-five years. The Court went on to strike down criminal bans on sodomy between consenting adults of the same-sex,²⁷ the exclusionary federal definition of marriage as between one man and one woman,²⁸ and state prohibitions on same-sex marriage.²⁹ As late as 2020, the Court in *Bostock v. Clayton County, Georgia*³⁰ held that the federal prohibition on workplace “sex” discrimination inherently encompasses discrimination on the basis of sexual orientation and gender identity.

Amidst these legal wins, however, were warning signs. In several cases pitting LGBTQ equality against religious liberty and free speech interests, the Court signaled that its commitment to inclusion for gay and trans people had limits.³¹ Tucked within the Court’s dicta and sharp dissenting opinions

24. See Michael L. Smith, *Moral Panic and the First Amendment*, 72 BUFF. L. REV. 455, 475-81 (2024) (noting that the stated purpose and legislative language in recent drag restrictions typically focus on “minors” and “protecting children”).

25. Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. 281, 283-84 (2024).

26. 517 U.S. 620 (1996).

27. *Lawrence v. Texas*, 539 U.S. 558 (2003).

28. *U.S. v. Windsor*, 570 U.S. 744 (2013).

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

30. 590 U.S. 644 (2020).

31. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (validating an asserted First Amendment right to exclude a group from marching in a parade under a pro-LGBTQ banner); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (validating an asserted First Amendment right to preclude an openly gay man from serving as a Scoutmaster);

were growing concerns for the purported religious and conservative victims on the losing end of each discrete legal battle within the greater culture war.³² The pivotal jurisprudential turning point for the conservative movement came in 2016 when Donald Trump first won the presidency in a shock victory over Hillary Clinton. Due to unprecedented maneuvering by Senate Republicans to hold open during President Obama's last year in office the vacant seat formerly held by Justice Scalia, the fortuitous retirement of moderate Justice Kennedy, and the untimely death of Justice Ginsburg while the 2020 election was already underway, President Trump succeeded in appointing three conservative jurists to the Supreme Court. With the high Court's composition now significantly more right-leaning than at any time in recent history,³³ those opposed to LGBTQ liberty and equality are demonstrating far less restraint in their reactionary and mean-spirited efforts to secure victories of their own.

Following Trump's Supreme Court makeover, constitutional change came quickly. In several high-profile cases, the newly unleashed Court demonstrated its willingness to upend longstanding precedents that once protected civil liberties and promoted inclusion for marginalized groups. Chiefly notable among those recent decisions is *Dobbs v. Jackson Women's Health Organization*,³⁴ gutting constitutional protections for abortion access, and *Students for Fair Admissions v. Harvard*,³⁵ effectively prohibiting institutions of higher education from positively considering race in admissions—a case that opened the door for the second Trump Administration's subversive attempts to characterize DEI writ large as unlawful discrimination (against people who are White and men who are straight).³⁶

Rumsfeld v. F. for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) (rejecting an association of law schools' asserted First Amendment right to exclude military recruiters on campuses in protest of the ban on openly gay persons serving in the military); and *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018) (validating a religious business owner's First Amendment right to refuse a for-profit service in connection with a same-sex wedding).

32. See Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 370-82 (describing the ways in which "members of the Court have sometimes gone out of their way to express concern for the religious and conservative objectors who might negatively be affected by a pro-gay outcome").

33. The Court is now at its most conservative ideological point since the infamous *Lochner* Era of the 1930s. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 248 (2020).

34. 597 U.S. 215 (2022).

35. 600 U.S. 181 (2023).

36. See generally Kimberly West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355 (2024) (discussing attacks on race-conscious policies, including DEI initiatives, as part of entrenched repression strategies designed to rollback civil rights more broadly). Cases like *Students for Fair Admissions v. Harvard* are "degrading Americans'

During this period of civil rights reversals, the Court also twice ruled against LGBTQ equality interests and for the exclusionary speech and religious liberty interests of conservative opponents of LGBTQ equality. First, in *Fulton v. City of Philadelphia*,³⁷ the Court found that Philadelphia violated a religious foster care agency's free exercise rights when the city declined to renew the agency's contract because of its refusal to place children in the homes of same-sex couples. Second, the Court in *303 Creative LLC v. Elenis*³⁸ held that a religious for-profit website designer had a free speech right to deny her wedding services to a same-sex couple.

