

# The Biden Administration's Commitment to Minority Protection

by Davide Zecca

**Abstract:** *L'impegno dell'amministrazione Biden alla protezione delle minoranze* – This article discusses the evolution of U.S. legislation and policies affecting the interests of marginalized minorities (identified on the basis of race, gender and sexual orientation) under the tenure of President Biden. The text provides an assessment of the effectiveness of the actions undertaken with reference to workplace discrimination in federal employment, access to public accommodations, family life, health care and education. The analyses refers also to the most relevant judicial rulings regarding anti-discrimination law (e.g., the U.S. Supreme Court's decisions on abortion and affirmative actions).

**Keywords:** Anti-discrimination; Minorities; Federal employment; Marriage equality; Transgender rights

## 1. Minority Protection: Setting Up the Perimeter

Assessing the performance of the Biden administration in protecting minority rights requires a preliminary definition of the demographic and social groups that qualify as such. A first criterion to categorize a cluster of individuals as a minority may be its percentage in the context of a given demographic. According to the U.S. Census Bureau, Non-Hispanic Whites represented the largest share of the U.S. population in 2023, accounting for approximately 58% of the residents in the country.<sup>1</sup> All other ethnic groups (Hispanics, African Americans, Asians, Pacific Islanders, Native Americans, etc.) therefore make up a minority of the population, thereby justifying the choice to include in this study policies and acts undertaken by the incumbent administration that were directed towards any of the above ethnic communities.

In addition to racialized and ethnic groups, the present contribution aims to discuss also the efforts by the Biden administration to protect the rights of people adversely impacted by existing policies or legislation because of their sexual orientation or gender identity. Assessing the demographic size of these minority groups is a rather complicated task, but

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<sup>1</sup> *New Estimates Highlight Differences in Growth Between the U.S. Hispanic and Non-Hispanic Populations*, U.S. Census Bureau, June 27, 2024, <https://www.census.gov/newsroom/press-releases/2024/population-estimates-characteristics.html>.

recent surveys estimate that the non-heterosexual population accounts for about 7% in the country, whereas the transgender and non-binary population accounts for less than 2%.<sup>2</sup>

Demographics, however, is not the only perspective that matters when addressing anti-discrimination policies pursued by governmental institutions. Accordingly, even if women do not qualify as a minority group from a mere demographic standpoint, the present article will also refer to policies specifically addressed to the female population. Methodologically, the choice may be justified according to a specific understanding of the study of anti-discrimination law, which may be defined as a holistic analysis of the existence of disadvantages for a social or demographic group, from a political, socio-cultural and material standpoint (irrespective of the sheer size of the group within a selected population).<sup>3</sup>

Alternate lenses might prove useful to assess the anti-discrimination policies promoted by the incumbent administration, such as that of religious affiliation. However, the likely non-existence of a dominant religious group in the country (Christians make up the majority of people who declare to be religious, but they are split into several denominations – Protestants, Evangelical and Roman Catholics, to mention the most prominent) and the fact that an increasing percentage of the population is religiously unaffiliated appear justifiable grounds to refrain from discussing anti-discrimination policies with regard to religious minorities in the present article.<sup>4</sup> Moreover, despite the prospective relevance of inquiring into the impact of the existing U.S. legal framework on the condition of religious groups, the breadth of the subject matter would most likely require ad hoc studies to be addressed properly.<sup>5</sup>

It is worth noting that the demographic make-up of the electorate who voted for Biden in 2020 was more diverse than the constituency supporting Trump; estimates accounted that an overwhelming majority of African American citizens who voted chose Biden (92%), along with a majority of Asians (72%) and Hispanics (59%) and a majority of women (55%).<sup>6</sup> According to post-election estimates, also a majority of Native

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<sup>2</sup> A. Brown, *5 key findings about LGBTQ+ Americans*, in *Pew Research Center*, June 23, 2023, <https://www.pewresearch.org/short-reads/2023/06/23/5-key-findings-about-lgbtq-americans/>; J.M. Jones, *LGBTQ+ Identification in U.S. Now at 7.6%*, March 13, 2024, <https://news.gallup.com/poll/611864/lgbtq-identification.aspx>; A.R. Flores, K.J. Conron, *ADULT LGBT POPULATION in the United States*, in Williams Institute UCLA School of Law, December 2023, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Dec-2023.pdf>.

<sup>3</sup> T. Khaitan, *A Theory of Discrimination Law*, Oxford, 2015, 122.

<sup>4</sup> *Modeling the Future of Religion in America*, Pew Research Center, September 2022, [https://www.pewresearch.org/wp-content/uploads/sites/20/2022/09/US-Religious-Projections\\_FOR-PRODUCTION-9.13.22.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2022/09/US-Religious-Projections_FOR-PRODUCTION-9.13.22.pdf).

<sup>5</sup> For an insight on the Biden administration's policies towards religious groups, see S. Mancini, *Religious Freedom and Minority Rights under the Biden Administration*, in G.F. Ferrari (Ed.), *The American Presidency After Two Years of President Biden*, in *DPCE online*, 2023, Special Issue 1, 235-248.

<sup>6</sup> R. Igielnik, S. Keeter, H. Hartig, *Behind Biden's 2020 Victory*, in *Pew Research Center*, June 30, 2021, [https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PP\\_2021.06.30\\_validated-voters\\_REPORT.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PP_2021.06.30_validated-voters_REPORT.pdf).

American citizens casted their votes for the Democratic nominee (60%), potentially contributing to consolidate the Democratic candidate's slim edge in Arizona, where the margin separating Biden and Trump consisted of some 10,000 votes.<sup>7</sup> Incidentally, it was the support of African American voters in the Democratic primaries held in South Carolina in early 2020 that gave momentum to the candidacy of Biden, who had performed below expectations in the first electoral contests to select the challenger to then President Trump.<sup>8</sup> Members to any of the groups making up this diverse electoral constituency could have thus expected to benefit from the policies of the Biden administration. Accordingly, the incoming administration was supposed to deliver tangible results to these social groups, at least to prospectively preserve the competitive advantage that they provided to the Democratic party's candidate in the Presidential contest.

Against this backdrop, the article will discuss executive actions, legislative acts and other policies impacting on the conditions of marginalized minorities over the tenure of Joe Biden as President of the United States of America. Acknowledging the saliency of judicial developments shaping the U.S. legal framework, reference will be made to relevant decisions by the federal judiciary likely to affect the implementation of the acts adopted by the other branches of government. The text will discuss such initiatives by focusing on specific social contexts, ranging from workplace discrimination in federal employment (par. 2) to access to public accommodations and family life (par. 3), from health care assistance (par. 4) to education (par. 5). The article will not consider the actions of the incumbent administration fostering the political participation of minority groups, whose extent has already been discussed in a mid-term assessment that does not appear to require relevant updates.<sup>9</sup> The conclusions will discuss the effectiveness of the policies pursued under the Biden administration, also in light of the change of political circumstances that have occurred following the 2022 mid-term elections (par. 6).

