



# Trump Administration continued to advance discriminatory policies and practices against LGBT people and people living with HIV in 2018

By Sean Cahill, Tim Wang and Bishar Jenkins



LOVE  
TRUMPS  
HATE

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In 2018 the Trump Administration restricted the right of transgender people to serve in the military, and the right of people living with HIV to serve in the Peace Corps.

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## INTRODUCTION

In 2018 the Trump Administration continued to advance discriminatory policies that undermine the ability of LGBT people to access health care and other services. It also restricted the right of transgender people to serve in the military, and the right of people living with HIV to serve in the Peace Corps. The Trump Administration promoted religion-based discrimination against LGBT people, eliminated critical nondiscrimination protections, and appointed federal judges who oppose LGBT equality. The administration's frequent affiliations with anti-LGBT advocacy organizations, such as Focus on the Family and the Family Research Council, clearly display hostility toward LGBT equality.

Despite this bleak picture, there were some potentially hopeful developments, such as the Food and Drug Administration's regulation of e-cigarettes, which LGBT people use at a disproportionate rate, and indications that the federal government will develop a new national HIV/AIDS strategy to take effect in 2020, and reconvene the President's Advisory Council on HIV/AIDS.

During its first year in office, as we documented in a January 2018 report,<sup>1</sup> the Trump Administration compiled a strikingly anti-LGBT record of executive branch actions that undermined the health and well-being of LGBT people. These included rescinding guidance to schools that discrimination based on gender identity violates Title IX of the Education Amendments of 1972, reversing Department of Justice policy interpreting Title VII of the

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<sup>1</sup> Cahill S, Geffen S, Wang T (2018, January 16). *One year in, Trump Administration amasses striking anti-LGBT record*. Boston: The Fenway Institute.

Civil Rights Act of 1964 to prohibit gender identity discrimination, reversing progress on sexual orientation and gender identity (SOGI) data collection in federal surveys, weakening the Affordable Care Act, and failing to promote LGBT equality as a key goal of U.S. foreign policy.

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Overall in its second year in office, the Trump Administration continued building upon the striking record against LGBT rights that it amassed in its first year. This assault on the human rights of LGBT people and people living with HIV (PLWH) is part of a broader attack on racial, religious, and gender equality, and on key institutions of our democracy, such as an independent, free press. Despite candidate Trump’s claim that he would advocate for LGBT Americans, the Trump Administration continues to expand discriminatory policies toward LGBT people.

## I. ROLLBACK OF LGBT NONDISCRIMINATION REGULATIONS

Trump Administration officials took a number of steps in 2018 that undermine nondiscrimination protections for LGBT people. In February 2018, the Department of Education decided not to hear complaints regarding transgender individuals’ access to restrooms that correspond to their gender identity. Further, the Department has refused to issue rulings on complaints on that issue, signaling that it will not advocate for transgender youth in schools.<sup>2</sup> This builds on anti-transgender actions taken in 2017. In February 2017, the U.S. Department of Justice and the Department of Education notified the U.S. Supreme Court that they were ordering schools across the U.S. to ignore 2016 guidance issued by President Obama’s Department of Justice and Department of Education stating that discrimination on the basis of gender identity in schools is prohibited under Title IX.<sup>3,4</sup>

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<sup>2</sup> Turner C, Kamenetz A. (2018, February 12). The Education Department Says It Won’t Act on Transgender Student Bathroom Access. NPR. <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>

<sup>3</sup> Somashekar S, Brown E, Vucci E. (2017). Trump Administration rolls back protections for transgender students. *Washington Post*. [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.11ef42f0311c](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.11ef42f0311c)

<sup>4</sup> Department of Justice press release (2016, May 13). U.S. Departments of Justice and Education release joint guidance to help schools ensure the civil rights of transgender students. <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>

In March 2018, Secretary of Housing and Urban Development (HUD) Ben Carson altered the Department's mission statement to eliminate references to inclusion and protection from discriminatory housing practices. This development is especially concerning, as HUD was formed to address systemic racial discrimination in housing and lack of access to quality housing.<sup>5</sup> This approach also diverges from the Obama Administration's inclusive approach to expanding access and opportunity to housing. In 2012, the Obama Administration released an Equal Access Rule, which said that "the federal Department of Housing and Urban Development guarantees access to its programs regardless of 'actual or perceived sexual orientation, gender identity or marital status (Equal Access Rule, 24 CFR 5.105(a)(2)).'"<sup>6</sup>

In an October 2018 brief to the U.S. Supreme Court, the Department of Justice argued that gender identity is outside of the scope of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, religion, sex and national origin."<sup>7</sup> This

contradicts six federal appellate court rulings as of October 2018 that gender identity discrimination is a form of sex discrimination and therefore prohibited under Title VII.<sup>8</sup>

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## The Trump Administration has sought to **redefine sex as fixed and unalterable** under Title IX.

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In October 2018, the Department of Health and Human Services, in collaboration with the Department of Justice and the Department of Education, was reported to have drafted a memorandum which sought to redefine sex as fixed and unalterable under Title IX. The only recognized sexes would be male and female. This narrow definition would ignore the reality and existence of the estimated 1.4 million transgender Americans living across the U.S.,<sup>9</sup> as well as the

up to 1.7% of the population with variations in their sex characteristics (known as intersex).<sup>10</sup> The memorandum encouraged departments and agencies throughout the federal government to adopt a similar approach by stating, "[gender should be determined] on a biological basis that is clear, grounded in science, objective and administrable."<sup>11</sup> However, this narrow definition

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<sup>5</sup> Terkel A. (2018, March 6). Ben Carson Removes Anti-Discrimination Language from HUD Mission Statement. *Huffington Post*. [https://www.huffingtonpost.com/entry/hud-mission-statement\\_us\\_5a9f5db0e4b002df2c5ec617](https://www.huffingtonpost.com/entry/hud-mission-statement_us_5a9f5db0e4b002df2c5ec617)

<sup>6</sup> Sullivan B. (2016, September 20). HUD ISSUES FINAL RULE TO ENSURE EQUAL ACCESS TO HOUSING AND SERVICES REGARDLESS OF GENDER IDENTITY. U.S. Department of Housing and Urban Development. <https://archives.hud.gov/news/2016/pr16-137.cfm>

<sup>7</sup> Moreau J. (2018, October 25). Transgender workers not protected by civil rights law, DOJ tells Supreme Court. *NBC News*. <https://www.nbcnews.com/feature/nbc-out/transgender-workers-not-protected-civil-rights-law-doj-tells-supreme-n924491>

<sup>8</sup> *Ibid.*

<sup>9</sup> Flores, A., Herman, J., Gates, G., and Brown, T. (June 2016). *How Many Adults Identify As Transgender In The United States*. The Williams Institute. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>

<sup>10</sup> Melanie Blackless et al. (2000). How Sexually Dimorphic Are We? Review and Synthesis, 12 *American Journal of Human Biology* 151.

<sup>11</sup> Green E, Benner K, Pear R. (2018, October 21). Transgender Could Be Defined Out of Existence under Trump Administration. *New York Times*. <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-Administration-sex-definition.html>

is not grounded in science at all, as professional medical and health organizations—such as the American Medical Association<sup>12</sup> and the American Psychiatric Association<sup>13</sup>—have for years confirmed that there is a complex medical spectrum of sex that includes genetic markers, internal and external anatomy, and gender identity, which may itself have a biological component. Not only is this memo at odds with established medical research, it could also have wide-reaching public health consequences by weakening nondiscrimination protections for transgender people in health care, education, and elsewhere. This is especially concerning, as discrimination against transgender people is already common, and can act as a barrier to seeking necessary care.<sup>14</sup>

## II. SEXUAL ORIENTATION AND GENDER IDENTITY DATA COLLECTION

In 2018, the Trump Administration continued to remove sexual orientation and gender identity (SOGI) questions items from federal surveys. The Bureau of Justice Statistics (BJS) released a proposal to remove SOGI questions from the National Crime Victimization Survey (NCVS) for 16- and 17-year old respondents. BJS said it was removing the questions because they are too “sensitive” for adolescents to consider.<sup>15</sup> The NCVS is one of the country’s main sources of data on criminal victimization, including information on hate violence, sexual assault, intimate partner violence, and experience with the criminal justice system. LGBT people—and especially black gay and bisexual men and transgender women—are often the victims of bias-motivated hate violence. In fact, on a per capita basis, LGBT people are more likely to be the targets of hate crimes than any other group in America.<sup>16</sup> In 2014, one fifth (20.4%) of reported hate crimes were perpetrated based on the victim’s sexual orientation or gender identity.<sup>17</sup>

According to data from the 2015 Youth Risk Behavior Survey, 10% of LGB youth nationally reported being threatened or injured with a weapon on school property, compared with

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<sup>12</sup> American Medical Association. Medical Spectrum of Gender D-295.312. <https://policysearch.ama-assn.org/policyfinder/detail/spectrum%20gender?uri=%2FAMADoc%2Fdirectives.xml-D-295.312.xml>.