In just four years since Trump first left office, the Supreme Court has weaponized the First Amendment in ways that facilitate the painting of LGBTQ persons seeking equality and liberty as the oppressors of people of faith and conservative conviction. In an ominous sign of what may be on the horizon, the Court in *Spectrum WT v. Wendler*³⁹ recently denied emergency review in a case seeking to enjoin a Texas university's drag show ban on campus. Under existing precedent, the lower court's order upholding the drag ban appears plainly incorrect given convincing evidence that the ban was motivated by an effort to censor pro-LGBTQ speech and expressive conduct based on its subject matter and viewpoint.⁴⁰ The Court's silence may be a harbinger of its eventual approval.

When viewed as a whole, the story of Trump's mark on the Supreme Court is one of civil rights upheaval and realignment. This shift has been gradually underway since the end of the liberal Warren Court era, but the Court's hard-right turn has accelerated and morphed the shift into a perverse new constitutional order.⁴¹ Gone are equity concerns for historically marginalized groups, and gone is the noble impulse to protect freedoms of

understanding that it is morally correct to eradicate racism against non-Whites and also morally correct to have U.S. policies and laws that incentivize racial parity instead of virtually whites-only workplaces and educational institutions." *Id.* at 1403.

37. 593 U.S. 522 (2021).

38. 600 U.S. 570 (2023).

39. *Spectrum WT v. Wendler*, 144 S. Ct. 1053 (2024) (mem.), *denying petition for writ for injunction pending appeal* in 693 F. Supp. 3d 689 (N.D. Tex. 2023).

40. See Luke A. Boso, *Exclusionary Expressive Conduct*, 66 B.C. L. REV. 295 (2025) (discussing legislative attempts to ban and regulate drag and the constitutional problems those attempts pose).

41. The Court's ideological rightward turn materialized "[a]cross multiple substantive areas," reflected in cases in which "the Court issued decidedly anti-equality and antidemocratic decisions that threaten the promise of equal citizenship for women, people of color, and LGBTQ people. In so doing, the Court elevated the interests of the white Christian nationalist movement . . ." Kyle C. Velte, *The Supreme Court's Gaslight Docket*, 96 TEMP. L. REV. 391, 393 (2024).

choice that fundamentally affect a person's life course.⁴² Instead, today's primary benefactors of the Constitution's liberty and equality guarantees are those who have long wielded political power to suppress the liberty and equality of others.⁴³ This jurisprudential shift makes sense when positioned within the narrative of Trump's acerbic rise in the national political spotlight and his unshakeable grip on political power. In many ways, all three branches of government at the federal level, and the cohort of states representing the Trump-supporting electorate, now embody a reactionary response to the progressive victories of the 2010s and during the Obama Administration. The backlash,⁴⁴ however, is more vicious than many may have been prepared for. Reasonable fears mount each day for what may come next.

In the current 2024-25 term, the Supreme Court is on track to once again deliver strong anti-LGBTQ legal victories for the ascendant conservative right. The most high-profile dispute before the Court this term is *U.S. v. Skrametti*,⁴⁵ involving a challenge to Tennessee's ban on gender-affirming medical care for minors. The Court agreed to decide the specific issue of whether the ban violates the Equal Protection Clause as an impermissible form of discrimination based on sex or transgender status. The argument for treating laws targeting transgender persons as *per se* sex classifications subject to intermediate scrutiny is strong,⁴⁶ as is the argument that transgender classifications are separately suspect or quasi-suspect thus warranting heightened scrutiny.⁴⁷ Nevertheless, the Court seems poised to

42. *Contra Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that individuals have a right to use contraception and "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

43. Melissa Murray characterizes the Court's current era as reflecting in part a "jurisprudence of men," in which the Court "prioritizes, both explicitly and implicitly, men's rights, even as it diminishes and constrains women's rights." Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 803 (2023).

44. See, e.g., Stacey L. Sobel, *The Backlash Boomerang: Using Reverse Animus and Hostility to Limit LGBTQ Equality*, 22 U. PA. J. CONST. L. 1155, 1178 (2020) (describing post-*Obergefell* backlash as a mixture of "governmental and individual attempts to limit or halt the progress made by LGBTQ advocates" in ways designed to "subordinate the LGBTQ community").

45. *L.W. v. Skrametti*, 83 F.4th 460 (6th Cir. 2023), cert. granted in part, No. 23-477, 144 S. Ct. 2679 (June 24, 2024).

46. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 567-73 (2016) (explaining two primary arguments: distinctions based on transgender status (1) rely on sex stereotypes about appropriate male and female behavior, and (2) inherently rely on evaluations regarding the congruence between assigned sex and identity).

47. See, e.g., Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1127-29 (2024) (outlining the arguments in favor of this holding and discussing how lower courts have addressed them).

uphold the bans given the direction and tone of questioning by the conservative justices during oral argument.⁴⁸ Further, in assessing the likely outcome, it would be foolish to ignore the simple truth that the Court has not identified a new suspect or quasi-suspect classification since 1976,⁴⁹ and it has repeatedly rejected calls to do so in subsequent cases.⁵⁰

Notably, the *Skrmetti* Court declined to take up the distinct constitutional question of whether legal bans on gender-affirming care for minors impermissibly violate parents' fundamental right to make decisions concerning "the care, custody, and control of their children."⁵¹ Claims sounding in parental rights have recently become an effective legal and political rallying cry—when raised by conservative parents who object to their children's exposure to progressive ideas on gender, sexuality, and race.⁵² Parental rights jurisprudence requires an explanation for if and why decisions by parents seeking to affirm their children's sexual and gender diversity are somehow different from decisions by parents seeking to shield and suppress their children's gender and sexuality diversity. Given the obvious logical difficulties in articulating any coherent distinction between progressive and conservative parental rights claims, the Court's silence is foreboding.

Seemingly unconcerned by the appearance of hypocrisy or inconsistency, the Court in early 2025 agreed to hear a different parental rights case, *Mahmoud v. Taylor*,⁵³ litigated on behalf of parents who object to their children's participation in K-12 instruction involving LGBTQ themes.⁵⁴ The question at issue is whether the Constitution requires public K-12 schools to give parents advance notice and the ability to opt their

48. Amy Howe, *Supreme Court Appears Ready to Uphold Tennessee Ban on Youth Transgender Care*, SCOTUSBLOG (Dec. 4, 2024), <https://www.scotusblog.com/2024/12/supreme-court-appears-ready-to-uphold-tennessee-ban-on-youth-transgender-care/> (noting that the Court's conservatives expressed interest in a novel approach that would characterize the distinction as one based on medical judgment rather than sex—and potentially upend protections for other distinctions previously understood to be based on sex).

49. Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating intermediate scrutiny as the standard of review governing sex classifications).

50. See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 n.18 (2004) (enumerating examples of failed attempts).

51. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This liberty interest is "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*

52. See Hila Keren, *Due Care in A Conservative Court*, 2025 WIS. L. REV. 1, 45-54 (2024) (documenting conservative parental rights activism and mobilization in legislation, litigation, and publications).

53. *Mahmoud v. Taylor*, 145 S. Ct. 1123 (2025) (granting petition for certiorari).

54. Amy Howe, *Justices Take Up Maryland Parents' Challenge to LGBTQ Books in Schools*, SCOTUSBLOG (Jan. 17, 2025), <https://www.scotusblog.com/2025/01/justices-take-up-maryland-parents-challenge-to-lgbtq-books-in-schools/>.

children out of educational materials involving LGBTQ-inclusive material.⁵⁵ Motivated by their beliefs that “they have a religious duty to train their children in accord with their faiths on what it means to be male and female,” “the institution of marriage,” “human sexuality,” “and related themes,”⁵⁶ the claimants raise a free exercise claim, a parental rights claim under due process principles, and a hybrid of the two under the somewhat anachronistic 1972 *Wisconsin v. Yoder*⁵⁷ decision regarding compulsory schooling of Amish schoolchildren.⁵⁸

A decision in the claimants’ favor in *Mahmoud* would alter the constitutional field for protected religious liberty, parental rights, or both. Historically, a decision in which the Court broadened the contours of any one of these rights could have been understood as a civil rights victory by expanding the reach of liberty and equality for all. But the Court’s decision to hear these claims, and not the claims of parents who seek legal refuge to help their child access gender-affirming medical care, suggests that any newly expanded constitutional protections may be contingent on whether the nature of the underlying rights-bearing claim aligns with ideological backlash to LGBTQ inclusion.

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It is within this inhospitable environment of rapid social, political, and legal change that LGBTQ people are experiencing and expressing fear. Its sources are many: some loud and explosive, some subtle and slow burning. Fear is a reasonable response to this crushing onslaught of a rapidly evolving governmental apparatus destined to exclude and erase. But we should not let fear lead to paralysis. Keeping hope alive can help manage and channel fear into positive action aimed at achieving goals still within reach.

