

## GAY PRIDE AND PREJUDICE

*Dakota Richmond*

*For years, members of the LGBTQ+ community had one focus—staying alive. Life was taken day by day and planning for the future seemed to be equivalent to a fantasy. However, recent civil rights victories for the LGBT+ population have substantially impacted and improved the community's quality of life. What no one expected, however, was how these victories would affect the community later on in life. With LGBTQ+ individuals now having greater visibility and the ability to live longer, happier lives, problems now arise as members age. New struggles have become apparent as LGBTQ+ members step into their golden years; namely, where individuals can seek care when they no longer can care for themselves. For those in the heterosexual community, the answer is simple. They are either cared for by their children, or they move into retirement communities where they can seek comfort in being around their peers. But what happens when members of the LGBTQ+ community don't have children to take care of them? Or even worse, what happens when they are forced into a retirement community that is religiously centered, causing members of the community to live in close quarters with other residents who still hold homophobic ideologies? With more and more LGBTQ+ members aging, this problem is becoming increasingly apparent.*

*This Note evaluates this problem by exploring the historical context of the LGBTQ+ community and their access to healthcare to suggest that while this issue is taking on a new form, the dilemma has been evident for decades. This Note goes on to examine the potential catalysts of the problem including Constitutional exemptions, and the different avenues that the legal community could take to secure a safe future for LGBTQ+ elders.*

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Dakota Richmond, Administrative Editor 2023-2024, *The Elder Law Journal*; J.D. 2024, University of Illinois College of Law; B.S. 2020, Political Science and Psychology, University of Illinois at Urbana-Champaign. The author would like to thank her parents, Chad and Lisa Richmond, for their everlasting support and encouragement in her writing and legal endeavors.

## I. Introduction of a Premature Death

The U.S. Supreme Court decision *Obergefell v. Hodges* federally legalized same-sex marriage.<sup>1</sup> Struggles for LGBTQ+ individuals continue, however, especially for seniors who are reaching old age. In America, there are currently over 2.7 million LGBTQ+ adults who are fifty years or older.<sup>2</sup> Due to members of the community not having children as often as heterosexual individuals (14.7% of same-sex couples, compared to 37.8% of opposite-sex couples, have at least one child under eighteen in their household),<sup>3</sup> they struggle to have the support they need to maintain their independence.<sup>4</sup> Thus, many are forced to turn to nursing homes and other long-term care facilities as they cannot take care of themselves.<sup>5</sup>

But what happens when the place that is supposed to take care of you does not respect your sexual orientation? This is becoming an all-too-familiar problem as more of the LGBTQ+ population ages and finds themselves in long-term care facilities.<sup>6</sup> Many are having their civil rights violated at the hands of religious exemption laws<sup>7</sup> which allow religiously affiliated long-term care providers to avoid allowing same-sex couples to live together, limit family visits, and more.<sup>8</sup> What results from this discrimination? A premature death, not physically, but of the individual's identity and true personhood. LGBTQ+ elders are forced to bury one of the most fundamental aspects of themselves and the memories that go along with it, as they are re-closeted for the sake of their safety.<sup>9</sup> Due to the quickly aging LGBTQ+ population, it is

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

2. *New Report Highlights Dangers of Religious Exemption Laws for LGBT Elders*, MOVEMENT ADVANCEMENT PROJECT (Dec. 15, 2017), <https://www.lgbtmap.org/-news/Dangers-of-Religious-Exemption-Laws-for-LGBT-Elders>.

3. Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html>.

4. Christopher Carpenter & Gary J. Gates, *Gay and Lesbian Partnership: Evidence from California*, 43 DEMOGRAPHY 573, 585 (Aug. 2008).

5. LGBT AGING CTR., *LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD 4* (2011), [https://www.lgbtagingcenter.org/resources/pdfs/nsclc\\_lgbt\\_report.pdf](https://www.lgbtagingcenter.org/resources/pdfs/nsclc_lgbt_report.pdf) [hereinafter *STORIES FROM THE FIELD*].

6. *See id.*

7. *See infra* Section III.E.

8. *See infra* Section III.E.

9. *See* Antonia Noori Farzan, *Illinois Woman Allegedly Assaulted for Being Gay Can Sue Retirement Home for Failing to Stop Abuse*, WASH. POST (Aug. 28, 2018, 7:09

imperative that steps are taken immediately to resolve this issue before any further civil rights violations occur.

This Note examines the background of religious exemption laws, the sociological makeup of LGBTQ+ individuals, and how they are more likely to find themselves in long-term care. This Note then analyzes the validity of these religious exemption laws and their constitutionality against the civil rights of the LGBTQ+ population. Finally, this Note suggests a solution to this problem to avoid an impediment on the rights of Americans.

## II. BACKGROUND

Healthcare has long been a battle for members of the LGBTQ+ community.<sup>10</sup> More than one in six LGBTQ+ adults reported avoiding accessing healthcare due to anticipated discrimination, and 16% of LGBTQ+ adults reported actual discrimination in healthcare encounters.<sup>11</sup> Less than half of the adult LGBTQ+ population in the United States live in states with medical insurance protections that include sexual orientation and gender identity.<sup>12</sup>

### A. HISTORICAL CONTEXT OF LGBTQ+ DISCRIMINATION IN HEALTHCARE

Throughout history — time and time again — the healthcare system has failed members of the community.<sup>13</sup> Most recently, the mpox (formerly known as “monkeypox”)<sup>14</sup> outbreak brought the inequities in the

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AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/28/illinois-woman-allegedly-assaulted-for-being-gay-can-sue-retirement-home-for-failing-to-stop-abuse/>.

10. See Laura Crouch, *LGBTQIA+ Health Disparities*, SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/health-nutrition/lgbtqia-health-disparities/> (last visited Oct. 5, 2023).

11. Logan S. Casey, Sari L. Reisner, Mary G. Findling, Robert J. Blendon, John M. Benson, Justin M. Sayde & Carolyn Miller, *Discrimination in the United States: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans*, 54 HEALTH SERV. RES. 1454, 1454 (2019).

12. *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies) (last visited Oct. 5, 2023).

13. See Crouch, *supra* note 10.

14. See Press Release, WHO, *WHO Recommends New Name For MonkeyPox Disease* (Nov. 18, 2022) (explaining that the name “monkeypox” was phased out in November 2023 in favor of the name “mpox”); see also Bill Chappell, *WHO Renames Monkeypox as Mpox, Citing Racist Stigma*, NPR (Nov. 28, 2022, 11:41 AM), <https://www.npr.com/2022/11/28/1141111111>.

healthcare system for the LGBTQ+ community to the forefront.<sup>15</sup> The mpox virus causes symptoms such as fever, skin rash, headache, muscle aches and backaches, chills, tiredness, and swollen lymph nodes.<sup>16</sup> It is spread from person to person through “direct contact with rashes, scabs, or body fluids of a person with mpox; extended close contact (more than four hours) with respiratory droplets from an infected person; and clothes, sheets, blankets, or other materials that have been in contact with rashes or bodily fluids of an infected person.”<sup>17</sup> The Biden administration declared the mpox outbreak a public health emergency on August 4, 2022.<sup>18</sup> Although anyone can contract the virus through close contact, the outbreak has been concentrated in gay men.<sup>19</sup> Due to this, messaging surrounding the outbreak has been tainted with anti-LGBTQ+ stigma.<sup>20</sup> This has led to reports of patients who were suspected of having mpox being refused treatment by lab workers.<sup>21</sup> The federal government has been severely criticized for its lack of urgency in its response to the outbreak.<sup>22</sup> The United States took a “wait-and-see” approach to the outbreak, despite the fact that in June 2022 they received a vaccine supply and information regarding the treatment of the virus from Europe.<sup>23</sup> Additionally, preventative protections for the LGBTQ+ community such as accessibility to vaccines, research into the efficacy of the vaccine, and educating at-risk populations as to how the

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[www.npr.org/sections/goatsandsoda/2022/11-/28/1139403803/who-renames-monkeypox-as-mpox-citing-racist-stigma#:~:text=Monkeypox%20disease%20now%20ha%20a,has%20bee-n%20used%20for%20decades.aszu](http://www.npr.org/sections/goatsandsoda/2022/11-/28/1139403803/who-renames-monkeypox-as-mpox-citing-racist-stigma#:~:text=Monkeypox%20disease%20now%20ha%20a,has%20bee-n%20used%20for%20decades.aszu).

15. Fenit Nirappil, *Struggle to Protect Gay, Bisexual Men from Monkeypox Exposes Inequities*, WASH. POST (Aug. 4, 2022, 3:37 PM), <https://www.washingtonpost.com/health/2022/07/27/monkeypox-gay-men-vaccine-treatment>.

