

THE NONSENSE ABOUT BATHROOMS:
HOW PURPORTED CONCERNS OVER SAFETY BLOCK LGBT
NONDISCRIMINATION LAWS AND OBSCURE
REAL RELIGIOUS LIBERTY CONCERNS

by
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Although Americans overwhelmingly believe that LGBT people should not be turned away from a business open to the public just for being gay or transgender, no state has enacted protections for all LGBT people against being told that “we don’t serve people like you.”

This Article traces the impasse over new state legislation banning discrimination on the basis of sexual orientation and gender identity (“SOGI”) to one critical assertion: that ensuring LGBT people “equal enjoyment of facilities” means that men will now be allowed “in women’s bathrooms,” threatening the safety of others. Although the claim that SOGI nondiscrimination laws expose the public to victimization by sexual predators reaches back to 2008, it reached a crescendo in 2015 when opponents defeated Houston’s Equal Rights Ordinance by tagging it as a “bathroom bill, and 2016 when North Carolina legislators wiped aside a Charlotte ordinance that was silent about facility access, requiring instead that businesses defined as “public accommodations” must require patrons to use the bathroom matching the sex of their birth.”

Despite the punishing treatment of North Carolina after H.B. 2, the 2017 legislative year opened with a raft of bills designed to force individuals to use the bathroom matching the sex of their birth. While proponents of these bills claim that extending nondiscrimination protections to the LGBT community imperils public safety, this Article argues that this claim is not predicated on evidence about—or risks from—trans

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people. Sex offenders are the source of this threat, as affidavits filed in support of North Carolina’s defense of H.B. 2 acknowledge.

Notably, the bathroom narrative has served to obscure pressing religious liberty issues, such as how nondiscrimination laws should interact with—or give way to—religious convictions on questions of sexuality in religious spaces, like the nature of gender itself. This Article concludes that SOGI nondiscrimination laws are necessary to advance human dignity and to secure “a level playing field so that all persons can enjoy the fruits of their labor.” Policymakers should therefore reject the case against SOGI nondiscrimination protections based on public safety. It is, however, incumbent on lawmakers to ensure that civil laws governing questions of sexuality do not inadvertently spill over to houses of worship and other places where religious believers should have discretion to decide such matters for their communities. This Article further concludes that it is possible to authorize businesses to open restrooms to LGBT persons in a way that ensures the safety, dignity, and privacy of all their patrons while respecting the religious convictions of people of faith.

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INTRODUCTION

Americans overwhelmingly believe that lesbian, gay, bisexual, or transgender (“LGBT”) people should not be turned away from a restaurant or other business open to the public just for being gay or transgender. Most people of good will see such denials of service as wrong, treating individuals differently based on irrelevant characteristics, which is demeaning both to the person refused and to the wider community. Yet, since 2008 no state has enacted protections for all LGBT people against being told that “we don’t serve people like you,” although some states have broadened pre-existing sexual orientation discrimina-

tion bans to include transgender (“trans”) people or enacted LGBT protections in stages.¹

The prospects for legislation banning discrimination on the basis of sexual orientation and gender identity (“SOGI”), whether in new state laws or a single federal law laying the issue to rest, seem now, more than any time in the past several decades, to be out of reach.² While the reasons for the lack of progress are complex,³ one issue has emerged forcefully since 2015: the assertion that giving trans people equal access to facilities threatens the safety of others.

Although the claim that SOGI nondiscrimination laws expose the public to victimization by sexual predators reaches back to 2008, it reached a crescendo in 2015 and 2016. First, opponents defeated Houston’s Equal Rights Ordinance (“HERO Ordinance”) by tagging it a “bathroom bill”⁴—even though gay rights advocates “outspen[t] their opponents three to one” in an attempt to sustain the measure.⁵ Opponents recast the commitment “not [to] discriminate on the basis of any protected characteristic [when] making available the use of . . . facilities”⁶

¹ See *infra* Part I.

² Compare *Preserve Freedom, Reject Coercion*, THE COLSON CENTER FOR CHRISTIAN WORLDVIEW, <http://www.colsoncenter.org/freedom> (last visited Jan. 23, 2017) [hereinafter *Preserve Freedom*] (“SOGI laws in all these forms, at the federal, state, and local levels, should be rejected. We join together in signing this letter because of the serious threat that SOGI laws pose to fundamental freedoms guaranteed to every person.”) with U.S. COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (September 2016), <http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF> (statement of Chairman Martin R. Castro) (“However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality.”). See also *infra* note 19.

³ For an analysis of other impediments, see Robin Fretwell Wilson, *Bathrooms and Bakers: How Sharing the Public Square Is the Key to a Truce in the Culture War*, in FAITH, SEXUALITY, AND THE MEANING OF FREEDOM (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., forthcoming) (discussing the pivotal role played in state law reform efforts by high-profile cases of wedding vendors, like bakers and florists, who have refused for religious reasons to facilitate same-sex weddings).

⁴ David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/> (“In one especially noted example, a non-discrimination proposal in Houston was defeated in November, in large part because of controversy over transgender use of bathrooms.”).

