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**In the Supreme Court of the United States**

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY;  
LORIE SMITH,

*Petitioners,*

*v.*

AUBREY ELENIS; SERGIO RAUDEL CORDOVA;  
CHARLES GARCIA; RICHARD LEE LEWIS, JR.;  
MAYUKO FIEWEGER; CHERYLIN PENISTON;  
JEREMY ROSS; DANIEL WARD; PHIL WEISER,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF MASSACHUSETTS, CALIFORNIA,  
CONNECTICUT, DELAWARE, THE DISTRICT OF  
COLUMBIA, HAWAII, ILLINOIS, MAINE,  
MARYLAND, MICHIGAN, MINNESOTA, NEVADA,  
NEW JERSEY, NEW MEXICO, NEW YORK,  
NORTH CAROLINA, OREGON, PENNSYLVANIA,  
RHODE ISLAND, VERMONT, WASHINGTON, AND  
THE ATTORNEY GENERAL OF WISCONSIN AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

MAURA HEALEY

*Attorney General of Massachusetts*

ELIZABETH N. DEWAR\*

*State Solicitor*

ABIGAIL B. TAYLOR

*Chief, Civil Rights Division*

ADAM M. CAMBIER

*Assistant Attorney General*

One Ashburton Place

Boston, MA 02108

(617) 963-2204

bessie.dewar@mass.gov

*\*Counsel of Record*

*(Additional counsel are listed on signature pages.)*

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## INTERESTS OF AMICI CURIAE

Massachusetts, California, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the Attorney General of Wisconsin share sovereign and compelling interests in protecting our residents and visitors from discrimination. Like Colorado, we support civil rights protections for people belonging to historically disenfranchised groups, including prohibitions on discrimination in places of public accommodation: the restaurants, stores, and other businesses that are part of daily life in a free society. Responding to the pervasive discrimination that members of these groups have long suffered and continue to suffer today, public accommodations laws ensure equal enjoyment of goods and services and combat the severe personal, economic, and social harms caused by discrimination.<sup>1</sup>

We also share interests in upholding the rights protected by the First Amendment. We do not seek to abridge the right to hold and express views regarding the nature of marriage, which underlie petitioners' objection to Colorado's public accommodations law. But, as this Court has long recognized, the right to freedom of speech is not infringed by prohibiting

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<sup>1</sup> Counsel for all parties have consented to this brief's filing. Under this Court's Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

businesses open to the public from turning away customers on the basis of their race or other characteristics protected by public accommodations laws.

Exempting businesses from public accommodations laws based on personal objections to serving all comers—objections that, under the Free Speech Clause, could be based not only on sincere religious belief but also on any number of other beliefs—would undermine the vital benefits these laws provide to residents and visitors. Many Americans would face exclusion from a host of everyday businesses or, at the very least, face the ever-present threat that any business owner could refuse to serve them when they walk in the door, simply because of their race, religion, sex, or sexual orientation. We therefore join Colorado in supporting affirmance of the judgment below.

### **SUMMARY OF THE ARGUMENT**

For centuries, the common law has required businesses that offer their goods and services to the public to serve all customers on an equal footing. Following the end of the Civil War, numerous States—including Colorado—codified this requirement by statute. Today, the vast majority of the States have laws forbidding public accommodations from discriminating against customers on the basis of protected characteristics such as race, religion, sex, and sexual orientation.

These public accommodations laws serve compelling governmental interests in eradicating discrimination, benefitting our residents and our

society. Statutes forbidding discrimination in the marketplace ensure that everyone, regardless of membership in an unpopular group, will have access to goods and services and will not face the significant dignitary harms caused by exclusion from the public sphere—harms that continue to fall on members of the LGBTQ community in our country. More broadly, these statutes protect our States’ commercial marketplaces from the balkanization that occurs when businesses that hold themselves out as open to the public nevertheless turn away whole categories of customers at will. And, by ensuring full integration of the commercial sphere, these laws protect open discourse across all of the communities that make up our society.

The First Amendment does not bar the States from enforcing these critical laws. Nothing about public accommodations laws compels speech. Nor do public accommodations laws force businesses to adopt their customers’ messages; they only require that the businesses serve customers on an equal footing. Thus, while petitioners contend that their “message” is affected by Colorado’s public accommodations law, in fact they may continue to espouse any message they wish through the products and services they offer to the public. A law that simply tells businesses open to the public that they cannot exclude customers on the basis of protected characteristics like race, religion, or sexual orientation regulates conduct rather than speech.

But even if viewed as incidentally burdening speech, public accommodations laws pass constitutional muster under any level of scrutiny.

Protecting our residents from discrimination in public establishments and protecting society from economic balkanization are unquestionably compelling interests, as this Court has long recognized. And these statutes are narrowly tailored to the harms they aim to avert. Ill-defined carve-outs along the lines of those proposed by petitioners would gravely undermine our compelling governmental interests rather than promote them.

Indeed, petitioners' proposed broad exemptions from compliance with public accommodations laws on the basis of personal objections are not limited to sincere religious beliefs, let alone limited to the issue of same-sex marriage and the rights of our LGBTQ residents. Such a holding in petitioners' favor would permit discrimination in the marketplace against anyone in our society, should a business owner object to their race, sex, religion, or other protected characteristic. Nothing in the First Amendment requires States to permit this kind of discrimination and its manifold harms.

## ARGUMENT

The States have sovereign and compelling interests in protecting their residents, and particularly members of historically disadvantaged groups, from the economic, personal, and social harms caused by invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). Since the mid-nineteenth century, States have enacted statutes intended to stamp out discrimination in places of public accommodation. *See Romer v. Evans*, 517 U.S. 620, 627-28 (1996). Allowing businesses like

303 Creative LLC to exempt themselves from these statutes would dramatically undermine the States' interests in eradicating discrimination and harm individuals and society at large.