## 2. Fostering Diversity, Equity, Inclusion and Accessibility in Federal Workplaces

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<sup>7</sup> G.R. Sanchez, *What might we expect from Native American voters in the upcoming 2022 election?*, December 16, 2021, in *Brookings*, <https://www.brookings.edu/articles/what-we-might-expect-from-native-american-voters-in-the-upcoming-2022-election/>; *Native Americans Overcome Major Obstacles; Part of Voting Coalition That Led Biden to Victory*, in *Latino Decisions*, November 10, 2020, <https://latinodecisions.com/blog/native-americans-overcome-major-obstacles-part-of-voting-coalition-that-led-biden-to-victory/>.

<sup>8</sup> A. van Wagtenonk, *Biden got nearly two-thirds of the black vote in South Carolina*, in *Vox*, March 1, 2020, <https://www.vox.com/policy-and-politics/2020/3/1/21160030/biden-black-vote-south-carolina-results>.

<sup>9</sup> D. Zecca, *Biden's Voting Rights Ambitions: An Effort Doomed To Fail?*, in G.F. Ferrari (Ed.), *The American Presidency After Two Years of President Biden*, in *DPCE online*, 2023, Sp. Iss. 1, 285-306; see also D.T. Muller, *A Bully Pulpit Approach to Elections in the Early Biden Administration*, 2021 *U. Ill. L. Rev. Online* 166 (2021).

One of the most prominent areas where President Biden has pursued anti-discrimination policies since the beginning of his term of office has been that of federal employment. Therefore, this paragraph will address Presidential actions and policies furthering diversity, equity, inclusion and accessibility in federal workplaces. Discrimination in private employment will not be discussed, as the administration has not undertaken specific initiatives in this regard, also in light of the recent developments associated with the decision of the U.S. Supreme Court in *Bostock v. Clayton County*.<sup>10</sup> The finding of a majority of the Justices that the prohibition of discrimination on the basis of sex, encompassed in Title VII of the *Civil Rights Act* of 1964, implies also a prohibition to discriminate on the basis of sexual orientation (or gender identity) marked a momentous shift in the regulation of discrimination in private employment.<sup>11</sup>

Turning to federal employment, the centrality of anti-discrimination policies in the agenda of the Biden administration is exemplified by the first executive order signed by the newly sworn in President after taking office.<sup>12</sup> The act provides extensive guidelines to federal agencies and offices established under the authority of the executive branch of government to implement ad hoc policies to advance equity, civil rights, racial justice and equal opportunity for all, including people of color and others who have been historically underserved, marginalized and adversely affected by persistent poverty and inequality.<sup>13</sup> The text identifies underserved communities as “populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life”.<sup>14</sup> The executive order charges the head of each agency to draft a plan for addressing any barrier limiting full and equal participation for underserved communities and individuals seeking to enroll or access federal benefits, services or programs and to take advantage of agency procurement and contracting opportunities.<sup>15</sup> The act provides also for the revocation of an executive order adopted by former President Trump to ban federal agencies and contractors from addressing what were identified as “divisive concepts” associated with “race or sex stereotyping and race or sex scapegoating”.<sup>16</sup>

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<sup>10</sup> 590 U.S. 644 (2020).

<sup>11</sup> J. Novkov, *Bostock v. Clayton County on LGBT Employment Discrimination*, in M. Marietta (Eds.), *SCOTUS 2020. Major Decisions and Developments of the U.S. Supreme Court*, Cham, 2020, 25-35; see also D. Zecca, *Bring back our jobs (with fewer protections though)!*, in *Dpce on line*, 2021, 1, 1189-1209, 1201.

<sup>12</sup> Executive Order 13985 of January 20, 2021 - *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 FR 10825.

<sup>13</sup> E.O. 13985, Sec. 1 (*Policy*).

<sup>14</sup> E.O. 13985, Sec. 2(b) (*Definitions*); Sec. 2(a) refers explicitly to “Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality”.

<sup>15</sup> E.O. 13985, Sec. 5 (*Conducting an Equity Assessment in Federal Agencies*).

<sup>16</sup> E.O. 13985, Sec. 10 (*Revocation of Trump’s Executive Order 13950 of September 22, 2020 (Combating Race and Sex Stereotyping)*). On E.O. 13950, see L.C. Rachow,

On the very same day of the inauguration of his term, Biden signed another executive order that explicitly refers to the principle of the equal protection of the laws provided for by Sec. 1 of the XIV Amendment, to its implementation through Title VII of the *Civil Rights Act of 1964* and to the finding of the Supreme Court in *Bostock v. Clayton County*. The act underlines that all the above corroborate the understanding that the prohibition of discrimination on the basis of sex implies also the prohibition of discrimination on the basis of gender identity and sexual orientation, while reminding that often such forms of discrimination overlap with other forbidden forms of discrimination such as those on the basis of race or disability conditions.<sup>17</sup> The act commands the head of each agency to undertake a review of all agency policies and actions associated with discrimination on the basis of sex, gender and sexual orientation, as well as other forms of overlapping discrimination.<sup>18</sup>

President Biden followed up on these first initiatives soon thereafter, by adopting an executive order aimed to ensure that all transgender individuals who wish to serve in the U.S. military and meet the appropriate standards are able to do so without discrimination. The provisions also revoked a Presidential Memorandum approved by President Trump that had endorsed the proposals by the Secretary of Defense and the Secretary of Homeland Security to disqualify transgender persons with a history or diagnosis of gender dysphoria from serving in the military, except under certain limited circumstances.<sup>19</sup>

Further actions followed a few months after, when a more comprehensive executive order tackling discrimination in federal employment under several perspectives was signed by President Biden.<sup>20</sup> The text expands the definition of “underserved communities” enshrined in E.O. 13985 to “populations sharing a particular characteristic, as well as geographic communities, who have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life [... including] individuals who belong to communities of color, such as Black and African American, Hispanic and Latino, Native American, Alaska

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*Scapegoating and Stereotyping: The Executive’s Power over Federal Contractors*, in 47 *J. Corp. L.* 529 (2022).

<sup>17</sup> Executive Order 13988 of January 20, 2021 - *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 FR 7023, Sec. 1 (*Policy*).

<sup>18</sup> E.O. 13988, Sec. 2 (*Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation*).

<sup>19</sup> Executive Order 14004 of January 25, 2021 - *Enabling All Qualified Americans to Serve Their Country in Uniform*, 86 FR 7471. See A. Vedder, *Uncle Sam Wants you, Unless You’re Trans: How Greene v. McElroy Allows Discrimination in the Military*, 45 *Mitchell Hamline L. J. Pub. Pol’y & Prac.* 87 (2024), where the author argues that, since serving in the military shall be understood as a constitutional right, delegation of power to infringe on such right to an agency of the executive branch requires explicit authorization under the test elaborated by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

<sup>20</sup> Executive Order 14035 of June 25, 2021 - *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, 86 FR 34593. For a broader discussion about the use of executive orders to advance diversity, equality and inclusion, see the contribution of A. Baraggia in this issue of the journal.



Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons [...] individuals who belong to communities that face discrimination based on sex, sexual orientation, and gender identity [...]; persons who face discrimination based on pregnancy or pregnancy-related conditions; parents; and caregivers [...] individuals who belong to communities that face discrimination based on their religion or disability; first-generation professionals or first-generation college students; individuals with limited English proficiency; immigrants; individuals who belong to communities that may face employment barriers based on older age or former incarceration; persons who live in rural areas; veterans and military spouses; and persons otherwise adversely affected by persistent poverty, discrimination, or inequality”.<sup>21</sup>

The following provisions direct the head of each federal agency to prioritize the advancement of diversity, equity, inclusion and accessibility (DEIA) as a strategic goal of the agency’s management agenda, in pursuance of the implementation of a government-wide DEIA Plan prepared by the Director of the Office of Personnel Management and the Deputy Director for Management of the Office of Management and Budget.<sup>22</sup> E.O. 14035 also commands that the Director of Office of Personnel Management and the Deputy Director for Management of the Office of Management and Budget issue guidance to agencies and to the Executive Office of the President to improve the recruitment of individuals from underserved communities for internship, fellowship, and apprenticeship programs as well as to ensure that all interns, fellows, and apprentices with disabilities, including applicants and candidates, have a process for requesting and obtaining reasonable accommodations to support their work in the federal government.<sup>23</sup>

The text also encourages the establishment of a government-wide initiative to strengthen partnerships to facilitate recruitment of individuals who are members of underserved communities for federal employment opportunities. The initiative shall involve institutions providing education and other services to individuals who identify as Black, Hispanic, Native American, Asian and Pacific Islander, female, disabled, veteran, economically disadvantaged, formerly incarcerated or LGBTQ+.<sup>24</sup>

Moreover, the executive order seeks to establish favorable conditions for the employment of disabled individuals in the federal workforce, by mandating that agencies provide an equitable, accessible, and inclusive environment for employees with disabilities, included the establishment of forms of reasonable accommodation allowing qualified individuals with disabilities to perform the essential functions of their positions and access advancement opportunities.<sup>25</sup> Similarly, the text accounts for the needs of LGBTQ+ individuals, by holding that federal employees should be able to openly express their sexual orientation, gender identity and gender

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<sup>21</sup> E.O. 14035, Sec. 2(a) (*Definitions*).

<sup>22</sup> E.O. 14035, Sec. 4 (*Responsibilities of Executive Departments and Agencies*).

<sup>23</sup> E.O. 14035, Sec. 6 (*Promoting Paid Internships*).

<sup>24</sup> E.O. 14035, Sec. 7 (*Partnerships and Recruitment*).

<sup>25</sup> E.O. 14035, Sec. 10 (*Advancing Equity for Employees with Disabilities*).

expression, and to have these identities affirmed and respected, without fear of discrimination, retribution or disadvantage. To further this goal, federal agencies shall ensure that existing employee support services equitably serve LGBTQ+ employees, that they have equitable access to health care, health insurance coverage and all other insurance coverage and employee benefits and that they have their respective gender identities accurately reflected and identified in the workplace.<sup>26</sup> The head of each agency is also requested to revise compensation practices to redress existing paying inequities and establish equal pay policies for all federal employees.<sup>27</sup> Moreover, to further the reintegration of former convicts into society, the text provides that the Director of Office of Personnel Management shall evaluate the existence of barriers that formerly incarcerated individuals face in accessing federal employment opportunities and any effect of those barriers on the civil service, evaluating possible actions to expand federal employment opportunities for this category of citizens such as the establishment of a new hiring authority.<sup>28</sup>

The effort of the Biden administration to foster diversity, equality, inclusion and accessibility in the context of federal employment was enhanced towards the end of the first year of the term through the release of the strategic plan pursuant to Sec. 3 of E.O. 14035.<sup>29</sup> Together with laying down more thoroughly the operative principles to which the pursuance of DEIA in federal employment shall be inspired, the document provides also more detailed definitions for diversity,<sup>30</sup> equity,<sup>31</sup> inclusion<sup>32</sup> and accessibility.<sup>33</sup>

The text specifies that fostering DEIA requires the federal workforce to address the needs of communities such as those including African

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<sup>26</sup> E.O. 14035, Sec. 11 (*Advancing Equity for LGBTQ+ Employees*).

<sup>27</sup> E.O. 14035, Sec. 12 (*Pay Equity*).

<sup>28</sup> E.O. 14035, Sec. 13 (*Expanding Employment Opportunities for Formerly Incarcerated Individuals*).

<sup>29</sup> *Government-Wide Strategic Plan To Advance Diversity, Equity, Inclusion, And Accessibility In The Federal Workforce*, November 2021, available at [https://www.whitehouse.gov/wp-content/uploads/2021/11/Strategic-Plan-to-Advance-Diversity-Equity-Inclusion-and-Accessibility-in-the-Federal-Workforce-11.23.21.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://www.whitehouse.gov/wp-content/uploads/2021/11/Strategic-Plan-to-Advance-Diversity-Equity-Inclusion-and-Accessibility-in-the-Federal-Workforce-11.23.21.pdf?utm_medium=email&utm_source=govdelivery).

<sup>30</sup> “The practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities”.

<sup>31</sup> “The consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment”.

<sup>32</sup> “The recognition, appreciation, and use of the talents and skills of employees of all backgrounds”.

<sup>33</sup> “The design, construction, development, and maintenance of facilities, information and communication technology, programs, and services so that all people, including people with disabilities, can fully and independently use them. Accessibility includes the provision of accommodations and modifications to ensure equal access to employment and participation in activities for people with disabilities, the reduction or elimination of physical and attitudinal barriers to equitable opportunities, a commitment to ensuring that people with disabilities can independently access every outward-facing and internal activity or electronic space, and the pursuit of best practices such as universal design”.

American, Hispanic, Native American, Alaska Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons; the needs of individuals who belong to communities that face discrimination based on sex, sexual orientation and gender identity; the needs of individuals who face discrimination based on pregnancy or pregnancy-related conditions; the needs of parents and caregivers; the needs of individuals who belong to communities that face discrimination based on their religion; the needs of persons with disabilities; the needs of first-generation professionals or first-generation college students; the needs of individuals with limited English proficiency; the needs of immigrants; the needs of individuals who may face employment barriers based on older age; the needs of formerly incarcerated individuals; the needs of people who live in rural areas; the needs of veterans and military spouses; the needs of people adversely affected by persistent poverty, discrimination or inequality and the needs of people experiencing overlapping forms of discrimination.<sup>34</sup>

Following the mid-term elections of 2022 President Biden has supplemented his earlier initiatives with the adoption of an executive order aimed at supporting the activity of individuals belonging to minority groups through specific arrangements internal to federal agencies as well as the set-up of preferential avenues for the award of public procurement to business owned by minority individuals.<sup>35</sup> The act directs the heads of several governmental agencies to establish an Agency Equity Team within each agency to coordinate the implementation of such initiatives.<sup>36</sup> Furthermore, the executive order commits the government to award 15% of the value of federal procurements in 2025 to small businesses owned and controlled by socially and economically marginalized individuals.<sup>37</sup>

As it may be inferred from the several initiatives that have been illustrated above, the Biden administration has set out detailed arrangements to ensure that discrimination in federal employment is eradicated – or at least mitigated. The main avenues to advance this agenda have been the adoption of ad hoc strategic plans laid down by the heads of governmental agencies and the establishment of strict monitoring mechanisms to oversee the implementation of the policy directions provided for in several executive orders as well as in the ad hoc government-wide strategic plan. It is also worth noting that governmental agencies have been directed to review existing internal anti-discrimination policies by considering the potential overlaps of the disadvantages associated with the affiliation to more than one minority group, thereby acknowledging the relevance of an intersectional approach to anti-discrimination legislation and policymaking.<sup>38</sup> The commitment of a

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<sup>34</sup> Annex I, *Government-Wide Strategic Plan To Advance Diversity, Equity, Inclusion, And Accessibility In The Federal Workforce*, cit.