<sup>13</sup> American Psychiatric Association. Gender dysphoria. DSM-5. Arlington, VA, 2013. <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>

<sup>14</sup> Reisner SL, White Hughto JM, Dunham E, Heflin K, Begenyi JB, Coffey-Esquivel J, Cahill S (2015, Sep). Legal protections in public accommodations settings: A critical public health issue for transgender and gender nonconforming people. *Milbank Quarterly*. 93(3):484-515.

<sup>15</sup> Bureau of Justice Statistics, Department of Justice. (April 11, 2018). “Agency Information Collection Activities: Proposed eCollection eComments Requested; Revision of a Currently Approved Collection; Comments Requested: National Crime Victimization Survey (NCVS).” Document Citation 83 FR 15634. <https://www.federalregister.gov/documents/2018/04/11/2018-07448/agency-information-collection-activities-proposed-ecollection-ecomments-requested-revision-of-a>

<sup>16</sup> Park H, Mykhyalyshyn I. (2016, June 16). L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group. *The New York Times*.

<sup>17</sup> Federal Bureau of Investigation. (2014). *Uniform Crime Reports: 2014 Hate Crime Statistics*. Available at <https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014>

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5.1% of heterosexual youth. According to GLSEN's 2015 National School Climate Survey, 27.0% of LGBT students reported being physically harassed in the past year based on sexual orientation, and 20.3% reported being physically harassed based on their gender expression. Because of harassment in schools, compounded with other factors such as family rejection and homelessness, LGBT youth are particularly vulnerable to interaction with the criminal justice system. Removing the SOGI questions from the NCVS for 16- and 17-year old respondents will impair attempts to better understand and address the pervasive violence and victimization disproportionately affecting LGBT youth. As to the claim that SOGI are

too sensitive to ask adolescents, most states now ask high school students about sexual orientation on the Youth Risk Behavior Survey,<sup>18</sup> and a growing number of states ask about transgender status.

#### *Background*

For decades, researchers and activists have promoted adding sexual orientation and gender identity (SOGI) questions to federal surveys to capture health and demographic data about LGBT people. Under the Obama Administration the number of federal surveys and studies measuring sexual orientation increased to 12; seven of these also measured gender identity or transgender status.<sup>19</sup> In 2017, the Trump Administration halted the forward momentum on adding SOGI questions to surveys by proposing the elimination of SOGI questions from the National Survey of Older Americans Act Participants (NSOAAP) and reversing plans to add SOGI questions to the Administration for Community Living's (ACL) Annual Program Performance Report for Centers for Independent Living in 2017.<sup>20</sup> While the sexual orientation question was eventually added back onto the NSOAAP, it continues to exclude a transgender status question that was asked previously. The ACL survey, which could provide important data on LGBT people living with disabilities, has not added the SOGI questions as originally planned for 2017.

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<sup>18</sup> Kann L., McManus T., Harris W.A., et al. (2018). Youth Risk Behavior Survey—United States, 2017. *MMWR Surveill Summ*;67(No. SS-8):1-479. <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf>

<sup>19</sup> Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys. (2016, August). Current measures of sexual orientation and gender identity in federal surveys. [https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/WorkingGroupPaper1\\_CurrentMeasures\\_08-16.pdf](https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/242/2014/04/WorkingGroupPaper1_CurrentMeasures_08-16.pdf)

<sup>20</sup> Singh S, Durso LE, Tax A. (2017). *The Trump Administration is rolling back data collection on LGBT older adults*. Center for American Progress. <https://www.americanprogress.org/issues/lgbt/news/2017/03/20/428623/trump-administration-rolling-back-data-collection-lgbt-older-adults/>

### III. PREVENTING TRANSGENDER PEOPLE FROM SERVING IN THE MILITARY

The Trump Administration has opposed legal equality for transgender people on a number of fronts. In July 2017, President Trump issued a series of tweets announcing a ban on transgender people serving in the U.S. military based on “tremendous medical costs and disruption” that he believed transgender troops would impose.<sup>21</sup> Several attorneys representing active-duty service members moved to block Trump’s transgender military ban. In response, Secretary of Defense General James Mattis revised the policy so that it would prevent transgender people from serving if they sought to undergo medical transition, but would allow transgender personnel already serving to continue serving. It would also technically allow transgender troops to serve, but they would have to serve in accordance with their biological sex rather than their gender identity. This clearly still presented unnecessary roadblocks to allowing transgender people to serve openly in the military.<sup>22</sup>

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The transgender military ban **continued to be blocked** by federal courts.

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The Trump Administration has attempted to implement its transgender military ban multiple times over the past two years through the issuance of rules and regulations within the U.S. Departments of Defense and the Department of Homeland Security. However, the military ban continued to be blocked by federal courts. As a result, the Trump Administration is now attempting to circumvent the typical process, by suggesting that the conservative-leaning U.S. Supreme Court abandon its custom and rule on a transgender military ban before all regional circuit courts render a decision on the matter.<sup>23</sup> This approach demonstrates the

Administration’s aversion to proper governmental checks and balances, but it also reveals the Administration’s eagerness to effectuate a discriminatory policy that would prevent transgender individuals from serving their country. As we went to press, the U.S. Court of Appeals for the D.C. Circuit sided with the Trump Administration and the Pentagon in support of the transgender military ban.<sup>23,1</sup>

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<sup>21</sup> Cahill S, Geffen S, Wang T (2018, January 16). *One year in, Trump Administration amasses striking anti-LGBT record*. Boston: The Fenway Institute, 7.  
<sup>22</sup> Marimow A. (December 10, 2018). “Trump administration: It’s ‘extraordinary’ judges won’t let military restrict transgender troops.” *The Washington Post*. [https://www.washingtonpost.com/local/legal-issues/president-trumps-transgender-military-ban-is-back-in-court/2018/12/09/56a0c13a-f965-11e8-8c9a-860ce2a8148f\\_story.html?utm\\_term=.69317f5fc7e7](https://www.washingtonpost.com/local/legal-issues/president-trumps-transgender-military-ban-is-back-in-court/2018/12/09/56a0c13a-f965-11e8-8c9a-860ce2a8148f_story.html?utm_term=.69317f5fc7e7)

<sup>23</sup> Barnes R. (2018, November 23). Trump Administration asks Supreme Court to immediately take up military transgender ban. *The Washington Post*. [https://www.washingtonpost.com/politics/courts\\_law/trump-administration-asks-supreme-court-to-immediately-take-up-transgender-military-ban/2018/11/23/6cfl1b32-ef39-11e8-8679-934a2b33be52\\_story.html?utm\\_term=.b8e2e5c3709e](https://www.washingtonpost.com/politics/courts_law/trump-administration-asks-supreme-court-to-immediately-take-up-transgender-military-ban/2018/11/23/6cfl1b32-ef39-11e8-8679-934a2b33be52_story.html?utm_term=.b8e2e5c3709e)

<sup>23,1</sup> AP Staff. (2019, Jan. 6). “Appeals court sides with Trump in transgender military case.” *Associated Press*. <https://www.wric.com/news/politics/appeals-court-sides-with-trump-in-transgender-military-case-1/1688792700>





In an effort to garner support for his proposed military ban after several court injunctions, it was revealed in reports that President Trump enlisted the assistance of the Family Research Council, an evangelical organization actively opposed to LGBT rights, to help draft the new policy to implement the transgender military ban.<sup>24</sup> Employing the advice of the Family Research Council, the Trump Administration attempted to frame the transgender ban as a military readiness issue, when the evidence proves that transgender individuals are able to carry out their official duties with the same effectiveness as their cisgender counterparts and that there are no medical impediments to their service in the military.<sup>25</sup>

