

Protecting the Forgotten: Enacting an LGBTQIA+ Long-Term Care Bill of Rights

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This paper examines the need for Congress to enact a statutory Long-Term Care Bill of Rights (BOR) due to gaps in existing state and federal anti-discrimination legislation on the basis of sexual orientation and gender identity in the United States today. The first Long-Term Care BOR was enacted on the municipal level in San Francisco in 2015. It was necessary despite the fact that California has some of the most robust anti-discrimination protections for LGBTQIA+ people in the country. While some states like California prohibit discrimination on the basis of sexual orientation or gender identity in housing, employment, and public accommodations, they fail to address the unique vulnerability of LGBTQIA+ older adults in long-term care facilities. At the federal level, the broadest LGBTQIA+ anti-discrimination protections come from the recent Bostock decision, which reads sexual orientation and gender identity into “sex” for purposes of Title VII. While this was a victory for overall LGBTQIA+ rights, it is limited to employment. Considering that most older adults, especially those in long-term care facilities, are no longer in the workforce, the Bostock decision provided no real protection for this sub-population of the LGBTQIA+ community. President Biden recently passed an executive order in July 2022 that addressed some of these gaps in protection. Yet, this can be easily invalidated by future presidents, and courts may determine that only Congress can create such protections. Unfortunately, several recent studies have uncovered the discrimination, harassment, and abuse LGBTQIA+ older adults face in long-term care facilities. A Long-Term Care BOR would protect LGBTQIA+ older adults from these experiences by defining types of discriminatory behavior, informing residents of their rights, and providing pathways for challenging potential violations. Congress should enact a Long-Term Care BOR because it is a necessary protection for a vulnerable and quickly growing population.

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Introduction

The LGBTQIA+ older adults¹ who are reliant on long-term care services today are of the generation that fought for queer liberation in America.² They lived through the Stonewall Riots, survived the HIV/AIDS epidemic, and saw the legalization of same-sex marriage—all just to face discrimination and harassment in long-term care facilities.³ The stories of LGBTQIA+ older adults in long-term care facilities are heartbreaking and cause for action.⁴ For

¹ “Older adults” refers to those aged fifty and older. See KAREN I. FREDRIKSEN-GOLDSSEN ET AL., *THE AGING AND HEALTH REPORT: DISPARITIES AND RESILIENCE AMONG LESBIAN, GAY, BISEXUAL, AND TRANSGENDER OLDER ADULTS*, at ii (2012), <http://depts.washington.edu/agepride/wordpress/wp-content/uploads/2012/10/Full-report10-25-12.pdf> [<https://perma.cc/6FC9-JSXM>] (using the age of fifty as the threshold age for categorizing “older LGBT people”).

² See *id.* (inferring that because the LGBTQIA+ liberation movement gained momentum in the 1970s, much of LGBTQIA+ older adults experienced their formative years during the liberation movement).

³ The Stonewall Riots occurred in 1969 as a protest against the police violence that the LGBTQIA+ community was facing in New York City and beyond. See generally MARTIN DUBERMAN, *STONEWALL 203–09* (1993) (discussing history of Stonewall through the lives of six individuals). The Riots are considered the catalyst for the LGBTQIA+ liberation movement. See ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 30 (1996) (“[The day of the Riots] continues to be commemorated internationally—most enthusiastically in the United States—as Stonewall Day, a date which marks the constitution of lesbian and gay identities as a political force. Stonewall functions in a symbolic register as a convenient if somewhat spurious marker of an important cultural shift away from assimilationist policies and quietist tactics, a significant if mythological date for the origin of the gay liberation movement.”).

⁴ See generally NAT’L SENIOR CITIZENS L. CTR. ET AL., *LGBT OLDER ADULTS IN LONG-TERM CARE FACILITIES: STORIES FROM THE FIELD* (2011),

example, Vera and Zayda were partners of nearly sixty years when Zayda moved into an assisted living facility due to her Alzheimer's, and they had to hide their decades-long romantic relationship to protect themselves from discrimination.⁵ Their remaining years were spent in fear and loneliness, as they were unable to show their love and affection for each other while in the long-term care facility.⁶ One floor nurse told the story of another resident of a Florida nursing home, who was unable to communicate after a stroke and whose family had decided to prevent her from seeing her partner of over fifty years.⁷ The surviving partner had to beg sympathetic nurses during the night shift to know whether her partner was even still alive, as same-sex partners of residents are often kept in the dark in regards to their partner's health and well-being.⁸ These are the realities of LGBTQIA+ older adults in long-term care facilities across the country.⁹ Despite the gains made in LGBTQIA+ rights over the last several decades, LGBTQIA+ older adults remain vulnerable to discrimination based on sexual orientation and gender identity in long-term care facilities.¹⁰

This paper examines the need to enact a Long-Term Care Bill of Rights (BOR) to address the existing gaps in state and federal anti-discrimination provisions and protect older adults from discrimination on the basis of sexual orientation and gender identity. The first Long-Term Care BOR was enacted on the municipal level in San Francisco in 2015.¹¹ San Francisco saw the need to enact the BOR despite the fact that California has some of the most robust anti-discrimination protections for LGBTQIA+ people in the

https://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf

[<https://perma.cc/K8N9-5J2S>] (detailing first-hand accounts of a variety of issues faced by older adults in long-term care, including the fear of being out, physical and verbal harassment, and refusal to provide basic care).

⁵ *Id.* at 7 (describing that Vera and Zayda pretended to be sisters when Zayda moved into an assisted living facility after their fifty-eight-year-long relationship).

⁶ *Id.* (recalling that Zayda felt "too vulnerable to tell the truth").

⁷ The resident's experiences are not uncommon among LGBTQIA+ long-term care residents, because facilities will often refuse to allow a gay or lesbian resident to receive visits from their same-sex partners. *See id.* at 9, 12 (reporting the stories of married and unmarried couples whose families had decided to separate them from their partners, which is reflected by the eleven percent of survey respondents who reported experiencing visitation restrictions).

⁸ Long-term care facilities are not required to share personal health information of a resident with their same-sex partner, and they often refuse to do so. *See id.* at 10–12.

⁹ *See generally id.* (reporting commonplace mistreatment, including verbal and physical harassment, inside assisted care facilities by staff and other residents).

¹⁰ The period between 1991 and 2015 ushered in five watershed cases that are largely referred to as turning-point moments for the LGBTQIA+ rights movement. The following cases have each contributed significantly to the lengthy legal battles fought by the LGBTQIA+ community: *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See* Ellen Ann Anderson, *Transformative Events in the LGBTQ Rights Movement*, 5 IND. J.L. & SOC. EQUAL. 441, 451–64 (2017) (reviewing each case).

¹¹ S.F., CA., POLICE CODE art. 33, § 3304.1 (2015).

country.¹² This paper argues that LGBTQIA+ advocates across the country should follow San Francisco's lead by implementing Long-Term Care BORs in order to effectively protect the rights and dignity of LGBTQIA+ older adults.

Section II outlines existing statutory and common law protections for LGBTQIA+ older adults in long-term care facilities. This Note undergoes an analysis of current state and federal LGBTQIA+ laws and long-term care regulations in the United States.¹³ It first focuses on the current LGBTQIA+ protections at the state level and the degree to which these state protections greatly vary.¹⁴ Twenty-four states and territories, including California and the District of Columbia, prohibit discrimination on the basis of sexual orientation or gender identity in housing, employment, and public accommodations.¹⁵ Eight states provide some degree of protection,¹⁶ while the other nineteen states provide no state-wide legislative protections for LGBTQIA+ individuals in any contexts.¹⁷

Section II also outlines the current federal LGBTQIA+ protections. At the federal level, there are no comprehensive legislative protections for

¹² See *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Aug. 9, 2023), https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing [<https://perma.cc/PK4S-22DA>] (indicating that California and twenty-two other states have some of the strongest protections for LGBTQIA+ people).

¹³ See generally Nancy J. Knauer, *The LGBTQ Equality Gap and Federalism*, 70 AM. U. L. REV. 1 (2020) (discussing how federalism creates an increasing equality gap for LGBTQIA+ people as states continue to pass legislation targeting their communities).

¹⁴ *Id.*

¹⁵ States with LGBTQIA+ nondiscrimination legislation across housing, employment, and public accommodations are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. MOVEMENT ADVANCEMENT PROJECT, *supra* note 12. The territories include Washington D.C. and the U.S. Virgin Islands. *Id.*

¹⁶ Regarding housing nondiscrimination laws, the state civil rights and human rights commissions of Florida, Kansas, Kentucky, Nebraska, North Dakota, Ohio, and Pennsylvania explicitly interpret existing prohibitions on sex discrimination to include sexual orientation and gender identity, but none of these states have passed their own explicit LGBTQIA+ nondiscrimination legislation. *Id.* Wisconsin prohibits discrimination in housing based on sexual orientation, but not gender identity. *Id.* Regarding public accommodations, the state civil rights and human rights commissions of Florida, Kansas, North Dakota, Ohio, and Pennsylvania have interpreted existing prohibitions on sex discrimination to include sexual orientation and gender identity, but none of these states have yet passed their own LGBTQIA+ nondiscrimination legislation for public accommodations. *Id.* Wisconsin prohibits discrimination in public accommodations based on sexual orientation, but not gender identity. *Id.*

¹⁷ MOVEMENT ADVANCEMENT PROJECT, *supra* note 12 (listing the following states without any LGBTQIA+ protections: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wyoming).

LGBTQIA+ people.¹⁸ Even the newly enacted Respect for Marriage Act¹⁹ does not provide comprehensive protections.²⁰ However, the recent U.S. Supreme Court decision in *Bostock v. Clayton County*²¹ held that the term “sex” for purposes of Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity.²² While this was a victory for overall LGBTQIA+ rights, Title VII only provides protection in the context of employment,²³ and thus rarely impacts older and retired adults.²⁴ Furthermore, President Joseph Biden signed an executive order in July 2022, entitled “Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals.”²⁵ Section 10 addresses the specific needs of LGBTQIA+ older adults by ordering the Secretary of Health and Human Services (HHS) to publish a “Bill of Rights for LGBTQI+ Older Adults.”²⁶ However, in addition to the HHS failing to publish a BOR to date, the Executive Order is limited in its ability to meaningfully impact the lives of LGBTQIA+ older adults, as executive orders can be easily revoked by future presidents, or even invalidated by Congress.²⁷ Therefore, a legislatively-

¹⁸ See Gilbert Gonzalez & Kyle. A. Gavulic, *The Equality Act is Needed to Advance Health Equity for Lesbian, Gay, Bisexual, and Transgender Populations*, 110 AM. J. PUB. HEALTH 801, 801 (2020) (discussing the critical importance of Congress passing the Equality Act, which would provide federal LGBTQIA+ anti-discrimination protections).

¹⁹ Pub. L. No. 117–228, 136 Stat. 2305 (2022).

²⁰ See Ryan Thomas, *What is the Respect for Marriage Act?*, PBS NEWSHOUR (Nov. 17, 2022, 3:41 PM), <https://www.pbs.org/newshour/politics/same-sex-marriage-bill-clears-key-hurdle-in-senate-heres-what-it-does-and-doesnt-do> [<https://perma.cc/C5JB-DCTJ>] (“The Respect for Marriage Act does not codify same-sex marriage protections. . . . [T]he bill will not require nonprofit religious organizations to provide ‘any services, facilities, or goods for the solemnization or celebration of a marriage.’ It further states that the act will not deny or alter any tax-exemption eligibility, such as that held by churches and universities that may decline to recognize same-sex marriages; and that it will not require the federal government to recognize polygamous marriages.”).