<sup>35</sup> Executive Order 14091 of February 16, 2023 - *Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government*, 88 FR 10825.

<sup>36</sup> E.O. 14091, Sec. 2 (*Establishing Equity-Focused Leadership Across the Federal Government*).

<sup>37</sup> E.O. 14091, Sec. 7 (*Advancing Equitable Procurement*).

<sup>38</sup> The first use of the term intersectionality is attributed to the seminal article by K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*



fraction of the federal procurements for the year 2025 to small enterprises run by individuals belonging to marginalized minority groups highlights the intention of the administration to pursue development strategies for minorities that do not rely exclusively on governmental direct intervention, but rather on the empowerment of minority entrepreneurs, who might assume the role of drivers of social and economic growth within their respective communities.<sup>39</sup>

Indeed, most of the above acts will have limited effects, as they will apply solely within the executive branch of government for the tenure of the current administration, with no guarantee against their revocation in case an administration ideologically hostile to DEIA policies steps in. That notwithstanding, the adoption of internal practices and guidelines to handle diversity and foster tolerance in the federal workforce might contribute to the consolidation of a more favorable working environment for minority groups within the federal government.<sup>40</sup>

### 3. Preventing Gender Based Discrimination and Pursuing Equality in the Access to Public Accommodations and in Family Life

The attempt to nurture a widespread anti-discrimination culture in the U.S. society has not been limited to the initiatives undertaken with respect to federal employment. Executive and legislative efforts have delivered tangible results for what concerns private and family life concerns of minority groups, while still falling short of addressing some of the perceived shortcomings of the existing legislative framework regulating public accommodations.

A first legislative attempt by the Democratic congressional delegation to pass a sweeping anti-discrimination bill materialized with the introduction of the so-called *Equality Act* in the House.<sup>41</sup> The ambitious goal of the bill was to prohibit discrimination based on sex, sexual orientation and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit and the jury system. Specifically, the text defined and included sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation. The bill aimed at expanding the definition of public accommodations to include places or establishments that provide exhibitions, recreation, exercise, amusement, gatherings or displays, goods,

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*Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in 1 *Un. Chicago Leg. Forum* 139 (1989).

<sup>39</sup> The saliency of fostering entrepreneurial activities as a means to empower marginalized groups and lift part of a population from poverty is widely discussed by economic and social research; for a broad discussion of the issue refer *e.g.* to C. Sutter, G.D. Bruton, J. Chen, *Entrepreneurship as a solution to extreme poverty: A review and future research directions*, in 34(1) *Journal of Business Venturing* 197 (2019).

<sup>40</sup> K. White Whilby, *Using Executive Orders To Affirmatively Advance Racial Equity*, in *Health Affairs*, July 2, 2024, <https://www.healthaffairs.org/content/forefront/using-executive-orders-affirmatively-advance-racial-equity>.

<sup>41</sup> H.R.5 – *An Act to prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes*, 117th Congress (2021-2022).

services or programs and transportation services. The draft legislation intended to allow the Department of Justice to intervene in support of equal protection claims filed in federal court on account of alleged discrimination based on sexual orientation or gender identity. Moreover, the legislation sought to prohibit the possibility to deny a person access to a shared facility, including a restroom, a locker room and a dressing room, that is in accordance with the person's gender identity.

The bill was passed by the House of Representatives along party lines (224-206, with the support of only three Republican Representatives) a mere week after its introduction in the House. After being introduced in the Senate, the text was referred to the Judiciary Committee, but it was never brought to the floor for a vote. While an unaccomplished initiative, the approval of the *Equality Act* in the House makes it possible to highlight some of the issues associated with discrimination in the access to public accommodations that the Democratic party (and its voters) appear to hold dear and would likely address more comprehensively if they had wide enough congressional support. There are at least two prominent examples that deserve to be mentioned in this regard, at least in light of the controversy that they have stirred up over the past few years.

The first concerns the clash between freedom of speech – more specifically the freedom not to be coerced to convey a given speech – and freedom of religion granted under the I Amendment, on the one hand, and the obligation to accommodate requests and provide services to customers of private businesses, especially when this implies an alleged infringement of religious beliefs, on the other. This issue has been recently raised in front of the U.S. Supreme Court that, in handing down its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, has avoided to tackle the merits of the controversy, delivering a ruling on procedural grounds.<sup>42</sup> The *Equality Act* intended to reconcile these competing values to ensure more extensive access to public accommodations for minority groups, while granting limited exceptions based on religious beliefs.<sup>43</sup>

A second issue that the *Equality Act* sought to address concerns the use of restrooms by transgender students in schools. Federal courts have recently grappled with anti-discrimination claims filed on the assumption that restrictive policies in this regard infringe on individual rights recognized by federal legislation and by the Constitution. Over the four years of Biden's tenure the Supreme Court has twice refused to grant certiorari to review lower-court rulings holding that the denial of transgender students' requests to use the restroom aligning with their gender identity was a violation of Title IX and of the Equal Protection

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<sup>42</sup> 584 U.S. 617 (2018).

<sup>43</sup> Reference may be had also to *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), a case concerning the refusal of the City of Philadelphia to contract with a foster care agency due to its unfavorable policy towards same-sex couples; see A. Howe, *Court holds that city's refusal to make referrals to faith-based agency violates Constitution*, in *SCOTUSblog*, June 17, 2021, <https://www.scotusblog.com/2021/06/court-holds-that-citys-refusal-to-make-referrals-to-faith-based-agency-violates-constitution/>; H. Hollman, *Court requires religious exemption but leaves many questions unanswered*, in *SCOTUSblog*, June 22, 2021, <https://www.scotusblog.com/2021/06/court-requires-religious-exemption-but-leaves-many-questions-unanswered/>.

Clause.<sup>44</sup> Despite the favorable reading of the relevant statutory provisions in the cases mentioned, especially following the decision in *Bostock v. Clayton County*, the issue is far from settled, as at least one other federal appellate court recently dismissed similar claims.<sup>45</sup> The adoption of appropriate legislation to regulate the subject matter more thoroughly would have likely helped to solve the apparent interpretative disagreement.