#### IV. JUDICIAL APPOINTEES WITH PROBLEMATIC RECORDS ON LGBT EQUALITY

In July 2018, President Trump appointed U.S. Court of Appeals Circuit Court Judge Brett Kavanaugh to the vacant seat left by retiring Justice Anthony Kennedy. Kennedy was a supporter of LGBT equality and privacy going back to the landmark *Romer v. Evans* case, which found that an anti-gay Colorado ballot referendum violated the “equal protection of the laws” guaranteed by the Fourteenth Amendment to the U.S. Constitution.<sup>26</sup> Judge Kavanaugh’s record on LGBT rights and his comments during his 2006 and 2018 confirmation hearings are concerning for LGBT people. During his U.S. Supreme Court confirmation hearing, Kavanaugh was asked by Senator Kamala Harris if he believed that the Supreme Court’s landmark decision in *Obergefell v. Hodges*, which legalized same-sex marriage in all 50 states, was correctly decided or not. Kavanaugh repeatedly refused to answer Senator Harris’s question and instead quoted Justice Kennedy’s opinion in the *Masterpiece Cake Shop* case, which found that a wedding cake baker could refuse to serve a gay couple.<sup>27</sup> Kavanaugh’s unwillingness to fully elucidate his opinion on LGBT rights or affirm the fundamental equality of LGBT people is a source of concern.

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<sup>24</sup> Stern M. (2018, March 24). “Trump’s Trans Troops Ban Will Never Take Effect.” *Slate*. <https://slate.com/news-and-politics/2018/03/trumps-new-trans-troops-ban-is-still-unconstitutional.html>

<sup>25</sup> Schaefer A. (2016, June). Impact of Transgender Personnel on Readiness and Healthcare Costs in the U.S. Military Likely to Be Small. RAND Corporation. <https://www.rand.org/news/press/2016/06/30.html>

<sup>26</sup> *Romer v. Evans*, 517 U.S. 620 (1996)

<sup>27</sup> Scott E. (2018, September 7). “In Kavanaugh’s non-answer on same-sex marriage, many heard a troubling response.” *The Washington Post*. [https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/?utm\\_term=.2ea4b10629f3](https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/?utm_term=.2ea4b10629f3)



From June 2003 to May 2006, Kavanaugh served as Staff Secretary to President George W. Bush. During this time, President Bush spoke out frequently against same-sex marriage, which became legal in Canada in mid-2003 and in Massachusetts in late 2003.<sup>28</sup> In 2004, 13 states considered and passed anti-gay ballot measures banning same-sex marriage. This was widely viewed as a factor in the election of Bush and Dick Cheney in 2004.<sup>29</sup> President Bush also promoted a federal anti-gay marriage amendment at this time. During Kavanaugh's 2006 confirmation to the U.S. Court of Appeals, in response to a question regarding expanding the definition of marriage through judicial or legislative means, Kavanaugh remarked that "some of the worst moments in the Supreme Court history have been moments of judicial activism, where courts have imposed their own policy preferences."<sup>30</sup> This echoed President

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Bush's statement in 2004, when he endorsed the federal anti-gay marriage amendment, in which he denounced "activist judges...[who] have made an aggressive attempt to re-define marriage."<sup>31</sup> Of course, religious right and anti-gay activists and politicians, such as the American Center for Law and Justice, have no problem challenging pro-gay family recognition policies in the courts,<sup>32</sup> leading to the conclusion that "activist judges" are simply those whose rulings they don't agree with.

The confirmation of Brett Kavanaugh as a U.S. Supreme Court Justice heightens concerns among LGBT people that their civil rights will not be protected under the much more conservative Supreme Court. Kavanaugh's confirmation, on top of that of Justice Gorsuch in 2017, raises concerns that pro-LGBT court victories, such as the 5-4 *Windsor* and *Obergefell* decisions, could potentially be reversed.

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<sup>28</sup> Abramson, A. (2018, September 4). Democrats put Kavanaugh's time in the Bush White House in the spotlight. *Time*. <http://time.com/5386461/brett-kavanaugh-confirmation-hearings-bush/>

<sup>29</sup> Cahill, S. (2005). The Symbolic Centrality of Gay Marriage in the 2004 Presidential Election. In *The Future of Gay Rights in America*. Hirsch, H. (Ed.). New York: Routledge. 47-79.

<sup>30</sup> Peltz, J, Sherman M. (2018, July 19). LGBT advocates fear Kavanaugh's votes on gay rights issues. *Associated Press*. <https://apnews.com/47537133ca5042f88e5f55df9a94ec3f>

<sup>31</sup> The White House, Office of the Press Secretary (2004, February 24). Remarks by the President. Cited in Cahill S (2004). *Same-Sex Marriage in the United States: Focus on the Facts*. NY: Lexington, 90.

<sup>32</sup> Cahill S & Tobias S (2007). *Policy Issues Affecting Lesbian, Gay, Bisexual and Transgender Families*. Ann Arbor: University of Michigan Press, 105-106.

In April 2018, the U.S. Senate confirmed Trump nominee Kyle Duncan for an appointment to the 5th U.S. Court of Appeals based in Louisiana. LGBT advocacy groups opposed his nomination. Duncan filed an amicus brief to the US Supreme Court during the historic *Obergefell v. Hodges* case, which struck down state anti-same-sex marriage laws. Duncan claimed that a U.S. Supreme Court decision affirming marriage equality for same-sex couples would “damage” the political and social institutions of the country.<sup>33</sup> Further, he represented a Virginia school board in its lawsuit against a transgender high school student who sought to use the restroom that aligned with their gender identity.<sup>34</sup>

According to Lambda Legal, President Trump has appointed numerous anti-LGBT judges to the federal courts: “In nomination after nomination, his picks for federal courts are hostile to civil rights in general and specifically hostile to LGBTQ rights...many of these nominees (1 in 3) have deep histories of anti-LGBTQ advocacy...”<sup>35</sup> We know that many of President Trump’s recent judicial nominees oppose legal equality for LGBT people, and worry that the others will oppose LGBT equality when cases come before them. Their confirmation to the judiciary threatens the progress that LGBT people have achieved over the past several decades.

## V. FOREIGN POLICY

The federal government has taken a number of steps in 2018 that undermine the rights of LGBT people and people living with HIV at home and abroad. The Trump Administration has also undermined vulnerable LGBT communities in the global South by failing to champion LGBT equality and challenge anti-LGBT persecution, often by governments.

In 2018, the Peace Corps dismissed volunteers who tested positive for HIV. Peace Corps volunteer Romany Tin was issued a “medical separation” after being diagnosed with HIV during his term of duty in Cambodia.<sup>36</sup> This stigmatizing and insensitive policy is alarming, as it has been applied to individuals who are physically fit to serve and have achieved viral suppression. Further, the Peace Corps has refused to disseminate pre-exposure prophylaxis for HIV prevention (PrEP) to at-risk volunteers. In one case, a volunteer tested HIV positive, after being denied PrEP.<sup>37</sup> These developments demonstrate a lack of sensitivity and understanding of HIV, and perpetuate stigma around HIV. This is a dangerous message to send, especially as many of these volunteers work in countries where HIV and homosexuality are

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<sup>33</sup> Sopelsa, B. (2018, April 25). Senate confirms anti LGBTQ-rights opponent to judgeship. *NBC News*. <https://www.nbcnews.com/feature/nbc-out/senate-confirms-lgbtq-rights-opponent-judgeship-n868996>

<sup>34</sup> *Ibid.*

<sup>35</sup> Lambda Legal (Last updated 10/16/2018). Stacking the courts: The fight against Trump’s extremist judicial nominees. <https://www.lambdalegal.org/judicial-nominees>

<sup>36</sup> Straube, T. (2018, March 12). Peace Corps Volunteer Claims He Was Sent Home After Contracting HIV. *Poz*. <https://www.poz.com/article/peace-corps-volunteer-claims-sent-home-contracting-hiv>

<sup>37</sup> *Ibid.*

already highly stigmatized and criminalized. This discriminatory and counterproductive Peace Corps policy could send a message condoning the stigmatizing of HIV and same-sex behavior in countries that already experience high rates of HIV stigma and that are already hostile to LGBT people.