²¹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

²² *Id.* at 1737; see also CHRISTY MALLORY, LUIS A. VASQUEZ & CELIA MEREDITH, LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 4 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf> [<https://perma.cc/26DT-4B7C>] (discussing the how the *Bostock* decision impacts state and federal LGBTQIA+ protections).

²³ The *Bostock* decision has also impacted the interpretation of “sex” in Title VII and the Fair Housing Act. MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 4.

²⁴ Cf. Jessica Z. Rothenberg & Daniel S. Gardner, *Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967*, 38 J. SOCIO. & SOC. WELFARE 9, 9–10 (2011) (discussing that older workers are increasingly pushing off their retirement plans due to ongoing economic stress).

²⁵ Exec. Order No. 14075, 87 Fed. Reg. 37,189 (June 15, 2022); see also Michael D. Shear, *Biden Signs Measure to Protect L.G.B.T.Q. Rights, Citing ‘Hateful Attacks’*, N.Y. Times (June 15, 2022), <https://www.nytimes.com/2022/06/15/us/politics/biden-lgbtq-rights-executive-order.html> [<https://perma.cc/K7E6-ZH8R>] (explaining that the Executive Order broadly provides resources and extending protections to LGBTQIA+ communities).

²⁶ Exec. Order No. 14075, § 10(b), 87 Fed. Reg. 37,189, 37,193 (June 15, 2022).

²⁷ CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION 15 (2021) (“[E]xecutive orders are less persistent than other acts that have the force and effect of law, such as

enacted LGBTQIA+ Bill of Rights is needed to fill this gap in federal protections for LGBTQIA+ older adults and to protect this community from discrimination in long-term care facilities.²⁸

Section II concludes with a discussion of existing long-term care regulations at the state and federal levels. While treatment of residents in long-term care facilities is fairly regulated by state and federal government entities, such as the Federal Code of Regulations,²⁹ LGBTQIA+ older adults remain vulnerable to discrimination, harassment, and abuse based on their LGBTQIA+ identities.³⁰

Section III addresses the ways that LGBTQIA+ older adults in long-term care facilities are not adequately protected from discrimination and harassment through existing laws. The section begins with a presentation of the gaps in LGBTQIA+ and long-term care protections across jurisdictional levels. Even in states with the most expansive LGBTQIA+ protections, the unique needs of LGBTQIA+ older adults are typically ignored.³¹ Section III also considers why LGBTQIA+ older adults are overrepresented in long-term care facilities despite the over-arching apprehension towards accessing care due to fear of mistreatment.³² Finally, Section III presents quantitative and anecdotal evidence to show that these apprehensions are warranted. LGBTQIA+ older-adults are experiencing discrimination, harassment, and abuse based on their gender identity, gender expression, and/or sexual orientation while living in long-term care facilities every day across the country.³³

federal statutes that can be altered only through later-in-time enactments, because a sitting President can revoke or modify his or a prior President's executive order by issuing a new executive order. In other words, if the current President disagrees with an existing executive order for any reason, he normally may revoke or modify that order without delay and without consulting with the other branches of government.”).

²⁸ See S.F., CA., POLICE CODE art. 33, § 3304.1 (2015) (providing model language as the first long-term care BOR passed in San Francisco).

²⁹ See, e.g., 42 C.F.R. § 483.1(a)(i) (2023) (“Skilled nursing facilities participating in Medicare must meet certain specified requirements.”).

³⁰ See generally *supra* NAT’L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4 (detailing first-hand accounts of isolation and physical and verbal harassment inside facilities).

³¹ *Id.*; see also Ames Simmons, *Transgender People and Dementia Care*, S.F. Bay Times (May 4, 2023), <https://sfbaytimes.com/transgender-people-and-dementia-care/> [<https://perma.cc/5YKL-RDXF>] (identifying that dementia may impact gender identity and that transgender patients may require certain gender-affirming medical care in old age).

³² See Laura Williamson, *Older LGBTQ Adults Face Unique Challenges in Giving and Receiving Care*, AM. HEART ASS’N (Jan. 25, 2023), <https://www.heart.org/en/news/2023/01/25/older-lgbtq-adults-face-unique-challenges-in-giving-and-receiving-care> [<https://perma.cc/6XLN-KVU8>] (explaining that many LGBTQIA+ couples do not have children, so many of these people do not have any family assistance in old age, which causes the LGBTQIA+ community to rely heavily on long-term care facilities).

³³ See Joy Jacobson, *LGBT Older Adults in Long-Term Care*, 117 AM. J. NURSING 18, 18 (2017) (“A third of this population have incomes at or below 200% of the federal poverty level, compared with just a quarter of non-LGBT elders. Transgender people report discrimination in health care,

Section IV argues for the enactment of a Long-Term Care BOR in order to address the gaps in current protections and improve the lives of LGBTQIA+ older adults—specifically members of this community living in long-term care facilities. Based on existing Long-Term Care BORs and additional recommendations, Section IV systematically outlines the different sections of the BOR that advocates should include when drafting this piece of legislation at the municipal, state, or federal level.

Section V highlights the challenges that advocates face in passing a Long-Term Care BOR at the federal level due to Congress' current political gridlock.³⁴ Yet, advocates at the municipal and state levels, especially in democratic-majority jurisdictions, should continue to push for the enactment of a Long-Term Care BOR. Section V presents administrative options for implementing a Long-Term Care BOR where legislation enactment is unlikely. Finally, Section V points to the practical challenges of enforcing a Long-Term Care BOR and includes ways to mitigate those challenges by ensuring that LGBTQIA+ residents are aware of their rights and have access to resources, such as information on how to pursue legal action.

I. Current Law

Statutory protections against discrimination for the LGBTQIA+ community are a relatively recent development in the United States.³⁵ Well into the twentieth century, states across the country continued to enforce anti-LGBTQIA+ legislation criminalizing same-sex relationships.³⁶ As late as 1986, the Supreme Court upheld anti-sodomy laws in *Bowers v. Hardwick*,³⁷

and in one survey two-thirds reported fearing they wouldn't be able to access care as they age. As gay and bisexual men with HIV live longer, they do not always find geriatrics clinicians with expertise in treating the condition. In a survey of black lesbians attending a symposium on breast cancer, 74% reported being depressed, 42% had poor nutrition, and 21% smoked—all increasing breast cancer risk. Only 18% of bisexuals over age 45 come out to the people important to them, and a third of older bisexuals report moderate to severe depression.”).

³⁴ See generally CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 1 (2022) (reporting that “In the House of Representatives, there are 222 Democrats . . . , 215 Republicans . . . , and 4 vacant seats. The Senate has 50 Republicans, 47 Democrats, and 3 Independents, who all caucus with the Democrats.”); SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003) (discussing how the United States legislative branches became so politically divided, and how that has impacted the state of America today).

³⁵ See William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 91 (2007) (explaining that the first LGBTQIA+ anti-discrimination law passed at a state level was in Wisconsin in 1981).

³⁶ See AM. C.L. UNION, *Why Sodomy Laws Matter*, (June 26, 2003) <https://www.aclu.org/other/why-sodomy-laws-matter> [<https://perma.cc/4HZE-L2D4>] (discussing the history of discrimination against the LGBTQIA+ community through the use of sodomy laws).

³⁷ 478 U.S. 186 (1986).

finding that there is no fundamental liberty to engage in same-sex relations.³⁸ It was not until 2003 in *Lawrence v. Texas*³⁹ that the U.S. Supreme Court overturned *Bowers*, thus invalidating all anti-sodomy laws.⁴⁰ For decades, the continued existence of anti-LGBTQIA+ laws and the precedent set by *Bowers* justified for denying LGBTQIA+ rights.⁴¹ These anti-LGBTQIA+ legislation represented the majority-held view that members of the LGBTQIA+ community were a threat to public safety and American moral values.⁴² While legislators and judges continued to restrict their constitutional rights, LGBTQIA+ Americans faced intense violence and harassment in the streets, especially from police.⁴³ While the largest movement for LGBTQIA+ rights began in 1969 with the Stonewall Riots, true systemic changes were enacted slowly over decades with those small progressions continuously threatened by anti-LGBTQIA+ legislators and politicians.⁴⁴

Yet, as members of the LGBTQIA+ community gained more visibility, legislators, justices, and the American public at large slowly began to move away from antiquated views that demonized and pathologized gay, lesbian, and transgender individuals.⁴⁵ The late twentieth and early twenty-first century saw the first real legal protections for LGBTQIA+ Americans.⁴⁶ In 2003, the Supreme Court overturned *Bowers*,⁴⁷ and in 2015, the Court struck

³⁸ *Id.* at 195.

³⁹ 539 U.S. 558 (2003).

⁴⁰ *Id.* at 578.

⁴¹ See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“The constitutional amendment before us here is not the manifestation of a ‘bare . . . desire to harm’ homosexuals, but rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of laws.”).

⁴² See generally RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981) (describing history of the deletion of homosexuality from the Diagnostic and Statistical Manual III, which classified homosexuality as a mental illness until 1973).

⁴³ Timothy Stewart-Winter, *Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States*, 102 J. AM. HISTORY 61, 63–66 (2015) (describing how the gay liberation movement fought to end police brutality because local police targeted queer individuals in bars and frequently performed police raids on them).

⁴⁴ See FLA. STAT. ANN. § 1001.42 (2022) (restricting the ability of educators to discuss topics related to sexual orientation and gender identity in classrooms); see also Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1852–56 (2022) (explaining that Florida's “Don't Say Gay” bill, HB 1557, represents a broader attempt by Republican legislators to pull-back LGBTQIA+ rights in 2022).

⁴⁵ See *LGBTQ+ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/WP2D-XJZZ>] (showing that between 1997–2021, the majority of Americans have moved towards general acceptance of LGBTQIA+ individuals).

⁴⁶ See Turner, *supra* note 35, at 91–92 (telling the story of how Wisconsin's prohibition of discrimination based on sexual-orientation in 1981 is nestled as an important milestone in the history for the gay liberation movement).

⁴⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

down state marriage prohibitions as unconstitutional and mandated national marriage equality for same-sex couples in *Obergefell v. Hodges*.⁴⁸ At the same time the courts were making progress, several states began enacting their first LGBTQIA+ anti-discrimination provisions in public accommodations, housing, and employment.⁴⁹

To have a comprehensive understanding of the current LGBTQIA+ protections in America, one must explore the complex relationship between state and federal LGBTQIA+ anti-discrimination legislation, as well as relevant long-term care regulations. As such, Section I proceeds in three parts. The first part outlines the various levels of LGBTQIA+ protections among states. This includes an analysis of what, if any, spaces in each state are protected against discrimination based on LGBTQIA+ identity. The second part analyzes the current federal LGBTQIA+ anti-discrimination protections in the United States. The third part discusses the limited protections for LGBTQIA+ older adults provided by state and federal long-term care regulations.