⁵ Dominic Holden, *Why America’s Top LGBT Group Is Losing an Argument Over Bathrooms*, BUZZFEED NEWS (Dec. 22, 2015), <https://www.buzzfeed.com/dominicholden/hrc-bathroom-strategy>. Advocates spent heavily because they believe that when “building momentum across the country, every victory you have is a building block,” making Houston’s law a must-win battle. Commentators agree that the defeat boiled down to a single “bumper-sticker-ready slogan: ‘No men in women’s bathrooms.’” *Id.*

⁶ Hous., Tex., Ordinance 2014-530 (May 14, 2014) (encompassing both government buildings and “privately owned and operated public accommodations,

as “allowing men to enter women’s restrooms and locker rooms—defying common sense and common decency.”⁷

Within months, and citing similar concerns for public safety, North Carolina legislators wiped aside a Charlotte ordinance that was silent about facility access, directing instead that all public accommodations require patrons to use the bathroom of their birth.⁸ Since passage of the law—known as H.B. 2—the state has suffered significant financial losses through travel bans, boycotts, and lost jobs, and it may yet lose billions in federal support for schools if litigation begun during the Obama Administration continues.⁹

Exacerbating matters, on May 13, 2016, the Obama Administration issued a “Dear Colleague” letter to schools receiving Title IX funds, directing them to “allow transgender students access to [bathroom and locker] facilities consistent with their gender identity.”¹⁰ Although a federal district court enjoined the directive nationally, concluding that the Administration’s interpretation of Title IX’s ban on sex discrimination was inconsistent with the statute’s plain language,¹¹ the discretion of schools to decide such matters became an issue in the presidential election.¹²

Despite North Carolina’s punishing treatment, the 2017 legislative year opened with a raft of proposed “bathroom-of-one’s-birth” laws. Some focused on schools alone, presumably prompted by the “Dear Colleague” letter.¹³ Others would follow North Carolina’s example and regulate ac-

including restaurants, bars, entertainment venues and places of public amusement, hotels and motels and public conveyances”).

⁷ Alexa Ura, *Bathroom Fears Flush Houston Discrimination Ordinance*, TEX. TRIB. (Nov. 3, 2015), <https://www.texastribune.org/2015/11/03/houston-anti-discrimination-ordinance-early-voting/> (quoting Texas Lieutenant Governor Dan Patrick discussing the defeat of a Houston nondiscrimination ordinance).

⁸ See *infra* note 30.

⁹ See *infra* Part IV.

¹⁰ U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, *Dear Colleague Letter on Transgender Students*, May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter *Dear Colleague Letter*].

¹¹ Order, *Franciscan Alliance, Inc. v. Burwell*, Case 7:16-cv-00108 (N.D. Tex. Dec. 31, 2016), <https://assets.documentcloud.org/documents/3249186/Injunction-Franciscan-Alliance-v-Burwell.pdf>.

¹² Michael F. Haverluck, *Obama’s Transgender Restroom Mandate Bombs with Voters*, ONENESSNOW (June 25, 2016), <https://www.onenewsnw.com/politics-govt/2016/06/25/obamas-transgender-restroom-mandate-bombs-with-voters>.

¹³ See, e.g., H.R. 41, 2017 Leg., 90th Sess. (Minn. 2017) (requiring school restrooms, lockers rooms, and showers to be used by a single sex, where sex is determined by chromosomes and determined at birth, while permitting single user facilities to accommodate transgender students); S. 98, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017) (requiring school restrooms, locker rooms, and showers designated for male or female students only with biological sex defined as “the physical condition of being male or female, which is determined by a person’s chromosomes,

cess to public bathrooms in government buildings or public establishments more generally.¹⁴

This Article argues that the claim that extending nondiscrimination protections to the LGBT community imperils public safety is not predicated on evidence about or risks from trans people. Sex offenders are the source of this threat.¹⁵ Even as to sex offenders, however, the relationship

and is identified at birth by a person's anatomy and indicated on their birth certificate"); S. 6, 84th Leg., 2017 Sess. (Tex. 2017) (prohibiting municipalities from creating restroom and changing facility requirements while requiring schools and government-controlled facilities to designate bathrooms by "biological sex," defined as "the physical condition of being male or female, which is stated on a person's birth certificate"; exemptions for custodial purposes, repairs, emergency assistance, or a child accompanying a caregiver). *See also* Patrik Jonsson, *How the 'Bathroom Bill' Debate Went Nationwide*, CHRISTIAN SCI. MONITOR (May 21, 2016), <http://www.csmonitor.com/USA/Society/2016/0521/How-the-bathroom-bill-debate-went-nationwide> (discussing the role of the "Dear Colleague" letter).

¹⁴ *See, e.g.*, S. 1, 2017 Leg., Reg. Sess. (Ala. 2017) (providing three options for restrooms or changing facilities open to the public: (1) single user, (2) single gender, (3) gender neutral with attendant to monitor use; gender is not defined in the bill); H.R. 202, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017) (requiring all public restrooms to be gender-divided and preempting contrary municipal laws); H.R. 3012, 2017–18 Gen. Assemb., 122nd Sess. (S.C. 2017) (forbidding local governments from enacting laws or adopting standards other than biological sex, defined as "the physical condition of being male or female, which is stated on a person's birth certificate," for restroom use in public accommodations or private clubs, but making exemptions for custodial purposes, repairs, emergency assistance, or a child accompanying a caregiver); Tex. S. 6 (prohibiting municipalities from creating restroom and changing facility requirements while requiring schools and government-controlled facilities to designate bathrooms by "biological sex," defined as "the physical condition of being male or female, which is stated on a person's birth certificate," but making exemptions for custodial purposes, repairs, emergency assistance, or a child accompanying a caregiver); H.R. 1011, 65th Leg., Reg. Sess. (Wash. 2017) (allowing public and private entities to limit access to sex-segregated facilities "if the person is preoperative, nonoperative, or otherwise has genitalia of a different gender from that which the facility is segregated" for, with exceptions for parents or caretakers who take a dependent child or disabled person of the opposite-sex into a restroom to help them).