16. Pritish K. Tosh, *Monkeypox: What is it and how can it be Prevented?*, MAYO CLINIC (July 25, 2023), <https://www.mayoclinic.org/diseases-conditions/infectious-diseases/expert-answers/monkeypox-faq/faq-20533608>.

17. *Id.*

18. Nirappil, *supra* note 15.

19. *Id.*

20. Ayanna Alexander, *AIDS Echoes in Monkeypox Messages Worry LGBTQ Health Advocates*, BLOOMBERG L. (Aug. 11, 2022, 4:25 AM), <https://news.bloomberglaw.com/health-law-and-business/aids-echoes-in-monkeypox-messages-worry-lgbtq-health-advocates>.

21. *Id.*

22. See Joseph Goldstein & Sharon Otterman, *As Monkeypox Spread in New York, 300,000 Vaccine Doses Sat in Denmark*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/25/nyregion/nyc-monkeypox-vaccine-doses-denmark.html>.

23. *Id.*; Alex Abad-Santos, *The US Monkeypox Response is Failing Queer Men*, VOX, (Aug. 11, 2022, 11:50 AM), <https://www.vox.com/culture/23292430/monkeypox-outbreak-us-gay-men>.

virus spreads, were—and continue to be—severely lacking.<sup>24</sup> Appointments to receive the vaccine for mpox were difficult to obtain, filling up within hours of being released to the public.<sup>25</sup> In New York City, vaccinations were made available without advance notice, making it impossible for recipients to plan ahead.<sup>26</sup> Much of this is due to the supplies of the vaccines dwindling or, in some regions, running out entirely.<sup>27</sup> Those who were able to find a supply of the vaccine often waited in long lines outside the clinics for their turn to be vaccinated.<sup>28</sup>

Much of the discourse surrounding the mpox outbreak was reminiscent of the HIV/AIDS epidemic of the 1980s.<sup>29</sup> By 1984, AIDS had already affected at least 7,700 people in the United States and had killed more than 3,500.<sup>30</sup> By this point in time, scientists had identified the cause of AIDS and all major modes of transmission.<sup>31</sup> However, it wasn't until 1985—four years after the AIDS crisis began—that President Ronald Reagan first publicly mentioned the crisis.<sup>32</sup> Lack of clarification and education by government officials allowed misinformation and stigma about the disease to spread, permitting it to be dubbed the “gay plague” colloquially and across news medias.<sup>33</sup> It was not until the end of 1987 that the country started taking steps towards raising awareness for AIDS, and by then, 47,000 people had already been infected with HIV.<sup>34</sup>

Moreover, doctors were reluctant to learn about the disease.<sup>35</sup> An AIDS organization in New Mexico invited 1,300 medical practitioners

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24. See Abad-Santos, *supra* note 23.

25. *Id.*

26. *Id.*

27. Stephanie Nolen, *Monkeypox Shots, Treatments and Tests Are Unavailable in Much of the World*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2022/09/12/health/monkeypox-vaccines-treatments-equity.html>.

28. Matt Laviertes, *For Pioneering AIDS Activists, Monkeypox Outbreak Evokes Déjà Vu*, NBC NEWS (Aug. 11, 2022, 9:19 AM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/pioneering-aids-activists-monkeypox-outbreak-evokes-deja-vu-rcna40523>.

29. *Id.*

30. Joseph Bennington-Castro, *How AIDS Remained an Unspoken — But Deadly — Epidemic for Years*, HISTORY (Aug. 22, 2023), <https://www.history.com/news/aids-epidemic-ronald-reagan>.

31. *Id.*

32. *Id.*

33. *See id.*

34. *Id.*

35. Bruce Lambert, *AIDS War Shunned By Many Doctors*, N.Y. TIMES (Apr. 23, 1990), <https://www.nytimes.com/1990/04/23/nyregion/aids-war-shunned-by-many-doctors.html>.

to a seminar on new treatments for the disease, but only one person showed up.<sup>36</sup> Physicians who did not treat AIDS patients had shortcomings including, “a lack of training, fear of infection, disdain for homosexuals and drug abusers, fear of scaring off non-AIDS patients, discomfort in discussing sex and drugs, and failure to recognize AIDS symptoms.”<sup>37</sup> During the crisis, physicians seemed to abandon their medical oath: nurses refused to bring meals to hospitalized patients, and doctors in major medical journals debated if they even had a moral obligation to treat people with AIDS at all.<sup>38</sup> By 1995, AIDS was the single greatest killer of men ages 25–44 in America.<sup>39</sup> The gay community was forced to take matters into their own hands, caring for the sick themselves and ensuring that they were not evicted due to discrimination.<sup>40</sup>

Unfortunately, lessons from the AIDS epidemic were not learned, and many in the LGBTQ+ community who lived through it are feeling haunting similarities to the current mpox virus outbreak.<sup>41</sup> Most notably, the slow response to the outbreak has been a major subject of concern.<sup>42</sup> The AIDS virus emerged in the late 1970s, and yet, it was not until 1981 that the United States released the first government report on the disease.<sup>43</sup> Similarly, the global response to mpox has been slow, as 20,500 cases of mpox were reported by the time the vaccines were released in July 2022.<sup>44</sup> Relatedly, the number of vaccines offered initially fell severely short of meeting the amount needed, as 200,000 two-dose vaccines were distributed by July, despite the 3.8 million population of gay men.<sup>45</sup> Another critique of the response has been that the government did not do enough to tailor the mpox messaging to reach the

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36. *Id.*

37. *Id.*

38. Jen Christensen, *AIDS in the '80s: The Rise of a New Civil Rights Movement*, CNN HEALTH (June 1, 2016, 5:37 PM), <https://www.cnn.com/2016/04/14/health/-aids-atlanta-emory-university-the-80s>.

39. Tim Fitzsimons, *LGBTQ History Month: The Early Days of America's AIDS Crisis*, NBC NEWS (Oct. 15, 2018, 9:59 AM), <https://www.nbcnews.com/feature/nbc-out/lgbtq-history-month-early-days-america-s-aids-crisis-n919701>.

40. Nurith Aizenman, *How To Demand A Medical Breakthrough: Lessons From the AIDS Fight*, NPR (Feb. 9, 2019, 7:38 AM), <https://www.npr.org/sections/health-shots/2019/02/09/689924838/>.

41. Lavietes, *supra* note 28.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

LGBTQ+ community.<sup>46</sup> Just like that in the AIDS messaging, the government tried to tailor the warnings of mpox to the general public.<sup>47</sup> LGBTQ+ advocates criticize this strategy, as they argue that failure to tailor messaging to the community most affected by the virus puts the LGBTQ+ population at risk of being misinformed and more susceptible to transmission.<sup>48</sup>

Mistakenly, many thought that this struggle for equality in healthcare (and in general) would be over when *Obergefell v. Hodges* affirmed the right to same-sex marriage in 2015.<sup>49</sup> The suit, brought by James Obergefell and John Arthur James, challenged Ohio's refusal to recognize same-sex marriage on death certificates.<sup>50</sup> On January 16, 2014, the U.S. Supreme Court granted their Petition for a Writ of Certiorari to hear the case.<sup>51</sup> The legal question at issue was whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.<sup>52</sup> On June 26, 2015, the United States Supreme Court ruled that the Fourteenth Amendment requires all states to license marriages between same-sex couples and to recognize all marriages that were lawfully performed in other states.<sup>53</sup> Many believed this historic outcome would be the solution to the discrimination that members of the LGBTQ+ face on a daily basis; however, the fight for equality is far from over.<sup>54</sup>

These are just some of the countless examples demonstrating the problem of American healthcare ignoring the needs of the LGBTQ+ population.<sup>55</sup> This issue is pervasive, targeted, and affects every area and stage of life—including nursing homes and their LGBTQ+ residents.

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); see Karl Laird, *The Beginning Rather Than the End: Obergefell v. Hodges and the Continuing Struggle for LGBTQ Equality*, OXFORD HUM. RTS. HUB (June 29, 2015), <https://ohrh.law.ox.ac.uk/the-beginning-rather-than-the-end-obergefell-v-hodges-and-the-continuing-struggle-for-lgbt-equality/>.

50. *Obergefell*, 576 U.S. at 644.

51. *Id.* at 656.

52. *Id.*

53. *Id.* at 681.