A. *State LGBTQIA+ Protections*

The first LGBTQIA+ anti-discrimination law in the country was passed at the state level in Wisconsin in 1981 and prohibited discrimination based on sexual orientation in housing, public accommodations, and employment.⁵⁰ In the following years, thirty-one states, the District of Columbia, and the U.S. Virgin Islands have followed.⁵¹ Yet, LGBTQIA+ anti-discrimination legislation at the state level is complicated, and it is not nearly as expansive as one may assume.⁵² When considering any kind of civil rights anti-discrimination protections, state legislation often targets only specific institutions.⁵³ For instance, public accommodations, housing, education, and employment are the most common spaces in which some states have explicit LGBTQIA+ anti-discrimination legislation.⁵⁴ Several states, such as California, have enacted legislation that protects individuals from discrimination on the basis of sexual orientation and gender identity in

⁴⁸ 576 U.S. 644, 681 (2015).

⁴⁹ MOVEMENT ADVANCEMENT PROJECT, *supra* note 12 (outlining levels of LGBTQIA+ protections across states within housing and public accommodations).

⁵⁰ Turner, *supra* note 35, at 91.

⁵¹ MOVEMENT ADVANCEMENT PROJECT, *supra* note 12.

⁵² *See id.* (explaining that some states offer explicit protections, while others have state commissions interpreting protections in the law).

⁵³ *See id.* (indicating that some states may only protect sexual orientation or gender identity, but not both, and some states will protect the LGBTQIA+ community in only the house, public accommodation, or credit sectors).

⁵⁴ *Id.*

employment, housing, and public accommodations.⁵⁵ States with this level of protection for LGBTQIA+ individuals are among those with the most robust LGBTQIA+ anti-discrimination legislation.⁵⁶ Other states, however, protect against discrimination in housing, but not in public accommodation.⁵⁷ Some, such as in Pennsylvania, have no explicit LGBTQIA+ anti-discrimination protections across any of these spaces, but their human rights commissions have stated that the state will comply with judicial rulings, such as the *Bostock* decision.⁵⁸ The remaining nineteen states have no explicit or implicit protections for LGBTQIA+ individuals against discrimination on the basis of sexual orientation or gender identity in any of these contexts.⁵⁹ When taking a deeper look at LGBTQIA+ anti-discrimination protections in various states, it is clear there are varying levels of legislative protections—anywhere from robust to non-existent.⁶⁰

B. Federal LGBTQIA+ Protections

Perhaps the broadest LGBTQIA+ anti-discrimination protections that exist today come from Title VII of the Civil Rights Act and the Court's recent decision in *Bostock v. Clayton County*.⁶¹ Title VII protects individuals from employment discrimination based on race, color, religion, sex, and national origin.⁶² In 2020, the Supreme Court held in *Bostock* that “sex” discrimination also includes discrimination based on sexual orientation and gender identity.⁶³ *Bostock* was a major win for the LGBTQIA+ community because the holding is the only existing federal case that explicitly protects individuals from discrimination based on sexual orientation and gender identity.⁶⁴ Prior to this decision, there were no federal legislative provisions

⁵⁵ HUM. RTS. COMM'N FOUND. & EQUAL. FED'N INST., 2020 STATE EQUALITY INDEX (2021) <https://reports.hrc.org/2020-state-equality-index> [https://perma.cc/PYK3-B2CV].

⁵⁶ *See id.* (indicating that California has some of the most protections for LGBTQIA+ across all public and private sectors).

⁵⁷ *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 12 (listing Utah, for example, as a state that protects against housing discrimination, but not discrimination in public accommodations).

⁵⁸ *Id.*

⁵⁹ *Id.* (listing the following states without any LGBTQIA+ protections: Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wyoming).

⁶⁰ *See* HUM. RTS. COMM'N FOUND. & EQUAL. FED'N INST., *supra* note 55 (providing an in-depth look into which states have many or no protections for LGBTQIA+ individuals).

⁶¹ 140 S. Ct. 1731, 1754 (2020) (prohibiting an employer from firing an individual merely because the employee is gay or transgender under the Civil Rights Act).

⁶² 47 U.S.C. § 2000e-2 (1964).

⁶³ *Bostock*, 140 S. Ct. at 1754.

⁶⁴ *Id.*; *see also* MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 1 (expressing that the *Bostock* decision created the potential to increase state protections for millions of LGBTQIA+ Americans); Press Release, U.S. Dep't of Hous. & Dev., HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity (Feb. 11, 2021),

or judicial rulings which explicitly protected the LGBTQIA+ community in any institutional spaces.⁶⁵ *Bostock*'s impact extends beyond just employment discrimination at the federal level.⁶⁶

For instance, the Fair Housing Act of 1968 protects individuals from discrimination on the basis of race, color, national origin, religion, sex, familial status, and disability.⁶⁷ While the Act does not explicitly include sexual orientation or gender identity, the United States Department of Housing and Urban Development (HUD) recently announced that federal housing protections include "sex" in concert with *Bostock*.⁶⁸ This policy means that instances of discrimination on the basis of sexual orientation or gender identity in the context of housing will be fully investigated and available legal actions will be taken.⁶⁹

LGBTQIA+ discrimination protections in education have swayed dramatically over the last several years due to changes in administrations.⁷⁰ Although there is no anti-discrimination legislation for LGBTQIA+ students, administrations have interpreted existing law to expand protections to include sexual orientation and gender identity, like in situations of transgender students using a gender-affirming bathroom.⁷¹ During President Barack Obama's administration, the United States Department of Education released a "Dear Colleagues" letter⁷² which stated that Title IX, which prohibits sex-based discrimination in educational settings, would protect transgender students in all public schools against harassment and

<https://archives.hud.gov/news/2021/pr21-021.cfm> [<https://perma.cc/4AE6-DPMB>] [hereinafter HUD Press Release] (applying the *Bostock* decision to the Fair Housing Act and applying regulations to state and local jurisdictions that receive federal funding).

⁶⁵ See Katy Steinmetz, *Why Federal Laws Don't Explicitly Ban Discrimination Against LGBT Americans*, TIME (Mar. 21, 2019, 7:36 PM), <https://time.com/5554531/equality-act-lgbt-rights-trump/> [<https://perma.cc/KRC2-3CZT>] (explaining that the first attempt to pass a federal LGBTQIA+ anti-discrimination bill occurred in 1974 with the Equality Act, but it was met with opposition and did not pass).

⁶⁶ MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 1 ("While the case directly addresses discrimination within the employment context, the reasoning adopted by the Court has implications for civil rights law that prohibit discrimination in other settings.").

⁶⁷ 42 U.S.C. § 3631 (1968).

⁶⁸ HUD Press Release, *supra* note 64.

⁶⁹ *Id.* ("HUD will accept and investigate all jurisdictional complaints of sex discrimination, including discrimination because of gender identity or sexual orientation, and enforce the Fair Housing Act where it finds such discrimination occurred.").

⁷⁰ Knauer, *supra* note 13, at 51 (explaining that although LGBTQIA+ advocates made great strides during the Obama administration, "because these gains were not statutory, and the majority were not even regulatory, it was relatively easy for the Trump administration to reverse many of these Obama-era advancements").

⁷¹ *Id.* at 51–52.

⁷² For an explanation of "Dear Colleague" letters, see *OSEP Policy Documents*, U.S. DEP'T OF EDUC., (Aug. 5, 2020), <https://www.ed.gov/policy/speced/guid/idea/memosdcrltr/index.html#pl> [<https://perma.cc/PJ38-ABCF>] (discussing policy letters regarding implementation of Individuals with Disabilities Education Act).

discrimination.⁷³ In 2017, President Donald Trump's administration swiftly withdrew this guidance, leaving all LGBTQIA+ students completely vulnerable to discrimination in schools.⁷⁴

Recently, President Biden's administration swiftly attempted to rebuild the LGBTQIA+ protections that were under attack during President Trump's time in office; President Biden signed an executive order in June 2022 outlining specific actions to be taken to address the needs of LGBTQIA+ individuals across housing, health, education, and older adult care.⁷⁵ Section 10 requires the Secretary of HHS to "address discrimination, social isolation, and health disparities faced by LGBTQI+ older adults."⁷⁶ The Secretary of HHS must create "guidance on non-discrimination protections" on the basis of one's LGBTQIA+ identity in long-term care settings.⁷⁷ This also includes the publication of a "Bill of Rights for LGBTQI+ Older Adults."⁷⁸ While the executive order was certainly an exciting achievement for advocates fighting for the rights of LGBTQIA+ older adults, the danger of relying too heavily on executive orders such as these cannot be overemphasized.⁷⁹ Executive orders can be overturned or revoked by another president's administration or by Congress.⁸⁰ Briefly reviewing the recent history of presidential action in regard to LGBTQIA+ rights highlights the lack of stability of executive orders.⁸¹

President Biden has reinstated the Title IX interpretation under the Obama Administration in two executive orders,⁸² which are now guaranteed

⁷³ Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., and Vanita Gupta, Principal Deputy Assistant Att'y Gen. for C.R., U.S. Dep't of Just. (May 13, 2016) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/76FG-VJ5S>].

⁷⁴ Knauer, *supra* note 13, at 52; Dear Colleague Letter on Transgender Students from Sandra Battle, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., and T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Just. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/T4NJ-9HNN>] (declaring that the previous administration's letter does not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor [does it] undergo any formal public process.").

⁷⁵ Exec. Order No. 14075, 87 Fed. Reg. 37,189 (June 15, 2022).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See CONG. RSCH. SERV., *supra* note 27, at 15 (explaining that an executive order is not immune from modifications or revocations by succeeding presidents or by Congress).

⁸⁰ *Id.*

⁸¹ See *supra* text accompanying note 74.

⁸² See Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (providing equal treatment to all people under the law, regardless of their gender identity and sexual orientation); Exec. Order No. 14021, 86 Fed. Reg. 13,803 (Mar. 8, 2021) (providing an educational environment free of discrimination on the basis of sex).

by the *Bostock* decision's legally binding precedent.⁸³ Now, just as with the Fair Housing Act, the term "sex" in Title IX will be interpreted to include sexual orientation and gender identity.⁸⁴ The impact the *Bostock* decision has on the long-term protections for LGBTQIA+ students is significant, as recent history has shown that mere executive interpretations can be easily redacted.⁸⁵ However, it is vital to note that one of President Biden's executive orders is limited only to education, and thus only protects students and only in educational settings.⁸⁶

In addition to these current increases in federal protections based on the *Bostock* decision, some state protections may be increased across employment, housing, education, and public accommodations.⁸⁷ In 2020, when there were twenty-seven states that prohibited employment discrimination based on sex but not based on sexual orientation or gender identity, as many as 3.6 million LGBTQIA+ Americans could have gained protections from employment discrimination based on sexual orientation and gender identity if state statutes were consistent with *Bostock*.⁸⁸ Similarly, if state housing statutes were consistent with *Bostock*, 5.2 million LGBTQIA+ adults would have been protected against housing discrimination across the twenty-six states with sex-based, housing, anti-discrimination laws in 2020.⁸⁹ In educational spaces, there would also have been a fifty-four percent increase in protection among fourteen states with sex-based anti-discrimination provisions in education.⁹⁰

Despite the *Bostock* decision marking a major moment for LGBTQIA+ rights, there is no comprehensive LGBTQIA+ anti-discrimination legislation at the federal level.⁹¹ Currently, LGBTQIA+ advocates are pushing for the passage of the Equality Act, which would amend the Civil Rights Act of

⁸³ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (prohibiting an employer from firing an individual merely because the employee is gay or transgender under the Civil Rights Act).