A third set of bills would encompass government buildings but not all public accommodations. *See, e.g.*, H.R. 106, 2017 Leg., Reg. Sess. (Ky. 2017) (requiring patrons to use the bathroom and changing facilities matching their "biological sex" in all facilities under control of state or local governments); H.R. 1612, Gen. Assemb., 2017 Sess. (Va. 2017) (requiring government entities to provide separate restrooms by sex, defined as "the physical condition of being male or female as shown on an individual's original birth certificate," creating a right of action against government entity if someone encounters person of the opposite-sex in those restrooms, and requiring school notification of parents if a student seeks designation as opposite-sex).

¹⁵ Expert Opinion of Sheriff Tim Hutchison (Retired), *Carcano v. McCrory*, Case No. 1:16-cv-00236-TDS-JEP (M.D.N.C. Aug. 17, 2016) (on file with Lewis & Clark Law

between safety to the public, which should be paramount,¹⁶ and “bathroom-of-one’s-birth” laws is speculative. Since the enactment of North Carolina’s law, more than one governor has asked “Is it an issue?” and rejected the “need [for] more government rules. . . . Making government rules for things that don’t even need government rules would be silly.”¹⁷

Just as bathroom-of-one’s-birth laws do little to advance public safety, they do nothing to protect religious liberty, despite claims to the contrary by some gay rights opponents.¹⁸ Bathroom bills are part of a larger trend to “treat regulation or deregulation of sexual minorities as though

Review) [hereinafter Hutchison Expert Opinion] (“Transgender Individuals Are Not the Source of This Threat.”).

¹⁶ Fears about sexual predators generally are, unfortunately, grounded. See Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251 (2001); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to a Victim’s Siblings*, 51 EMORY L.J. 241 (2002).

¹⁷ David A. Graham, *What’s Behind the New Wave of Transgender ‘Bathroom Bills,’* ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/01/states-see-a-new-wave-of-transgender-bathroom-bills/512453/>.

¹⁸ See, e.g., Kevin Conlon, et al., *‘Religious Freedom’ Bills: Opinions are as Different as Individuals in the South*, CNN (Apr. 19, 2016), <http://www.cnn.com/2016/04/08/us/southern-states-religious-freedom-bills-reaction/> (“A spate of bills across the nation, but especially across the South, has pitted religious freedom against LGBT rights, resurrecting the specter of the civil rights movement, which saw religion and race locking horns many decades ago. In North Carolina, it’s about which bathrooms transgender people can use.”); Emma Margolin, *Backlash Grows Over ‘Religious Freedom’ and ‘Anti-Discrimination’ Push*, NBC NEWS (Apr. 11, 2016), <http://www.nbcnews.com/news/us-news/backlash-grows-over-religious-freedom-anti-discrimination-push-n554016> (“A newer crop of legislation—as seen in North Carolina—focuses more narrowly on keeping transgender people out of the bathroom that corresponds with their gender identities. But according to Rose Saxe, staff attorney at the American Civil Liberties Union, it’s easy to draw a straight line from ‘religious freedom’ to these so-called ‘bathroom bills.’”). Some draw the linkage to religious liberty through the “superseding” of Charlotte’s municipal ordinance, which mirrors laws “used in other states to punish Christian business owners for refusing on conscience grounds to, for example, provide goods or services for same-sex ceremonies.” Bruce Hausknecht, *Protecting Religious Freedom in the States*, FOCUS ON THE FAMILY, <http://www.focusonthefamily.com/socialissues/religious-freedom/north-carolina-hb2-and-religious-freedom/protecting-religious-freedom-in-the-states>, (last visited Jan. 17, 2017). For a discussion of how public accommodations laws enacted before marriage equality and without wedding related services in mind—which made no conscious attempt to share the public square—formed the basis for liability in these cases, see Wilson, *supra* note 3 (arguing that policymakers should move away from flawed, one-sided laws to new models for sharing the public square that guarantee access to LGBT persons while ensuring that religious owners of family businesses can provide the service without compromising their faith).

it were deregulation or regulation of [conservative believers'] own religious practices.”¹⁹

As this Article shows, laws hyper-regulating bathroom use divert energy from difficult and pressing questions about how nondiscrimination laws should interact with—or give way to—religious convictions on questions of sexuality in religious spaces, such as churches and religious schools. This Article concludes that SOGI nondiscrimination laws advance human dignity and secure “a level playing field, so that all persons can enjoy the fruits of their labor.”²⁰ Policymakers correctly reject the case against SOGI nondiscrimination protections based on public safety. Trans people have long, without problems, self-directed to the restroom that makes sense, both in places that ban LGBT discrimination and those that do not.²¹

It is possible to authorize businesses to open restrooms to LGBT persons in a way that ensures the safety, dignity, and privacy of all their patrons. Nondiscrimination protections should encompass trans people, but take care that civil laws governing questions of sexuality important to some faith communities, like the nature of gender identity, do not inadvertently spill over to houses of worship or other places where religious believers should have discretion to decide such matters for their communities.