54. Laird, *supra* note 49.

55. See *supra* Section II.A.

**B. HEALTHCARE DISCRIMINATION TOWARDS LGBTQ+ ELDERS**

Unfortunately, this pattern of discrimination in healthcare against members of the LGBTQ+ community persists into their old age.<sup>56</sup> This is particularly exemplified through LGBTQ+ elders' reliance on nursing homes or assisted living facilities, and the repeated discrimination that occurs within them.<sup>57</sup>

Statistically, homosexual couples are less likely to have children.<sup>58</sup> Traditionally, children often take care of heterosexual couples, keeping them from needing nursing homes or assisted living facilities in their old age.<sup>59</sup> But, as LGBTQ+ people are less likely to have children, they are more likely to need nursing homes or assisted living facilities when they reach old age and can no longer care for themselves independently.<sup>60</sup>

Within nursing homes, elderly LGBTQ+ members are facing repeated incidences of discrimination.<sup>61</sup> Discrimination at the hands of nursing home staff runs rampant.<sup>62</sup> In some cases, staff refuse to touch LGBTQ+ residents, which can lead to a lack of basic care including feeding, bathing, and toileting.<sup>63</sup> A study involving 769 respondents (284 of which were elderly LGBTQ+ adults, and 485 were family members or friends, social service providers, legal services providers, or others) found that 43% of respondents reported mistreatment.<sup>64</sup> In total, 853 instances of mistreatment were reported.<sup>65</sup> Of those who reported instances of mistreatment, 124 were LGBTQ+ older adults.<sup>66</sup> Verbal or

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56. *Aging LGBT Seniors a 'Major Public Health Issue'*, AM. HEART ASS'N (June 26, 2018), <https://www.heart.org/en/news/2018/07/13/aging-lgbt-seniors-a-major-public-health-issue>.

57. STORIES FROM THE FIELD, *supra* note 5, at 3.

58. Danielle Taylor, *Fifteen Percent of Same-Sex Couples Have Children in Their Household*, U.S. CENSUS BUREAU (Sept. 17, 2020), <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html>.

59. LGBT MOVEMENT ADVANCEMENT PROJECT, SERVICES AND ADVOC. FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS, *IMPROVING THE LIVES OF LGBT OLDER ADULTS 6* (2010), <https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf>.

59. *Id.*

61. See STORIES FROM THE FIELD, *supra* note 5, at 8.

62. David Henry Wolfenson, *The Risks to LGBT Elders in Nursing Homes and Assisted Living Facilities and Possible Solutions*, 26 TUL. J. L. & SEXUALITY 123, 125 (2017).

63. *Id.*

63. STORIES FROM THE FIELD, *supra* note 5, at 8.

65. *Id.*

66. *Id.*



physical harassment by other residents was the most frequently reported problem.<sup>67</sup> Instances included using slurs against LGBTQ+ residents, and calling them by dead names (the name given to a person at birth which the individual no longer uses due to their gender transition) or incorrect pronouns.<sup>68</sup> Negative treatment by staff was the second most frequently reported problem.<sup>69</sup> Employees made inappropriate remarks towards residents, spread rumors, prayed over residents or told them they would “go to hell” for their sexual orientation or gender identity.<sup>70</sup> But the problems do not stop there. Some staff even refused to accept a medical power of attorney that involved a same-sex partner.<sup>71</sup> A medical power of attorney (also referred to as a Health Care Proxy) is a legal document that allows individuals to designate an agent to make health care decisions on their behalf if they become incapacitated.<sup>72</sup> Respondents reported having to carry their medical directives with them, outlining their same-sex partners as their medical power of attorney to prove and persuade staff to respect their legal authority.<sup>73</sup>

Sometimes, discrimination goes as far as refusal to admit a resident into a facility based upon their affiliation with the LGBTQ+ community.<sup>74</sup> Twenty percent of members of the LGBTQ+ community have reported facilities’ refusal to admit or re-admit a resident, or attempts to abruptly discharge a resident.<sup>75</sup> In 2014, the Equal Rights Center conducted a study where they sent senior LGBTQ+ and straight couples to apply for housing in ten different states: Arizona, Colorado, Florida, Georgia, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, and Washington.<sup>76</sup> Of these states, three (Colorado, New Jersey, and Washington) had statewide protections against housing discrimination based on sexual orientation, while the remaining seven had no such

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67. *Id.* at 9.

68. *Id.*

69. *Id.* at 11.

70. *Id.*

71. *Id.* at 9.

72. *Id.* at 11.

73. *Id.* at 12.

74. See LGBT MOVEMENT ADVANCEMENT PROJECT, SERVICES AND ADVOC. FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS, WHY LGBT ELDERS NEED THE EQUALITY ACT 5 (2021), <https://www.lgbtmap.org/file/2021-brief-equality-act-sage-map.pdf> [hereinafter WHY LGBT ELDERS].

75. *Id.*

76. See EQUAL RTS. CTR., OPENING DOORS: AN INVESTIGATION OF BARRIERS TO SENIOR HOUSING FOR SAME-SEX COUPLES 11 (2014), [https://equalrightscenter.org/wp-content/uploads/senior\\_housing\\_report.pdf](https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf) [hereinafter OPENING DOORS].

protections.<sup>77</sup> All of the housing targeted in the study was age-restricted housing, meaning it permitted only residents who were fifty-five and older, or sixty-two and older.<sup>78</sup> Once availability was established at these homes, an LGBTQ+ “tester” and a heterosexual “tester” each posed as a senior who was looking to move to a senior living community with their spouse.<sup>79</sup> In 48% of the tests conducted, the LGBTQ+ tester experienced at least one type of adverse, differential treatment.<sup>80</sup> In 12.5% of the tests, the LGBTQ+ tester experienced multiple forms of adverse, differential treatment.<sup>81</sup> Instances of differential treatment included: housing providers giving the LGBTQ+ tester fewer options than the matched heterosexual tester in terms of units available for rent; housing providers quoting higher fees, rental price, and/or more extensive application requirements for the LGBTQ+ tester; housing providers providing the heterosexual tester, but not the LGBTQ+ tester, with information regarding financial incentives, including promotions for visiting the facility; and in some cases, while the testers inquired about one-bedroom units, the LGBTQ+ tester was only given information about two-bedroom apartments, while the heterosexual tester was provided with the one-bedroom information they requested.<sup>82</sup> In twenty of the two hundred tests, housing providers offered fewer units to LGBTQ+ testers.<sup>83</sup> In three of those twenty tests, there was an outright denial of availability for the LGBTQ+ tester (who was told there was no housing available at the community), while there were housing options made available to the heterosexual tester.<sup>84</sup>

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77. *Id.* at 12.

78. *Id.*

79. *Id.* at 13.

80. *Id.* at 14.

81. *Id.*

82. *Id.*

83. *Id.* at 15.

84. *Id.*

### III. ANALYSIS

The strong grip religion has on nursing homes often is a catalyst for the struggles that LGBTQ+ elders face in nursing homes.<sup>85</sup> The contentious history between religion and the LGBTQ+ population is continued and displayed in nursing homes.<sup>86</sup> Unfortunately, religious organizations are able to use their control over nursing homes as a tool to continue their history of discrimination and prejudice.<sup>87</sup> Using religious exemption laws, religious organizations running nursing homes can skirt the already lacking state and federal protections for LGBTQ+ elders.<sup>88</sup>

#### A. RELATIONSHIP BETWEEN RELIGION AND THE LGBTQ+ COMMUNITY

Many have seen the brightly painted signs wielded by members of the Westboro Baptist Church stating, “God Hates F—.”<sup>89</sup> The group’s religious beliefs are centralized around their hatred for the LGBTQ+ community.<sup>90</sup> In fact, they believe that America has sentenced itself to eternal damnation by its tolerance of homosexuality.<sup>91</sup> Although Westboro Baptist may be one of the most outrageous anti-LGBTQ+ religious groups, it is certainly not the only one. The Vatican has openly stated that the Roman Catholic Church cannot bless same-sex marriages.<sup>92</sup> The Vatican also claims that same-sex marriages are not in God’s plan for families and children.<sup>93</sup> Boyd K. Packer, the second highest-ranking Mormon leader, has called same-sex attraction “impure and unnatural” and “against God’s law and nature.”<sup>94</sup> Some religious organizations have even advocated for LGBTQ+ hate and discrimina-

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85. WHY LGBT ELDERS, *supra* note 73, at 5.

86. *See generally id.*

87. *Id.*

88. *Id.*

89. *Westboro Baptist Church*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church> (last visited Oct. 5, 2023).

90. *Id.*

91. *Id.*

92. Bill Chappell, *Vatican Says Catholic Church Cannot Bless Same-Sex Marriages*, NPR (Mar. 15, 2021, 10:05 AM), <https://www.npr.org/2021/03/15/977415222/illicit-for-catholic-church-to-bless-same-sex-marriages-vatican-says>.