**I. State Public Accommodations Laws Are Deeply Rooted in History and Serve to Combat Invidious Discrimination.**

**A. Public Accommodations Statutes Have Long Been a Centerpiece of Efforts to Prevent Discrimination in Commercial Establishments.**

The American legal and political system has long recognized the importance of public accommodations being open to all. Modern statutes codify and expand upon a common law doctrine, dating back at least to the sixteenth century, that generally required public accommodations to serve all customers. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (recognizing that such statutes “codify the common-law innkeeper rule”); *see also, e.g., Lombard v. Louisiana*, 373 U.S. 267, 275-77 & n.6 (1963) (Douglas, J., concurring) (collecting references dating back to 1558). “At common law,” this Court has explained, “innkeepers, smiths, and others who ‘made profession of a public employment,’ were prohibited from refusing, without good reason, to serve a customer.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) (quoting *Lane v. Cotton*, 12 Mod. 472, 484-85, 88 Eng. Rep. 1458, 1464-65 (K.B. 1701)); *see* David S. Bogen, *The Innkeeper’s Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51, 89 (1996) (“By



the end of the seventeenth century, the obligation of the innkeeper to serve the public was firmly established.”).

This common law doctrine was widely recognized by British and American authorities. William Blackstone explained that “if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller.” William Blackstone, 2 COMMENTARIES ON THE LAW OF ENGLAND 139 (Edward Christian et al. eds., Collins & Hannay, 1830). Writing in 1701, Lord Holt affirmed that all who entered a “profession of a trade which is for the public good” must “serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him.” *Lane*, 12 Mod. at 484. “If on the road a shoe fall off my horse and I come to a smith to have one put on, and the smith refuse to do it,” he elaborated, “an action will lie against him,” because in entering “a trade which is for the public good, [he] has thereby exposed and vested an interest of himself in *all* the king’s subjects that will employ him in the way of his trade.” *Id.* (emphasis added). Similarly, “[i]f an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier.” *Id.*; *see also* Henry Jeremy, THE LAW OF CARRIERS, INN-KEEPERS, WAREHOUSEMEN AND OTHER DEPOSITORIES OF GOODS FOR HIRE 139 (1815) (explaining that an “inn” is

generally defined as “a house kept open for the reception and entertainment of all comers, for gain”).

The duty of an establishment engaged in a public or common calling to “to entertain all persons,” as Blackstone described it, arose from the understanding that when a store “hangs out a sign and opens” itself for business, it is implicit that the offer of service extends to all customers. See Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1309-10, 1322-25 (1996). The choice to open a business to the public created a “universal assumpsit”—that is, “a promise to the world to accept and serve” any customer that sought service. *Id.* Thus, at common law, cases held a range of businesses to the duty to provide services to all comers, including “the common innkeeper and victualler, the common carrier, the common ferryman, the common bargeman, hoyman or other common water carrier, the common farrier, the common tailor, and the common surgeon.” Charles Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 522 & nn. 33-39 (1911) (collecting cases). And the duty applied even when the business would otherwise prefer to exclude a particular customer based on, for example, their status as a foreigner. See Bogen, *The Innkeeper’s Tale*, *supra*, at 76-77 (explaining that the duty of innkeepers to serve all who sought lodging arose in part from the history of legal assignment of traveling foreigners to inns, and that the crown would intervene to ensure that, even if an innkeeper did not wish to take in foreign travelers, those customers were provided lodging).

Drawing from this common law history, States since the mid-nineteenth century have enacted statutes barring discrimination in places of public accommodation. *See Romer*, 517 U.S. at 627-28. These statutes emerged from the recognition, informed by the Civil War and debates leading up to the ratification of the Fourteenth Amendment, that despite the clarity of the doctrine, in practice common law often did not adequately protect Black Americans' access to goods and services in commerce. *See id.* (noting that because the "common-law rules . . . proved insufficient in many instances," States opted to "counter discrimination by enacting detailed statutory schemes"); *Hurley*, 515 U.S. at 571 (describing the post-Civil War enactment of public accommodations statutes). The first such statute, adopted by Massachusetts in 1865, provided that "[n]o distinction, discrimination or restriction on account of color or race shall be lawful in any licensed inn, in any public place of amusement, public conveyance or public meeting." Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865). And in the two decades that followed, 13 more States—Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, and Rhode Island—enacted comparable laws. *See* Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 239-40 & nn. 171-72, 179 (1978).

Today, there is widespread agreement across American jurisdictions that society must not tolerate

discrimination by entities that choose to provide goods and services to the public. Forty-five States, as well as the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, have enacted public accommodations laws that protect the public from discrimination based on a range of characteristics.<sup>2</sup> All of these jurisdictions forbid discrimination on the basis of race, sex, ancestry or national origin, and religion or creed.<sup>3</sup> In addition, 26 of these jurisdictions forbid discrimination on the basis of sexual orientation, 25 on the basis of gender identity, 18 on the basis of marital status, 7 on the basis of veteran or military status, 35 on the basis of disability, and 20 on the basis of age.<sup>4</sup> These statutes have long been held constitutional as applied to a range of establishments, including commercial businesses. *See, e.g., Heart of Atlanta*, 379 U.S. at 260. Indeed, the laws “are well

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<sup>2</sup> *See* National Conference of State Legislatures, *State Public Accommodation Laws* (June 25, 2021), <https://tinyurl.com/ed8mnpm5>; P.R. Laws Ann. Tit. 1 § 13; V.I. Code Ann. Tit. 10 § 3; 19 Guam Code Ann. § 2110.