I. THE LINKAGE BETWEEN LEGISLATIVE PROGRESS ON NONDISCRIMINATION PROTECTIONS AND THE BATHROOM NARRATIVE

As Figure 1 shows, the United States is a classic checkerboard of public accommodation laws. No federal law protects LGBT people

¹⁹ DOUGLAS LAYCOCK, 3 RELIGIOUS LIBERTY: RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE LEGISLATION, AND THE CULTURE WARS (forthcoming 2018) (on file with author) (“The conservative believers consistently conflate morals legislation with religious liberty legislation. That is, they treat regulation or deregulation of sexual minorities as though it were deregulation or regulation of their own religious practices. This is part of the unwillingness to compromise; both sides insist on restricting the other side’s liberty and not just on protecting their own.”); cf. Brian Fraga, *Gender Identity ‘Bathroom Bills’ Battles to Continue in 2017*, NAT’L CATH. REG. (Jan. 3, 2017), <http://www.ncregister.com/daily-news/gender-identity-bathroom-bills-battles-to-continue-in-2017> (quoting “Gerard Bradley, a professor at the University of Notre Dame who teaches legal ethics and constitutional law [says] that one can criticize the transgender ideology fueling the anti-North Carolina sentiment without referencing religion”).

²⁰ *Proponent Testimony of the Ohio Civil Rights Commission: Hearing on H.B. 176 Before the H. State Gov’t Comm.*, 128th Gen. Assemb., Reg. Sess. (Ohio 2009) (on file with Lewis & Clark Law Review) (Statement of G. Michael Payton, Exec. Dir. Ohio Civil Rights Comm’n) [hereinafter Statement of Payton].

²¹ See *infra* Part III.

against being denied service by public establishments, which must serve all people irrespective of “race, color, religion, or national origin.”²² Twenty-nine states also provide no protection in state law. Twenty-one states, as well as the District of Columbia, protect gay, lesbian, and bisexual people from being denied service by public establishments. All but three of these states make both sexual orientation *and* gender identity illicit bases for refusing service.²³

Three states go the other way, as Figure 1 shows. Arkansas, North Carolina, and Tennessee affirmatively bar the enactment of local nondiscrimination laws to protect LGBT people, measures now being tested by cities, like Fayetteville, Arkansas, that have enacted SOGI nondiscrimination protections in the face of state law.²⁴

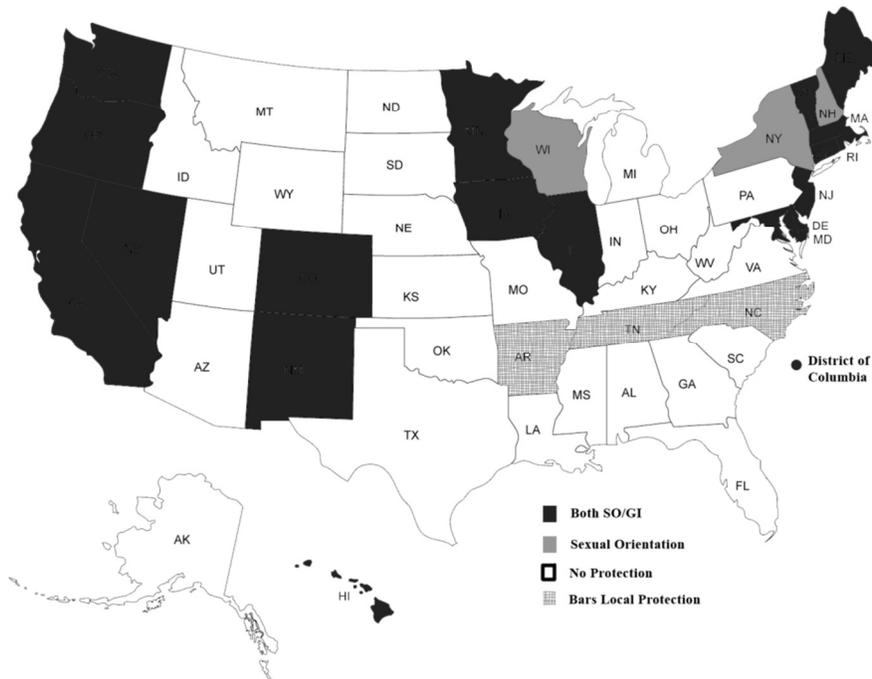
²² 42 U.S.C. § 2000a (2012) (banning discrimination on the basis of race, color, religion, or national origin). Unlike the federal regulatory foment interpreting bans against “sex discrimination” in housing and hiring to encompass sexual orientation and gender identity, federal protections against refusals by commercial establishments to serve LGBT people will not be forthcoming absent Congress’s intercession. This is so because Title II of the Civil Rights Act does not bar discrimination on the basis of sex. Wilson, *supra* note 3.

²³ Wisconsin, New Hampshire, and New York. See Appendix A for a state-by-state breakdown.

²⁴ S. 202, 90th Gen. Assemb., 2015 Sess. (Ark. 2015) was enacted without the governor’s signature. While there have been no direct challenges to the constitutionality of the law, local cities passed ordinances that include sexual orientation and gender identity to test it. See David Koon, *Testing the Discrimination Law*, ARK. TIMES (May 28, 2015), <http://www.arktimes.com/arkansas/testing-the-discrimination-law/Content?oid=3871873> (citing challenges in Eureka Springs, Conway, and Little Rock). For instance, Fayetteville passed a SOGI ordinance on the theory that the statute does not actually prevent cities from enacting SOGI nondiscrimination bills. The Arkansas Attorney General issued an opinion that the local ordinances are unenforceable as contrary to the statute. Ark. Op. Att’y Gen. No. 2015-088 (Sep. 1, 2015), <http://ag.arkansas.gov/opinions/docs/2015-088.pdf>. An anti-ordinance group challenged the Fayetteville law, arguing it conflicted with Act 137, among other things. The district court granted summary judgement in favor of the city, holding that there was no conflict between the statute and Fayetteville’s local ordinance. Order, *Protect Fayetteville v. City of Fayetteville*, No. CV 2015-1510-1 (Ark. Cir. Ct. Mar. 1, 2016), <https://localtvkfs.files.wordpress.com/2016/03/judge-martin-summary-judgement.pdf>. The Attorney General has appealed the ruling to the Arkansas Supreme Court. Notice of Appeal, *Protect Fayetteville*, No 72cv15-1510 (March 30, 2016), <https://localtvkfs.files.wordpress.com/2016/03/attorney-general-ordinance-5781-appeal.pdf>.