93. *Id.*

94. Bishop Gene Robinson, *How Religion Is Killing Our Most Vulnerable Youth*, CAP (Oct. 15, 2010), <https://www.americanprogress.org/article/how-religion-is-killing-our-most-vulnerable-youth/>.

tion.<sup>95</sup> In 1977, Anita Bryant, a former Miss Oklahoma and a Top-Forty singer, began her “Save Our Children” campaign by villainizing the LGBTQ+ community.<sup>96</sup> Her justification for this? Her Christian faith.<sup>97</sup> Bryant dubbed her movement as her “Christian Crusade.”<sup>98</sup> Her argument was that LGBTQ+ people were a threat to children, and thus did not deserve rights.<sup>99</sup> She fought against antidiscrimination legislation and had a hand in the repeal of a nondiscrimination ordinance in Dade County, Florida.<sup>100</sup>

## B. RELIGIOUS ANTI-LGBTQ+ RHETORIC LEADS TO VIOLENCE

This anti-LGBTQ+ agenda preached by some religious leaders indoctrinates their congregations and leads to violence against the community.<sup>101</sup> In 1980, a former NYC Transit Authority police officer, Ronald Crumpley, targeted gay men in Greenwich Village.<sup>102</sup> Called the “Ramrod Massacre,” Crumpley opened fire on two men outside of a deli before moving to a blockfront shared by two popular gay bars.<sup>103</sup> Crumpley killed two men and wounded six others.<sup>104</sup> Crumpley was the son of a prominent Harlem preacher and believed that gay men were servants of the devil.<sup>105</sup> He told the police, “I’ll kill them all—the gays—they ruin everything.”<sup>106</sup>

The Colorado Club Q attack in 2022 is also linked to hate rhetoric spewed by anti-LGBTQ+ religious organizations.<sup>107</sup> Club Q is an

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95. See Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida’s LGBTQ Culture War*, NBC NEWS (Apr. 14, 2022, 11:21 AM), <https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna242152>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. See Sam Moskowitz, *Remembering the Ramrod Massacre*, VILLAGE PRES. BLOG (Nov. 20, 2018), <https://www.villagepreservation.org/2018/11/-20/remembering-the-ramrod-massacre/>.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. David W. Dunlap, *New York’s Own Anti-Gay Massacre, Now Barely Remembered*, N.Y. TIMES (June 15, 2016), <https://www.nytimes.com/2016/06/16/nyregion/new-yorks-own-anti-gay-massacre-now-barely-remembered-orlando.html>.

107. Hannah Beckler, *Preached at, Spat on, Threatened, Colorado Springs’ Transgender Community Grapples with the Club Q Attack*, INSIDER (Dec. 30, 2022, 8:00

LGBTQ+ nightclub located in Colorado Springs where, in late November of 2022, Anderson Aldrich entered the club, shooting.<sup>108</sup> Five people died—including two transgender people—and seventeen others were wounded.<sup>109</sup> Natives of Colorado Springs trace the origin of this violence to 1984, when New Life Church—which lobbied against same-sex marriage—was founded in the city.<sup>110</sup> Then, in 1990, Focus on the Family, a conservative ministry, moved its headquarters to Colorado Springs, making it a national base for the political Christian Right.<sup>111</sup> The city quickly became home to more than a hundred Christian-Right ministries, many of which advocate for anti-LGBTQ+ agendas.<sup>112</sup> Today, Focus on the Family circulates pamphlets, slide decks, and podcasts opposing protections for transgender children at school, supporting conversion therapy for transgender children, and reinforcing anti-transgender messaging.<sup>113</sup> Many experts are calling killings like the one at Club Q “scripted” violence, as perpetrators are acting in response to the demonizing rhetoric being shared by some religious anti-LGBTQ+ groups.<sup>114</sup>

### C. THE DANGER OF RELIGION IN LONG-TERM CARE FACILITIES

Eighty percent of senior living providers are faith-based institutions.<sup>115</sup> In 2020, 139 Catholic-affiliated nursing homes were identified in the United States, with at least one facility in thirty-three out of the fifty states.<sup>116</sup> An additional 306 Christian-affiliated nonprofit nursing homes were identified as well.<sup>117</sup> Religiously-affiliated facilities can claim a religious exemption to exempt them from providing certain

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AM), <https://www.insider.com/anderson-aldrich-suspected-club-q-shooter-steeped-in-homophobic-rhetoric-2022-12>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. LEADINGAGE, ZIEGLER, LEADINGAGE ZIEGLER 200 121 (2022), [https://leadingage.org/wp-content/uploads/2022/10/LeadingAge\\_Ziegler\\_200\\_2022\\_FNL.pdf](https://leadingage.org/wp-content/uploads/2022/10/LeadingAge_Ziegler_200_2022_FNL.pdf).

116. Nick Lata, *2020 Catholic Nursing Homes Report*, ELDERGUIDE (Nov. 17, 2020), <https://elderguide.com/resources/catholic-nursing-homes-report/>.

117. *Id.*

forms of care.<sup>118</sup> This problem is created by federal and state policy-makers passing religious exemption laws that allow businesses and healthcare providers to discriminate against the LGBTQ+ community, as long as they can cite religious reasons for doing so.<sup>119</sup> An entire host of problems then ensues, ranging from verbal and physical harassment by other residents, refusal to admit/re-admit or an abrupt discharge, or verbal/physical harassment by staff, without fear of federal or state intervention.<sup>120</sup>

#### D. REAL PEOPLE, REAL HURT

In October 2021, Marie King, a seventy-nine-year-old transgender woman, filed a complaint with the Maine Human Rights Commission, alleging that Sunrise Assisted Living facility in Jonesport, Maine refused her admission due to her identifying as transgender.<sup>121</sup> It is believed that this was the first officially filed complaint of its kind in the United States.<sup>122</sup> The facility settled the complaint and agreed to establish policies and procedures to ensure that it is accepting of LGBTQ+ seniors.<sup>123</sup> This settlement, however, is not binding precedent.<sup>124</sup>

A similar story is told by Mary Walsh and Bev Nance, who have been married since 2009 and in a committed relationship for about forty years.<sup>125</sup> They applied to move into Friendship Village senior living facility in Missouri, but were denied housing once the staff learned that they were married.<sup>126</sup> They were told by the facility that the home did not condone same-sex marriage and that they only accepted married

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118. See LGBT MOVEMENT ADVANCEMENT PROJECT, PUB. RTS./PRIV. CONSCIENCE PROJ., SERVICES AND ADVOC. FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS, DIGNITY DENIED: RELIGIOUS EXEMPTIONS AND LGBT ELDER SERVICES 1 (2017), <https://www.lgbtmap.org/file/Older-Adults-Religious-Exemptions.pdf> [hereinafter DIGNITY DENIED].

119. See generally *id.*

120. WHY LGBT ELDERS, *supra* note 73, at 5.

121. Benjamin Ryan, *Nursing Home Settles Historic Transgender Discrimination Complaint*, NBC NEWS (June 16, 2022, 7:43 AM), <https://www.nbcnews.com/nbc-out/out-news/nursing-home-settles-historic-transgender-discrimination-complaint-rca33676>.

122. *Id.*

123. *Id.*

124. *Id.*

125. Tim Fitzsimons, *Judge Rules Against Lesbians Rejected from Retirement Home*, NBC NEWS (Jan. 18, 2019, 9:12 AM), <https://www.nbcnews.com/feature/nbc-out/judge-rules-against-elderly-lesbians-rejected-retirement-home-n960211>.

126. *Id.*

couples consisting of “one man and one woman.”<sup>127</sup> Additionally, the facility asserted that their marriage was “not in accordance with biblical principles.”<sup>128</sup> The couple filed a case against the facility in the U.S. District Court in St. Louis, citing discrimination on the basis of gender.<sup>129</sup> The federal court sided with Friendship Village, ruling that it was not a case of gender discrimination, but rather, one of sexual orientation.<sup>130</sup> The Court noted that discrimination based on sexual orientation was not illegal under fair housing laws.<sup>131</sup>

#### E. RELIGIOUS EXEMPTION LAWS

What gives long-term care facilities the legal right to discriminate in this way? The problem begins with a gap in federal laws protecting the LGBTQ+ community.<sup>132</sup> This problem is furthered by federal and state policymakers passing religious exemption laws that allow businesses and healthcare providers to discriminate against the LGBTQ+ community as long as they can cite religious reasons for doing so.<sup>133</sup>

There are two main kinds of religious exemption laws—broad religious exemption laws and targeted religious exemptions.<sup>134</sup> Broad religious exemption laws (which are sometimes called “Religious Freedom Restoration Acts”) allow people, churches, nonprofit organizations, and sometimes corporations to be exempt from state laws that burden their religious beliefs.<sup>135</sup> Usually, the person or organization must seek out an exemption through court proceedings.<sup>136</sup> Targeted religious exemption laws, on the other hand, provide blanket exemptions in a specific area of operations.<sup>137</sup> Examples include child

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127. *Id.*

128. Benjamin Long, *U.S. LGBT+ Retirees Lose Round in Housing Battle but Legal War Continues*, REUTERS (Jan. 18, 2019, 4:51 PM), <https://www.reuters.com/article/us-usa-lgbt-housing/u-s-lgbt-retirees-lose-round-in-housing-battle-but-legal-war-continues-idUSKCN1PC2OG>.