After the unsuccessful attempt to pass the *Equality Act*, the Biden administration released in October 2021 an unprecedented *National Strategy On Gender Equity And Equality*,<sup>46</sup> articulated around ten strategic priorities instrumental in fostering the development of a social environment that eradicates all forms of gender discrimination.<sup>47</sup> After stressing the goal of “building back better” – the motto of the 2020 Biden-Harris campaign – the document refers to the guiding principles for the implementation of the policy goals set out in the document. More specifically, the strategy shall be inspired to a whole-of-government implementation, involving all agencies and offices in the administration, rather than outsourcing the promotion of these goals to single institutions or offices within the executive branch of government. Reference is made also to the establishment of collaborative interactions and partnerships with subnational governmental authorities as well as other States, multilateral and non-governmental organizations. The document invokes also the convenience of an enhanced focus on the intersectionality of the condition of people belonging to minority and marginalized communities, who usually bear overlapping burdens associated with their personal status. Moreover, the strategy makes clear that the ten priorities outlined are interconnected in order to foster the economic security of women and the social welfare of the nation.

Further executive action was implemented halfway through the second year of the term, when President Biden adopted a sweeping executive order specifically addressed to advance equality for LGBTQI+

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<sup>44</sup> The cases there were appealed to the Supreme Court were *G.G. v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) and *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023). See A. Howe, *Justices won't intervene in dispute over transgender rights and bathrooms*, in *SCOTUSblog*, June 28, 2021, <https://www.scotusblog.com/2021/06/justices-wont-intervene-in-dispute-over-transgender-rights-and-bathrooms/>.

<sup>45</sup> *Adams v. Sch. Bd. of St. Johns Cnty*, 57 F.4th 791 (11th Cir. 2022).

<sup>46</sup> *National Strategy On Gender Equity And Equality*, October 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf>.

<sup>47</sup> The ten strategic priorities are: Improve Economic Security and Accelerate Economic Growth; Eliminate Gender-Based Violence; Protect, Improve, and Expand Access to Health Care, including Sexual and Reproductive Health Care; Ensure Equal Opportunity and Equity in Education; Promote Gender Equity and Fairness in Justice and Immigration Systems; Advance Human Rights and Gender Equality Under the Law; Elevate Gender Equality in Security and Humanitarian Relief; Promote Gender Equity in Mitigating and Responding to Climate Change; Close Gender Gaps in Science, Technology, Engineering, and Mathematics Fields; Advance Full Participation in Democracy, Representation, and Leadership.

individuals.<sup>48</sup> The act promotes the adoption of policies aimed at preventing discrimination based on sexual orientation and gender identity in a wide variety of public settings, included health care assistance and education, which will be addressed in the following paragraphs.

For what concerns social barriers in a broader sense, the document promotes initiatives to address and eliminate disparities in the child welfare system experienced by LGBTQI+ individuals and their family members. Examples include the over-representation of LGBTQI+ individuals in the child welfare system, the disproportionately high rates of abuse and placements in unsupportive or hostile environments faced by LGBTQI+ individuals in foster care, the disproportionately high rates of homelessness faced by LGBTQI+ individuals who exit foster care and the discrimination faced by LGBTQI+ relatives and foster and adoptive families.<sup>49</sup> Moreover, the executive order directs the Secretary of Human and Health Services to conduct a study on the impact of existing federal statutory and regulatory eligibility standards on the ability of LGBTQI+ individuals to access federal benefits and programs for families.<sup>50</sup> Further provisions are aimed at the establishment of a working group on LGBTQI+ homelessness and housing equity, specifically devoted to prevent and address homelessness and housing instability among LGBTQI+ individuals,<sup>51</sup> as well as at considering whether to issue a notice of proposed rulemaking to clarify that LGBTQI+ individuals are included in the definition of “greatest social need” for purposes of targeting outreach, service provision and funding under the *Older Americans Act*.<sup>52</sup>

The most enduring legacy of the Biden administration under the perspective of anti-discrimination legislation and policies, however, is arguably the adoption of the *Respect for Marriage Act*.<sup>53</sup> A landmark accomplishment marked by the 117<sup>th</sup> Congress within days from its recess and shortly before the advent of the 118<sup>th</sup> Congress, this piece of legislation repealed the *Defense of Marriage Act (DOMA)*.<sup>54</sup> The latter recognized the possibility of all U.S. States to refuse to recognize same-sex marriage relationship entered into under the laws of other U.S. States, while also clarifying that all references to marriage in any legislative or executive act of the U.S. federal government referred to a legal union between a man and a woman. The legislative framework has since been altered by the two paramount decisions of the Supreme Court in *U.S. v.*

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<sup>48</sup> *Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals* (E.O. 14075, June 15, 2022).

<sup>49</sup> E.O. 14075, Sec. 5 (*Addressing Discrimination and Barriers Faced by LGBTQI+ Children, Youth, Parents, Caretakers, and Families in the Child Welfare System and Juvenile Justice Systems*).

<sup>50</sup> E.O. 14075, Sec. 6 (*Reviewing Eligibility Standards for Federal Benefits and Programs*).

<sup>51</sup> E.O. 14075, Sec. 9 (*Preventing and Ending LGBTQI+ Homelessness and Housing Instability*).

<sup>52</sup> E.O. 14075, Sec. 10 (*Strengthening Supports for LGBTQI+ Older Adults*).

<sup>53</sup> *An Act to repeal the Defense of Marriage Act and ensure respect for State regulation of marriage, and for other purposes*, Pub. L. 117–228, 136 Stat. 2305 (2022).

<sup>54</sup> *An Act to define and protect the institution of marriage*, Pub. L. 104–199, 110 Stat. 2419 (1996).

*Windsor*<sup>55</sup> - declaring that federal legislation cannot refuse to recognize same-sex marriages contracted under the laws of any State of the Union for the application of federal legislation – and in *Obergefell v. Hodges*<sup>56</sup> - holding that marriage must be made available to same-sex couples in all States of the Union on the same conditions provided for heterosexual couples.

Despite the main provisions of the DOMA had been declared unconstitutional for the violation of the Due Process Clause of the V and XIV Amendment, the explicit recognition of marriage equality through its crystallization in federal legislation is a remarkable achievement of the pro-LGBTQI+ coalition. Passing such legislation was instrumental to prevent potential overruling of the above decisions, that were hastily criticized by the conservative bloc of the Supreme Court when they were delivered.<sup>57</sup> Such criticism has been echoed more recently in the concurring opinion of Justice Clarence Thomas in *Dobbs v. Jackson Women's Health Organization*,<sup>58</sup> where the senior Supreme Court's Justice has called for reconsideration of the whole judicial doctrine of substantive due process.<sup>59</sup>

#### 4. Ensuring Fairness in Health Care Assistance

The Biden administration has undertaken efforts to ensure fair access to health care assistance to marginalized classes of citizens as well, especially through executive actions intended to counterbalance concerning judicial developments, with notable reference to reproductive freedom.