<sup>3</sup> *See id.*

<sup>4</sup> *See id.* In addition to the 23 jurisdictions with express statutory bars against discrimination on the basis of sexual orientation, *see id.*, Florida, Michigan, and Pennsylvania have interpreted their statutes’ prohibitions of discrimination on the basis of sex in to prohibit discrimination on the basis of sexual orientation and gender identity. *See* Florida Comm’n on Human Relations, *Notice: Sexual Discrimination* (2021), <https://tinyurl.com/3665suwx>; Michigan Civil Rights Comm’n, *Interpretive Statement* (May 21, 2018), <https://tinyurl.com/2hpskmad>; Pennsylvania Human Relations Comm’n, *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act* (Apr. 2022), <https://tinyurl.com/3avkcm56>.

within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” *Hurley*, 515 U.S. at 572.

Importantly, state laws requiring non-discriminatory access to public accommodations do not regulate conduct by private organizations that do not hold themselves open to the public. Instead, they regulate only the conduct of business establishments and other similar entities that do make the choice to hold themselves open to the public at large. Some States define the covered commercial entities in general terms.<sup>5</sup> Others list with particularity the types of establishments covered by the laws.<sup>6</sup> Still others, like Colorado—which defines “place of public accommodation” to include “any place of business engaged in any sales to the public and any place

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<sup>5</sup> See, e.g., Iowa Code § 67-5902(9) (“Place of public accommodation’ means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.”); La. Rev. Stat. § 51:2232(10) (defining “[p]lace of public accommodation, resort, or amusement” to mean “any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds”); Vt. Stat. Ann. tit. 9, § 4501(1) (“Place of public accommodation’ means any school, restaurant, store establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public.”).

<sup>6</sup> See, e.g., N.J. Stat. Ann. § 10:5-5(*l*); S.C. Code § 45-9-10.

offering services, facilities, privileges, advantages, or accommodations to the public” and then lists examples of such businesses—employ a hybrid approach. Colo. Rev. Stat. § 24-34-601(1).<sup>7</sup> But all public accommodations laws limit their reach to establishments that choose to provide goods or services to the public.<sup>8</sup>

As part and parcel of these laws, 23 States and the District of Columbia also prohibit posting notices and advertisements that indicate that services or goods

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<sup>7</sup> Colorado’s law specifies that public accommodations include but are “not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.” Colo. Rev. Stat. § 24-34-601(1); *see also, e.g.*, Ha. Stat. § 489-2.

<sup>8</sup> *See, e.g.*, Iowa Code § 216.2(13)(a) (“Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private.”); La. Rev. Stat. § 51:2232(10) (“a bona fide private club is not a place of public accommodation, resort, or amusement if its policies are determined solely by its members and its facilities or services are available only to its members and their bona fide guests”); N.J. Stat. Ann. § 10:5-5(*l*) (“Nothing herein contained shall be construed to include or apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private.”).

will be denied on the basis of a protected characteristic. *See* Addendum Table: Discriminatory Advertising Laws, Add. 1-3. Twenty of those laws include an “unwelcome” term similar to Colorado’s provision making it unlawful for public accommodations to “publish, issue, circulate, send, distribute, give away, or display . . . any communication . . . or advertisement of any kind . . . that is intended or calculated to discriminate or actually discriminates against any” member of the general public based on a protected characteristic, or that states that goods or services “shall or will be refused, withheld from, or denied to any person or class of persons on account of” a protected characteristic or that the patronage of an individual belonging to a protected group “is unwelcome or objectionable or not acceptable, desired, or solicited,” Colo. Rev. Stat. § 24-34-701. *See* Add. 1-3. Prohibitions against discriminatory advertising are also commonly included in other forms of anti-discrimination measures directed at housing and employment. *See, e.g.*, 42 U.S.C. § 3604 (barring housing advertising that “indicates any preference, limitation, or discrimination based on” a protected characteristic); 42 U.S.C. § 2000e-3(b) (similar prohibition for employment advertisements). The States and the federal government, recognizing that advertisements themselves may serve as the means by which businesses turn away customers, have thus prohibited such advertisements in order to prevent discrimination and its resulting harms.

**B. Public Accommodations Laws Serve to Protect Individuals and Society At Large from Significant Harms.**

This Court has long recognized that the protections afforded by public accommodations laws “plainly serv[e] compelling state interests of the highest order.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (quoting *Roberts*, 468 U.S. at 624). “[N]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a . . . citizen who seeks only equal treatment”—than a denial of equal service by a business “ostensibly open to the general public.” *Daniel v. Paul*, 395 U.S. 298, 306-08 (1969) (quotations omitted); *see also Heart of Atlanta*, 379 U.S. at 292 (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.” (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964))).

Discrimination by places of public accommodation causes unique and severe economic, personal, and social harms. It denies equal access to important goods and services and, by segregating the market, has a well-established “substantial and harmful effect” on the economy. *Heart of Atlanta*, 379 U.S. at 258 (acknowledging broad impacts of seemingly local discrimination); *see also Roberts*, 468 U.S. at 625-26. Contrary to petitioners’ suggestion, Pet. Br. 37-38, 45, many Americans, particularly those who live in less populated areas, cannot, having been turned away by



one business on account of their identity, simply obtain the same goods or services from another business: Across wide swaths of this country, customers do not have a choice among bakeries or funeral homes.<sup>9</sup> And more than that, discrimination by places of public accommodation stigmatizes its victims, causing them intense dignitary injuries and encouraging social fragmentation and conflict. *See Roberts*, 468 U.S. at 625-26; *Daniel*, 395 U.S. at 306; *Heart of Atlanta*, 379 U.S. at 250; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (allowing wedding service providers to refuse to provide goods and services to same-sex couples would create “a community-wide stigma inconsistent with the history and dynamics of civil rights laws”).