⁸⁴ MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 4 ("Given the unequivocal result in *Bostock*—that the plain language of a statute prohibiting sex discrimination against individuals by definition bars sexual orientation and gender identity discrimination as well—the same reasoning seems likely to prevail with regard to the interpretation of other laws.")

⁸⁵ Knauer, *supra* note 13, at 52.

⁸⁶ See Exec. Order No. 14021, 86 Fed. Reg. 13,803 (applying only to educational spaces); see also MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 4 (explaining why state laws remain an important source of protection for LGBTQIA+ people because of the *Bostock*'s limited scope).

⁸⁷ See MALLORY, VASQUEZ & MEREDITH, *supra* note 22, at 4.

⁸⁸ *Id.* at 1.

⁸⁹ *Id.* at 1–2.

⁹⁰ *Id.* at 2

⁹¹ For a brief discussion about how the Respect for Marriage Act of 2022 does not comprehensively provide enough protections for LGBTQIA+ couples, see *supra* text accompanying note 20. Before the Respect for Marriage Act, the only other federal legislation protecting LGBTQIA+ individuals was The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which enables for the investigation and prosecution of hate crimes, not proactively prohibiting discrimination. 18 U.S.C. § 249 (2010).

1964, the Fair Housing Act, the Equal Credit Opportunity Act, and the Jury Selection and Services Acts to explicitly include sexual orientation and gender identity.⁹² Although the U.S. House of Representatives passed the Equality Act in February 2021, the Senate failed to pass it, which was likely due to the partisan divide in Congress.⁹³ The Act was reintroduced in Congress in 2023⁹⁴ because it is a necessary legal protection, in addition to *Bostock*, to create clarity and finality that a mere judicial holding could not provide.⁹⁵

II. Long-Term Care Protections

A Long-Term Care Bill of Rights exists at the intersection of LGBTQIA+ and long-term care laws. Thus, it is equally important to explore how, if at all, current long-term care law impacts LGBTQIA+ older adults.⁹⁶ There are several pieces of federal legislation that regulate long-term care facilities.⁹⁷ For instance, the Requirements for State and Long Term Care Facilities section of the Code of Federal Regulation covers all requirements for any federally funded long-term care facility.⁹⁸ Sections range from emergency preparedness⁹⁹ to food and nutrition services,¹⁰⁰ but the most relevant section for residents in long-term care facilities is the section entitled “Resident Rights.”¹⁰¹ This section was originally enacted to protect older adults from abuse, neglect, and harassment in long-term care facilities by outlining the legal guarantees that all residents have in any long-term care facility, whether or not it is federally funded.¹⁰² While the guidelines are

⁹² *The Equality Act*, HUM. RTS CAMPAIGN (June 22, 2023), <https://www.hrc.org/resources/equality> [<https://perma.cc/AKL4-2N8V>].

⁹³ See CONG. RSCH. SERV., *supra* note 34, at 1 (explaining the make-up of the Senate by party); Daniella Diaz & Annie Grayer, *House Passes Equality Act Aimed at Ending Discrimination Based on Sexual Orientation and Gender Identity*, CNN (Mar. 16, 2021), <https://www.cnn.com/2021/02/25/politics/equality-act-passes-house/index.html> [<https://perma.cc/ACC7-QAHU>].

⁹⁴ HUM. RTS CAMPAIGN, *supra* note 92.

⁹⁵ See generally Paul H. Rubin, *Common Law and Statute Law*, 11 J. L. STUDIES 205 (1982) (discussing the distinctions between common law and statutory law).

⁹⁶ See John T. White & Tracey L. Gendron, *LGBT Elders in Nursing Homes, Long-Term Care Facilities, and Residential Communities*, in HANDBOOK OF LGBT ELDER: AN INTERDISCIPLINARY APPROACH TO PRINCIPLES, PRACTICES, AND POLICIES 417, 419 (Debra A. Harley & Pamela B. Teaster eds., 2016) (explaining that long-term care touches all types of long-term care, which includes independent living, in-home care, senior centers, assisted living, skilled nursing, and hospice).

⁹⁷ See, e.g., Older Americans Act, 42 U.S.C. §§ 3001–3058ff (1965).

⁹⁸ 42 C.F.R. § 483.01 (1989) (providing the statutory basis and scope of requirements).

⁹⁹ *Id.* § 483.73.

¹⁰⁰ *Id.* § 483.60.

¹⁰¹ *Id.* § 483.10.

¹⁰² *Id.* § 483.10(b) (providing all residents in a facility with rights without regards to what type of facility they are in).

extensive, the section's overarching theme is that residents should be treated with respect and dignity and are to be free from abuse and neglect, which is achieved by residents having a right to be fully informed of their medical treatment, to have access to any visitors, and to not be physically or chemically restrained by long-term care staff.¹⁰³

These types of protections are necessary because long-term care residents experience high risks of mistreatment in these facilities.¹⁰⁴ However, even though these protections are far-reaching and detailed, the Code of Federal Regulations does little to protect LGBTQIA+ residents specifically.¹⁰⁵ The Regulations do not mention abuse, harassment, neglect, or discrimination based on sexual orientation or gender identity except for one place; long-term care facilities shall not restrict visitors based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability.¹⁰⁶ However, LGBTQIA+ older adults are not included throughout the Resident Rights section, nor is there any enforcement mechanism which would ensure that long-term care facilities are in compliance with the regulations.¹⁰⁷ LGBTQIA+ older adults could be protected against general abuse and neglect, but they are left completely unprotected from abuse, neglect, harassment, and discrimination based on sexual orientation and gender identity.¹⁰⁸

Another federal legislation regulates long-term care facilities—the Older Americans Act of 1965.¹⁰⁹ The Older Americans Act addressed the lack of existing social services in place to support older adults.¹¹⁰ One of the strongest provisions of the Older Americans Act is the federal Long-Term Care Ombudsman Program, which requires that all long-term care facilities have an ombudsman on site to act as an advocate for residents.¹¹¹ Working

¹⁰³ *Id.* § 483.10(e)–(h).

¹⁰⁴ See Lori Post et al., *Elder Abuse in Long-Term Care: Types, Patterns, and Risk Factors*, 32 RSCH. ON AGING 323, 324 (2010) (explaining that in 1996, 689,000 older Americans in long-term care settings experienced some kind of physical, emotional, or financial abuse).

¹⁰⁵ 42 C.F.R §§ 483.01–483.95 (1989) (failing to specifically protect LGBTQIA+ in regulations, even if they may generally provide some general rights); see generally NAT'L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4 (providing stories from people in the long-term care field who acknowledged the need for specific LGBTQIA+ protections); see also Joy Jacobson, *LGBT Older Adults in Long-Term Care*, 117 AM. J. NURSING 18–20 (2017) (discussing the realities of LGBTQIA+ older adults in American long-term care facilities).

¹⁰⁶ 42 C.F.R § 483.01(f)(4)(vi)(C).

¹⁰⁷ See *id.* §§ 483.01–483.95 (failing to specifically protect LGBTQIA+ in regulations, even if they may generally provide some general rights).

¹⁰⁸ See *id.*

¹⁰⁹ See Older Americans Act, 42 U.S.C. §§ 3001–3058ff (1965).

¹¹⁰ CONG. RSCH. SERV., R43414, OLDER AMERICANS ACT: OVERVIEW AND FUNDING 1 (2023) (explaining that the Act provides a wide range of programs for people who are ages sixty and older).

¹¹¹ *Long-Term Care Ombudsman Program*, ADMIN. FOR CMTY. LIVING (July 5, 2023), <https://acl.gov/programs/Protecting-Rights-and-Preventing-Abuse/Long-term-Care-Ombudsman-Program> [https://perma.cc/D2G8-WQET].

as liaisons between residents and long-term care facility staff, ombudsmen solve resident problems and inform residents of their rights.¹¹² Unfortunately, states are not required to train ombudsmen on LGBTQIA+ cultural competency, thus are often ill-equipped to handle issues that arise due to a resident's LGBTQIA+ identity.¹¹³ Without proper training, health care providers may overlook relevant health risks among their LGBTQIA+ patients or treat their patients with hostility or unintentionally discriminate due to a lack of understanding or cultural competency.¹¹⁴ Although the Ombudsman Program represents the federal government's desire to protect older Americans, it does not have the inability to meet the unique challenges of LGBTQIA+ residents of long-term care facilities.

At the state level, most states have some long-term care facility legislation or policy regulations.¹¹⁵ Of course, the Older Americans Act requires all states to have an Ombudsmen Program, but many states have enacted their own regulations beyond the Code of Federal Regulations.¹¹⁶ While these regulations vary widely in depth and detail, they all share one similarity: none of them include specific protections for LGBTQIA+ residents.¹¹⁷

III. Reasons for Change

The first part of Section III discusses the considerable gaps in protections for LGBTQIA+ older adults, even in the most LGBTQIA-friendly states. The second part addresses the overrepresentation of LGBTQIA+ older adults in long-term care facilities as a result of generational stigmatization and marginalization. Section III concludes with a deep dive into the disheartening realities of LGBTQIA+ older adults in long-term care facilities.

¹¹² *Id.*

¹¹³ *See generally id.* (failing to list requirements of training and cultural competency).

¹¹⁴ *See generally* Bethany Rhoten et al., *Impact of an LGBTQ Cultural Competence Training Program for Providers on Knowledge, Attitudes, Self-Efficacy, and Intentions*, 69 J. HOMOSEXUALITY 1030 (2022) (finding that providing LGBTQIA+ cultural competency training to healthcare providers positively impacted self-efficacy and intention).

¹¹⁵ *See e.g.* FLA. STAT. ANN. §§ 400.0060–400.053 (2023) (regulating nursing homes, home health services, and healthcare facilities through an ombudsman program).

¹¹⁶ *See generally* BARBARA COLEMAN, WENDY FOX-GRAGE & DONNA FOLKEMER, STATE-LONG TERM CARE: RECENT DEVELOPMENTS AND POLICY DIRECTIONS (2002) (discussing each state's long-term care regulations).

¹¹⁷ *See id.* (excluding specific regulations for or considerations of LGBTQIA+ residents).

A. Gaps in Current Protections

LGBTQIA+ older adults exist at the specific intersection of LGBTQIA+ experiences and long-term care rights.¹¹⁸ This population faces unique challenges that non-LGBTQIA+ older adults and younger LGBTQIA+ people cannot understand on account of homophobia and ageism respectively.¹¹⁹ Therefore, it is vital that legal protections and regulations are specifically tailored to these experiences to protect the growing amount of LGBTQIA+ older adults¹²⁰ from the discrimination, harassment, and abuse that they currently face on a daily basis in long-term care facilities.

As previously discussed, while there are varying levels of state and federal LGBTQIA+ and long-term care protections, there is yet to be a comprehensive piece of legislation that addresses the specific needs of LGBTQIA+ older adults in long-term care facilities.¹²¹ At the state level, even among the states that have at least some LGBTQIA+ anti-discrimination provisions, such protections are limited to spaces where there are rarely any LGBTQIA+ older people.¹²² Due to limited physical and mental abilities, people in long-term care facilities often cannot access public accommodations, independent housing, or employment.¹²³ Thus, while LGBTQIA+ younger people may be protected to a certain extent in these states, LGBTQIA+ older adults are essentially completely unprotected.¹²⁴

At the federal level, despite the *Bostock* decision providing the most expansive LGBTQIA+ protections to date, the holding has yet to reach

¹¹⁸ See generally Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1 (2009) (discussing how these older adults face specific challenges because of homophobia and ageism).