In October 2018, the Trump Administration announced that it will no longer issue G-4 visas to same-sex domestic partners of foreign diplomats or employees of international organizations—such as the World Bank or the United Nations—who are working and living in the United States. The G-4 visa is typically offered to family members and dependents of foreign diplomats and employees of international organizations. Under the Obama Administra-

tion, G-4s were issued to same-sex partners and legally married same-sex couples. Under the Trump Administration’s new rules, only same-sex partners who are legally married will continue to be eligible for the visa, and foreign couples will need to present proof of marriage to obtain or renew the visas. If proof of marriage is not submitted, the same-sex partner will be forced to leave the United States. This is an especially problematic and discriminatory rule given that only a small number of countries around the world (27) have legalized same-sex marriage.<sup>38</sup> These countries are in the Americas and Western Europe, and also include South Africa, Australia, and New Zealand. Other than South Africa, no country in Africa, Asia, and Eastern Europe recognizes marriage between same-

sex couples.<sup>39</sup> State Department officials have noted that they can work on a case-by-case basis for legal workarounds if the foreign couple is from a country that has not legalized same-sex marriage. Even so, this new rule presents needless barriers for foreign same-sex couples working for international organizations to obtain visas to work in the United States. The policy also sends a discriminatory message.<sup>40</sup>

Contrary to the Obama Administration, which promoted LGBT equality as a key goal of U.S. foreign policy,<sup>41</sup> the Trump Administration has largely dropped LGBT equality, and human rights more broadly, from its foreign policy priorities. The Trump Administration’s lack of

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<sup>38</sup> Tang E (2018, June 22). Here are the 27 countries where same-sex marriage is officially legal. *ABC News*. <https://abcnews.go.com/GMA/Culture/27-countries-sex-marriage-officially-legal/story?id=56041136>

<sup>39</sup> Ibid.

<sup>40</sup> Wong E. and Schwirtz M. (2018, October 2). “U.S. Bans Diplomatic Visas for Foreign Same-Sex Domestic Partners.” *The New York Times*. <https://www.nytimes.com/2018/10/02/us/politics/visa-ban-same-sex-partners-diplomats.html>

<sup>41</sup> U.S. State Department fact sheet. (2013). Advancing the human rights of lesbian, gay, bisexual and transgender persons worldwide: A State Department priority. U.S. Department of State. <http://www.state.gov/documents/organization/211690.pdf>



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leadership on LGBT rights abroad has negative ramifications for LGBT people around the world, especially those in sub-Saharan Africa, majority Muslim and Arab countries, and the former Soviet bloc in Eastern Europe and Central Asia. It also poses a threat to American citizens living abroad, for foreign diplomats within the United States, and for foreigners who benefit from U.S. foreign aid. It is likely no accident that in the past two years a number of governments have unleashed campaigns of persecution against gay men or LGBT people, including Tanzania,<sup>42</sup> Chechnya,<sup>43</sup> and Indonesia.<sup>44</sup>

In 2018 the wave of anti-gay persecution worsened in Tanzania, with the government of Dar es Salaam launching a task force to identify and round up gay people.<sup>45</sup> “They are raiding houses. It is a horrible thing,” one activist told *The Guardian*. “It is just going to get worse. So many people are leaving the city, running away. They are targeting the activists, saying we are promoting homosexuality. We have to hide.” Another activist said that it is “open season on gay people” and reported lists of names being published on social media to “out people.”<sup>46</sup>

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<sup>42</sup> Gaffey, Conor. (2017, June 27). Gay in Africa: “Even cows” disapprove of homosexuality, says Tanzanian president amid crackdown. *Newsweek*. <https://www.nytimes.com/aponline/2017/12/08/world/africa/ap-af-tanzania-gays.html>

<sup>43</sup> Kramer, Andrew E. (2017, April 1). Chechen authorities arresting and killing gay men, Russian paper says. *New York Times*. <https://www.nytimes.com/2017/04/01/world/europe/chechen-authorities-arresting-and-killing-gay-men-russian-paper-says.html?mtrref=www.google.com>

<sup>44</sup> Hutton, Jeffrey. (2017, December 20). Indonesia’s crackdown on gay men moves from bars into the home. *New York Times*. <https://www.nytimes.com/2017/12/20/world/asia/indonesia-gay-raids.html?mtrref=www.google.com>

<sup>45</sup> Burke J (2018, November 5). Hundreds in hiding as Tanzania launches anti-gay crackdown. *The Guardian*. <https://www.theguardian.com/world/2018/nov/05/tanzania-gay-people-in-hiding-lgbt-activists-crackdown>

<sup>46</sup> Ibid.

On January 1, Secretary of State Mike Pompeo attended the inauguration of Brazil's new president Jair Bolsonaro. Bolsonaro, a former Army captain who long served as a congressman but operated at Brazil's political margins because of his far right political views, campaigned on a racist, sexist, homophobic platform.<sup>46.1</sup> Bolsonaro has in the past said he would rather die than have a gay son, advocated that parents should "beat the gay" out of their children, and in 2013 proclaimed, "Yes I am homophobic—and very proud of it."<sup>46.2</sup> Bolsonaro has already inspired violence against the LGBT community in Brazil. In October 2018, a transgender woman and a drag queen were both murdered, with the attackers in both incidents invoking Bolsonaro's name.<sup>46.2</sup> On his first day in office, he signed an executive order prohibiting the country's human rights ministry from hearing any concerns from the country's LGBT community.<sup>46.3</sup> He also signed executive orders targeting the descendants of slaves and the country's indigenous populations. After the inauguration, Pompeo tweeted out a photo of himself meeting with Bolsonaro thanking him for a great meeting to "reinforce our shared commitment to democracy, education, prosperity, security, and #human-rights."<sup>46.4</sup>

## VI. RELIGIOUS REFUSAL POLICIES

In its second year in office, the Trump Administration continued to enforce and endorse religious liberty policies and legislation that would allow for discrimination against LGBT people based on religious beliefs.

In January 2018, the U.S. Department of Health and Human Services created the Division of Conscience and Religious Freedom under the Office of Civil Rights (OCR). This division was created following President Trump's 2017 executive order, which directed federal agencies to expand religious freedom protections in ways that could increase discrimination against LGBT individuals and same-sex couples.<sup>47</sup> Also in early 2018, OCR collected public comments regarding a new proposed rule titled, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority." While this proposed rule did not specifically mention LGBT people, sexual orientation, or gender identity, it could easily be interpreted as codifying anti-LGBT discrimination in health care. The proposed rule states that "freedom from discrimination on the basis of religious belief or moral conviction...does not just mean the right not to be treated differently or adversely; it also means being free not to act contrary

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<sup>46.1</sup> Haltiwanger, J (2018, Oct. 29). "The 'Brazilian Donald Trump' just became president in a landslide. He got there despite saying he couldn't love a gay son and that a colleague was too 'ugly' to be raped." *Business Insider*. <https://www.businessinsider.com/jair-bolsonaro-brazil-election-results-trump-2018-10>

<sup>46.2</sup> Sullivan, Zoe. (2018, Oct. 29). "LGBTQ Brazilians on edge after self-described 'homophobic' lawmaker elected president." *Associated Press*. <https://www.nbcnews.com/feature/nbc-out/lgbtq-brazilians-edge-after-self-described-homophobic-lawmaker-elected-president-n925726>

<sup>46.3</sup> AP Staff. (2019, Jan. 3) Brazil's Bolsonaro targets minorities 1st day in office. *Associated Press*. <https://www.nbcnews.com/feature/nbc-out/brazil-s-bolsonaro-targets-minorities-1st-day-office-n954181>

<sup>46.4</sup> (2019, Jan. 2) Twitter. <https://twitter.com/SecPompeo/status/1080485576564969472>

<sup>47</sup> Cha, A., Eilperin, J. (2018, January 17). New HHS civil rights division to shield health workers with moral or religious objections. *Washington Post*. [https://www.washingtonpost.com/national/health-science/trump-administration-creating-civil-rights-division-to-shield-health-workers-with-moral-or-religious-objections/2018/01/17/5663d1c0-fbe2-11e7-8f66-2df0b94bb98a\\_story.html](https://www.washingtonpost.com/national/health-science/trump-administration-creating-civil-rights-division-to-shield-health-workers-with-moral-or-religious-objections/2018/01/17/5663d1c0-fbe2-11e7-8f66-2df0b94bb98a_story.html)

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The 2018 directive was clearly aimed at **gutting the sexual orientation and gender identity nondiscrimination regulation** affecting federal contractors.