Thus, beyond the harms to individuals, discrimination by covered business establishments engenders balkanization in society, harming the social fabric of the States and the marketplace of ideas fostered by the First Amendment. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This Court has long recognized the “importance, both to the individual and to society, of removing the barriers to . . . political and social integration that have historically plagued certain disadvantaged groups.” *Roberts*, 468 U.S. at 626.

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<sup>9</sup> *See, e.g.*, First Amended Compl., *Zawadski v. Brewer Funeral Servs.*, No. 17-cv-19, Dkt. 12 (Cir. Ct., Pearl River Cnty., Miss., Mar. 7, 2017) (complaint against Mississippi funeral home that had the only crematorium in the county and abruptly refused to provide mortuary services upon learning the deceased man was married to a man, forcing the spouse to scramble to find services at the last minute, 90 miles from their home).

When all members of society can access the restaurants and coffee shops, barber shops and florists, photography companies and tailors that dot the American landscape, Americans of different creeds, backgrounds, and viewpoints converge and engage in open discourse. The right of access upheld by public accommodations laws thereby *contributes* to the exchange of ideas between groups that the First Amendment safeguards. *See, e.g., Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”). Conversely, the rule envisioned by petitioners—under which businesses with some self-identified expressive aspect could refuse to serve customers on the basis of the customer’s race or religion or sexual orientation—would give rise to segregation in the commercial sphere detrimental to the very values the First Amendment protects.

**C. LGBTQ Americans Suffer the Harms from Discrimination That Public Accommodations Laws Strive to Eliminate.**

Petitioners’ far-reaching theory in this case threatens to exclude people of any religion, race, sex, or nationality from businesses across our States—and, of course, threatens antidiscrimination laws the States have enacted to protect LGBTQ Americans in particular. LGBTQ Americans have faced a long history of invidious discrimination: fired from their jobs, evicted from their homes, targeted by police, and denied service by businesses simply because of their “distinct identity.” *Obergefell v. Hodges*, 576 U.S. 644,

660 (2015); *see also id.* at 660-61, 673-74, 677-78. At present, “[o]ur society has come to the recognition that gay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727). And because the governmental interest in preventing such adverse treatment “is a weighty one,” *id.*, many States and other jurisdictions prohibit discrimination against LGBTQ people in places of public accommodation. *See* Part I.A, *supra*, at 8-12.

Yet harmful discrimination against LGBTQ Americans remains a persistent problem. LGBTQ Americans are still much more likely to be bullied, harassed, and attacked in hate crimes than their non-LGBTQ peers.<sup>10</sup> LGBTQ people also report overt discrimination, particularly in the form of denial of service by businesses, at rates comparable to, or greater than, those for other historically disadvantaged groups.<sup>11</sup>

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<sup>10</sup> *See* Tasseli McKay et al., *Understanding (and Acting On) 20 Years of Research on Violence and LGBTQ + Communities*, 20 TRAUMA, VIOLENCE, & ABUSE 665, 669-70 (2019); Tim Fitzsimons, *Nearly 1 in 5 Hate Crimes Motivated by Anti-LGBTQ Bias, FBI Finds*, NBC News (Nov. 12, 2019), <https://tinyurl.com/53awb4mx>.

<sup>11</sup> *See* Christy Mallory & Brad Sears, *Refusing to Serve LGBT People: An Empirical Assessment of Complaints Filed under State Public Accommodations Non-Discrimination Laws*, 8 J. RES. GENDER STUD. 106, 113-16 (2018); Christy Mallory & Brad Sears, *LGBT Discrimination, Subnational Public Policy, and Law in the United States*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 1, 2-8 (2020), <https://tinyurl.com/yvtrkmwc>.

This continuing discrimination harms the health and well-being of LGBTQ people, their families, and their communities. A large and growing body of evidence shows that discriminatory social conditions have severe negative health impacts on LGBTQ people, including increased rates of mental health disorders and suicide attempts, especially for LGBTQ youth.<sup>12</sup> Notably, these outcomes are less severe and less pervasive in communities that provide LGBTQ people with legal protection against discrimination, including in public accommodations.<sup>13</sup>

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<sup>12</sup> Ctr. for the Study of Inequality, What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?*, Cornell University (2019), <https://tinyurl.com/2faxfjnu> (detailing findings from 300 peer-reviewed studies); see also, e.g., Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA PSYCHIATRY 671, 672 (2018); Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA PEDIATRICS 350, 351 (2017); Mark L. Hatzenbuehler, *Structural Stigma: Research Evidence and Implications for Psychological Science*, 71 AM. PSYCHOLOGIST 742, 745-46 (2016); Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896, 899-901 (2011); Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 AM. J. PUB. HEALTH 2275, 2277-78 (2009).

<sup>13</sup> See Raifman et al. (2018), *supra* n.12, at 673-75; Raifman et al. (2017), *supra* n.12, at 353-55; Hatzenbuehler et al. (2009), *supra* n.12, at 2277-78.

The exemption petitioners seek from Colorado's public accommodations law enables precisely the sort of discrimination that has historically burdened LGBTQ Americans. The company will provide a wedding website design service to opposite-sex couples but deny the exact same service to same-sex couples. Pet. Br. 23 n.2. An objection to two people of the same sex marrying cannot reasonably be divorced from the status of being LGBTQ. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-42 (2020); *Christian Legal Soc. v. U.C. Hastings*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). Nor is it a defense to provide other website design services for LGBTQ customers, see Pet. Br. 22. Public accommodations laws exist to prevent not only outright exclusion, but also separate and unequal treatment. Otherwise, our country would be blighted by segregated businesses that serve in perniciously unequal ways, reserving some services only for customers who are members of preferred groups. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (restaurant serving African American customers only through a take-out window, not in the dining area). The First Amendment does not require permitting such unequal treatment by businesses that offer their goods and services to the public.