¹¹⁹ See *id.*; see also *On Intersectionality: Essential Writings*, UNIVERSITÉ LAVAL, <https://institutedi2.ulaval.ca/centre-ressources/on-intersectionality-essential-writings/> [<https://perma.cc/W32C-BWQB>] (explaining how Kimberlé Crenshaw coined the term “intersectionality,” which “speak[s] to the multiple social forces, social identities, and ideological instruments through which power and disadvantage are expressed and legitimized”).

¹²⁰ See generally Katherine Fasullo et al., *LGBTQ Older Adults in Long-Term Care Settings: An Integrative Review to Inform Best Practices*, 45 CLINICAL GERONTOLOGY 1087 (2021) (reporting that by 2050, there will be up to two billion older adults—roughly seventeen percent of the world population).

¹²¹ While there is no federal legislation protecting long-term care residents from mistreatment based on LGBTQIA+ identity, there are a handful of states and municipalities with state and local protections. See S.F., CA., POLICE CODE art. 33, § 3304.1 (2015); N.J. STAT. ANN. § 26:2H-12.102 (2021).

¹²² MOVEMENT ADVANCEMENT PROJECT, *supra* note 12.

¹²³ See ROSALIE A. KANE, ROBERT L. KANE & RICHARD C. LADD, *THE HEART OF LONG-TERM CARE* 3 (1998) (explaining that needing additional assistance to care is a major reason why older adults enter long-term care facilities).

¹²⁴ Cf. S.F., CA., POLICE CODE art. 33, § 3304.1 (2015) (providing LGBTQIA+ residents in San Francisco with protections in long-term care facilities); N.J. STAT. ANN. § 26:2H-12.102 (2021) (providing LGBTQIA+ residents in New Jersey with protections in long-term care facilities).

beyond employment, housing, and education.¹²⁵ Again, these are not the spaces in which LGBTQIA+ older adults are accessing resources, and they are certainly not where LGBTQIA+ older adults are experiencing discrimination.¹²⁶ Furthermore, while the federal government has developed more social welfare programs in order to meet the needs of the continuously growing older adult population,¹²⁷ these safety net programs and laws fail to provide equal protections for LGBTQIA+ older adults specifically.¹²⁸ LGBTQIA+ older adults are often ineligible for these social welfare programs because they are founded on the presumption of marriage and do not recognize families of choice.¹²⁹ Similarly, while the LGBTQIA+ executive order signed by President Biden in June 2022 attempts to fill some of these gaps in protection, it fails to provide the security that a legislative Bill of Rights would provide.¹³⁰

B. *Overrepresentation in Long-Term Care Facilities*

LGBTQIA+ older people experience high rates of discrimination, harassment, and abuse based on sexual orientation and gender identity in long-term care settings.¹³¹ LGBTQIA+ older adults are more reliant on formal social services, such as long-term care facilities, than their non-LGBTQIA+ counterparts.¹³² As such, they enter long-term care facilities at higher rates and are more vulnerable to discrimination.¹³³ There are a variety

¹²⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (prohibiting an employer from firing an individual merely because the employee is gay or transgender under the Civil Rights Act).

¹²⁶ See *supra* text accompanying note 24.

¹²⁷ See SERVS. AND ADVOC. FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS & LGBT MOVEMENT ADVANCEMENT PROJECT, IMPROVING THE LIVES OF LGBT OLDER ADULTS 7 (2010), <https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf> [<https://perma.cc/FX6F-NWQP>] [hereafter IMPROVING THE LIVES OF LGBT OLDER ADULTS] (reporting that thirty percent of the federal budget is spent on older Americans).

¹²⁸ See *supra* Section II.

¹²⁹ IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at 6–9 (explaining that many LGBTQIA+ older adults never married or had biological children so laws and regulations are not crafted around the way most LGBTQIA+ people form families).

¹³⁰ Exec. Order No. 14075, 87 Fed. Reg. 37,189 (June 15, 2022).

¹³¹ SOON KYU CHOI & ILAN H. MEYER, WILLIAMS INST., LGBT AGING: A REVIEW OF RESEARCH FINDINGS, NEEDS, AND POLICY IMPLICATIONS 6 (2016), <https://www.lgbtagingcenter.org/resources/pdfs/LGBT-Aging-A-Review.pdf> [<https://perma.cc/34L2-6JCJ>].

¹³² See generally Nancy J. Knauer, *supra* note 118; IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at 6 (reporting that eighty percent of long-term care in the United States is provided by family members, and more than two-thirds of older adults depend on their family members as their sole source of assistance).

¹³³ See *id.* at ii-iv (pointing to social isolation, disparities in health problems, and lack of emotional and financial support from families).

of contributing factors that make this a reality.¹³⁴ While most non-LGBTQIA+ older adults seek assistance from informal support networks prior to entering a long-term care facility, studies show that LGBTQIA+ older adults have less familial support and are more socially isolated.¹³⁵ This is due to both the legal barriers to marriage existing for most of their lives and the familial ostracization because of their LGBTQIA+ identity.¹³⁶ One research study completed in 2010 found that LGBTQIA+ older adults are two times more likely to be single and live alone and three to four times less likely to have children.¹³⁷ Further, LGBTQIA+ older adults are more likely to be estranged from extended family members due to their sexual orientation or gender identity.¹³⁸ As a result of overall lack of familial support, LGBTQIA+ older adults tend to reach out to social support networks instead.¹³⁹ One study found that Black LGBTQIA+ older adults are likely to list people from their churches or faith groups as part of their support networks.¹⁴⁰ The importance of social and religious support for all individuals should not be undervalued; however, the reality is that older adults may not be able to rely on these non-traditional support networks in the same ways they would rely on immediate family members.¹⁴¹

Furthermore, this lack of familial support, compounded with general social isolation, results in LGBTQIA+ older adults being at a greater risk of mental and physical health issues.¹⁴² The Williams Institute reported that in one study, sixty percent of surveyed LGBTQIA+ older adults felt a lack of companionship and fifty percent reported feeling generally isolated.¹⁴³

¹³⁴ See CHOI & MEYER, *supra* note 131, at 0–1 (listing problems faced by LGBTQIA+ older adults, including social isolation, disparities in health problems, and lack of familial emotional and financial support).

¹³⁵ Knauer, *supra* note 118, at 310.

¹³⁶ See generally Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN & L. 101 (2014) (discussing how more recent marriage equality advances have complicated the ways in which LGBTQIA+ older adults navigate the challenges of aging).

¹³⁷ ROBERT ESPINOZA, SERVS. & ADVOC. FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS, OUT & VISIBLE: THE EXPERIENCES AND ATTITUDES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER OLDER ADULTS, AGES 45-75, at 17 (2014), <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-out-visible-lgbt-market-research-full-report.pdf> [<https://perma.cc/J6BD-69PJ>].

¹³⁸ See *id.* at 18 (expressing that while there is a general cultural trend moving towards acceptance of LGBTQIA+ individuals, it was not uncommon for older generations to ostracize LGBTQIA+ members from their immediate and extended family members).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally THOMAS R. COLE, *THE JOURNEY OF LIFE: A CULTURAL HISTORY OF AGING IN AMERICA* (1992) (discussing the ways that Americans view familial and social responsibilities as they pertain to aging).

¹⁴² CHOI & MEYER, *supra* note 131, at 1.

¹⁴³ *Id.*

Loneliness and isolation can cause adults to be more at risk for other physical and mental health conditions, and a lack of support networks means their conditions often worsen without intervention.¹⁴⁴ Research indicates that the long-term effects of social isolation are considerable, often resulting in depression, poverty, re-hospitalization, delayed care-seeking, poor nutrition, and premature mortality.¹⁴⁵

C. Experiences of LGBTQIA+ Older Adults

Despite LGBTQIA+ older adults being at a greater risk of physical and mental health issues, this population often avoids accessing care due to fears of how they will be treated.¹⁴⁶ The LGBT Aging Center found in a recent survey that when asked whether LGBTQIA+ older adults felt they could be open with long-term care facility staff about their sexual orientation, gender identity, or expression, only twenty-two percent responded “yes.”¹⁴⁷ Furthermore, when service providers were asked if they believed LGBTQIA+ older adults should be honest about their identities while in long-term care facilities, eighty-five percent said that they did not think they should.¹⁴⁸ The survey also found that a majority of the service providers reported that LGBTQIA+ residents of long-term care facilities are likely to experience abuse and neglect from staff, isolation from other residents, discrimination by residents, and discrimination by staff if they are honest about their identities.¹⁴⁹ Based on this disheartening data, it is not surprising that many LGBTQIA+ older adults will avoid entering long-term care facilities until it is absolutely necessary. People who do enter long-term care facilities will often hide their LGBTQIA+ identity to avoid discrimination.¹⁵⁰

Unfortunately, these fears are well-founded as they are based on the real experiences of LGBTQIA+ older adults in long-term care facilities.¹⁵¹ Reported instances of discrimination based on a resident’s actual or perceived sexual orientation or gender identity in long-term care facilities include verbal or physical harassment from other residents and staff, refused admission or re-admission, refusal to accept a resident’s power of attorney from their spouse, restriction of visitors, refusal to use chosen names and pronouns, and denial of medical care and basic services.¹⁵² The LGBT Aging Center collected countless, heart-breaking stories from residents and their

¹⁴⁴ Knauer, *supra* note 118, at 314.

¹⁴⁵ IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at iii.

¹⁴⁶ CHOI & MEYER, *supra* note 131, at 18.

¹⁴⁷ NAT’L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4, at 10.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 6–7.

¹⁵¹ *Id.* at 8.

¹⁵² *Id.*, at 1.

family members expressing these instances.¹⁵³ One woman recounted the experience of her two lesbian friends who had been together for over fifty years before falling ill.¹⁵⁴ Their families sent them to separate nursing homes despite the couple's protests, and they both passed away without ever seeing or hearing from each other again.¹⁵⁵ Other residents reported that staff called them slurs and knowingly refused to use their chosen pronouns.¹⁵⁶

LGBTQIA+ older adults may also be excluded from social activities or feel unsafe participating due to hostility from staff and fellow patients.¹⁵⁷ Despite many LGBTQIA+ older adults having strong, non-familial social networks, LGBTQIA+ elders in long-term care settings may self-select out of visits from same-sex partners or LGBTQIA+ friends due to fear of harassment.¹⁵⁸ The issues of isolation become even more problematic if residents develop mental or physical incapacitation.¹⁵⁹ Without immediate family, spouses, or friends to help advocate for their care, their needs often go unnoticed and unmet.¹⁶⁰ These instances of discrimination, harassment, abuse, and neglect are happening every day across the country to thousands of LGBTQIA+ older adults. As of today, there are little to no legal protections in place to do anything about it.

IV. Proposed Changes: Long-Term Care Bill of Rights

Recognizing the immediate need to provide targeted legal protections for LGBTQIA+ older adults in long-term care facilities, advocates in various states and municipalities have enacted the first Long-Term Care BORs.¹⁶¹ In 2015, San Francisco enacted the country's first Long-Term Care BOR.¹⁶² That the first Long-Term Care BOR was passed in California is significant.¹⁶³ As discussed in previous sections, California has some of the most expansive and robust LGBTQIA+ anti-discrimination laws in the country, covering housing, employment, and public accommodations.¹⁶⁴ Yet, advocates in

¹⁵³ NAT'L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4, at 6–7, 10–17.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 10–11, 13–14.