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to one's beliefs." This language is exceptionally broad, and could be interpreted to allow providers to deny general health care services to LGBT people, as well as specific services such as STI screening to a gay man, fertility treatment to a lesbian couple, or gender affirmation treatment to a transgender individual. Rules and regulations that allow health care providers to discriminate based on religious beliefs will only exacerbate anti-LGBT discrimination in health care.

In July 2018, then-Attorney General Jeff Sessions announced the creation of a Religious Liberty Task Force that will enforce the 2017 memo issued by the Department of Justice on religious liberty. In the speech announcing the formation of the task force, Sessions said, "A dangerous movement...is now challenging and eroding our great tradition of religious freedom," which "must be confronted and defeated." The Religious Liberty Task Force is led by Associate Attorney General Jesse Panuccio, who previously defended supporters of Proposition 8, the 2008 ballot measure which prohibited marriage for same-sex couples in California.<sup>48</sup>

The Human Rights Campaign called the Religious Liberty Task Force part of:

***"...a brazen campaign to erode and limit the rights of LGBTQ people in the name of religion. The Attorney General standing shoulder-to-shoulder this morning with anti-LGBTQ extremists tells you everything you need to know about what today's announcement was really all about."***<sup>49</sup>

In August 2018, the Department of Labor (DOL) issued a new religious liberty directive that could allow religiously-affiliated organizations receiving federal funding to discriminate against LGBT people. The directive instructs Department of Labor staff to consider recent religious liberty developments when enforcing nondiscrimination policies, citing the *Masterpiece Cakeshop (2018)* and *Hobby Lobby (2014)* U.S. Supreme Court rulings in favor of religious refusal as well as previous Trump Administration executive orders regarding religious liberty. It states, "This Directive supersedes any previous guidance that does not reflect these legal developments, for example, the section in OFCCP's Frequently Asked

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<sup>48</sup> Burton T. (2018, July 31). "Jeff Sessions announces a religious liberty task force to combat 'dangerous' secularism." Vox. <https://www.vox.com/identities/2018/7/31/17631110/jeff-sessions-religious-liberty-task-force-memo-christian-nationalism>

<sup>49</sup> Ring T (2018, July 30). Sessions launches new LGBT assault with 'Religious Liberty' Task Force. *The Advocate*. <https://www.advocate.com/politics/2018/7/30/sessions-launches-new-lgbt-assault-religious-liberty-task-force>

Questions: Sexual Orientation and Gender Identity regarding ‘Religious Employers and Religious Exemption.’” The OFCCP is the Office of Federal Contract Compliance Programs. The DOL directive specifically states that religious liberty should be taken into account when enforcing Executive Order 11246, a 2014 order by President Obama that prohibits anti-LGBT discrimination by organizations contracting with the federal government. This 2018 DOL directive was clearly aimed at gutting the sexual orientation and gender identity nondiscrimination regulation affecting federal contractors, and will increase religion-based discrimination against LGBT by federal contractors.<sup>50</sup>

### *Background*

In recent years, religious refusal legislation, which would allow the refusal of services to LGBT people based on religious beliefs, has become more and more popular in states across the country. Since religious conservatives’ U.S. Supreme Court victory in *Burwell v. Hobby Lobby Stores, Inc.* (2014)—upholding a company’s refusal to cover contraception in an employee health plan<sup>51</sup>—and the two pro-same-sex marriage Supreme Court rulings in 2013 and 2015,<sup>52</sup> religious conservatives have introduced a slew of state and federal bills that frame refusal to serve LGBT people and/or same-sex couples as the Constitutionally-guaranteed “free exercise” of religion. In September 2017, the Department of Health and Human Services released its Draft Strategic Plan for FY 2018-2022 which made extensive mention of faith and faith-based organizations, and, in contrast with previous years, not a single mention of LGBT health. The strategic plan stated that the Department would “vigorously enforce” and “affirmatively accommodate” religious beliefs.<sup>53</sup> This language closely mirrored the language of state and federal religious refusal legislation that is being used to discriminate against LGBT people under the guise of religious freedom.<sup>54,55,56</sup>

In October 2017, the Department of Justice issued a memorandum to all executive departments and agencies that could allow individuals and organizations to discriminate against LGBT people and same-sex couples in health care and social services under the guise of religious freedom. In the memo, then Attorney General Jeff Sessions argued that the Free Exercise Clause “protects the right to perform or abstain from performing certain physical acts in accordance with one’s beliefs.” This protection “encompass[es] aspects of observance and practice, whether or not central to, or required by, a particular religious faith.” These freedoms apply to “private associations, and even businesses” as well as individuals and religious organizations.<sup>57</sup>

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<sup>50</sup> Johnson C. (2018, August 14). “New Trump Administration memo on Obama order alarms LGBT advocates.” *The Washington Blade*. <https://www.washingtonblade.com/2018/08/14/new-trump-admin-memo-on-obama-order-troubles-lgbt-advocates/>

<sup>51</sup> Supreme Court of the United States. 2014, June 30. *Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc., et al.* Retrieved from: <https://www.aclu.org/legal-document/burwell-v-hobby-lobby-stores-supreme-court-opinion>

<sup>52</sup> Supreme Court of the United States. 2013. *United States v. Windsor*. 570 U.S. — Docket No. 12-307; Supreme Court of the United States. 2015. *Obergefell v. Hodges*. 576 U.S. — Docket No. 14-556

<sup>53</sup> U.S. Department of Health and Human Services. (2017). *Draft Strategic Plan FY 2018-2022*. <https://www.hhs.gov/about/strategic-plan/index.html>

<sup>54</sup> Mississippi House of Representatives. 2016. House Bill No. 1523. <http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf>

<sup>55</sup> Tennessee State Legislature. (2016). An Act to amend Tennessee Code Annotated, Title 4; Title 49 and Title 63, relative to conscientious objections to the provision of counseling and therapy. Amendment No. 1. Available online at: <http://www.capitol.tn.gov/Bills/109/Amend/HAI006.pdf>

<sup>56</sup> O’Hara ME. (2016). First Amendment Defense Act would be “devastating” for LGBTQ Americans. *NBC News*. <http://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416>

<sup>57</sup> Attorney General Jeff Sessions. 2017. Federal law protections for religious liberty. Memorandum for all executive departments and agencies. Washington, DC. <https://www.justice.gov/opa/press-release/file/1001891/download>





This memo could enable and encourage individuals and organizations to discriminate against LGBT people and same-sex couples in health care and social services, including health care and services funded by government contracts. It could also be seen as protecting the right of government employees in a wide range of fields to refuse service to LGBT people, same-sex couples, unmarried heterosexual couples, and single-parent families. In the memo, Sessions also states that religious organizations should be able to accept federal government grants and discriminate in hiring for programs funded by those grants.<sup>58</sup>

A proposed rule issued by HHS on October 25, 2017 reiterated the Administration's view that religious organizations could receive funding from HHS to provide health care and other services, even if they discriminate in providing care and services and in hiring based on their religious views.<sup>59</sup>

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<sup>58</sup> Ibid.

<sup>59</sup> Removing Barriers for Religious and Faith-Based Organizations To Participate in HHS Programs and Receive Public Funding. A Proposed Rule by the Health and Human Services Department on 10/25/2017. <https://www.federalregister.gov/documents/2017/10/25/2017-23257/removing-barriers-for-religious-and-faith-based-organizations-to-participate-in-hhs-programs-and>

Religion has been invoked to deny LGBT people access to health care. For example, LGBT individuals have been denied appropriate mental health services and counseling;<sup>60</sup> a newborn was denied care because her parents were lesbians;<sup>61</sup> transgender patients have been denied transition-related medical care;<sup>62</sup> and an individual was denied his HIV medication,<sup>63</sup> all because of someone else's religious beliefs. LGBT people already experience discrimination in health care. Federal regulations should be aimed at specifically enumerating sexual orientation and gender identity in nondiscrimination regulations rather than codifying discrimination under the guise of freedom of religion.