Tennessee Pub. Ch. 278 (2011) was challenged by two advocacy organizations, members of the Nashville city council, and a schoolteacher as unconstitutional violations of due process under the Fourteenth Amendment akin to the law at issue in *Romer v. Evans*, 517 U.S. 620 (1996). The trial court dismissed for lack of standing. On appeal, the Tennessee Court of Appeals affirmed. *Howe v. Haslam*, 2014 WL 5698877 (Tenn. Ct. App. 2014).

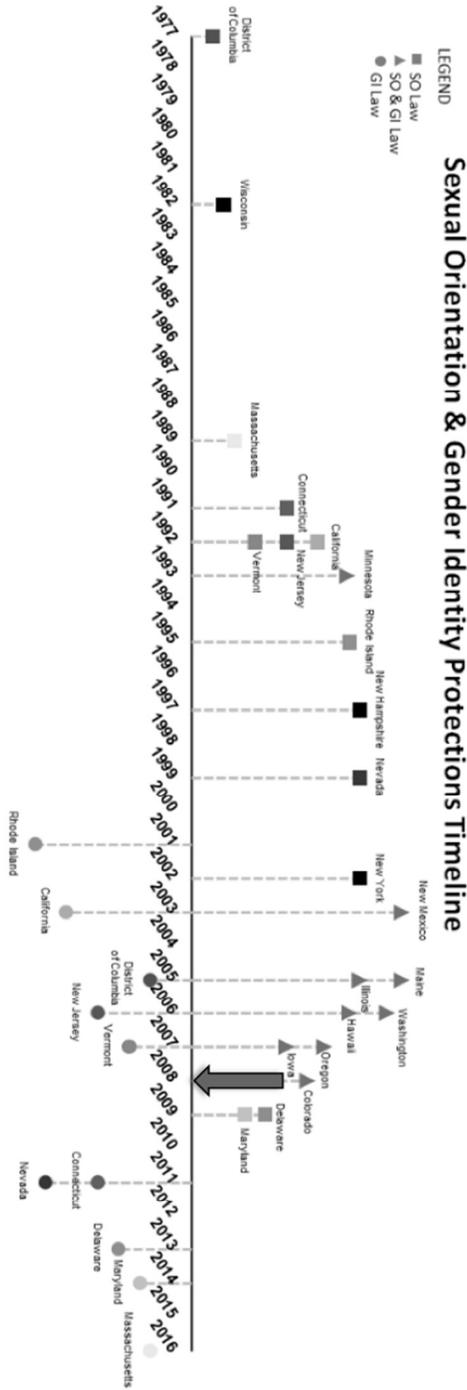
Figure 1.



As Figure 2 shows, state SOGI nondiscrimination protections were enacted across almost four decades, beginning in 1977. With a single exception before 2003 (Minnesota), most states moved to ban sexual orientation discrimination and later followed with gender identity discrimination bans, if they followed at all.²⁵ Minnesota was an early leader in enacting both sexual orientation and gender identity protections in 1993. Between 2003 and 2008, states dramatically shifted to protecting both sexual orientation and gender identity in the same law. In other words, the “T” stayed in.

²⁵ California enacted a sexual orientation ban in 1992 and amended it to include gender identity in 2003. Washington, D.C. enacted a sexual orientation ban in 1977 and amended it to include gender identity in 2005. In 1992, New Jersey enacted a sexual orientation ban, and in 2006 amended it to include gender identity. Rhode Island enacted a sexual orientation ban in 1995, amending it to include gender identity in 2001. Vermont enacted a sexual orientation ban in 1992, which it amended to include gender identity in 2001. *See* Appendix A.

Figure 2.



Since 2008, when the “bathroom” narrative emerged, wholly new nondiscrimination laws including transgender individuals within the ambit of their protection have completely stalled.²⁶ States have broadened pre-2008 sexual orientation discrimination bans to encompass gender identity, as Massachusetts did in July 2016.²⁷ States have also staggered enactment of these protections into law, first banning sexual orientation discrimination and later banning gender identity discrimination, as Delaware and Maryland did.²⁸ But no state has enacted a new law protecting the full LGBT community from discrimination in public accommodations since 2008.

Bathrooms have played a decisive role in deciding the fate of state laws. Supporters refuse to entertain LGBT rights laws that omit the “T”: equal treatment of transgender people in public accommodations, LGBT advocates say, is non-negotiable.²⁹ After North Carolina called a special

²⁶ Opponents make other factual claims for resisting SOGI laws. Although proponents of SOGI laws argue that religious liberty exemptions will provide protection to those with religious objections, Professor Robert George argues that any such protections will be fleeting. Robert P. George, 2014 Diane Knippers Memorial Lecture by Robert George on Marriage & Religious Liberty (Oct. 16, 2014), in *JUICY ECUMENISM*, Oct. 18, 2014, <https://juicyecumenism.com/2014/10/18/2014-diane-knippers-memorial-lecture-by-robert-george-on-marriage-religious-liberty> (suggesting any “bargain would be accepted by liberal forces temporarily for strategic or tactical reasons, as part of the political project of getting marriage redefined; but guarantees of religious liberty and non-discrimination for people who cannot in conscience accept same-sex marriage could then be eroded and eventually removed”). Historically, religious liberty protections have been remarkably resilient; outside home rule for the District of Columbia, one is hard-pressed to find a single religious liberty protection that has been carved back, other than Illinois’s amendment of its state religious freedom restoration act to make way for O’Hare Airport. See Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015).