E.O. 14075, already mentioned in the previous paragraph, encompasses a provision directing the Secretary of Health and Human Services to use the Department's authority to protect the access of LGBTQI+ individuals to medically necessary care from harmful State and local laws and practices, included through the promotion of policies to support health equity also in the area of mental health care.<sup>60</sup> Moreover, the act instructs the federal government to implement policies reducing the risk of the exposure of LGBTQI+ individuals to conversion therapies, while also committing it to advocate for the cessation of its use abroad,<sup>61</sup> The executive order seeks also to promote the establishment of family counseling and support programs to prevent or reduce behaviors associated with family rejection of LGBTQI+ youth.<sup>62</sup> Additionally, the Secretary of Human and Health Services is directed to establish an initiative to address the health disparities faced by LGBTQI+ youth and

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<sup>55</sup> 570 U.S. 744 (2013).

<sup>56</sup> 576 U.S. 644 (2015).

<sup>57</sup> See the dissenting opinions appended by the late Justice Antonin Scalia in *U.S. v. Windsor*, 570 U.S. 778-802 (2013), and in *Obergefell v. Hodges*, 576 U.S. 713-720 (2015).

<sup>58</sup> 597 U.S. 215 (2022).

<sup>59</sup> 597 U.S. 332 (2022).

<sup>60</sup> E.O. 14075, Sec. 2 (*Addressing Harmful and Discriminatory Legislative Attacks on LGBTQI+ Children, Youth, and Families*).

<sup>61</sup> E.O. 14075, Sec. 3 (*Addressing Exposure to So-Called Conversion Therapy*).

<sup>62</sup> E.O. 14075, Sec. 4 (*Promoting Family Counseling and Support of LGBTQI+ Youth as a Public Health Priority of the United States*).



adults, taking also steps to prevent them from committing suicide and addressing the barriers and exclusionary policies that LGBTQI+ individuals and families face in accessing quality, affordable, comprehensive health care, including mental health care, reproductive health care and HIV prevention and treatment.<sup>63</sup>

Addressing the evolution of the access to health care assistance during the Biden administration necessarily requires a succinct reference to the momentous decision by the federal Supreme Court in *Dobbs v. Jackson Women's Health Organization*.<sup>64</sup> By overruling the seminal finding in *Roe v. Wade*,<sup>65</sup> a majority of the Justices held that no right to abortion is rooted in the Due Process Clause of the XIV Amendment. The judicial reconsideration of a precedent that had been the law of the land for several decades has prompted the incumbent administration to timely intervene to protect women's reproductive freedom.

In the aftermath of *Dobbs*, President Biden adopted a first executive order to identify potential actions to protect and expand access to abortion and reproductive health care services more generally, including actions to enhance family planning services such as access to emergency contraception, and to ensure the safety of patients, providers and third parties and protect the security of clinics, pharmacies and other entities providing, dispensing or delivering reproductive and related health care services.<sup>66</sup> Soon thereafter, Biden signed a second executive order seeking to advance access to reproductive health care services, including by making Medicaid funds available for patients traveling across State lines for medical care and promoting the adoption of appropriate actions to ensure compliance with federal non-discrimination laws by health care providers that receive federal financial assistance.<sup>67</sup>

More recently, the Biden administration has promoted enhanced efforts to sponsor actions specifically aimed at strengthening the research about women's health. This goal has been pursued by reserving federal funding to these studies and by prioritizing grantmaking and other awards to advance women's health research.<sup>68</sup>

An assessment of the most relevant developments about access to health care assistance requires also to refer to the decisions handed down by the Supreme Court in the 2023 term. One of the most recent decisions revolved around a lawsuit filed by Texan individual physicians challenging the Food and Drug Administration's approval of the use of mifepristone (an abortion inducing drug) to perform abortions. The Court reversed a previous judgment of the Court of Appeals for the 5<sup>th</sup> Circuit (that had, in

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<sup>63</sup> E.O. 14075, Sec. 4 (*Safeguarding Access to Health Care and Other Health Supports for LGBTQI+ Individuals*).

<sup>64</sup> For a more detailed account of the decision of the Court see the contribution of V. Barsotti in this issue of the journal.

<sup>65</sup> 410 U.S. 113 (1973).

<sup>66</sup> Executive Order 14076 of July 8, 2022 - *Protecting Access to Reproductive Healthcare Services*, 87 FR 42053.

<sup>67</sup> Executive Order 14079 of August 3, 2022 - *Securing Access to Reproductive and Other Healthcare Services*, 87 FR 49505.

<sup>68</sup> Executive Order 14120 of March 18, 2024 - *Advancing Women's Health Research and Innovation*, 89 FR 20095.

turn, upheld a decision of a federal district court),<sup>69</sup> holding that the plaintiffs lacked standing to litigate the issue before a federal court for the FDA's authorization of the use of mifepristone did not harm them to any extent.<sup>70</sup> The decision ensured that mifepristone nowadays remains one of the most widespread drugs to induce abortion in the States where the practice is legal, but the issue is far from being ultimately settled, as the Attorneys General of three States (Kansas, Missouri and Idaho) have recently filed amended complaints in this lawsuit.<sup>71</sup>

Later this same term, the Supreme Court refused to discuss the merits of two lawsuits concerning emergency abortions in Idaho, holding that certiorari had improvidently been granted.<sup>72</sup> The Court's order left in place a preliminary injunction by a district court that enjoined Idaho from enforcing a piece of legislation preventing the performance of any abortion unless in case of necessity to prevent a pregnant woman's death. The injunction held that Idaho legislation conflicts with federal legislation mandating all Medicare-funded hospital to provide essential care to patients experiencing medical emergencies,<sup>73</sup> for it forbids medical intervention to prevent grave harms to women's health (except the risk of death).<sup>74</sup>

## 5. Establishing a Safe and Open Educational Environment

The efforts of the Biden administration to implement anti-discrimination policies in a wide range of social settings extended also to the field of education. These actions have been undertaken exclusively by the executive branch of government and have mainly addressed the issue of discrimination on the basis of sexual orientation or gender identity in schools. The first such initiative has been the adoption of an executive order aimed at guaranteeing an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, sexual violence, and discrimination on the basis of

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<sup>69</sup> *FDA v. Alliance for Hippocratic Medicine*, 78 F. 4th 210 (CA5 2023); *Alliance for Hippocratic Medicine v. FDA*, 668 F. Supp. 3d 507 (ND Tex. 2023).

<sup>70</sup> *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024). See A. Howe, *Supreme Court preserves access to abortion pill*, in *SCOTUSblog*, 13 June 2024, <https://www.scotusblog.com/2024/06/supreme-court-preserves-access-to-abortion-pill/>.

<sup>71</sup> *Alliance for Hippocratic Medicine v. FDA Court Case*, in *Reproductive Freedom for All*, last updated October 25, 2024, <https://reproductivefreedomforall.org/resources/alliance-for-hippocratic-medicine-v-fda-court-case/>.

<sup>72</sup> *Moyle v. United States and Idaho v. United States*, 603 U.S. \_\_\_\_ (2024).

<sup>73</sup> *Emergency Medical Treatment and Active Labor Act*, Pub. L. 99-272, 100 Stat. 164 (1986).