## VII. HIV/AIDS POLICY

For most of its first two years in office, the Trump Administration has been notably absent from leadership on HIV/AIDS policy at a critical juncture in the domestic and global HIV epidemics. In the U.S., 1 in 2 Black men who have sex with men (MSM) and 1 in 4 Latino MSM will acquire HIV in their lifetimes if current infection rates persist.<sup>64</sup> As of January 2019, President Trump had not appointed a White House Office of National AIDS Policy Director. The important position has been vacant for two years, since Amy Lansky resigned in January 2017. At the end of 2017, President Trump summarily dismissed the Presidential Advisory Council on HIV/AIDS (PACHA), exacerbating a vacuum of leadership on HIV/AIDS at the federal level.<sup>65</sup> PACHA did not meet at all in 2018.

In November 2018, the Centers for Medicare and Medicaid Services (CMS) released a proposed rule that would change requirements for protected classes of drugs in Medicare Part D plan formularies. Currently, Part D plan formularies generally must include all drugs in six protected categories, including antiretrovirals used to treat HIV. If enacted, the proposed rule could allow insurance companies to have more control over patients' access to medications—typically restricting the more expensive medications by requiring patients to first try generic lower cost medications—rather than allowing providers to work directly with patients to decide what medication would be most effective, regardless of cost. Furthermore, many HIV medications are not available in generic form in the U.S.

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<sup>60</sup> *Ward v. Wilbanks*, 09-CV-11237, 2010 WL 3026428 (E.D. Mich. 2010, July 26), rev'd and remanded sub nom. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), dismissed with prej. by *Ward v. Wilbanks*, 09-CV-11237 (E.D. Mich. Dec. 12, 2012) (case settled).

<sup>61</sup> Phillip A. (2015, February 19). "Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It." *Washington Post*. <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>

<sup>62</sup> National Women's Law Center. (2014, May.) *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS*. Available online at: [http://www.nwlc.org/sites/default/files/pdfs/lgbt\\_refusals\\_factsheet\\_05-09-14.pdf](http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf)

<sup>63</sup> *Complaint, Simoes v. Trinitas Reg'l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. Law Div. 2012, May 23).

<sup>64</sup> The Centers for Disease Control and Prevention. (2016, February 23). Lifetime Risk of HIV diagnosis. <https://www.cdc.gov/nchstp/newsroom/2016/croi-press-release-risk.html>

<sup>65</sup> Guaino, B. (2017, December 29). Trump administration fires all members of HIV/AIDS advisory council. *Washington Post*. [https://www.washingtonpost.com/news/to-your-health/wp/2017/12/29/trump-administration-fires-all-members-of-hiv-aids-advisory-council/?utm\\_term=.2c6b3d12ee0d](https://www.washingtonpost.com/news/to-your-health/wp/2017/12/29/trump-administration-fires-all-members-of-hiv-aids-advisory-council/?utm_term=.2c6b3d12ee0d)

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Focus on the Family was awarded a grant from the President’s Emergency Plan for AIDS Relief (PEPFAR) to implement an **abstinence-based curriculum** in South Africa.

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Despite these negative HIV/AIDS policy developments, at the Ryan White HIV/AIDS Conference in Maryland in December 2018, Secretary of Health and Human Services Alex Azar made a number of announcements that indicate that the Trump Administration is taking steps to

address HIV in the U.S. First, Azar announced that HHS will update the National HIV/AIDS Strategy launched by President Obama in 2010 and updated in 2015 through 2020.<sup>66</sup> HHS hosted a listening session on the national strategy at the conference. Azar said in his speech to conference attendees that the 2020 strategy would highlight PrEP uptake as a major tool to prevent HIV infection. He also talked about the importance of addressing disparities affecting African Americans, Latinos, and gay men.<sup>67</sup>

Azar also announced that he would reconvene the Presidential Advisory Council on HIV/AIDS in March 2019. PACHA will be cochaired by Carl Schmid, Deputy Director of the AIDS Institute, and John Wiesman, Secretary of Health for Washington State.<sup>68</sup>

Latino populations in his speech are welcome developments. We urge him to also explicitly prioritize transgender women, and to understand that public policies that stigmatize gay men and other LGBT people—such as the assaults on legal equality described above—and policies that inhibit immigrants from accessing services, such as the proposed public charge rule (see Section X below), undermine efforts to reduce racial/ethnic disparities in the epidemic.

One other positive development in domestic HIV policy in 2018 was the U.S. Preventive Services Task Force’s proposed A rating for PrEP for HIV prevention.<sup>69</sup> Such a rating would mean that insurance will fully cover PrEP, including copays. In its comment in support of this proposed rating, the Fenway Institute encouraged the U.S. Preventive Services Task Force (USPSTF) to also cover screenings for HIV and other STIs, and for some patients renal monitoring, as recommended by the CDC.<sup>70</sup> Fenway also recommended that future PrEP medications be covered, and that the USPSTF explicitly mention bisexuals in its guidance.

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<sup>66</sup> Azar, A. (2018, December 12). HHS Secretary Azar’s Remarks to the National Ryan White Conference on HIV Care and Treatment. US Department of Health and Human Services. <https://www.hiv.gov/blog/hhs-secretary-azar-s-remarks-national-ryan-white-conference-hiv-care-and-treatment>

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> U.S. Preventive Services Task Force (2018, November). Draft Recommendation Statement, Prevention of Human Immunodeficiency Virus (HIV) Infection: Pre-Exposure Prophylaxis. <https://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementDraft/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis>

<sup>70</sup> Centers for Disease Control and Prevention: US Public Health Service: *Preexposure prophylaxis for the prevention of HIV infection in the United States—2017 Update: a clinical practice guideline*. <https://www.cdc.gov/hiv/pdf/risk/prep/cdc-hiv-prep-guidelines-2017.pdf>. Published March 2018. Pages 47-48.

At the global HIV/AIDS level, the Trump Administration is giving renewed support to abstinence as a HIV/AIDS prevention tool. An international affiliate of the anti-LGBT U.S. group Focus on the Family was awarded a \$49,505 grant from the President's Emergency Plan for AIDS Relief (PEPFAR) to implement an abstinence-based curriculum in South Africa. Evidence has demonstrated a lack of efficacy of abstinence-based HIV/AIDS prevention programs. Researchers have found no discernible change in sexual behavior as a result of abstinence messaging on HIV/AIDS prevention.<sup>71</sup> The Focus on the Family South Africa website promotes heteronormative constructs on its website, by stating "[marriage] is intended by God to be a thriving, lifelong relationship between a man and a woman."<sup>72</sup> Further, the organization denigrates transgender individuals, by arguing that humans are "intentionally and immutably" male and female.<sup>73</sup>

## VII. UNDERMINING THE AFFORDABLE CARE ACT

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In 2018 President Trump allowed insurance plans that do not cover pre-existing conditions, such as HIV or cancer.

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On December 14, 2018 Judge Reed O'Connor, a United States District Judge of the United States District Court for the Northern District of Texas, ruled that the individual mandate of the Affordable Care Act (ACA) was unconstitutional, and as a result, struck down the entire ACA, which he argued cannot stand without the individual mandate. In 2012, the U.S. Supreme Court ruled that the individual mandate was constitutional based on Congress's ability to legally impose a tax penalty on people who did not have health insurance. As part of President Trump's tax overhaul in December 2017, the tax penalty for not having health insurance was dropped to zero dollars. This prompted a group of Republican governors and state attorneys general to file a lawsuit, arguing that since Congress was no longer exercising its legal taxing power with the penalty zeroed out, the individual mandate was

now unconstitutional. Judge O'Connor agreed, stating that the individual mandate "can no longer be sustained as an exercise of Congress's tax power."<sup>74</sup> President Trump, who has made several attempts to dismantle the ACA since the beginning of his presidency, tweeted his approval of Judge O'Connor's decision: "Great news for America!"<sup>75</sup> The ACA has been

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<sup>71</sup> McNeil, D., Jr. (2015, February 26). U.S. Push for Abstinence in Africa Is Seen as Failure Against H.I.V. *New York Times*. <https://www.nytimes.com/2015/02/27/health/american-hiv-battle-in-africa-said-to-falter.html>

<sup>72</sup> Lavers, M. K. (2018, April 24). Anti-LGBT South Africa group receives PEPFAR grant. *Washington Blade*. <https://www.washingtonblade.com/2018/04/24/anti-lgbt-south-africa-group-receives-pepfar-grant/>

<sup>73</sup> Ibid.