²⁷ Connecticut amended its 1991 sexual orientation discrimination ban to include gender identity in 2011; Massachusetts expanded its 1989 sexual orientation discrimination ban to include gender identity in 2016; Nevada amended its 1999 ban on sexual orientation discrimination to include gender identity in 2011; Hawaii amended its 2006 sexual orientation discrimination law to also ban gender identity discrimination in 2011. See Appendix A.

²⁸ Maryland enacted its sexual orientation nondiscrimination law in 2009, later amending it to include gender identity in 2014. Delaware enacted its sexual orientation nondiscrimination law in 2009 and later amended it to include gender identity in 2013. See Appendix A.

²⁹ Stephen Peters, *HRC Condemns Non-Discrimination Amendment In Michigan Excluding Gender Identity*, HUMAN RTS. CAMPAIGN (Nov. 12, 2014), <http://www.hrc.org/blog/hrc-condemns-non-discrimination-amendment-excluding-gender-identity-insists>; Stefan Styrsky, *HRC Embraces Transgender Rights*, GAY CITY NEWS (Aug. 12–18, 2004), http://gaycitynews.nyc/gcn_333/hrcembracestransgender.html (“‘The Human Rights Campaign adopts a policy that we will only support ENDA if it is inclusive of sexual orientation and gender identity and expression,’ a statement from HRC said.”); Masen Davis, *The Journey to Inclusion: Reflections on ENDA*, GAY.COM (Nov. 29, 2007,

session of the legislature solely to enact H.B. 2, wiping aside a Charlotte ordinance ensuring “full and equal enjoyment of . . . facilities”³⁰ and replacing it with state law requiring all people to use bathrooms matching their gender at birth³¹—gay rights advocates mobilized the business and entertainment communities to push back. North Carolina lost jobs and conference venues, experienced travel bans and widespread boycotts,³² and saw the NCAA and NBA basketball tournaments moved out of state.³³

http://www.thetaskforce.org/static_html/TF_in_news/07_1217/stories/6_the_journey_to_inclusion.pdf (“Within days of the announcement that Congressional leaders were considering stripping gender identity from ENDA, at least 350 organizations committed their resources and reputations to insist on a bill that would protect our entire community.”); Jonathan Oosting, *‘Religious Liberty’ a Sticking Point for Republicans Wary of New LGBT Anti-Discrimination Bills*, MICHIGANLIVE (Sept. 11, 2014), http://www.mlive.com/lansing-news/index.ssf/2014/09/bolger_wont_back_lgbt_antidis.html (“But Emily Dievendorf of Equality Michigan, one of several partner groups in the coalition, called the gender identity protections ‘non-negotiable,’ explaining that transgender individuals are ‘the number one category in the LGBT community to be targeted for discrimination.’”).

³⁰ CHARLOTTE, N.C., CODE art. III, chap. 2, sec. 12-58 (“It shall be unlawful to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, religion, sex, marital status, familial status, sexual orientation, gender identity, gender expression, or national origin.”). Before the 2016 amendment to its ordinance, Charlotte law expressly exempted “[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private” from its prohibition on sex discrimination. *See* Charlotte, N.C. Ordinance 7056 (Feb. 22, 2016).

³¹ An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, 2016 N.C. Sess. Laws 3 (House Bill 2) (applying to public accommodations and government buildings).

³² Edward Helmore, *North Carolina Reels from Business Backlash to Anti-LGBT Law*, GUARDIAN (Apr. 15, 2016), <https://www.theguardian.com/world/2016/apr/15/north-carolina-lgbt-law-business-backlash>; Rob Dauster, *NCAA Moves Tournament Games to South Carolina*, NBC SPORTS (Oct. 7, 2016), <http://collegebasketball.nbcsports.com/2016/10/07/ncaa-moves-tournament-games-to-south-carolina/>.

³³ Press Release, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA to Relocate Championships from North Carolina for 2016–17*, (Sept. 12, 2016), <http://www.ncaa.org/about/resources/media-center/news/ncaa-relocate-championships-north-carolina-2016-17>; Jason Pratt, *NBA Officially Shuns North Carolina over Bathroom Law, Moves All-Star Game to New Orleans*, LIFESITE NEWS (Aug. 29, 2016), <https://www.lifesitenews.com/news/nba-officially-shuns-north-carolina-over-bathroom-law-moves-all-star-game-t>. The NCAA selected seven new destinations for its 2016–17 championships—California, Virginia, South Carolina, Georgia, Tennessee, Massachusetts, and Texas—only two of which, California and Massachusetts, have statewide laws banning SOGI discrimination in public accommodations, as the Appendix shows. Press Release, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA Announces Sites for Relocated Championships* (Oct. 7, 2016), <http://www.ncaa.org/about/resources/media-center/news/ncaa-announces-sites-relocated-championships>. Louisiana, which will host the 2017

North Carolina still faces the loss of about “\$4.7 billion annually as a result of Title IX³⁴ violations” if a federal lawsuit challenging H.B. 2 succeeds.³⁵

As advocates pressed for protections for the full LGBT community, SOGI opponents upped the ante: extending protections to trans people, they charged, opens up wholly new risks to the public. This narrative emerged shortly after Colorado Governor Bill Ritter signed Colorado

NBA All-Star Game, also lacks a statewide law banning SOGI discrimination in public accommodations. Pratt, *supra*.