129. *Id.*

130. *Id.*

131. *Id.*

132. See OPENING DOORS, *supra* note 76, at 9.

133. See generally DIGNITY DENIED, *supra* note 118.

134. LGBT MOVEMENT ADVANCEMENT PROJECT, RELIGIOUS EXEMPTION LAWS 1 (2023), <https://www.lgbtmap.org/img/maps/citations-religious-exemption.pdf> [hereinafter RELIGIOUS EXEMPTION LAWS].

135. *Id.*

136. *Id.*

137. *Id.*

welfare services, medical care, and businesses serving the public.<sup>138</sup> Forty-two percent of LGBTQ+ people live in a state with statutory religious exemption laws.<sup>139</sup> For example, Alabama's HB 95 (2017),<sup>140</sup> Arkansas's SB 289 (2021),<sup>141</sup> Illinois's 745 ILCS 70/1 (2016),<sup>142</sup> Mississippi's HB 1523 (2016),<sup>143</sup> and South Carolina's H 4776 (2022)<sup>144</sup> permit medical professionals to decline to serve LGBTQ+ people and others, based on a religious exemption.<sup>145</sup>

Of the fifty states, only one state (Alabama) has a constitutional religious exemption law.<sup>146</sup> Article I, Section 3.01 of the Alabama Constitution (entitled the "Alabama Religious Freedom Amendment") "guarantee[s] that the freedom of religion is not burdened by state and local law" and provides "a claim or defense to persons whose religious freedom is burdened by government."<sup>147</sup> Twenty-four other states have statutory religious exemption laws.<sup>148</sup> These states are primarily in the southern United States but include some northern states as well, such as Illinois,<sup>149</sup> Indiana,<sup>150</sup> Pennsylvania,<sup>151</sup> Rhode Island,<sup>152</sup> and Connecticut.<sup>153</sup> Comparatively, some southern states do not have statutory religious exemption laws, such as Georgia, North Carolina, and West

138. *Id.*

139. See Religious Exemption Laws, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](https://www.lgbtmap.org/equality-maps/religious_exemption_laws) (last visited Oct. 5, 2023) [hereinafter RELIGIOUS EXEMPTION LAW MAP].

140. H.B. 95, 2017 Reg. Sess. (Ala. 2017) (codified as ALA. CODE § 22-21B-4 (2017)).

141. S.B. 289, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (codified as ARK. CODE ANN. § 17-80-504 (West 2021)).

142. 745 ILL. COMP. STAT. ANN. 70/1 (West 2016).

143. H.B. 1523, Reg. Sess. (Miss. 2016) (codified as MISS. CODE ANN. § 11-62-5 (West 2016)).

144. H.B. 4776, 124th Gen. Assemb., Reg. Sess. (S.C. 2022) (codified as S.C. CODE ANN. § 44-139-30 (2022)).

145. See generally RELIGIOUS EXEMPTION LAWS, *supra* note 134.

146. ALA. CONST., art. I, § 3.01; RELIGIOUS EXEMPTION LAWS, *supra* note 134, at 1.

147. ALA. CONST., art. I, § 3.01.

148. RELIGIOUS EXEMPTION LAW MAP, *supra* note 139.

149. 775 ILL. COMP. STAT. ANN. 35/1-99 (West 1998); see RELIGIOUS EXEMPTION LAW MAP, *supra* note 139.

150. IND. CODE ANN. § 34-13-9-9 (West 2023); see RELIGIOUS EXEMPTION LAWS, *supra* note 134, at 2.

151. 71 PA. STAT. AND CONS. STAT. ANN. § 2401-2407 (West 2002); see RELIGIOUS EXEMPTION LAWS, *supra* note 134, at 5.

152. 42 R.I. GEN. LAWS ANN. § 42-80.1-3 (West 1993); see RELIGIOUS EXEMPTION LAWS, *supra* note 134, at 5.

153. CONN. GEN. STAT. ANN. § 52-571(b) (West 2023); see RELIGIOUS EXEMPTION LAWS, *supra* note 134, at 2.



Virginia.<sup>154</sup> Twenty-seven states—including California, Colorado, and Wisconsin—have no religious exemption laws at all.<sup>155</sup>

For years, questions have surrounded what religions qualify for a religious exemption.<sup>156</sup> Religious exemptions stem from the first two provisions of the First Amendment, known as the Religion Clauses.<sup>157</sup> They provide that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”<sup>158</sup> When interpreting the provisions, the Supreme Court has said that “rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.”<sup>159</sup> One early case that the Supreme Court heard suggested that courts might determine and define what is “religion.”<sup>160</sup> However, in later cases, the Supreme Court seemed to reject that strategy as they restricted the ability of the government and court system to determine the legitimacy of religious beliefs.<sup>161</sup> The most clear rule regarding the legitimacy of beliefs is that the Religion Clauses extend only to religious activities.<sup>162</sup> Thus, in order to determine whether the activities are “religious,” courts and the government can investigate whether a person’s beliefs are insincere or secular (meaning that they stem from political, sociological, or philosophical views rather than religious beliefs).<sup>163</sup> Religious beliefs can fall within the scope of the clauses even if it is not

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154. RELIGIOUS EXEMPTION LAW MAP, *supra* note 139.

155. *See generally* RELIGIOUS EXEMPTION LAWS, *supra* note 134.

156. *See* United States v. Seeger, 380 U.S. 163, 167 (1965); Reynolds v. United States, 98 U.S. 145, 165 (1878); Welsh v. United States, 398 U.S. 333, 340 (1970).

157. *Amdt1.2.1 Overview of the Religion Clauses (Establishment and Free Exercise Clauses)*, CONST. ANN., [https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE\\_00013267](https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267) (last visited Oct. 5, 2023) [hereinafter *Overview of the Religion Clauses*].

158. U.S. CONST. amend. I.

159. Walz v. Tax Comm’n of City of New York, 397 U.S. 664, 669 (1970).

160. Reynolds, 98 U.S. at 162 (1879); *Overview of the Religion Clauses*, *supra* note 157.

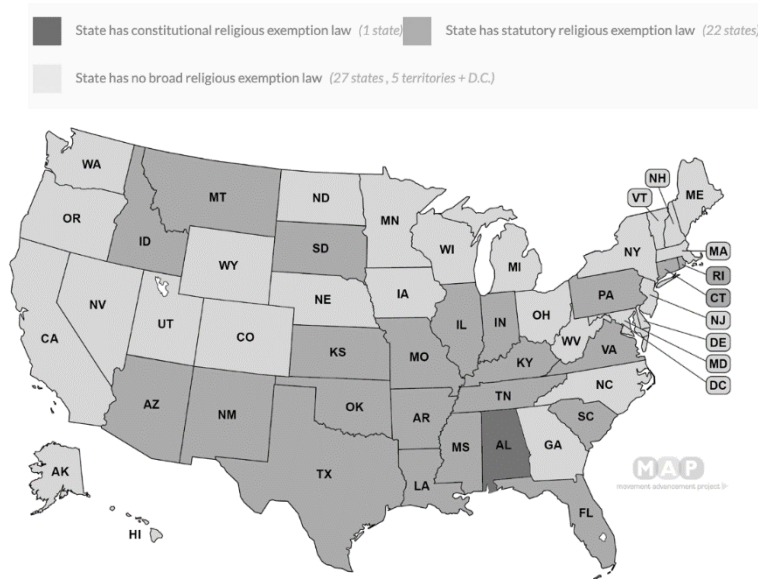
161. *Overview of the Religion Clauses*, *supra* note 157; *see, e.g.*, Seeger, 380 U.S. at 184; United States v. Ballard, 322 U.S. 78, 88 (1944).

162. *Overview of the Religion Clauses*, *supra* note 157.