<sup>74</sup> Goodnough A. and Pear R. (2018, December 14). "Texas Judge Strikes Down Obama's Affordable Care Act as Unconstitutional." *The New York Times*. <https://www.nytimes.com/2018/12/14/health/obamacare-unconstitutional-texas-judge.html>

<sup>75</sup> Yilek C (2018, December 14). Trump: 'Great news' that Obamacare ruled unconstitutional. *The Washington Examiner*. <https://www.washingtonexaminer.com/news/trump-great-news-that-obamacare-ruled-unconstitutional>



Vice President Mike Pence, left, stands with Family Research Council President Tony Perkins before speaking at the 2018 Values Voter Summit in Washington, Saturday, Sept. 22, 2018. (AP Photo/Susan Walsh)

vital in expanding health insurance coverage to millions of Americans, and has disproportionately benefited traditionally underinsured and vulnerable populations, including LGBT people<sup>76</sup> and people living with HIV<sup>77</sup> and other pre-existing conditions.

During 2018 President Trump took other steps to undermine the ACA, such as allowing inexpensive, short-term insurance plans to be sold that do not cover pre-existing conditions, such as HIV or cancer, and that do not offer most of the benefits and safeguards that the ACA requires.<sup>78</sup>

## IX. PARTICIPATION IN FAMILY RESEARCH COUNCIL'S ANTI-LGBT VALUES VOTERS SUMMIT

The Trump Administration's alignment with the Family Research Council, a staunchly anti-LGBT activist group, underlines the administration's hostile stance toward LGBT people. In September 2018, Vice President Mike Pence and Secretary of State Mike Pompeo addressed the Family Research Council's annual Value Voters Summit in 2018.<sup>79</sup> President Trump spoke to the 2017 Values Voters Summit.<sup>80</sup> Anti-LGBT rhetoric is a recurring theme among the speeches given at this summit.<sup>81</sup> That Trump, Pence and Pompeo would address this religious right, anti-LGBT political pep rally underscores the Trump Administration's deep hostility to LGBT people and LGBT equality.

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<sup>76</sup> Karpman M, Skopec L, Long S. (2015, April 5). QuickTake: Uninsurance Rate Nearly Halved for Lesbian, Gay, and Bisexual Adults since Mid-2013. Health Reform Monitoring Survey. <http://hrms.urban.org/quicktakes/Uninsurance-Rate-Nearly-Halved-for-Lesbian-Gay-and-Bisexual-Adults-since-Mid-2013.html>

<sup>77</sup> Belluz J (2017, February 15). Why Obamacare repeal would be devastating to people with HIV. *Vox*. <http://www.vox.com/2017/2/8/14532310/obamacare-aca-repeal-hiv-aids>

<sup>78</sup> Benen S (2018, August 1). To undermine the ACA, the Trump administration pushes 'short-term' plans. *MSNBC*. <http://www.msnbc.com/rachel-mad-dow-show/undermine-the-aca-the-trump-administration-pushes-short-term-plans>

<sup>79</sup> Fitzsimon T. (2018, September 24). Pence is first VP to speak at anti-gay group's Values Voter Summit. *NBC News*. <https://www.nbcnews.com/feature/nbc-out/pence-first-vp-speak-anti-gay-group-s-values-voter-n912641>

<sup>80</sup> Taylor, J (2017, October 13). "Trump To Values Voters: In America 'We Don't Worship Government, We Worship God.'" *National Public Radio*. <https://www.npr.org/2017/10/13/557459193/trump-set-to-address-values-voter-summit-for-first-time-as-president>

<sup>81</sup> Cahill, S. and Burack, C. (2006, October). *Internal enemy: Gays as the domestic al-Qaeda; A report from the Family Research Council's Values Voter Summit*. 2006: National Gay and Lesbian Task Force Policy Institute

## X. PROPOSED PUBLIC CHARGE RULE AND ITS LIKELY IMPACT ON IMMIGRANTS' ACCESS TO HEALTH CARE AND OTHER SERVICES

On October 10, 2018, the Department of Homeland Security released a proposed rule regarding the public charge definitions used to determine whether an immigrant is inadmissible to the United States.<sup>82</sup> As written, the rule radically lowers the historical standard for determining whether someone is “likely to become a public charge.” Under current policy, only cash welfare assistance and government funded long-term care can be taken into consideration in the public charge test. The proposed rule would alter this test such that any person who seeks or uses a wide range of life-saving health and human services programs—from housing assistance to health care (including treatment for HIV/AIDS) to anti-hunger and anti-poverty services—could be deemed a public charge, which could create barriers to maintaining or improving their immigration status.

If the proposed rule remains as is, it could result in individuals being deterred from using vital services such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), Medicaid or the Children’s Health Insurance Program (CHIP) to address their basic health needs, ultimately leading to worse health and developmental outcomes for them, their children, and their communities.

This is especially concerning for immigrants who identify as LGBT. Immigrants make up a significant population of the LGBT community. The Williams Institute at UCLA School of Law estimates there are 637,000 LGBT-identified individuals among the adult authorized immigrant population.<sup>83</sup> Concerns regarding barriers to health care utilization as a result of this proposed rule could be amplified for LGBT immigrants, because anti-LGBT discrimination in healthcare is common and already acts as a barrier to seeking necessary medical treatment. A survey conducted by Lambda Legal found that 56% of LGB respondents and 70% of transgender respondents reported having at least one discriminatory experience—such as refusal of service, harsh or abusive language, being blamed for their health status, etc.—in a healthcare facility.<sup>84</sup> The survey also found that a higher proportion of LGBT people of color and/or low-income people reported experiencing discriminatory care. These experiences of discrimination act as a barrier to seeking necessary care in the first place, and if the proposed rule is adopted, LGBT immigrants will be deterred even further from seeking healthcare that they need.

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<sup>82</sup> Department of Homeland Security. (2018, October 10). *Inadmissibility on Public Charge Grounds*. Proposed Rule. DHS Docket No. USCIS-2010-0012. <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds>

<sup>83</sup> Gates, G.J. (2013). “LGBT Adult Immigrants in the United States.” UCLA School of Law: The Williams Institute. <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>

<sup>84</sup> Lambda Legal. 2010. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

The proposed rule also introduced a new test for income, where earning under 125% of the federal poverty level (\$31,375 annually for a family of 4) would be considered a negative factor in deciding whether an immigrant could be granted a green card or permanent residency. LGBT people, including those who are immigrants, experience widespread workplace discrimination which hurts their ability to attain and maintain economic security. A 2017 national survey found that one in five LGBT people experienced discrimination due to their sexual orientation or gender identity when applying for a job, and 22% reported experiencing this discrimination in pay or promotions.<sup>85</sup> In effect, this proposed rule would punish LGBT immigrants for systemic workplace discrimination.

Furthermore, LGBT people are also more likely to depend on programs that could lead to a public charge determination under the proposed rule. Research has shown that LGBT people are more likely than non-LGBT people to report experiencing food insecurity,<sup>86</sup> and LGBT people and their families are more than twice as likely to report receiving Supplemental Nutrition Assistance Program (SNAP) benefits.<sup>87</sup> LGBT people and their families are also more likely to receive Medicaid benefits and more likely to rely on housing assistance programs than non-LGBT people.<sup>88</sup> Penalizing immigrants for actual or predicted usage of a wide-range of supplementary assistance in their lifetimes will likely disproportionately impact LGBT immigrants and their families.

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**LGBT people are more likely to depend on programs that could lead to a public charge determination under the proposed rule.**

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The proposed rule could also disproportionately affect the health and well-being of immigrants living with HIV. Under the proposed rule, an immigrant's health, including HIV status, would be considered when determining whether the applicant is likely to be able to work, attend school, care for themselves, or require expensive care or institutionalization. For many people, HIV/AIDS treatment is prohibitively expensive without assistance. Under this rule, immigrants living with HIV might forego using support services and payment assistance for HIV treatment

due to fear of a public charge determination. This would be devastating to the health of the individual, and could also have negative health consequences for the community at large, as disruptions in HIV care and treatment—especially resulting in reduced adherence or medication rationing—can lead to drug resistant strains of HIV and increased transmission of HIV.