³⁴ 20 U.S.C. § 1681(a) (2014). Title IX bans sex discrimination in schools or educational programs receiving federal financial assistance, which includes funding of salaries and student receipt of federal financial aid, and applies to recruiting, admissions, counseling, financial assistance, athletics, employment, harassment, and more. See U.S. DEP’T OF JUSTICE, *Title IX Legal Manual* (Aug. 6, 2015), <https://www.justice.gov/crt/title-ix>; U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, *Title IX and Sex Discrimination* (Apr. 29, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

³⁵ Elaina Athens, *Report: Billions in Federal Money at Risk in H.B.2 Fight*, ABC11.COM (May 6, 2016), <http://abc11.com/politics/report-billions-in-federal-money-at-risk-in-hb2-fight/1327345/>. The Department of Justice (“DOJ”) alleged violations of sex discrimination bans in Title IX, governing education, and Title VII, governing employment, asserting that sex discrimination includes sex-stereotyping. *United States v. North Carolina*, No. 1:16cv236, 2016 WL 4005839 (M.D.N.C. Aug. 26, 2016); see also Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, to North Carolina Governor Pat McCrory (May 4, 2016), <https://assets.documentcloud.org/documents/2823410/Civil-Rights-Division-letter-on-hb2.pdf> (“Federal courts and administrative agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity.”). The ACLU brought a separate lawsuit challenging North Carolina’s law. *Carcano v. McCrory*, 2016 WL 4508192 (M.D.N.C. 2016). The court granted a partial preliminary injunction against the enforcement of the law by the University of North Carolina, but rejected the plaintiffs’ motion for preliminary injunction on equal protection claims and reserved consideration of its motion on due process grounds. *Order and Preliminary Injunction, Carcano*, 2016 WL 4508192.

North Carolina countersued, asking for a declaration that North Carolina’s transgender policy complied with federal law. *Complaint, McCrory v. United States*, Case 5:16-cv-00238 (E.D.N.C. May 9, 2016). In September 2016, this suit was dropped as largely duplicative of the DOJ lawsuit against North Carolina. *Plaintiffs’ Notice of Voluntary Dismissal Without Prejudice, McCrory*, Case 5:16-cv-00238 (Sep. 16, 2016). At the same time, state legislators challenged the federal government’s interpretation of the discrimination law. *Complaint, Berger v. U.S. Dep’t of Justice*, Case 5:16-cv-00240 (E.D.N.C. May 9, 2016). Finally, another group challenged the federal government’s interpretation of “sex” discrimination prohibitions. *Complaint, North Carolinians for Privacy v. U.S. Dep’t of Justice*, No. 5:16-cv-245 (E.D.N.C. May 10, 2016). These latter two cases have been transferred to the Middle District of North Carolina (*North Carolinians for Privacy* is Case 1:16-cv-00845, *Berger* is Case 1:16-cv-00844), where they are being considered along with the other ongoing suits. See generally Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 *LAW & INEQ.* 385 (2016).

Senate Bill 200 into law—the last state law to protect gay and trans people in the same piece of legislation in the U.S. After the law was signed, Focus on the Family ran “an attention-grabbing advertising campaign in Colorado newspapers showing what obviously is an innocent little girl coming out of a bathroom stall where a grown man in boots is waiting.”³⁶ The new state law, Focus on the Family charged, means “you cannot make a distinction between men’s and women’s restrooms in public accommodations.”³⁷

The “bathroom narrative” has been pressed with increasing fervor since 2008, as Figure 3 shows. A search of LexisNexis’s “All Newspapers” database for “bathroom bill” in the gay rights context yielded 1538 discrete articles.³⁸ The oldest news report of a “bathroom bill” in connection with a SOGI nondiscrimination law appeared weeks after Governor Ritter signed Colorado Senate Bill 200 into law in 2008.³⁹ In 2015, the bathroom narrative emerged as the principal rhetorical weapon against protecting LGBT people from discrimination in public accommodations. As the Introduction noted, opponents undid Charlotte’s and Houston’s nondiscrimination ordinances by invoking images of “men [using] women’s bathrooms.”⁴⁰

³⁶ *Id.*

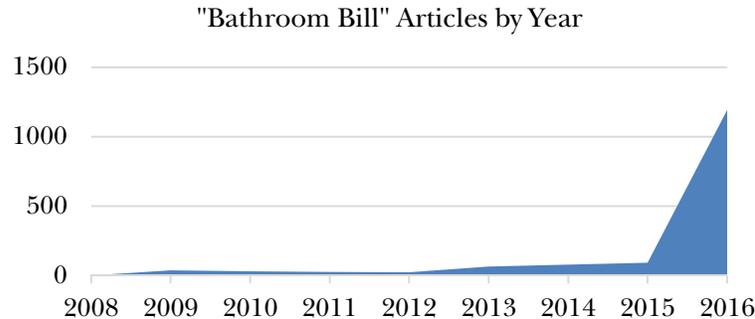
³⁷ *Id.*

³⁸ The specific search, conducted on September 18, 2016, read “(gay or transgender or lgbt” or “sexual orientation”) and “bathroom bill.” Searching only for “bathroom bill” with no limiting terms yields stories back to 2005, but they deal with “potty parity,” or the ratio of bathrooms for women to those for men. For instance, the oldest story in the LexisNexis database to use the words “bathroom bill” reported on a 2005 New York City ordinance signed by Mayor Michael Bloomberg to alleviate “long line[s] outside the ladies’ room.” When surveyed, female New Yorkers “were not aware that a bathroom bill was in the works.” Not every story that dealt with a “bathroom bill” concerned SOGI nondiscrimination protections. Some concerned same-sex marriage laws. See Maggie Clark, *Same-Sex Marriage Gets Initial Senate OK*, CAPITAL (Annapolis, MD), Feb. 24, 2011.