## **II. The First Amendment Does Not Exempt Businesses Open to the Public from State Anti-Discrimination Laws.**

There is no real dispute that petitioners' stated intent to refuse services to LGBTQ customers would violate Colorado's anti-discrimination law. The First Amendment does not require permitting this unequal

treatment by businesses that offer their services to the public. No matter the sincerity of a business owner's views, the Free Speech Clause does not allow a business to pick and choose its customers in violation of laws that prohibit discriminatory conduct.

**A. Prohibiting Businesses from Discriminating Against Customers Does Not Compel Speech.**

Although the First Amendment prohibits the States from “telling people what they must say” or requiring them to “speak the government’s message,” *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 61, 63 (2006) (“*FAIR*”), public accommodations statutes like Colorado’s do neither.

Indeed, Colorado’s public accommodations law does not regulate speech at all. In *FAIR*, this Court held that a prohibition on law schools discriminating against military recruiters when providing campus access to outside employers regulated “conduct, not speech”: “It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.” *Id.* at 60. Likewise here, anti-discrimination laws like Colorado’s affect what public accommodations “must *do*”—provide equal access—“not what they may or may not *say*.” *Id.* In other words, Colorado’s law does not require speaking or endorsing a government motto, pledge, or message. *See id.* at 62. Rather, the law simply requires businesses to “afford equal access” to the full range of their services without discriminating on the basis of a protected characteristic. *Id.* at 60.

Moreover, Colorado law does not “compel” the creation of websites, nor regulate the process of creating websites in any particular way. A web design business is under no legal obligation to offer wedding websites, nor to create those websites in any specific manner. Colorado law simply requires that businesses offering services to the public make those services available to customers belonging to protected classes if, and to the extent that, they provide those same services to others. See *FAIR*, 547 U.S. at 61-62 (law requiring schools to post written notice of military recruiter visits was “only ‘compelled’ if, and to the extent, the school” chose to assist “other recruiters” and was, in any event, “incidental to the [law’s] regulation of conduct”). This type of non-discrimination requirement is a “far cry” from laws “dictat[ing] the content of . . . speech.” *Id.* (distinguishing cases like *Wooley v. Maynard*, 430 U.S. 705 (1977)). As the *FAIR* Court noted, “prohibit[ing] employers from discriminating in hiring on the basis of race” does not compel speech, and “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Public accommodations laws also leave businesses free to disclaim any message they worry may be communicated by providing non-discriminatory service. So long as businesses treat all customers equally, they may, for example, create and disseminate a disclaimer stating that the provision of a service does not constitute an endorsement or

approval of any customer or conduct. *See id.* at 64-65; *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-88 (1980).

Accordingly, petitioners err in relying on *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), to suggest Colorado’s public accommodations law unlawfully compels speech. *See* Pet. Br. 17-19, 21, 23, 25-26, 28. Their argument relies on the premise that commercial businesses’ refusals to serve customers based on a protected characteristics like race and sexual orientation should receive the same First Amendment protection afforded to private, non-commercial organizations engaged in expressive associational activities at the core of the First Amendment’s protections. But this premise elides the fundamental distinction between a private speaker sharing its *own* message and a public accommodation offering services to the general public. While *Hurley* noted that “business corporations generally” enjoy a speaker’s “autonomy to choose the content of his *own* message,” and that a private parade organizer may “customar[ily] determin[e]” which expressive units it wishes to present, 515 U.S. at 573-75 (emphasis added), *Hurley* nowhere suggested that a business that offers as a service to the general public the creation of a product could refuse to provide the service to customers on the basis of their race, sex, religion, sexual orientation, or other protected characteristic—nor that laws requiring such service compel any form of speech. *See FAIR*, 547 U.S. at 63 (“The expressive nature of a parade was central to our holding in *Hurley*.”).



In essence, petitioners' claim fails because, contrary to their assertions, Pet. Br. 18, the mere fact of a commercial business open to the public providing services to customers regardless of their race, sex, religion, or sexual orientation as required by state law is not a "message" for purposes of the First Amendment. This case thus *does* present what petitioners call "the rare circumstance where an artist declines to speak based on the status of the requester rather than the artist's objection to the message," Pet. Br. 21: Petitioners would create a wedding website for a man and a woman both named Robin, but would not create the exact same website if they were both men, or both women. Selecting one's customers is conduct, not speech. And while petitioners protest that "context matters," Pet. Br. 23 n.2, the "context" they leave unsaid is that they do not want to provide one set of potential *customers* with their wedding website services. Just as a commercial business has no protected expressive interest in its relationship with its customers, *see Roberts*, 468 U.S. at 638 (O'Connor, J., concurring); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1073 (7th Cir. 2013), a business offering services to the general public does not have the right to "express a message" by offering only a subset of its services to clients of particular sexual orientations (or races, or sexes, or religions), *see Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M. 2013) ("While photography may be expressive, the operation of a photography business is not."). Similarly, such a business is not unlawfully compelled to speak when it is required to offer those clients all of its services on equal footing. *See id.* at 68.

To be sure, public accommodations laws do not require businesses to say whatever any customer wants them to say; they only forbid businesses from turning away customers *because of* those customers' protected characteristics. Consequently, contrary to petitioners' suggestion, Pet. Br. 27, a ruling in Colorado's favor here would not permit the States to force businesses to promote any particular religion, criticize same-sex marriage, deny climate change, or indeed espouse any particular actual message in the products and services that they offer to the public.