¹⁵⁷ IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at 44.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 36.

¹⁶⁰ *Id.*

¹⁶¹ SERVS. AND ADVOC. FOR GAY LESBIAN, BISEXUAL AND TRANSGENDER ELDERS & HIV & AGING POL'Y ACTION COAL., LGBTQ+/HIV LONG-TERM CARE BILL OF RIGHTS TOOLKIT 2 (2021), <https://www.sageusa.org/wp-content/uploads/2021/09/ltc-bor-toolkit-hapac-v2-logos.pdf> [<https://perma.cc/Q344-ACLM>] [hereinafter BILL OF RIGHTS TOOLKIT] (listing California, New Jersey, the District of Columbia, and Maryland as jurisdictions that have Long-Term Care BORs).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ MOVEMENT ADVANCEMENT PROJECT, *supra* note 12.

California understood that, despite these sweeping LGBTQIA+ provisions, LGBTQIA+ older adults were not adequately protected without a BOR.¹⁶⁵ Furthermore, while older adults in long-term care facilities were protected against general abuse and neglect per state and federal guidelines, there was no explicit legislation prohibiting discrimination and harassment based on sexual orientation and gender identity.¹⁶⁶ With more data being reported on the common negative experiences of LGBTQIA+ older adults in long-term care facilities, it became clear to advocates that legislation was needed to address this specific issue.¹⁶⁷ Thus came the first Long-Term Care BOR. Since 2015, California, Massachusetts, and New Jersey have each passed state-wide Long-Term Care BORs, along with the District of Columbia.¹⁶⁸

A Long-Term Care Bill of Rights is a legislative document that outlines the specifically prohibited discriminatory behaviors in long-term care facilities. Similar to pre-existing state and federal long-term care facility regulations, a Long-Term Care BOR provides a guideline of a resident's rights and the requirements of long-term care staff.¹⁶⁹ What makes a Long-Term Care BOR distinctive from existing provisions is that it targets the unique challenges that LGBTQIA+ older adults experience in long-term care facilities.¹⁷⁰ While each of the enacted Long-Term Care BORs differ slightly in language, the goal is the same: to legally protect LGBTQIA+ older adults from discrimination, harassment, abuse, and neglect in long-term care facilities based on sexual orientation and gender identity.¹⁷¹ These next parts of Section IV will outline the ideal portions to include in a Long-Term Care BOR with a breakdown of each relevant section.

A. *Necessity, Purpose, and Definitions*

The introductory sections of a Long-Term Care BOR should consist of a “Necessity and Purpose” and “Definitions” sections to define the goals, intention, and key terms of the BOR.¹⁷² The “Necessity and Purpose” section of a Long-Term Care BOR should outline why this piece of legislation is needed and include a brief explanation of the experiences of LGBTQIA+ older adults in long-term care facilities.¹⁷³ The “Necessity and Purpose” section acts as a vital explanation for state or federal legislators, as well as

¹⁶⁵ BILL OF RIGHTS TOOLKIT, *supra* note 161, at 1 (encouraging jurisdictions to adopt a BOR).

¹⁶⁶ NAT'L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4, at 21.

¹⁶⁷ *See* IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at 35–37.

¹⁶⁸ BILL OF RIGHTS TOOLKIT, *supra* note 161, at 2.

¹⁶⁹ *See, e.g.*, S.F., CA., POLICE CODE art. 33, § 3304.1 (2015); N.J. STAT. ANN. § 26:2H-12.102 (2021).

¹⁷⁰ NAT'L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4, at 22.

¹⁷¹ IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127, at 35–37.

¹⁷² *See, e.g.*, S.F., CA., POLICE CODE art. 33, § 3304.1(b)–(c) (2015).

¹⁷³ *Id.* § 3304.1(b).

long-term care managers and staff, as to how the Long-Term Care BOR rectifies the mistreatment of LGBTQIA+ residents.¹⁷⁴ Unfortunately, the experiences of LGBTQIA+ older adults in long-term care facilities are not often discussed, despite a growing movement for LGBTQIA+ rights.¹⁷⁵ Therefore, it is important for legislators to be fully aware of the very real, discriminatory practices against LGBTQIA+ residents of long-term care facilities.¹⁷⁶ Furthermore, such knowledge will help long-term care managers and staff understand that they should follow this new legislative provision not just because it is law, but because their residents need and deserve it.

The final introductory section of a Long-Term Care BOR is “Definitions.”¹⁷⁷ LGBTQIA+ rights can be overwhelming for those who are not privy to the ever-expanding nature of advocates’ inclusive work.¹⁷⁸ Language surrounding the LGBTQIA+ community is extensive, and many legislators and long-term care staff may not understand relevant terms that are required to understand the BOR itself and to be able to accurately comply with it.¹⁷⁹ Ideally, this section should be detailed and extensive, covering all language that may arise when discussing the experiences of LGBTQIA+ older adults in long-term care facilities.¹⁸⁰ Terms such as “sexual orientation,” “gender identity,” “transgender,” “gender-affirming surgery,” and “pronouns” should be included.¹⁸¹ When creating legislation that is

¹⁷⁴ *Id.*

¹⁷⁵ *See generally* Fasullo et al., *supra* note 120 (supporting that although LGBTQIA+ advocates are making strides to raise awareness of these challenges, many people still are unaware of the realities of LGBTQIA+ older adults).

¹⁷⁶ *See id.* (indicating that while there is currently limited research on the efficacy of LGBTQIA+ cultural competency in long-term care settings, existing data show that having a baseline understanding of LGBTQIA+ concepts can help long-term care staff provide better care to their patients).

¹⁷⁷ *See, e.g.*, S.F., CA., POLICE CODE art. 33, § 3304.1(c) (2015).

¹⁷⁸ *See generally* Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT’L GEOGRAPHIC (Oct. 19, 2021), <https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity> [<https://perma.cc/SXM6-KTJK>] (discussing how LGBTQIA+ terminology has evolved in America over time).

¹⁷⁹ *See generally* Alexis Forbes, *A (Short) Primer on Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Culture in America*, JURY EXPERT (Feb. 6, 2014), <https://www.thejuryexpert.com/2014/02/a-short-primer-on-lesbian-gay-bisexual-transgender-and-queer-lgbtq-culture-in-america/> [<https://perma.cc/9TA8-VDRE>] (explaining the importance of using correct LGBTQIA+ terminology to help normalize LGBTQIA+ culture).

¹⁸⁰ *See id.*

¹⁸¹ “Sexual orientation” refers to one’s sexual and romantic desires towards a particular gender(s). *See* GAY AND LESBIAN ALL. AGAINST DEFAMATION & MOVEMENT ADVANCEMENT PROJECT, AN ALLY’S GUIDE TO TERMINOLOGY: TALKING ABOUT LGBT PEOPLE & EQUALITY 3 (2012), https://s3.us-west-2.amazonaws.com/media.glaad.org/wp-content/uploads/2011/08/25203738/allys-guide-to-terminology_1-2c9.pdf [<https://perma.cc/WL4H-KMSW>]. “Gender identity” refers to one’s internal sense of gender. *Id.* The term “transgender” describes people whose gender identity does not align with their sex

potentially confusing or controversial, drafting language that is as detailed and prescriptive as possible is always best.¹⁸² This leaves less room for misinterpretation or ways to intentionally disregard the provision. Among the pre-existing Long-Term Care BORs, San Francisco's is the most prescriptive, so advocates should look to the language presented in its definitions of its Long-Term Care BOR to help craft similar sections for their respective localities.¹⁸³

B. *Prohibited Activities*

Perhaps the most important section of a Long-Term Care BOR is the "Prohibited Activities."¹⁸⁴ This section lists all activity that is unlawful for any long-term care facility or staff.¹⁸⁵ This section must be thorough, clear, and detailed and reflect all types of discrimination, harassment, abuse, and neglect that residents may experience based on their sexual orientation or gender identity.¹⁸⁶ As discussed, the most common negative experiences of LGBTQIA+ residents of long-term care facilities include denial of admission, refusal to allow same-sex partners to visit, and refusal to allow residents to express their true gender identity through chosen clothing, accessories, and pronouns.¹⁸⁷ Thus, similar to San Francisco's Long-Term Care BOR, it should be unlawful under a Long-Term Care BOR to do any of the following solely on the basis of a resident's perceived or actual sexual orientation or gender identity:

- (1) Deny admission to a long-term care facility, refuse to transfer a resident, or involuntarily discharge a resident;
- (2) Deny a request to share a room with another resident;
- (3) Refuse to assign a transgender resident a room based on their gender identity in a facility where rooms are assigned by gender;
- (4) Prohibit a resident from using, or harass a resident who wants to use, a restroom available to others of the same gender;
- (5) Refuse to use a resident's chosen pronouns;

assigned at birth. *Id.* "Gender-affirming surgery" is one way a person may decide to transition in order to better align their physical body with their gender identity and expression. *Id.*

¹⁸² See e.g., S.F., CA., POLICE CODE art. 33, § 3304.1(c) (2015).

¹⁸³ See *id.* (defining the following terms in its BOR: city, gender expression, gender identity, gender-nonconforming, HRC, LGBT, long-term care facility, long-term care facility staff, ombudsman program, resident, transgender, and transition).

¹⁸⁴ See, e.g., S.F., CA., POLICE CODE art. 33, § 3304.1(d) (2015) (codifying the city's prohibited activities).

¹⁸⁵ *Id.*

¹⁸⁶ This section should reflect similar specificity as the Code of Federal Regulations. See 42 C.F.R § 483.10 (1989) (listing a resident's rights).

¹⁸⁷ See generally IMPROVING THE LIVES OF LGBT OLDER ADULTS, *supra* note 127 (discussing challenges faced by LGBTQIA+ residents of long-term care facilities).

- (6) Deny a resident the right to wear or be dressed in clothing, accessories, or cosmetics that are permitted for any other resident;
- (7) Restrict a resident's right to associate with other residents, including a right to sexual intimacy;
- (8) Deny or restrict a resident's right to visitors; and
- (9) Deny or restrict medical or non-medical care, or to provide medical or non-medical care in a manner that demeans the resident's dignity or causes avoidable discomfort.¹⁸⁸

C. *Additional Requirements*

In addition to outlining the prohibited activities, a Long-Term Care BOR should ideally include other requirements for long-term care facilities and staff.¹⁸⁹ For instance, the San Francisco Long-Term Care BOR includes sections on recording keeping, confidentiality, privacy, LGBT Liaisons, and notice.¹⁹⁰ The Washington D.C. Long-Term Care BOR also includes a training requirement for all long-term care staff.¹⁹¹ This part outlines what each of these additional requirements entail and why they are essential.

1. *Record-Keeping, Confidentiality, and Privacy*

If long-term care staff are going to respect residents' gender identity and preferred pronouns,¹⁹² they must keep accurate and updated personal information on file. When residents enter the facility, staff should ask for and record their gender identity and chosen pronouns.¹⁹³ This information should be listed in all formal and informal documents that all staff members have access to. Any public-facing documentation, such as room labels or name tags, should also reflect the resident's accurate information.

Protecting the personal information of LGBTQIA+ residents is vital to their health and well-being.¹⁹⁴ Not only do LGBTQIA+ older adults face discrimination from long-term care staff, but they also experience high rates

¹⁸⁸ S.F., CA., POLICE CODE art. 33, § 3304.1(d).