<sup>74</sup> *U.S. v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022). See A. Howe, *Supreme Court allows emergency abortions, for now, in Idaho*, in *SCOTUSblog*, June 27, 2024, <https://www.scotusblog.com/2024/06/supreme-court-allows-emergency-abortions-for-now-in-idaho/>.

sexual orientation or gender identity.<sup>75</sup> The act mandated a timely review by the Secretary of Education, in consultation with the Attorney General, of all existing regulations, orders, guidance documents, policies and other agency actions potentially inconsistent with the policy goal mentioned above.<sup>76</sup> Moreover, the Secretary of Education was directed to take additional enforcement actions to account for intersecting forms of prohibited discrimination that can affect the availability of resources and the support for students who have experienced sex discrimination, including discrimination on the basis of race, disability and national origin and to account for the significant rates at which LGBTQ+ students are subject to sexual harassment.<sup>77</sup>

Notably, the executive order mandated the review of the rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”.<sup>78</sup> The rule-making process activated by the Department of Education concluded with the adoption of a final rule in April 2024.<sup>79</sup> The rule aims to provide full protection from sex-based harassment, defined as a form of sex discrimination that includes sexual harassment and harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, that is quid pro quo harassment, hostile environment harassment, or one of four specific offenses referenced in the *Clery Act*.<sup>80</sup> The text specifies the content of the obligations of the addressees of the rule (*i.e.*, schools and universities receiving public funds) to take prompt and effective action to end any sex discrimination in their education programs or activities and to prevent its recurrence and remedy its effects. These obligations encompass the establishment of appropriate complaint procedures, including the set-up of a fair, transparent, and reliable process to respond promptly and effectively to all complaints of sex discrimination, through the involvement of trained, unbiased decisionmakers to evaluate all relevant and not otherwise impermissible evidence. Schools are also required to provide supportive measures to complainants and respondents affected by conducts that may constitute sex discrimination and to adapt the regulations’ grievance procedure requirements to their educational communities. More generally, schools are required to protect students, employees, and applicants from discrimination based on pregnancy or related conditions, to prohibit discrimination against LGBTQI+ students and employees, to protect people from harm when they are separated or treated differently based on sex in school, to protect students and employees from retaliation, to

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<sup>75</sup> Executive Order 14021 of March 8, 2021 - *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, 86 FR 13803.

<sup>76</sup> E.O. 14021, Sec. 2(a) (*Review of Agency Actions*).

<sup>77</sup> E.O. 14021, Sec. 2(b) (*Review of Agency Actions*).

<sup>78</sup> 85 Fed. Reg. 30026 (May 19, 2020).

<sup>79</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 19 April 2024, 34 CFR 106.

<sup>80</sup> *Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act* (passed as the *Student Right-To-Know and Campus Security Act*), Pub. L. 101-542, 104 Stat. 2381 (1990).

support the right of parents and guardians to act on behalf of their elementary and secondary school children, to ensure clear communication of their nondiscrimination policies and procedures and to refrain from sharing personal information.<sup>81</sup>

The ambitious rule has been timely challenged and a handful of federal district courts have enjoined the Department of Education from enforcing the rule in its entirety.<sup>82</sup> The Biden administration has lodged an emergency request to the Supreme Court to stay the suspension and allow at least some of the provisions of the rule to enter into force at its expected deadline of 1 August 2024. A 5-4 majority of the Court rejected the application coming from the incumbent administration, ordering enforcement of the whole rule to be suspended while legal challenges continue to proceed through lower federal courts.<sup>83</sup>

The suspension of the enforcement of the rule on non-discrimination in schools and universities is not the only blow to anti-discrimination policies over the term of President Biden. The pursuance of diversity in higher education has indeed been marked by an apparent step backwards following the Supreme Court's decision in *Students for Fair Admissions v. Harvard*.<sup>84</sup> Despite not formally overruling the long-standing precedents in *Grutter v. Bollinger*<sup>85</sup> and *Regents of the University of California v. Bakke*,<sup>86</sup> a majority of the Justices found that decisive reliance on racial factors to determine the admission of students to higher education institutions is unconstitutional for the violation of the Equal Protection Clause of the XIV Amendment. The decision marks indeed a landmark change of attitude of the federal judiciary *vis-à-vis* so-called affirmative actions, that appears to exemplify a reading of the Constitution that is strictly color-blind.<sup>87</sup> While the finding in the two cases concerning Harvard University and the University of North Carolina might severely affect the effort of the

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<sup>81</sup> *FACT SHEET: U.S. Department of Education's 2024 Title IX Final Rule Overview*, <https://www.ed.gov/media/document/t9-final-rule-factsheet>; see also *Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule*, <https://www.ed.gov/media/document/t9-final-rule-summary.pdf>.

<sup>82</sup> *Kansas v. United States Dept. of Ed.*, \_\_\_ F. Supp. 3d \_\_\_, 2024 WL 3273285 (D Kan., July 2, 2024); *Texas v. United States*, No. 24-CV-86, 2024 WL 3405342 (ND Tex., July 11, 2024); *Carroll Independent School District v. United States Dept. of Ed.*, \_\_\_ F. Supp. 3d \_\_\_, 2024 WL 3381901 (ND Tex., July 11, 2024); *Arkansas v. United States Dept. of Ed.*, No. 4:24-CV-636, (ED Mo., July 24, 2024); *Alabama v. Cardona*, No. 7:24-CV-533, 2024 WL 3607492 (ND Ala., July 30, 2024). Enforcement of the rule is currently suspended in 26 States (Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming).

<sup>83</sup> *Department of Education v. Louisiana and Cardona v. Tennessee*, 603 U.S. \_\_\_ (2024). See A. Howe, *Supreme Court blocks temporary enforcement of expanded protections for transgender students*, in *SCOTUSblog*, August 16, 2024, <https://www.scotusblog.com/2024/08/supreme-court-blocks-temporary-enforcement-of-expanded-protections-for-transgender-students/>.

<sup>84</sup> 600 U.S. 181 (2023).

<sup>85</sup> 438 U.S. 265 (1978).

<sup>86</sup> 539 U.S. 306 (2003).

<sup>87</sup> E. Roman, *SFFA v. Harvard College: Closing the Doors of Equality in Education*, in 47 *Seattle U. L. Rev.* 1333, 1334 (2024).

Biden administration to pursue diversity in college campuses, the Department of Education has released a comprehensive report aimed at laying down strategies to enhance the access of a diverse pool of students to higher education opportunities.<sup>88</sup>

It is worth noting that E.O. 14075, already mentioned in paras. 3-4, also instructed the Secretary of Education to establish a working group on LGBTQI+ students and families, tasked to address discrimination against LGBTQI+ students and to strengthen supports for them and their families.<sup>89</sup>

## 6. Biden Anti-discrimination Policy: An Unfulfilled Pledge?

Providing a fully rounded assessment of the evolution of anti-discrimination legislation and policies in the U.S. legal framework under the Biden administration implies referring to actions undertaken by the executive branch of government directly (*e.g.*, executive orders, administrative rule-making by agencies or departments, strategic plans) as well as legislative efforts and accomplishments, while not forgetting to mention to what extent judicial findings by federal courts have affected the conditions of members of minority groups. The remarks that follow will be articulated by distinguishing structural interventions aimed at redressing entrenched inequalities, such as those associated with a consolidated set up of the legislative and administrative framework, and actions undertaken to mitigate the effects of contingent judicial findings, that have shaped the anti-discrimination policy of the incumbent administration.