Finally, just as the First Amendment does not license businesses to violate public accommodations laws, it does not protect advertising or publicizing an intent to do so. To the extent such notices constitute commercial speech, they can be banned outright simply because they advertise unlawful, discriminatory activities. *See Pittsburgh Press Co. v. Hum. Rels. Comm'n*, 413 U.S. 376, 388-89 (1973) (employment discrimination ordinance validly prohibited newspaper from publishing sex-segregated employment advertisements). Moreover, such laws in essence prohibit discriminatory conduct itself: refusals of service that are communicated preemptively in a notice, rather than only after service is requested by the customer. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." (quoting *FAIR*, 547 U.S. at 62) (internal quotation marks omitted)); *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited

to the few who ignored the sign and subjected themselves to personal rebuffs.”). The First Amendment thus does not forbid the dozens of state statutes that prohibit advertising an intent to exclude customers based on their race, sex, religion, or sexual orientation, *see* Add. 1-3.

**B. Public Accommodations Laws Like Colorado’s Satisfy Any Level of Constitutional Scrutiny.**

For all the reasons above, Colorado’s neutral and generally applicable public accommodations law regulates conduct as well as commercial speech advertising unlawful conduct, and therefore is not subject to heightened scrutiny.<sup>14</sup> The law would, however, survive intermediate scrutiny if viewed as imposing an incidental burden on speech, *see FAIR*, 547 U.S. at 67, and even strict scrutiny.

**1. Public Accommodations Laws Serve a Compelling State Interest in Combatting Discrimination in Public Establishments.**

As this Court has found time and again, “public accommodations laws ‘plainly serv[e] compelling state interests of the highest order.’” *Duarte*, 481 U.S. at 549 (quoting *Roberts*, 468 U.S. at 624). As described above, public accommodations laws further the States’

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<sup>14</sup> Petitioners’ contention that Colorado’s statute is somehow *not* viewpoint-neutral, *see* Pet. Br. 30-33, defies both common sense and decades of precedent. *See, e.g., Christian Legal Soc.*, 561 U.S. at 695 (“all-comers requirement” is “textbook viewpoint neutral”).

compelling interests in protecting our residents from the concrete harms caused by discrimination in public establishments and protecting our society at large from the balkanizing effects that such discrimination creates. *See* Part I.B, *supra*.

While petitioners protest that “eradicating discrimination” is too broad an interest to sustain Colorado’s law, Pet. Br. 37, Colorado’s interest is in fact more precise: eradicating discrimination *in public accommodations*, where discrimination makes its way into the public sphere and harms both individuals and the fabric of society at large. Indeed, petitioners acknowledge that “this Court has recognized that states have an interest in ensuring equal access to the marketplace generally.” Pet. Br. 43 (citing *Roberts*, 468 U.S. at 624). By thus “assuring equal access” to the commercial marketplace, public accommodations laws ensure that residents are not denied—or forced to overcome artificial barriers to acquire—goods and services on the basis of a protected trait. *Roberts*, 468 U.S. at 625; *see also Romer*, 517 U.S. at 631 (“[T]hese are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life.”). These laws thereby provide protection from the “stigmatizing injury” and “deprivation of personal dignity” that necessarily “accompanies denials of equal access to public establishments.” *Roberts*, 468 U.S. at 625 (quoting *Heart of Atlanta*, 379 U.S. at 250); *see Masterpiece*, 138 S. Ct. at 1727, 1729, 1732. And ensuring that such public establishments are indeed open to the entire public fosters not only the economic, but also the social and political integration of residents. *Roberts*, 468 U.S. at 625-26.

Petitioners also miss the mark in claiming that Colorado’s law does not address an “actual problem” because, they assert, turned-away customers can obtain services from other businesses. Pet. Br. 37-38. To begin with, customers may not in fact always have alternatives: People in less populated regions of the country, including large swaths of our States, naturally have fewer choices among businesses for any particular product or service, such that being refused service by even a single business meaningfully affects their access to the market. This problem is compounded for customers belonging to particularly disfavored groups, who may find themselves turned away repeatedly and consequently may not be able to find their desired services at all.<sup>15</sup>

Moreover and in any case, petitioners’ “just go elsewhere” argument ignores the central animating purpose of anti-discrimination laws: to ensure that people will *not* be turned away from businesses on account of their race, sex, religion, or sexual orientation. Their position hearkens back to the days when Black travelers were forced to rely on the “Negro Motorist Green Book” to “find[] lodging, businesses, and gas stations that would serve them along the

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<sup>15</sup> See, e.g., Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUD. 75, 77 (2021) (describing experiment finding in part that only 49.2% of 1,155 wedding vendors in Indiana, Iowa, North Carolina, and Texas responded favorably to inquiry from same-sex couple following the *Masterpiece Cakeshop* decision); see also *supra* note 9.

road.”<sup>16</sup> It would thus reinforce exactly the kind of social disintegration and economic balkanization that public accommodations laws like Colorado’s are intended to combat.

## **2. Public Accommodations Laws Are Narrowly Tailored to Serve the States’ Compelling Interest.**

Just as employment discrimination laws are “precisely tailored” to advance a state interest in providing “equal opportunity to participate in the workforce,” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014), public accommodations laws like Colorado’s are precisely tailored to advance a state interest in ensuring equal access to the businesses that sustain our everyday life. *See Roberts*, 468 U.S. at 628. Colorado’s law is therefore constitutional even if strict scrutiny were to apply.