¹⁸⁹ *See, e.g., id.* § 3304.1(f).

¹⁹⁰ *Id.*

¹⁹¹ D.C. CODE §§ 2-1402.101–2-1402.105 (2023).

¹⁹² *See generally* Jessica Bennet, *She? Ze? They? What's in a Gender Pronoun*, N.Y. TIMES (Jan. 30, 2016) <https://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html> [<https://perma.cc/Q34N-PKPN>] (demonstrating that a person may change their gender identity or preferred pronouns while being a resident of a long-term care facility).

¹⁹³ *See id.* (indicating that even companies like Facebook keep records of preferred pronouns and gender identity).

¹⁹⁴ *See Disclosing Your Sexual Orientation or Gender Identity to Healthcare Providers: The Effect of New HIPAA Regulations*, LAMBDA LEGAL (June 18, 2003), <https://legacy.lambdalegal.org/publications/disclosing-your-sexual-orientation-or-gender-identity-to-healthcare-providers-the-effect-of-new-hipaa-regulations> [<https://perma.cc/4JJA-27VS>] (discussing the importance of confidentiality between patients and healthcare providers).

of harassment from fellow residents due to their actual or perceived sexual orientation or gender identity.¹⁹⁵ The confidentiality and privacy requirement of the Long-Term Care BOR should state that all staff must keep personal information regarding HIV/AIDS status, sexual orientation, transgender status, or transition history completely protected from all residents.¹⁹⁶ Furthermore, any staff members that are not involved in the medical or personal care of a transgender or gender non-conforming resident should not be present during any physical examinations, treatment, or discussions of treatment.¹⁹⁷ These provisions not only uphold the respect and dignity that all residents deserve, but they also prevent LGBTQIA+ residents from experiencing unnecessary harassment from residents or staff.¹⁹⁸

2. *LGBTQIA+ Liaison and Notice*

As previously mentioned, the Older Americans Act requires all state long-term care facilities to have an Ombudsman Program.¹⁹⁹ While an ombudsman's sole purpose is to act as an advocate and problem-solver for all residents of long-term care facilities, ombudsmen are rarely adequately trained to deal with the unique issues that may arise due to a resident's sexual orientation or gender identity.²⁰⁰ Therefore, a Long-Term Care BOR should also require that each long-term care facility have an assigned LGBTQIA+ liaison.²⁰¹ The LGBTQIA+ liaison should be a staff member previously hired to work at the long-term care facility or a person who has volunteered to act as the designated person to handle all concerns brought by LGBTQIA+ residents. The liaison should be required to complete a certain number of hours of training, which will include basic LGBTQIA+ terminology and information on how to be an effective LGBTQIA+ ally and advocate.²⁰² All residents of the long-term care facility should be made aware of this staff member's position. Similarly, the "Notice" requirement of the Long-Term Care BOR should be an anti-discrimination notice that states that all long-term care facilities must post a notice that they do not discriminate based on sexual orientation or gender identity under their current nondiscrimination

¹⁹⁵ NAT'L SENIOR CITIZENS L. CTR. ET AL., *supra* note 4, at 10.

¹⁹⁶ *See, e.g.*, S.F. CAL., POLICE CODE art. 33 § 3304.1(f)(2)(A) (2023) (requiring confidentiality for sexual orientation, transgender status, transition history, and HIV status).

¹⁹⁷ *Id.* § 3304.1(f)(2)(B).

¹⁹⁸ *See id.* (demonstrating that requirements of confidentiality and privacy prioritize the safety and well-being of residents who may experience harassment or discrimination otherwise).

¹⁹⁹ 42 U.S.C. § 3058g.

²⁰⁰ *See* Rhoten et al., *supra* note 114, at 1030–32 (discussing how healthcare providers generally lack knowledge regarding LGBTQIA+ patients).

²⁰¹ *See, e.g.*, S.F. CAL., POLICE CODE art. 33 § 3304.1(f)(3) (2023) (requiring a LGBT Liaison to be assigned and to complete training for LGBT cultural competency).

²⁰² *Id.*

policy.²⁰³ This policy should be posted in public spaces throughout the facility and included in relevant materials and documents, including resident handbooks and on intake materials.²⁰⁴

3. *LGBTQIA+ Training*

Prohibiting certain discriminatory behavior and requiring LGBTQIA+ cultural competency training go hand in hand.²⁰⁵ If staff are not adequately trained to work with and advocate for LGBTQIA+ older adults, they may unintentionally discriminate, harass, or make LGBTQIA+ residents uncomfortable.²⁰⁶ The Washington D.C. Long-Term Care BOR includes an extensive section on LGBTQIA+ training requirements because advocates recognized that this was an essential part of protecting the rights and dignity of LGBTQIA+ older adults in long-term care facilities.²⁰⁷ The training should include the following: (1) definitions of common LGBTQIA+ terms; (2) best practices for communicating with or about LGBTQIA+ older adults; (3) information on the unique challenges LGBTQIA+ older adults face; and (4) strategies for creating safe and affirming long-term care settings.²⁰⁸ Studies show that LGBTQIA+ cultural competency training among long-term care staff can significantly improve the experiences of LGBTQIA+ older adults.²⁰⁹ For instance, a 2014 study looking at the efficacy of LGBTQIA+ training for aging service providers in California found that participants greatly increased their knowledge, skills, and positive attitude towards LGBTQIA+ older adults.²¹⁰ Competency training is a vital inclusion for LGBTQIA+ residents in any Long-Term Care BOR.

V. Anticipated Challenges

A. *Implementation*

To have the greatest impact, a Long-Term Care BOR should be passed at the federal level.²¹¹ Federal legislation would protect millions of

²⁰³ See, e.g., *id.* § 3304.1(f)(4).

²⁰⁴ *Id.*

²⁰⁵ See Valerie L. Leyva, Elizabeth M. Breshears & Robin Ringstad, *Assessing the Efficacy of LGBT Cultural Competency Training for Aging Services Providers in California's Central Valley* 57 J. GERONTOLOGICAL SOC. WORK 335, 345 (2014) (“Although it is encouraging that individuals attending cultural competency training demonstrate increased knowledge, skill, and awareness of working with LGBT older adults, this does not insure that their agencies will engage in a correlational shift in service provision.”).

²⁰⁶ *Id.* at 344.

²⁰⁷ D.C. CODE § 2-1402.105 (2023).

²⁰⁸ *Id.*

²⁰⁹ Leyva, Breshears & Ringstad, *supra* note 205, at 344.

²¹⁰ *Id.*

²¹¹ See generally Knauer, *supra* note 13.

LGBTQIA+ older adults from daily abuse and harassment, even in states that do not have their own LGBTQIA+ anti-discrimination legislation.²¹² Unfortunately, passing federal legislation is very unlikely due to the current political landscape of the United States.²¹³ Given that the Equality Act is unlikely to pass, a similar bill focused on protecting LGBTQIA+ residents in Long-Term Care facilities should be equally unlikely.²¹⁴

Therefore, the next best thing is to pass Long-Term Care BORs in as many states and localities across the country as possible.²¹⁵ Currently, there are only two states and the District of Columbia that have passed a Long-Term Care BOR.²¹⁶ As of this writing, there are twenty-two states that are Republican-controlled in both the legislature and governor's office.²¹⁷ Comparatively, there are eighteen states that have both a Democratic governor and Democratic-majority in their legislature.²¹⁸ Ten states have a partisan split between the governor and legislator.²¹⁹ Given the political and controversial nature of LGBTQIA+ rights, the ease with which advocates and legislators may be able to pass a Long-Term Care BOR in their state depends greatly on that state's particular political makeup.²²⁰ When looking at the states that have any LGBTQIA+ anti-discrimination statutes and policies, it is evident that most of these states have Democratic majority-control.²²¹ Thus, advocates in these states should take swift action in drafting and introducing Long-Term Care BORs. Given that many of these states already have some level of LGBTQIA+ anti-discrimination protections, there is a

²¹² *Cf. id.* at 4 (“LGBTQ people living in New York enjoy many more protections and suffer none of the disabilities that are imposed on LGBTQ people living in Mississippi.”).

²¹³ CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 1 (2022) (reporting the split partisan make-up in Congress).

²¹⁴ *See supra* text accompanying notes 92–95.

²¹⁵ *See, e.g.*, D.C. CODE §§ 2-1402.101–2-1402.105 (2023); S.F. CAL., POLICE CODE art. 33 § 3304.1(f)(3) (2023); N.J. STAT. ANN. § 26:2H-12.102 (2021); CAL. HEALTH & SAFETY CODE §§ 1439.50–1439.54 (2020).

²¹⁶ Those states include California and New Jersey. CAL. HEALTH & SAFETY CODE §§ 1439.50–1439.54 (2020); N.J. STAT. ANN. § 26:2H-12.102 (2021).

²¹⁷ *State Partisan Composition*, NAT’L CONF. OF STATE LEGISLATURES (May 23, 2023), <https://www.ncsl.org/about-state-legislatures/state-partisan-composition> [<https://perma.cc/QL9F-7D36>].

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See, e.g.*, Kimberly Kindy, *GOP Lawmakers Push Historic Wave of Bills Targeting Rights of LGBTQ Teens, Children, and Their Families*, WASH. POST (Mar. 25, 2022, 6:00 AM) <https://www.washingtonpost.com/politics/2022/03/25/lgbtq-rights-gop-bills-dont-say-gay/> [<https://perma.cc/7ZKE-BFJX>] (indicating that Republican-held majorities in states have pushed anti-LGBTQIA+ legislation).

²²¹ *Compare* MOVEMENT ADVANCEMENT PROJECT, *supra* note 12 (showing a map of states that have certain LGBTQIA+ protections), *with* NAT’L CONF. OF STATE LEGISLATURES., *supra* note 217 (showing a map of the states that have Democratic or Republican majority-control over their state legislature and governor's office).

decent chance that legislators will be in support of protecting a more specific sub-population of the LGBTQIA+ community.²²²

Unfortunately, in Republican-led states, advocates are likely to struggle passing a state-wide Long-Term Care BOR.²²³ However, although state-wide protection is ideal, advocates should also explore the possibility of passing a Long-Term Care BOR at the municipal level.²²⁴ For instance, in a split-partisan state like Pennsylvania, advocates may succeed in passing a Long-Term Care BOR at the municipal level in Philadelphia.²²⁵ Yet, passing a Long-Term Care BOR at the municipal level comes with its own challenges.

When passing any type of legislation at the municipal level, state preemption is always a possible concern.²²⁶ A Long-Term Care BOR may be prohibited from being enacted if any state-level legislation includes language that would preempt its purpose.²²⁷ For instance, Florida's long-term care regulations include some legislative language that have concerned advocates attempting to pass a Long-Term Care BOR at the municipal level in Miami.²²⁸ Similar to the Federal Code of Regulations, Florida's statute outlines residents' rights and ombudsman program requirements.²²⁹ The Florida long-term care regulations statute states that its purpose is "to protect the health, safety, welfare, and rights of the [long-term care facility] residents."²³⁰ One would think that this would include protecting the rights of LGBTQIA+ residents, but on a closer look, additional language can be easily interpreted to authorize the discrimination of LGBTQ older adults.²³¹ Throughout several parts of the Florida's "Residents' Rights" section, it states that residents should have full access to visitors, chosen clothing, or transfer requests so long as it does not "infringe upon the rights of other residents."²³² This language may be interpreted by anti-LGBTQIA+

²²² Kindy, *supra* note 220 (reporting that Republican-led states are overwhelmingly the states without any LGBTQIA+ anti-discrimination protections).