The rule of law remains fertile ground for hope. During his Administration, President Biden, aided by four uninterrupted years of Democratic control over the Senate, appointed 235 lifetime judges to the federal courts.⁵⁹ Reshaping federal courts will be one of the most durable and longest-lasting legacies of Joe Biden’s Presidency. President Biden’s final judicial tally represents more than a quarter of all active federal judges,

55. *Mahmoud v. McKnight*, 102 F.4th 191, 197, 201 (4th Cir. 2024) (affirming the district court’s decision denying the parents’ request for a preliminary injunction against school officials).

56. *Id.* at 201.

57. 406 U.S. 205 (1972).

58. See, e.g., Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 49-53 (2015) (discussing in detail *Yoder*’s unusual constitutional legacy as a difficult to apply and seldom followed precedent).

59. Zach Montague, *Biden Celebrates a Milestone on Judicial Confirmations After a Major Push by Democrats*, N.Y. TIMES (Jan. 2, 2025), <https://www.nytimes.com/2025/01/02/us/politics/biden-judicial-confirmations.html>.

exceeds the total number of judges appointed by President Trump in his first term, and left President Trump with fewer than fifty current and future judicial vacancies to fill at the start of his second term—far fewer than the over 100 vacancies President Trump inherited at the beginning of his first term.⁶⁰ Moreover, nearly two-thirds of President Biden’s judges are women, nearly two-thirds are people of color, and more are former public defenders than in any other president’s total judicial cohort.⁶¹ Despite conservative attacks on DEI, judicial diversity, at minimum, “enhances the perceived legitimacy and representativeness of the federal justice system.”⁶² Substantively, judicial diversity can “improve how judges make decisions and will ultimately enhance the quality of justice in our society.”⁶³

While this essay does not suggest that federal judges have either the will or power to prevent every cruel impulse of backlash politics, early judicial opinions reigning in the second Trump Administration’s egregious separation of powers abuses and rights violations offer tangible sources of hope. One example came just four days after President Trump was sworn in for his second term. One of Trump’s first Executive Orders purported to prospectively end birthright citizenship for children born to parents who are undocumented or temporary visa holders.⁶⁴ During a hearing on several states’ motion seeking a temporary restraining order to block the Order from taking immediate effect, Judge John C. Coughenour, a Ronald Reagan appointee, issued a powerful statement from the bench:

I’ve been on the bench for over four decades, [and] I can’t remember another case where the question presented is as clear as this one is. This is a blatantly unconstitutional order There are other times in world history where we look back and people of goodwill can say where were the judges, where were the lawyers?⁶⁵

60. *Id.*

61. Carl Hulse, *In Late Push, Senate Democrats Narrowly Top Trump on Judicial Confirmations*, N.Y. TIMES (Dec. 20, 2024), <https://www.nytimes.com/2024/12/20/us/politics/senate-democrats-judges-biden.html>.

62. Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years*, 2017 WIS. L. REV. 345, 348 (2017).

63. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1432 (2008) (identifying the inclusion of voices of color, credibility, and dialectic decision-making as three positive effects of viewpoint diversity on the federal bench).

64. Exec. Order No. 12,160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

65. David Gutman, *Judge in Seattle Blocks Trump Order on Birthright Citizenship Nationwide*, SEATTLE TIMES (Jan. 23, 2025), <https://www.seattletimes.com/seattle-news/politics/judge-in-seattle-blocks-trump-order-on-birthright-citizenship-nationwide/>.

Judge Coughenour's decision to issue a nationwide temporary injunction⁶⁶ thwarted one of the second Trump Administration's earliest official acts and signature campaign promises, and he acted while under the glare of global media attention and without regard to party loyalty. Courageous judicial acts like this may encourage other judges to similarly safeguard hallowed constitutional principles and provide a check against governmental malevolence.