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<sup>85</sup> Sejal Singh and Laura E. Durso (2017). "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," Washington, DC: Center for American Progress. <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>

<sup>86</sup> Taylor N.T. Brown, Adam P. Romero, and Gary J. Gates (2016). "Food Insecurity and SNAP Participation in the LGBT Community." UCLA: The Williams Institute. <https://williamsinstitute.law.ucla.edu/research/lgbt-food-insecurity-2016/>

<sup>87</sup> Rooney C (2018). "Protecting Basic Living Standards for LGBTQ People." Washington, DC: Center for American Progress. <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>

<sup>88</sup> Ibid.

## XI. BUREAU OF PRISONS CHANGE IN POLICY ON HOUSING ADULT TRANSGENDER PRISONERS

The Federal Bureau of Prisons (BOP) announced in May 2018 that, while it will continue to make housing determinations on a case-by-case basis as required by the Prison Rape Elimination Act (PREA), it will use “biological sex” to make initial determinations in the type of housing transgender inmates are assigned, and will assign transgender prisoners to facilities conforming to their gender identity only “in rare cases.”<sup>89</sup> This reverses a 2016 BOP policy<sup>90</sup> that housed adult prisoners based on their gender identity, not their birth sex.

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The Federal Bureau of Prisons will **house transgender prisoners based on their sex at birth**, putting them at greater risk of sexual and physical abuse.

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The BOP’s latest decision runs directly counter to the text and spirit of PREA, will undermine the safety and security of one of the most vulnerable prison populations, and negates decades of progress on LGBT rights and protections that were reflected in the issuance of PREA standards in 2012.<sup>91</sup>

Transgender prisoners are at higher risk of being raped in prison than other prisoners. A best practice is to place transgender women in women’s prisons. According to the Bureau of Justice Statistics, data from 2007 through 2012 indicate that 34.6% of transgender people in state and federal prisons and 34% in local jails reported some kind of sexual victimization while incarcerated.<sup>92</sup> Among cisgender heterosexual men, between 3.5% and 5.2% reported sexual victimization. Among cisgender heterosexual women, between 3.7% and 13.1% reported sexual victimization. Rates of sexual victimization by another prisoner against gay and bisexual men in prison are also very high, about 10 times the rate for heterosexual men.<sup>93</sup>

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<sup>89</sup> Federal Bureau of Prisons (2018, May 11). Change Notice to Transgender Offender Manual. <https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html>

<sup>90</sup> <http://www.prearesourcecenter.org/node/3927>.

<sup>91</sup> Cahill S (2017). From “Don’t drop the soap” to PREA standards: Reducing sexual victimization of LGBT people in the juvenile and criminal justice systems. *LGBTQ Politics: A Critical Reader*. New York: New York University Press. 134-152.

<sup>92</sup> Beck A. (2014). *Sexual victimization in prisons and jails reported by inmates, 2011-12. Supplemental tables: Prevalence of sexual victimization among transgender adult inmates*. Washington DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. [http://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf)

<sup>93</sup> Source: Beck AJ, Johnson C. (2012, May). *Sexual victimization reported by former state prisoners, 2008*. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>





According to the National PREA Resource Center, the new policy violates PREA Standards:

**Does a policy that houses transgender or intersex inmates based exclusively on external genital anatomy violate Standard 115.42(c) & (e)?**

**Yes. Standard 115.42(c) states:**

*In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.*

**In addition, Standard 115.42(e) states:**

*A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.<sup>94</sup>*

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<sup>94</sup> National PREA Resource Center (2016, March 24). <https://www.prearesourcecenter.org/node/3927>

## XII. DEPARTMENT OF VETERANS AFFAIRS PROPOSED EXCLUSION OF GENDER ALTERATIONS FROM THE MEDICAL BENEFITS PACKAGE

On July 9, 2018, the Department of Veterans Affairs (VA) released a request for comments regarding gender affirmation surgery.<sup>95</sup> Currently, in the VA's medical regulations, there is a provision that excludes "gender alterations" from its medical benefits package. While the VA will provide medical services to transgender veterans before and after gender affirmation surgery, the VA has thus far excluded the actual surgery from its medical benefits package. Gender affirmation surgery and hormone treatment are considered medically necessary by many physicians for their transgender patients. The American Medical Association adopted a resolution in 2008 supporting public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician.<sup>96</sup> In response to petitions to include medically necessary gender affirmation surgery in its medical benefits package, the VA released this request for comments to seek input to determine whether or not to amend the medical benefits package and eliminate the exclusion of medically necessary and life-saving gender affirmation surgery. A final decision regarding gender affirmation surgery has not yet been released by the VA.

## XIII. FOOD AND DRUG ADMINISTRATION REGULATION OF E-CIGARETTES

In November 2018, the Food and Drug Administration announced aggressive new regulations to reduce youth use of e-cigarettes. These include banning the sale of flavored tobacco products used in e-cigarettes.<sup>97</sup> Stricter regulation of e-cigarettes is important for LGBT people. According to the Massachusetts Behavioral Risk Factor Surveillance System survey, LGBT people aged 18-24 reported nearly three times the rate of e-cigarette use compared to non-LGBT people in the same age category (16.7% vs. 5.7%).<sup>98</sup> National data from the Population Assessment of Tobacco and Health (2013-2014) found higher rates of e-cigarette use among LGB people.<sup>99</sup>

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<sup>95</sup> Department of Veterans Affairs. (July 9, 2018). "Exclusion of Gender Alterations From the Medical Benefits Package." Request for Comments. Document Citation 83 FR 31711. <https://www.federalregister.gov/documents/2018/07/09/2018-14629/exclusion-of-gender-alterations-from-the-medical-benefits-package>

<sup>96</sup> H-185.950 Removing Financial Barriers to Care for Transgender Patients. Our AMA supports public and private health insurance coverage for treatment of gender identity disorder as recommended by the patient's physician. (Res. 122; A-08). <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advisory-committee/ama-policy-regarding-sexual-orientation.page?>

<sup>97</sup> U.S. Food and Drug Administration (2018, November 16). FDA's deeming regulations for e-cigarettes, cigars, and all other tobacco products. <https://www.fda.gov/tobaccoproducts/labeling/rulesregulationsguidance/ucm394909.htm>

<sup>98</sup> Massachusetts Department of Public Health. 2016. Massachusetts Behavioral Risk Factor Surveillance System.

<sup>99</sup> Wheldon C, Kaufman A, Kasza K, Moser R (2018). Tobacco use among adults by sexual orientation: Findings from the Population Assessment of Tobacco and Health Study. *LGBT Health*

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LGBT people and people living with HIV in the U.S. and around the world are now **much more vulnerable to discrimination.**

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## CONCLUSION

During its first year in office, the Trump Administration compiled a strikingly anti-LGBT record of actions that undermined the health and well-being of LGBT people. In its second year in office, the Trump Administration added to its anti-LGBT record by continuing to undermine the ability of LGBT people to access health care and other services, restricting the right of transgender people to serve in the military, prohibiting people living with HIV from serving in the Peace Corps, promoting religion-based discrimination against LGBT people, eliminating critical nondiscrimination protections, appointing federal judges who oppose LGBT equality, and affiliating frequently with anti-LGBT advocacy organizations, such as Focus on the Family and the Family Research Council.

While there were some potentially hopeful developments—such as the FDA’s regulation of e-cigarettes and the plans to develop a new national HIV/AIDS strategy to take effect in 2020—these positive developments were few and far between. Overall in its second year in office, the Trump Administration continued building upon the striking record against LGBT rights that it amassed in its first year. Unfortunately, the Trump Administration continues to expand discriminatory policies toward LGBT people.

Some of the actions that the Trump Administration has taken will have predictable and quantifiable repercussions, such as the loss of health insurance due to the undermining of the ACA. However, it is more difficult to predict the full extent of harm of many of the Trump Administration’s anti-LGBT actions, such as its support of religious refusal legislation, reinterpretation of sex discrimination, appointment of anti-LGBT conservative justices, and other attempts to rollback LGBT rights and protections that have taken decades to pass. The Trump Administration’s embrace of anti-gay leaders like Brazilian President Bolsonaro, and anti-LGBT groups like the Family Research Council, endanger the safety of LGBT people around the world. Discrimination against idealistic Americans living with HIV trying to serve in the Peace Corps exacerbates stigma, which undermines the global fight against HIV. It is undeniable that LGBT people and people living with HIV in the U.S. and around the world are now much more vulnerable to discrimination in health care, social services, employment, education, and access to basic government services.

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