²²³ *Id.*

²²⁴ See e.g., S.F. CAL., POLICE CODE art. 33 § 3304.1 (2023).

²²⁵ See PEW RSCH. CTR., *Party Affiliations Among Adults in the Philadelphia Metro Area by Political Ideology*, <https://www.pewresearch.org/religion/religious-landscape-study/compare/party-affiliation/by/political-ideology/among/metro-area/philadelphia-metro-area/> [https://perma.cc/JD99-LDMS] (indicating that Philadelphia has a sizeable population of voters who may belong in both political parties but also lean towards the other's political ideology).

²²⁶ See *Preemption*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/preemption> [https://perma.cc/M3RE-QCL7] ("The preemption doctrine refers to the idea that a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict.").

²²⁷ *Id.*

²²⁸ FLA. STAT. § 400.022 (2022).

²²⁹ *Id.* §§ 400.022, 400.0065.

²³⁰ *Id.* § 400.0065, 400.0069.

²³¹ See *id.* § 400.022 (listing the rights of residents).

²³² *Id.* § 400.022(1)(r).

legislators and facility staff to prohibit LGBTQIA+ residents from having their same-sex partners visiting or from wearing clothing that affirms their gender identity if such would infringe the religious or civil rights of other residents. Unfortunately, this language can present obstacles for advocates at the municipal level in a Republican-led state, and advocates should be aware of these obstacles when drafting legislative language.

B. *Administrative Options*

Due to the potential challenges to getting a Long-Term Care BOR passed legislatively, advocates should consider various administrative options.²³³ While enacting a Long-Term Care BOR legislatively is ideal, in split-partisan states, using administrative action to enforce some level of protections for LGBTQIA+ long-term care residents is the next best option.²³⁴ In split-partisan states like Pennsylvania, which has a Democratic governor and Republican-majority legislature, a governor may take executive actions—like executive orders—to protect LGBTQIA+ older adults in long-term care settings.

In June 2021, Governor Tom Wolf of Pennsylvania signed an executive order that modified the commonwealth's workplace policies regarding sexual harassment.²³⁵ With the support of the Governor's Advisory Commission on LGBTQ Affairs, Governor Wolf updated the harassment policies to explicitly prohibit sexual harassment in employment on the basis of sexual orientation and gender identity.²³⁶ This executive action is representative of the administrative actions that can be taken in lieu of explicit legislation in order to protect LGBTQIA+ citizens. Due to the Republican-led legislature in Pennsylvania, the Commonwealth currently has no LGBTQIA+ anti-discrimination legislation in place.²³⁷ Yet, by signing the executive order, Governor Wolf not only signaled to the LGBTQIA+ community that he is invested in protecting their rights, but he has created a pathway for further LGBTQIA+ protections, such as for older adults in long-term care facilities. In lieu of enacting a Long-Term Care BOR legislatively, Governor Wolf could sign another executive order modifying Pennsylvania's long-term care

²³³ See generally, H.F. Angus, *Administrative Decision and the Law: The Views of an Administrator*, 24 CANADIAN J. ECON. & POL. SCI. 512 (1958) (discussing the differences between administrative acts and legislation).

²³⁴ See *Separation of Powers: Legislative Oversight*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 17, 2022), <https://www.ncsl.org/about-state-legislatures/separation-of-powers-legislative-oversight#:~:text=The%20court%20determined%20that%20only,through%20legislative%20resolution%20to%20stand> [https://perma.cc/GC4L-TTNQ] (explaining that administrative actions have a lesser status than enacted laws, but they can enable current elected officials and agencies to enforce policies through other methods).

²³⁵ 51 Pa. Bull. 3594 (July 3, 2021).

²³⁶ *Id.*

²³⁷ MOVEMENT ADVANCEMENT PROJECT, *supra* note 12.

regulations to protect LGBTQIA+ residents of long-term care facilities against discrimination based on sexual orientation and gender identity. Currently, Pennsylvania's long-term care law only provides the most basic protections against abuse, neglect, and harassment.²³⁸ Yet, just as Governor Wolf's recent executive order clarified that the Commonwealth's current sexual harassment policies would include sexual orientation and gender identity, another executive order could be passed stating that abuse, harassment, and neglect in long-term care facilities also includes abuse, harassment, and neglect on the basis of sexual orientation and gender identity.

Another administrative option for protecting LGBTQIA+ long-term care residents is partnering with existing state advocacy organizations to support and advocate for long-term care residents. For example, the Pennsylvania Health Care Association (PHCA) claims to be the leading advocacy organization for senior care providers.²³⁹ Through education, advocacy, and quality assurance, PHCA supports Pennsylvania's senior population and advocates for their wellbeing and safety.²⁴⁰ Similarly, the Pennsylvania Society for Post-Acute and Long-Term Medicine (PMDA) is an organization made up of long-term care professionals seeking to advocate for the respect, dignity, safety, and well-being of all long-term care residents.²⁴¹ In addition to educating long-term care staff on best practices, PMDA advocates for laws and regulations that improve the experiences of long-term care residents.²⁴² Finally, the Pennsylvania Assisted Living Association (PALA) is a nonprofit organization that represents Personal Care Homes, provides education and advocacy, and partners with the Department of Human Services and Office of Long-Term Living.²⁴³ While these organizations do not currently and explicitly service LGBTQIA+ older adults, advocates can partner with these organizations and work to include LGBTQIA+ anti-discrimination advocacy in their work.

C. Enforcement

In addition to the challenges of getting a Long-Term Care BOR passed in certain states, advocates must consider the proper enforcement mechanisms to ensure that long-term care facilities comply with these new

²³⁸ 28 PA. CODE § 201.29 (2020).

²³⁹ *Who We Are*, PA. HEALTH CARE ASS'N, <https://www.phca.org/about/who-we-are/> [<https://perma.cc/BE5C-GMGP>].

²⁴⁰ *Id.*

²⁴¹ *About PMDA*, PA. SOC'Y FOR POST-ACUTE & LONG-TERM CARE MED., <https://www.pmda.org/about-pmda.html> [<https://perma.cc/UQP7-TM2R>].

²⁴² *Id.*

²⁴³ *About PALA*, PA. ASSISTED LIVING ASS'N, <https://pala.org/about-pala/> [<https://perma.cc/SUR5-Y6MK>].

provisions. There are several concerns regarding enforcement of a Long-Term Care BOR.²⁴⁴ It is vital that all long-term care residents know and understand the rights they have under a Long-Term Care BOR, as well as who they can contact if there is a potential violation.²⁴⁵ If these resources are not easily accessible, residents experiencing discrimination and harassment due to their sexual orientation or gender identity will not have the power to legally enforce their rights.

Every state in the United States, and many cities, currently have at least one Human Rights Commission (HRC).²⁴⁶ While each city or state HRC may have slightly differing goals and missions, their general purpose is to enforce anti-discrimination laws and investigate complaints of civil rights violations.²⁴⁷ Two other organizations that can enforce the rights of LGBTQIA+ residents of long-term care facilities is the National Ombudsman Reporting System (NORS) and the National Adult Protective Services Association (APS). NORS is a regulatory system that ensures long-term care ombudsmen are completing their required duties.²⁴⁸ Additionally, NORS investigates any complaints from long-term care residents about their experiences in a long-term care facility.²⁴⁹ The APS investigates all complaints of neglect and abuse from residents of long-term care facilities.²⁵⁰ While these programs may not be explicitly set up to handle instances of discrimination, abuse, or harassment based on sexual orientation or gender identity, they are required by the Code of Federal Regulations to investigate all complaints, whether or not they are on the basis of a resident's LGBTQIA+ identity.²⁵¹

²⁴⁴ See JENNY R. YANG & JANE LIU, ECON. POL'Y INST., STRENGTHENING ACCOUNTABILITY FOR DISCRIMINATION (2021), <https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/> [<https://perma.cc/3FPW-5EYZ>] (discussing the ways in which federal anti-discrimination provisions fail to provide adequate enforcement policies and procedures).

²⁴⁵ *Id.* (discussing how employees not knowing who to report violations to contributes to a decline in health and safety conditions for workers).

²⁴⁶ *Publications*, VT. HUM. RTS. COMM'N, <https://hrc.vermont.gov/resources/publications> [<https://perma.cc/MWP3-QGGA>] (“By law, the U.S. Commission on Civil Rights has established an advisory commission in each of the 50 states and the District of Columbia. . . . The committees advise the Commission of civil rights issues in their states that are within the Commission’s jurisdiction.”).

²⁴⁷ *Id.* (“[The U.S. Commission on Civil Rights] is directed to investigate complaints alleging that citizens are being deprived of their right to vote. . . . [and to] study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution.”).

²⁴⁸ *National Ombudsman Reporting System (NORS)*, NAT’L LONG-TERM CARE OMBUDSMAN RES. CTR, https://ltombudsman.org/omb_support/nors [<https://perma.cc/8FW8-GFTJ>].

²⁴⁹ *NORS Frequently Asked Questions (FAQs)*, NAT’L LONG-TERM CARE OMBUDSMAN RES. CTR., https://ltombudsman.org/omb_support/nors/nors-faqs [<https://perma.cc/7678-54GW>].

²⁵⁰ *About NAPSA*, NAT’L ADULT PROTECTIVE SERVS. ASS’N, <https://www.napsa-now.org/about/> [<https://perma.cc/S3BN-7T4U>].

²⁵¹ 42 C.F.R. § 483.420 (2023).

Finally, a Long-Term Care BOR should allow for civil action as an option for enforcement. Residents who have experienced discrimination, harassment, or abuse based on sexual orientation or gender identity may want to enforce their own rights granted to them by the Long-Term Care BOR through private civil action. Residents of a long-term care facility may lack the resources to pursue expensive, time-consuming civil action, but there are various legal organizations that can provide such resources and legal assistance like the National LGBTQ+ Elder Hotline²⁵² and Lambda Legal.²⁵³

Conclusion

Ensuring that race, gender, sexual orientation, class, religion, and ability are included in all forms of advocacy is an essential component to fighting for justice for all marginalized communities. Over the last several decades, the LGBTQIA+ rights movement has made great strides, but age is often left out of the conversation. Federal marriage equality, the *Bostock* decision, and the enactment of LGBTQIA+ anti-discrimination legislation have each marked huge victories for the LGBTQIA+ community. While federal and state long-term care regulations may protect residents from general abuse and neglect, there are currently no formal legal protections for LGBTQIA+ residents of long-term care facilities against discrimination on the basis of sexual orientation or gender identity. As this population continues to grow, LGBTQIA+ residents of long-term care immediately need formal protections of their dignity, health, safety, and well-being. LGBTQIA+ advocates across the country should push for the enactment of a Long-Term Care BOR which would specifically protect LGBTQIA+ older adults and provide them with the dignity and safety they deserve.

²⁵² SAGE's National LGBTQ+ Elder Hotline 877-360 LGBT, NAT'L RES. CTR. ON LGBTQ AGING, <https://www.lgbtagingcenter.org/resources/resource.cfm?r=969> [<https://perma.cc/L8UH-YC99>].

²⁵³ Help Desk, LAMBDA LEGAL, <https://lambdalegal.org/helpdesk/> [<https://perma.cc/7EDX-WM4Q>].