Petitioners posit a variety of ways they say Colorado’s law could be more narrowly tailored, Pet. Br. 47-49, but none would achieve the State’s compelling interest in ensuring equal marketplace access. To the contrary, rather than constituting better tailoring, they would frustrate the law’s very purpose. For example, petitioners suggest that Colorado could carve out from its public accommodations law businesses that want to “decline specific projects based on their message.” Pet. Br. 47-48. But, as discussed above, Part II.A, *supra*, public

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<sup>16</sup> Jennifer Kent & Christy Fisher, *Integration in a Post-Brown World: Conversation with Judge Marcella Holland*, MD. B.J., November/December 2016, at 34.

accommodations laws already do not force businesses to convey whatever *message* their customers direct. Rather, these laws simply require businesses open to the public to offer the full slate of their products and services—containing whatever messages they choose—to customers without refusing service on the basis of the customer’s race, sex, religion, or sexual orientation. Such an exemption would thus amount to permitting exactly the kind of discriminatory treatment and economic balkanization public accommodations laws exist to prevent.

The other alternatives petitioners suggest—exempting the wedding industry from public accommodations laws, or limiting the definition of public accommodations altogether—would likewise directly contravene the compelling interest undergirding the law. Instead of resulting in a law better tailored to Colorado’s interest in preventing discrimination in the marketplace, these unprincipled exemptions would simply have Colorado *allow* discrimination in certain sectors of the market. Laws like Colorado’s effectively ensure equal access and combat discrimination’s harms by comprehensively covering places open to the public; the States cannot both combat discrimination and, at the same time, license some businesses to discriminate. *See State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1235 (Wash. 2019) (“carv[ing] out a patchwork of exceptions for ostensibly justified discrimination” would “fatally undermine[]” the government’s interest).<sup>17</sup>

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<sup>17</sup> While petitioners highlight that the States’ diverse public accommodations laws do include, in some of the States, some of

Ultimately, petitioners' challenge to Colorado's public accommodations law is just the latest in a long line this Court has rejected, over business owners' objections based on personal convictions. *See, e.g., McClung*, 379 U.S. at 298 n.1 (rejecting argument that restaurant could discriminate against African Americans based on "personal convictions and . . . choice of associates," as argued in the Brief for Appellees, No. 543, 1964 WL 81100, at \*32-33 (U.S. Oct. 2, 1964)). Building on centuries of common law tradition, the Court has been steadfast in condemning discrimination in public establishments as a "unique evil" entitled to "no constitutional protection," *Roberts*, 468 U.S. at 628-29, and has recognized state laws prohibiting such discrimination as "unquestionab[ly]" constitutional, *Heart of Atlanta*, 379 U.S. at 260-61. So too should the Court here.

### **III. Petitioners' Proposed First Amendment Exception to Public Accommodations Laws Would Allow for Widespread and Varied Forms of Discrimination.**

A broad ruling in favor of petitioners would have dramatic and invidious consequences for our States'

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the limitations petitioners suggest, Pet. Br. 38, 47, those States' policy choices do not render Colorado's interests in eradicating discrimination in the public accommodations identified in Colorado's law any less compelling. And some States' choice not to tackle the problem of discrimination in as many industries or locations cannot become a ceiling limiting other States that would opt to have their laws prohibit discrimination more broadly; such limitations do not amount to narrow tailoring, but instead simply contravene—industry by industry, or place by place—the very purpose of public accommodations laws.



public accommodations laws, our residents, and our society.

Petitioners would sweepingly exempt from public accommodations laws any “form of expression” where “the complaining speaker’s own message was affected” by the law’s operation—where such changes to “expression” apparently are so indistinctly defined as to include the mere fact of a business open to the public serving a customer. Pet. Br. 17-18. Petitioners offer no principled basis to distinguish a web design business from myriad other businesses that may seek to claim an exemption from public accommodations laws. An architectural firm, sign-making store, hair salon, make-up studio, fine-dining restaurant: Under petitioner’s test, each is a business that its operator may subjectively view as involving “expressive” activity. Indeed, there is no reason why petitioners’ view of the operative test would limit First Amendment exemptions from public accommodations laws to businesses that are “expressive” in the sense they suggest, as opposed to other businesses that offer services with potentially expressive aspects—like a hotel ballroom that posts custom signs to announce its events or a hardware store that designs its own aisle markers.

Consequently, members of protected groups could be exposed to discrimination in a broad swath of the commercial marketplace. Examples abound of businesses that could refuse to provide a service to customers based only on the businesses’ objection to some “message” that, at its core, hinges only on those customers’ identities: A bakery whose owner opposed mixed-race relationships could refuse to bake wedding

cakes for interracial couples; a real estate agency whose owner opposed racial integration could refuse to represent Black couples seeking to purchase a home in a predominantly white neighborhood; or a portrait studio whose proprietor opposes interracial adoption could refuse to take pictures of white parents with their Black adopted children. Indeed, petitioners' rule would allow businesses to refuse to provide not just the same kind of service, but even the exact same *product* on the basis of some abstract "message" conveyed by that product's association with the recipient: A tattoo studio could ink American flag tattoos on customers born in the United States while refusing to sell identical tattoos to immigrants.

Although the First Amendment tolerates all manner of speech in the public square, *see, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011), it does not require insulating from liability businesses that violate nondiscrimination laws by turning away customers simply because of their race, religion, sex, or sexual orientation. This Court should adhere to its longstanding recognition, founded in centuries of legal tradition, that people should not be subjected "to indignities when they seek goods and services in an open market." *Masterpiece*, 138 S. Ct. at 1732. The States must be permitted to preserve our residents' social and economic well-being and protect all within our borders from the manifest harms of discrimination in public accommodations.

## CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

MAURA HEALEY  
*Attorney General of Massachusetts*  
ELIZABETH N. DEWAR\*  
*State Solicitor*  
ABIGAIL B. TAYLOR  
*Chief, Civil Rights Division*  
ADAM M. CAMBIER  
*Assistant Attorney General*  
One Ashburton Place  
Boston, MA 02108  
(617) 963-2204  
bessie.dewar@mass.gov  
*\*Counsel of Record*

August 19, 2022

ROB BONTA  
*Attorney General of*  
*California*  
1300 I St.  
Sacramento, CA 95814

KATHLEEN JENNINGS  
*Attorney General of*  
*Delaware*  
820 North French St.  
Wilmington, DE 19801

WILLIAM TONG  
*Attorney General of*  
*Connecticut*  
165 Capitol Ave.  
Hartford, CT 06106

KARL A. RACINE  
*Attorney General for the*  
*District of Columbia*  
400 6th St., NW  
Ste. 1800  
Washington, D.C. 20001

HOLLY T. SHIKADA  
*Attorney General of  
Hawai'i*  
425 Queen St.  
Honolulu, HI 96813

KWAME RAOUL  
*Attorney General of  
Illinois*  
100 West Randolph St.  
Chicago, IL 60601

AARON M. FREY  
*Attorney General of  
Maine*  
6 State House Station  
Augusta, ME 04333

BRIAN E. FROSH  
*Attorney General of  
Maryland*  
200 Saint Paul Place  
Baltimore, MD 21202

DANA NESSEL  
*Attorney General of  
Michigan*  
P.O. Box 30212  
Lansing, MI 48909

KEITH ELLISON  
*Attorney General of  
Minnesota*  
102 State Capitol  
75 Rev. Dr. Martin  
Luther King Jr. Blvd.  
St. Paul, MN 55155

AARON D. FORD  
*Attorney General of  
Nevada*  
100 North Carson St.  
Carson City, NV 89701

MATTHEW J. PLATKIN  
*Acting Attorney General  
of New Jersey*  
Richard J. Hughes  
Justice Complex  
25 Market St.  
Trenton, NJ 08625

HECTOR BALDERAS  
*Attorney General of  
New Mexico*  
408 Galisto St.  
Santa Fe, NM 87501

LETITIA JAMES  
*Attorney General of  
New York*  
28 Liberty St.  
New York, NY 10005

JOSHUA H. STEIN  
*Attorney General of  
North Carolina*  
114 W. Edenton Street  
Raleigh, NC 27603

ELLEN F. ROSENBLUM  
*Attorney General of  
Oregon*  
1162 Court St. N.E.  
Salem, OR 97301

JOSH SHAPIRO  
*Attorney General of  
Pennsylvania*  
16th Fl., Strawberry Sq.  
Harrisburg, PA 17120

ROBERT W. FERGUSON  
*Attorney General of  
Washington*  
P.O. Box 40100  
Olympia, WA 98504

PETER F. NERONHA  
*Attorney General of  
Rhode Island*  
150 South Main St.  
Providence, RI 02903

JOSHUA L. KAUL  
*Attorney General of  
Wisconsin*  
17 W. Main St.  
Madison, WI 53703

SUSANNE R. YOUNG  
*Attorney General of  
Vermont*  
109 State Street  
Montpelier, VT 05609

**ADDENDUM****Table: Discriminatory Advertising Laws**

The following States prohibit discriminatory advertising or notices as part of their public accommodations laws. Asterisks denote the state statutes that prohibit advertisements indicating that the patronage of a member of a protected group is “unwelcome.”

<i>State</i>	<i>State Law</i>
Alaska*	Alaska Stat. § 18.80.230 (2000).
Colorado*	Colo. Rev. Stat. §§ 24-34-601(2)(a), 701 (2021).
Delaware*	Del. Code Ann. tit. 6, § 4504(b) (West 2019).
District of Columbia*	D.C. Code § 2-1402.31(a)(2) (2006).
Idaho*	Idaho Code Ann. § 67-5909(5)(b) (2005).
Illinois*	775 Ill. Comp. Stat. § 5/5-102(B) (2007).
Iowa*	Iowa Code § 216.7(1)(b) (2019).

Add. 2

Kentucky*	Ky. Rev. Stat. Ann. § 344.140 (West 1992).
Maine*	Me. Rev. Stat. tit. 5, § 4592(2) (2019).
Massachusetts	Mass. Gen. Laws ch. 272, § 92A (2016).
Michigan*	Mich. Comp. Laws § 37.2302(b) (1977).
Montana	Mont. Code Ann. § 49-2- 304(1)(b) (1993).
New Hampshire*	N.H. Rev. Stat. Ann. § 354- A:17 (2019).
New Jersey*	N.J. Stat. Ann. § 10:5- 12(f)(1) (West 2020).
New York*	N.Y. Civ. Rights Law § 40 (McKinney 1945).
North Dakota*	N.D. Cent. Code § 14-02.4-16 (1995).
Oregon	Or. Rev. Stat. § 659A.409 (2007).
Pennsylvania*	43 Pa. Stat. § 955(i)(2) (2009).
Rhode Island*	R.I. Gen. Laws § 11-24-2 (2001).

Add. 3

South Dakota*	S.D. Codified Laws § 20-13-25 (1986).
Tennessee*	Tenn. Code Ann. § 4-21-502 (West 1978).
Virginia	Va. Code Ann. § 2.2-3904 (2020).
West Virginia*	W. Va. Code § 5-11-9(6)(B) (2016).
Wisconsin*	Wis. Stat. § 106.52(3)(a)(3)-(3m) (2016).