163. Frazee v. Ill. Dep’t of Emp. Sec., 489 U.S. 829, 833 (1989); *Overview of the Religion Clauses*, *supra* note 157; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (noting that philosophical beliefs would not rise to the demands of the Religion Clauses, but finding evidence for the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction); Welsh v. United States, 398 U.S. 333, 339 (1970) (interpreting a federal conscientious objector statute, the Supreme Court said “that the central consideration in determining whether . . . beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant’s life.”).

consistent with the tenets of a particular Christian sect.<sup>164</sup> In *Cruz v. Beto*, the Supreme Court held that non-Christian religions are also protected, when a Buddhist man was denied access to use a prison chapel, prohibited from writing his religious advisor, and prohibited from sharing his religious materials with other prisoners.<sup>165</sup>

FIGURE 1



#### F. RELIGIOUS FREEDOM RESTORATION ACT

The First Amendment of the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>166</sup> In 1993, Congress passed the Religious Freedom Restoration Act, which established a legislative test for laws that burden religious exercise.<sup>167</sup> Under this Act, the government can only substantially burden a person or business’s exercise of

164. *Overview of the Religion Clauses*, *supra* note 157.

165. *Id.* (citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972)).

166. U.S. CONST. amend. I.

167. LGBT MOVEMENT ADVANCEMENT PROJECT, *LGBT POL’Y SPOTLIGHT: STATE AND FEDERAL RELIGIOUS EXEMPTIONS AND THE LGBT COMMUNITY 1* (2015), <https://www.lgbtmap.org/file/policy-spotlight-report-RFRA.pdf> [hereinafter *LGBT POL’Y SPOTLIGHT*].

religion if the law (1) furthers a compelling governmental interest, and (2) does so in the least restrictive means of furthering that interest.<sup>168</sup> However, in 1997, the Supreme Court decided, in *City of Boerne v. Flores*, that the Religious Freedom Restoration Act did not apply to state laws.<sup>169</sup> This allows many states to enact their own statutes or constitutional amendments, similar to the Religious Freedom Restoration Act, to permit various forms of religious exemptions.<sup>170</sup>

In 2017, the U.S. Departments of Justice and Health and Human Services released guidance and regulations regarding religious exemptions.<sup>171</sup> The Department of Justice instructed all federal agencies to provide “significant leeway” to those seeking religious exemptions from federal laws, rules, and regulations.<sup>172</sup> The relationship between federal agencies and long-term care facilities is an important one as many facilities that provide aging care receive federal funds.<sup>173</sup> This can come in the form of federal grants, contracts, or most commonly, reimbursements through Medicaid and Medicare.<sup>174</sup> While exact estimates vary, Medicare pays somewhere between 45% and 65% of total nursing home costs in the United States.<sup>175</sup> Prior to this change, the Department of Health and Human Services required all medical facilities that received Medicare and Medicaid funding to allow visitation by same-sex partners and spouses.<sup>176</sup> This change would not allow hospitals or long-term care providers that receive federal funding to refuse such visitation while still receiving funding from taxpayers.<sup>177</sup>

The government is restricted in what laws may be passed regarding the exercise of religion. As mentioned, the Religious Freedom Restoration Act requires that any religious law furthers a compelling government interest, and is done in the least restrictive means available.<sup>178</sup> The Act defines “exercise of religion” broadly, stating that exercise of

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168. *Id.*

169. *See City of Boerne v. Flores*, 521 U.S. 507, 508–09 (1997).

170. LGBT POL’Y SPOTLIGHT, *supra* note 167, at 1.

171. DIGNITY DENIED, *supra* note 118, at 2.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Paying for Nursing Home Care: Medicare, Medicaid & Other Assistance*, PAYING FOR SENIOR CARE (June 16, 2021), <https://www.payingforseniorcare.com/nursing-homes>.)

176. DIGNITY DENIED, *supra* note 118, at 2.

177. *Id.*

178. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (codified as 42 U.S.C. § 2000bb-1).

religion means “an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.”<sup>179</sup> Thus, it must be determined what a “substantial” burden is. The Supreme Court has determined that a substantial burden occurs when the law in question requires someone to do something that their religion forbids, or the law prevents someone from doing something that their religion requires.<sup>180</sup> States, however, are able to make their own religious exemption laws that are less restrictive. For example, in Kansas, a substantial burden only needs to be “likely,” meaning that if a law may place a burden on religious exercise, it would be enough.<sup>181</sup>

Courts have considered a variety of beliefs as religions that are entitled to protection under religious exemption laws.<sup>182</sup> Individuals technically do not have to belong to an organized religious group to receive protection for religious beliefs.<sup>183</sup> General beliefs are considered religious (and protected by the First Amendment) if they “play the role of a religion and function as a religion” in an individual’s life.<sup>184</sup>

#### G. NURSING HOME REFORM ACT

Nursing homes are governed by both federal and state laws.<sup>185</sup> Perhaps the law most specific to nursing homes is the Nursing Home Reform Act (NHRA), which sets requirements for nursing homes to provide certain services to their residents.<sup>186</sup> Some of these services include dietary services, pharmaceutical services, social services, and comprehensive care plans for each patient.<sup>187</sup> Within the NHRA is a bill

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179. 775 ILL. COMP. STAT. ANN. 35/5 (West 2023).

180. See *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 140–01 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

181. See KAN. STAT. ANN. § 60-5303 (West 2023); LGBT POL’Y SPOTLIGHT, *supra* note 167, at 1.

182. *Religious Freedom*, ABA (Feb. 1, 2022), <https://www.americanbar.org/groups/crsj/projects-and-initiatives/civil-rights-civics-institute/religiousfreedom/>.

183. *Id.*

184. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

185. *Federal Nursing Home Regulations and State Laws*, NURSING HOME ALERT, <http://www.nursinghomealert.com/federal-nursing-home-regulations-and-state-laws> (last visited Oct. 5, 2023).

186. *Nursing Home Reform Act of 1987*, NURSING HOME ABUSE CTR., <https://www.nursinghomeabusecenter.com/resources/nursing-home-reform-act/> (last visited Oct. 5, 2023).

187. *Id.*

of rights of nursing home residents.<sup>188</sup> It provides that nursing home residents have certain basic rights including: necessary care (medical, physical, psychological, and social), privacy, security of possessions, the ability to welcome visitors or refuse visitors, be treated with dignity, and others.<sup>189</sup> Nursing homes that violate the NHRA are subject to penalties from the government such as monetary penalties, denial of Medicare or Medicaid funds, state monitoring, and temporary state management.<sup>190</sup> However, this legislation is extremely flawed. Despite some nursing homes violating the Act, punishments inflicted by the federal and state government are not severe enough to deter future wrongdoing.<sup>191</sup>

In terms of private action, courts have held that the NHRA only allows for private actions against state-operated nursing homes.<sup>192</sup> This leaves residents at the majority of nursing homes, which are privately operated, without a remedy under the NHRA.<sup>193</sup>

#### H. THE FAIR HOUSING ACT

The Fair Housing Act is often discussed when the issue of protecting LGBTQ+ elders' rights in nursing homes is considered.<sup>194</sup> Formally, this Act protects people from discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities.<sup>195</sup> This includes retirement homes and nursing homes.<sup>196</sup> The Fair Housing Act enumerates

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188. *Id.*

189. *Id.*

190. *Id.*

191. *The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain?: Hearing Before the S. Special Comm. on Aging, 110th Cong. (2007)* [hereinafter *NHRA Hearing*] (statement of Kathryn Allen, Director of Health Care, U.S. Government Accountability Office).

192. *Nichols v. St. Luke Ctr. of Hyde Park*, 800 F.Supp. 1564, 1567–68 (S.D. Ohio 1992).

193. See Janet Nguyen, *The Economics of Nursing Homes (and Paying for One)*, MARKETPLACE (Feb. 11, 2021), <https://www.marketplace.org/2021/02/11/the-economics-of-nursing-homes-and-paying-for-one>.

194. See, e.g., *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 868 (7th Cir. 2018).

195. *Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T OF HOUS. AND URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/fair\\_housing\\_act\\_overview](https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview) (last visited Sep. 19, 2023) [hereinafter HUD].