In just the first thirty days of the second Trump Administration, seventy-four lawsuits were filed in federal courts challenging the unrelenting torrent of executive actions, and judges had at least temporarily halted eighteen of the most extreme.⁶⁷ In one suit, Judge Royce C. Lamberth, another Ronald Reagan appointee, issued a temporary restraining order prohibiting the enforcement of the Executive Order mandating the transfer of transgender women currently housed in female prisons to male prisons.⁶⁸ Judge Lamberth reasoned that the plaintiffs are likely to succeed on the merits of their Eighth Amendment "failure-to-protect" and "deliberate indifference" claim, citing "various government reports and regulations recognizing that transgender persons are at a significantly elevated risk of physical and sexual violence relative to other inmates when housed in a facility corresponding to their biological sex."⁶⁹

In another early-stage suit, Judge Ana C. Reyes, a Joe Biden appointee who is the first LGBTQ woman and the first Latina appointed to the United States District Court for the District of Columbia,⁷⁰ expressed her incredulity during a hearing seeking an injunction against the Executive Order eliminating federal recognition of transgender persons. Judge Reyes noted from the bench that the Order's genetically binary definition of "sex" and the administration's sweeping attacks on "radical gender ideology" do not comport with the scientific fact that not all people have XX or XY chromosomes.⁷¹ Later in the hearing, in questioning government attorneys defending the Executive Order barring transgender persons from serving in

66. *Washington v. Trump*, -- F.Supp.3d ---, 2025 WL 272198 (W.D. Wash., Jan. 23, 2025).

67. Taylor Delandro, *74 lawsuits filed against Trump to stop his executive actions*, NEWSNATION (Feb. 17, 2025), <https://www.newsnationnow.com/politics/lawsuits-trump-executive-actions/>.

68. *Doe v. McHenry*, 2025 WL 388218 (D. D.C., Feb. 4, 2025).

69. *Id.* at *5.

70. Seth Stern, *First Latina, First LGBTQ Judge Confirmed to DC District Court*, BLOOMBERG LAW (Feb. 15, 2023), <https://news.bloomberglaw.com/us-law-week/first-latina-lgbtq-judge-confirmed-to-dc-district-court>.

71. Alex Woodward, *Judge torches Trump lawyers over ban on trans service members and pronouns: 'Frankly ridiculous'*, INDEPENDENT (Feb. 18, 2025), <https://www.independent.co.uk/news/world/americas/us-politics/trump-transgender-military-ban-court-hearing-b2700407.html>.

the military, Judge Reyes characterized the ban as “frankly ridiculous,” “demeaning,” and an overt expression of “animus.”⁷² To the point: The rule of law, guided by facts and well-established precedent, emerged as an early bulwark against an increasingly authoritarian administration determined to roll back civil rights and erase queer people through brute force. If the rule of law survives, so too can hope.

The many thoughtful essays in this symposium issue highlight additional examples of what LGBTQ people may reasonably fear and hope during this period of institutional upheaval, and they offer a varied and rich accounting of the state of law and society at the outset of the second Trump Administration. This essay thus closes with just one final example to inspire hope in an otherwise fearful time. As the 2024 election season drew to an ominous close, Sarah McBride emerged as a welcome counterpoint as she became the first and only transgender person elected to the U.S. House of Representatives.⁷³ Following a caustic crusade led by Republican Representative Nancy Mace, Republican Speaker Mike Johnson issued a new congressional rule restricting restroom and locker room access according to a person’s biological sex.⁷⁴ With demonstrated poise in the face of a clear personal assault, McBride calmly responded by agreeing to “follow the rules,” but then dismissed the new restroom policy as a frivolous “effort to distract from the real issues facing this country.”⁷⁵ Whatever private fear she must have felt in those public moments, McBride’s brave perseverance should serve as a small yet poignant example for U.S. citizens and non-citizens alike, and for our allies watching with fear from abroad, of how good people can achieve good things when guided by hope for a better and more equitable future.

We must not let fear paralyze us into submission. We must not let fear normalize further democratic erosion. We must instead find and cultivate hope to fight for civil rights, democratic norms and institutions, and the principles of fairness and justice that legitimate a collective belief in the rule of law.

72. *Id.*

73. Amy Harmon, *Delaware Lawmaker Wins House Seat, Becoming First Openly Transgender Member of Congress*, N.Y. TIMES (Nov. 5, 2024), <https://www.nytimes.com/2024/11/05/us/sarah-mcbride-transgender-house-election.html>.

74. Annie Karni, *Johnson Says He Will Bar Transgender Women from Capital Bathrooms*, N.Y. TIMES (Nov. 20, 2024), <https://www.nytimes.com/2024/11/20/us/politics/mike-johnson-transgender-women-ban-capitol-bathrooms.html>.

75. *Id.*