The incoming administration had pledged to advance equality and inclusion of LGBTQ+ individuals by protecting them from discrimination and ensuring them fair access to health care assistance.<sup>90</sup> The administration also committed to address the complaints raised by the emergence of the #MeToo movement in the military and in college campuses.<sup>91</sup> Under this perspective, executive actions have been undertaken to shape a more welcoming and diverse federal working environment for minority groups,<sup>92</sup> whose well-being and inclusion have been promoted by also ensuring fair access to health care and the protection from discrimination in schools. Women's complaints associated

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<sup>88</sup> *Strategies for increasing diversity and opportunity in higher education*, U.S. Department of Education, Office of the Under Secretary, September 2023, <https://sites.ed.gov/ous/files/2023/09/Diversity-and-Opportunity-in-Higher-Education.pdf>.

<sup>89</sup> E.O. 14075, Sec. 8 (*Supporting LGBTQI+ Students in our Nation's Schools and Educational Institution*).

<sup>90</sup> A.S. Leonard, *The Biden Administration's First Hundred Days: An LGBTQ Perspective*, 2021 *U. Ill. L. Rev. Online* 127 (2021).

<sup>91</sup> L. Wexler, *Biden's #MeToo Presidency: Military and Campus Justice Reform*, 2021 *U. Ill. L. Rev. Online* 134 (2021).

<sup>92</sup> For a broader analysis of the legal framework affecting the employment conditions of LGBTQ+ individuals, see G.R. Rosich, *Overview of Legislative, Judicial, and Executive Branch U.S. Policies Impacting the Rights and Risks of Transgender and Nonbinary People in the Workplace*, in J.A. Gedro, T.S. Rocco (Eds.), *The Routledge Handbook of LGBTQ Identity in Organizations and Society*, New York, 2024, 165-184.



with sexual harassment in the military and on college campuses have been addressed specifically and the possibility for transgender citizens to serve in the army has been restored. Indeed, several of these actions have contributed to spread awareness of the saliency of establishing a more diverse, equal, inclusive and accessible federal workplace, that might endure also in light of the effort to promote recruitment of federal employees from communities otherwise underrepresented in the federal workforce.<sup>93</sup>

It must be noted, however, that ambitious legislative goals, such as the adoption of the *Equality Act*, have not been fulfilled, thereby affecting the capacity of the Biden administration to entrench in federal legislation anti-discrimination policies concerning the access to public accommodations. Legislative efforts have also delivered high praised result, such as the approval of the *Respect for Marriage Act*, that combined the repeal of the *Defense of Marriage Act* with the recognition of marriage equality. Legislative action in this regard has lagged after the mid-term elections, as President Biden no longer enjoyed the benefits of a unified government and had to wrestle with a reluctant House determined to sabotage his agenda.<sup>94</sup> Even in the first half of the term, however, the legislative accomplishments have been limited, as the opposition within the Senate and the unwillingness of President Biden and at least a few Democratic Senators to push for a reconsideration of the rule on filibustering have prevented major reforms to advance.<sup>95</sup>

Over this Presidential term U.S. citizens have also witnessed the effects of the judicial appointments made by former President Trump to the Supreme Court in shaping the approach of the Justices to reproductive freedom and anti-discrimination claims.<sup>96</sup> The Biden administration has been unable to effectively advance an agenda capable of tackling the most immediate consequences of the landmark decisions on abortion (*Dobbs*) and affirmative actions (*Students for Fair Admissions*), that would at least require legislative entrenchment of the minority interests at stake to provide more enhanced guarantees against their infringement.

The promotion of a LGBTQ+ and race-conscious approach in schools has instead been pursued aggressively, both through ad hoc executive orders and the final rule adopted by the Department of Education in the last year of the term. The rule magnifies the effort of the Biden administration to shape anti-discrimination rule-making according

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<sup>93</sup> The Biden administration has pursued a similar policy for what concerns the appointment of federal judges, see the contributions of P. Passaglia and E. De Franciscis in this issue of the journal.

<sup>94</sup> On the relationship between President Biden and the Congress over the past two years, see the contribution of G.F. Ferrari in this issue of the journal.

<sup>95</sup> B. Din, *Biden open to bringing back talking filibuster*, in *Politico*, March 16, 2021, <https://www.politico.com/news/2021/03/16/biden-talking-filibuster-senate-476559>.

<sup>96</sup> On Trump's appointments to the Supreme Court, see P. Passaglia, *President Trump's Appointments: A Policy of Activism*, in *DPCE online*, 2021, 1, 927-944; on the policies of the Trump's administration with reference to women's reproductive freedom, see S. Mancini, *False science and misogyny: Trump's assault on reproductive rights*, in *DPCE online*, 2021, 1, 1087-1104.

to a peculiarly intersectional approach.<sup>97</sup> It is still uncertain whether the rule will come into effect in the whole country anytime soon, as its adoption has been challenged in court and its application has been stayed in several jurisdictions. Moreover, the denial of certiorari to appellate courts' decisions concerning anti-LGBTQ+ rules regulating the access to restrooms in schools leaves the question of their legitimacy unanswered. Together with the narrow decisions of the Supreme Court in *Masterpiece Cakeshop* and in *Fulton*, these judicial rulings question the scope of application of anti-discrimination legislation and policies in health care assistance and educational institutions receiving federal funding and in public accommodations.

It is complicated to provide an ultimate assessment of the performance of the Biden administration in protecting minority rights, also in light of the overall evolution of the U.S. legal framework over the past four years. Whereas the administration has been focused on advancing racial, gender and LGBTQ+ equality and inclusion and has directed federal employers to implement mechanisms, policies and arrangements to prevent all forms of discrimination in this regard, the condition of the members of minority groups is hardly better than it was four years ago. This assertion depends on the unfavorable judicial developments in terms of women's reproductive freedom and of the access of ethnic minorities to higher studies and education. The capacity to consolidate the achievements in terms of marriage equality in a piece of federal legislation might not be enough to conclude that the Biden Presidency marked a step forward in the field of anti-discrimination policies. Indeed, racial and LGBTQ+ minorities are still potentially subject to discrimination in the access to public accommodations, given the inability to pass the *Equality Act*. Whether the inability to deliver on some of the pledges to which Joe Biden committed in the 2020 Presidential campaign will cost Kamala Harris the critical support of the diverse electoral coalition that propelled Biden's victory four years ago will be discussed as part of the legacy of the 46<sup>th</sup> President of the United States of America.

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<sup>97</sup> K. Scarlett, *The Biden Administration's Proposed Title IX Rule: An Intersectional Examination*, in 103 *B.U. L. Rev. Online* 96 (2023).