196. LEADING AGE, *THE FAIR HOUSING ACT AND THE AMERICANS WITH DISABILITIES ACT: WHAT SENIOR LIVING PROVIDERS NEED TO KNOW 2* (2018), <https://leadingage.org/wp-content/uploads/drupal/The%20Fair%20Housing%20Act%20and%20the%20ADA.pdf>.

protected classes from discrimination in housing: race, color, national origin, religion, sex, familial status, and disability.<sup>197</sup> However, the contention in the Act relies on who is discriminating—the landlord/homeowner, or the tenants themselves.<sup>198</sup> The law is clear that landlords, leasing agents, real estate agents, or any other agent who is in charge of renting or selling a home cannot discriminate against current or potential tenants/buyers.<sup>199</sup> Nevertheless, the question remains as to whether landlords can be held liable for tenant-to-tenant discrimination.<sup>200</sup> The U.S. Department of Housing and Urban Development stated in 2016 that landlords should be liable under the Fair Housing Act “for failing to take prompt action” to solve any harassment by tenants against other tenants for harassment that they “knew or should have known” was occurring.<sup>201</sup>

The Seventh Circuit became the first circuit to hold that the Fair Housing Act imposes liability on landlords for tenant-on-tenant discrimination and harassment in *Wetzel v. Glen St. Andrew Living Community, LLC*.<sup>202</sup> Plaintiff Marsha Wetzel brought a suit against her apartment community, Glen St. Andrew Living Community, after she was subjected to a fifteen-month period of harassment by other tenants, due to her being a lesbian.<sup>203</sup> Wetzel informed the management of these incidents on multiple occasions and was not only ignored, but almost evicted.<sup>204</sup> Wetzel’s suit relied on section 3604(b) of the Fair Housing Act, which prohibits discrimination in the “terms, conditions, or privileges” of housing based on a protected characteristic, and section 3617,<sup>205</sup> which makes it illegal to “coerce, intimidate, threaten, or interfere with” any person’s enjoyment of section 3604 rights.<sup>206</sup>

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197. HUD, *supra* note 195.

198. *Wetzel v. Glen St. Andrew Living Community, LLC*, 132 HARV. L. REV. 2050, 2050 (2019) [hereinafter *Wetzel*, HARV.].

199. See HUD, *supra* note 195 (outlining that discriminatory refusal to rent or sell housing is prohibited under the FHA).

200. *Wetzel*, HARV., *supra* note 198, at 2050.

201. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63054-01, 63068 (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100); see also 24 C.F.R. § 100.7(a)(iii) (2023).

202. *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 864–68 (7th Cir. 2018).

203. *Id.* at 860.

204. *Id.*

205. *Id.* at 861 (citing Fair Housing Act, 42 U.S.C. § 3604(b), 3617).

206. Fair Housing Act § 3617.

The Seventh Circuit took the case on appeal and stated that a plaintiff bringing a claim under sections 3604(b) and 3617 of the Fair Housing Act for a hostile-housing-environment cause of action must make a three-prong showing: “(1) she endured unwelcome harassment based on a protected characteristic; (2) the harassment was severe or pervasive enough to interfere with the terms, conditions, or privileges of her residency, or in the provision of services or facilities; and (3) . . . there is a basis for imputing liability to the defendant.”<sup>207</sup> Wetzel met the first prong, as the Seventh Circuit had already held that sexual orientation-based discrimination qualifies as sex-based discrimination under Title VII, which applies equally under the Fair Housing Act.<sup>208</sup> The Court also found that the harassment that Wetzel faced was both “severe and pervasive.”<sup>209</sup> The case heavily relied on the third prong, namely, whether there is a basis under the Fair Housing Act for assigning liability to the apartment complex.<sup>210</sup> This was an issue of first impression for the Seventh Circuit.<sup>211</sup> The Court found that the “text [of sections 3604(b) and 3617] does not spell out a test for a landlord liability” or condition liability on landlords’ discriminatory intent.<sup>212</sup> To support this claim, the Court discussed the Supreme Court’s interpretation of a similar provision in Title VII.<sup>213</sup> This provision imposes liability on employers for coworker harassment which they knew or should have known was occurring.<sup>214</sup> However, the Court declined to adopt Title VII’s constructive notice standard due to “important differences” between employer-employee relationship and landlord-tenant relationships.<sup>215</sup> Instead, the Court held that the standard should be an actual notice standard.<sup>216</sup> This was concluded by analogizing the *Wetzel* case to the Title IX precedent in *Davis v. Monroe County Board of Education*.<sup>217</sup> This standard requires that landlords have “actual knowledge of the severe [covenant harassment]” and have been “deliberately indifferent

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207. *Wetzel*, 901 F.3d at 861–62.

208. *Wetzel*, HARV., *supra* note 198, at 2052.

209. *Wetzel*, 901 F.3d at 863.

210. *Wetzel*, HARV., *supra* note 198, at 2053.

211. *Id.*

212. *Wetzel*, 901 F.3d at 863.

213. *Id.* (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758–59 (1998)) (“An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”).

214. *Wetzel*, HARV., *supra* note 198, at 2053.

215. *Wetzel*, 901 F.3d at 863.

216. *Id.* at 859.

217. *Id.* at 863–64.

to it” in order to be held liable for tenant-on-tenant harassment.<sup>218</sup> However, this court decision is one of few, making it difficult to navigate this issue with a lack of judicial precedent.

### I. THE 1964 CIVIL RIGHTS ACT

Many of the places that elders access for services are often considered “public accommodation[s].”<sup>219</sup> This language comes from Title II of the Civil Rights Act.<sup>220</sup> Public accommodations as defined by this Act include “establishments which serve the public . . . if its operations affect commerce, or if discrimination or segregation by it is supported by State action.”<sup>221</sup> Establishments that fit this definition include restaurants, hotels, theaters, libraries, courthouses, and nursing homes.<sup>222</sup> While this definition encompasses many of the places that LGBTQ+ elderly persons frequent—including nursing homes—the Act does not include “sexual orientation” or “gender identity” in its list of protected classes, leaving nursing homes open to discriminate against the LGBTQ+ elderly.<sup>223</sup> Ultimately, this definition leaves the door open for providers to discriminate against elderly members of the LGBTQ+ community without facing repercussions under the Civil Rights Act.<sup>224</sup>

All of these problems—misuse or liberal use of religious exemption laws, lack of inclusion/protection of the LGBTQ+ elder population in already existing state and federal legislation, and absence of new civil rights legislation—create an environment in which LGBTQ+ elders in nursing homes may be discriminated against, with little to no recourse. However, amending already existing federal and state legislation to include the LGBTQ+ elder population, and enacting new federal legislation to bridge gaps, are possible solutions to put an end to this ongoing, pervasive discrimination.

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218. *Id.* at 864.

219. See WHY LGBT ELDERS, *supra* note 73, at 1.

220. 42 U.S.C. § 2000(a).

221. *Id.*

222. *Public Accommodations and Equal Rights*, FINDLAW (Apr. 23, 2018), <https://www.findlaw.com/civilrights/civil-rights-overview/public-accommodations-equal-rights.html>.

223. WHY LGBT ELDERS, *supra* note 73, at 1.

224. *Id.*



#### IV. RESOLUTION AND RECOMMENDATION

Solutions to the problem of nursing home discrimination against LGBTQ+ elderly residents are available on both the state and federal levels and involve both legislative and judicial action. Passing new legislation federally, amending already existing civil rights legislation, and setting judicial precedent in court are all ways to close the gap that allows for discrimination against LGBTQ+ elders in nursing homes.

##### A. FEDERAL RECOMMENDATIONS

There are tangible solutions to the discrimination and violence that LGBTQ+ elders face in long-term care facilities. For example, passing the Equality Act on the federal level would lessen some of the burdens on LGBTQ+ elders.<sup>225</sup> In 2019, the House of Representatives in the 116th Congress introduced H.R 5: The Equality Act.<sup>226</sup> This Act closes the public accommodation loophole by prohibiting discrimination based upon sexual orientation and gender identity in programs that receive federal funding and places of public accommodations.<sup>227</sup> The bill defines public accommodations as places of “public gathering” or “any establishment that provides a good, service, or program.”<sup>228</sup> Examples of public accommodations include hotels, theaters, stadiums, gas stations, restaurants, and most notably, shelters and healthcare.<sup>229</sup> This is particularly impactful for LGBTQ+ elders, as the places that elders access for services—such as nursing homes and long term care facilities—are not currently included in non-discrimination protections.<sup>230</sup> More than half of states lack laws explicitly prohibiting discrimination based on sexual orientation and gender identity in housing and places of public accommodation.<sup>231</sup> The Act would also amend existing civil rights laws such as the Civil Rights Act of 1964, the Fair Housing Act, the

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225. HUM. RTS. CAMPAIGN, WHAT DOES THE EQUALITY ACT MEAN FOR LGBTQ OLDER ADULTS?, [https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/EA\\_Fact\\_Sheet\\_Older\\_Adults.pdf](https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/EA_Fact_Sheet_Older_Adults.pdf).

226. Ty Gamble-Eddington, *The Equality Act: How We Got Here and How to Get it Passed*, GLAAD (Sept. 30, 2020), <https://www.glaad.org/amp/equality-act-how-we-got-here-and-how-we-move-forward>.

227. Equality Act, H.R. 5, 116th Cong. (2019).

228. *Id.*

229. See US. CONF. OF CATH. BISHOPS, TERMS AND HARMS OF THE EQUALITY ACT, [https://www.usccb.org/resources/terms\\_and\\_harms\\_of\\_the\\_equality\\_act.pdf](https://www.usccb.org/resources/terms_and_harms_of_the_equality_act.pdf).

230. *Get the Facts: Equality Act*, SAGE (Apr. 1, 2022), <https://www.sageusa.org/get-the-facts-equality-act/> [hereinafter *Get the Facts*].

231. WHY LGBT ELDERS, *supra* note 73, at 2.

Equal Credit Opportunity Act, and the Jury Selection and Services Act, to name a few.<sup>232</sup> Currently, the Equality Act is up for consideration in the U.S. Senate.<sup>233</sup> It has passed the House of Representatives twice and needs to gain sixty votes to pass in the Senate.<sup>234</sup> It originally passed in the House in 2019, but was stalled in the Republican-led Senate.<sup>235</sup> Most recently, the legislation was passed in the House on February 25, 2021, with a 224 to 206 vote.<sup>236</sup> President Biden committed to signing the bill into law should it pass in the Senate.<sup>237</sup>

Additionally, Congress should include LGBTQ+ people as a community of “greatest social need” within the Older Americans Act to increase funding for and access to specifically tailored services.<sup>238</sup> The Older Americans Act contains various requirements that both states and Area Agencies on Aging (which serve as local entities who oversee the comprehensive service system for the delivery of social, nutrition, and long-term services and supports to older adults) target populations of older adults with the greatest social need.<sup>239</sup> The Older Americans Act defines “greatest social need” as “a need caused by non-economic factors, which include: (a) physical and mental disabilities; (b) language barriers; and (c) cultural, social, or geographic isolation, including isolation caused by racial or ethnic status, that (i) restricts the ability of an individual to perform normal daily tasks or (ii) threatens the capacity of the individual to live independently.”<sup>240</sup> The Older Americans Act was passed in 1965 to improve community social services for the elderly.<sup>241</sup> The Older Americans Act funds the Administration on Aging and the Area Agencies on Aging.<sup>242</sup> However, the Act does not

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232. *The Equality Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/equality> (last visited Oct. 5, 2023).

233. *Get the Facts*, *supra* note 230.

234. *Id.*

235. Hannah Miao, *House Passes Equality Act Which Would Expand LGBTQ Protections*, CNBC (Feb. 25, 2021, 5:39 PM), <https://www.cnbc.com/2021/02/25/house-passes-equality-act-which-would-expand-lgbtq-protections.html>.

236. *Id.*

237. *Get the Facts*, *supra* note 230.

238. LGBT MOVEMENT ADVANCEMENT PROJECT, SERVICES AND ADVOC. FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS, UNDERSTANDING ISSUES FACING LGBT OLDER ADULTS 13 (2017), <https://www.lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf> [hereinafter UNDERSTANDING ISSUES].

239. *Id.*

240. Older Americans Act of 1965, 42 U.S.C. § 3002(24).

241. *Older Americans Act*, ADMIN. FOR CMTY. LIVING (July 5, 2022), <https://acl.gov/about-acl/authorizing-statutes/older-americans-act>.

242. UNDERSTANDING ISSUES, *supra* note 238, at 13.

categorize the LGBTQ+ population as a population of “greatest social need,” causing them to serve LGBTQ+ people less directly.<sup>243</sup>

## B. STATE LEGISLATION

States are also able to pass their own legislation to supplement existing legislation such as the Federal Nursing Home Reform Act.<sup>244</sup> Recently, Illinois passed a version of this legislation—SB 1319.<sup>245</sup> This bill amended already existing state legislation (the Assisted Living and Shared Housing Act) and added non-discrimination language.<sup>246</sup> This language protects residents from discrimination on the basis of the enumerated classes in the Illinois Human Rights Act, such as race, color, religion, national origin, ancestry, age, sex, marital status, disability, sexual orientation, and gender identity.<sup>247</sup> This bill also made it expressly prohibited for a nursing home or long-term care facility to discriminate based on sexual orientation or gender identity, making members of the LGBTQ+ community a protected class.<sup>248</sup>

## C. STATE JUDICIAL PRECEDENT

Setting state judicial precedent is another tool to protect LGBTQ+ elders. The Illinois bill, SB 1319, was created as a response to a now-resolved lawsuit brought by a lesbian woman against the long-term care facility in which she previously resided.<sup>249</sup> As discussed above, Marsha Wetzel filed a suit against the retirement home and assisted living facility Glen St. Andrew Living Community in Niles, Illinois.<sup>250</sup> Wetzel reported that once other residents learned that she was a lesbian, she was called homophobic slurs and derogatory nicknames, and was even physically attacked on several occasions.<sup>251</sup> Originally, the

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243. See Older Americans Act of 1965 § 3002(24).

244. See Federal Nursing Home Reform Act of 1987, 42 U.S.C. § 1396r(b)(4), 1395i-3(b)(4); see also 42 C.F.R. 483.25.

245. *Illinois Legislation to Advance Equity for LGBTQ Older Adults Approved by Gov. Pritzker*, EQUAL. ILL., <https://www.equalityillinois.us/illinois-legislation-to-advance-equity-for-lgbtq-older-adults-approved-by-gov-pritzker/> (last visited Sept. 19, 2023) [hereinafter EQUAL. ILL.].

246. *SB 1319 Fact Sheet*, EQUAL. ILL. (Apr. 8, 2019), <https://www.equalityillinois.us/sb-1319-fact-sheet/>.

247. *Id.*

248. Farzan, *supra* note 9.

249. EQUAL. ILL., *supra* note 245.

250. Farzan, *supra* note 9.

251. *Id.*

U.S. District Court for the Northern District of Illinois, Eastern Division sided with the retirement home, claiming that the Fair Housing Act imposes liability only on landlords that intentionally discriminate against a tenant.<sup>252</sup> However, Wetzel appealed to the U.S. Court of Appeals for the Seventh Circuit and they overturned the lower court's decision.<sup>253</sup> The judge held that landlords can be held liable for discrimination if they fail to respond to harassment faced by tenants who belong to a protected class.<sup>254</sup> This decision was a huge catalyst not only for residents in Illinois, but also for the nation, as this decision by a Court of Appeals may create discourse in other appeals courts, leading to a review by the Supreme Court. More courts should take on cases involving these issues in order to set judicial precedent to protect LGBTQ+ elders within their jurisdictions.

## V. Conclusion

The fight for LGBTQ+ rights is far from over. As more people find the courage to come out and live as their authentic selves, the aging population of LGBTQ+ people increases: "[m]ore than 39 million people in the U.S. are age 65 years or older including 2.4 million people who identify as lesbian, gay, bisexual or transgender (LGBT).<sup>255</sup> As the baby boomer generation ages, the older adult population will increase from 12.8% to an estimated 19% in 2030."<sup>256</sup> Thus, new challenges have arisen regarding the civil rights of the aging LGBTQ+ population. The pervasive monopoly that religious organizations seem to have on long-term care facilities, and the historical discrimination and oppression against the LGBTQ+ community by some of those organizations, worsen the problem. Issues like discrimination regarding admission to long-term care facilities, verbal, and physical violence against members of the population at the hands of nursing home staff and other residents, and fear forcing LGBTQ+ elders back into the closet at the end of their lives are just some of these challenges. It is imperative that these obstacles are faced head-on, prior to getting out of hand. Therefore, the religious exemption loophole and the discrimination that many

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252. *Id.*

253. *Id.*

254. *Id.*

255. *Lesbian, Gay, Bisexual and Transgender Aging*, AM. PSYCH. ASS'N., <https://www.apa.org/pi/lgbt/resources/aging> (last visited Oct. 5, 2023).

256. *Id.*

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LGBTQ+ elders face in nursing homes must be at the forefront of legislative priorities. The amendment of existing civil rights legislation to include LGBTQ+ elders and close loopholes, the enactment of new federal legislation to protect LGBTQ+ elders, and the setting of judicial precedent regarding these cases are all solutions that must be utilized. The right to age gracefully, peacefully, and with dignity is one that should not be taken from any persons, regardless of sexual orientation.