³⁹ See Peter Roper, *Ministry Turns Anti-Bias Law into Debate: Focus on the Family Charges the New Legislation Opens Public Restrooms to Sexual Predators*, PUEBLO CHIEFTAIN (Colo.), July 8, 2008.

⁴⁰ Justin Wm. Moyer, *Why Houston’s Gay Rights Ordinance Failed: Fear of Men in Women’s Bathrooms*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/>.

Figure 3.



That trope has hobbled efforts to enact SOGI nondiscrimination bills both at the state and municipal level across the country.⁴¹ In New Hampshire, for example, opponents charged that a bill to extend the state's 1997 sexual orientation nondiscrimination law to include transgendered people "would open women's bathrooms, changing rooms and locker rooms to sexual predators who could raise a defense in court that they were sexually confused."⁴² Democratic backers withdrew the bill, saying that "the atmosphere around [it] was so poisoned by mischaracterizations that passing the bill could actually harm those it was meant to protect."⁴³

Depicting bans on discrimination in public accommodations as threatening public safety has undoubtedly made "more Republicans . . . skittish about voting for employment protections for LGBT workers."⁴⁴ On the eve of the 2016 election, opponents dubbed a Pennsylvania bill that would ban SOGI discrimination in housing and hiring as a "Bathroom Bill," too.⁴⁵ All SOGI nondiscrimination protections, critics charge, not only threaten the public, but infringe "privacy rights."⁴⁶

⁴¹ Tom Fahey, *13-11 Vote Reflects Deep Split*, UNION LEADER (Manchester, NH), Apr. 30, 2009.

⁴² *Id.* (reporting that the "bathroom bill" label helped to kill New Hampshire H.B. 415 in the Senate, which would have banned discrimination against transgendered people).

⁴³ *Id.* The media, bill sponsors charged, acted as "unwitting partner[s] in the effort to continue denying a part of the population its civil rights" by parroting the *bathroom bill* nickname. *Id.*

⁴⁴ Lindsey McPherson, *Really, 30 Republicans Switched Sides on LGBT Discrimination*, ROLL CALL (May 20, 2016), <http://www.rollcall.com/news/politics/really-30-republicans-switched-sides-lgbt>.

⁴⁵ *Five Takeaways From the Bathroom Bill Hearing (SB1306)*, PAFAMILY.ORG (Aug. 31, 2016), <http://pafamily.org/2016/08/sb1306/> [hereinafter *Five Takeaways*]; see also *Sign the Petition: Stop Governor Wolf's Bathroom Bills*, PAFAMILY.ORG, <https://secure2>.

In a December 2016 letter entitled “Preserve Freedom, Reject Coercion,” over 75 religious leaders followed this tack. They maintain that “SOGI laws in *all [] forms*, at the federal, state, and local levels, should be rejected.”⁴⁷ “SOGI policies . . . violate privacy rights;” “even churches have faced threats and legal action under such laws . . . for seeking to protect privacy by ensuring persons of the opposite sex do not share showers, locker rooms, restrooms, and other intimate facilities.”⁴⁸ As Parts IV and V explain in greater detail, unlike the clunky SOGI nondiscrimination laws of the past, nuanced laws with careful definitions of what counts as a public accommodation prevent the spillover to churches that stoke concerns about *all* SOGI nondiscrimination protections, even nuanced ones.

Definitions of protected categories like gender identity also do important work to give employers and businesses certainty about where legal duties begin and end. Like the hazards of unnuanced laws, the safety rationale North Carolina says justifies H.B. 2 is predicated on inartful definitions of gender identity, giving cognizance to “patrons’ unverifiable self-declarations of their gender identities.”⁴⁹ Part II examines the claims made by opponents of SOGI nondiscrimination laws that they create unwarranted, limitless liability. Then, Parts III through V develop the importance and function of tight definitions to the safety rationale and to preserving religious autonomy on questions of faith.

II. THE CASE FOR LEGAL NONDISCRIMINATION PROTECTIONS

Despite the toxicity of the “bathroom bill” label for SOGI nondiscrimination laws, many Americans actually *oppose* laws forcing transgender people to use the bathroom matching their sex at birth, as Figure 4 illustrates.⁵⁰

convio.net/pfi/site/Advocacy?cmd=display&page=UserAction&id=167 (“Some things just shouldn’t be shared. Tell Gov. Wolf: No Bathroom Bill.”).

⁴⁶ *Five Takeaways*, *supra* note 45.

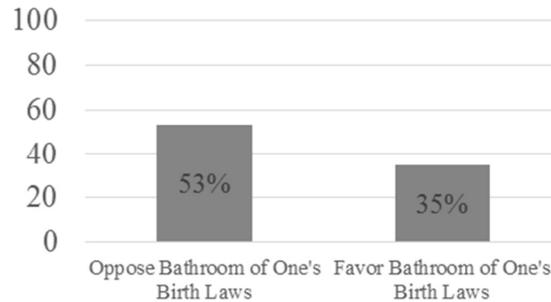
⁴⁷ *Preserve Freedom*, *supra* note 2 (emphasis added).

⁴⁸ *Id.*

⁴⁹ Expert Declaration and Report of Kenneth V. Lanning, *United States v. North Carolina*, Case No. 1:16-cv-00425-TDS-JEP (M.D.N.C. Aug. 17, 2016) (on file with Lewis & Clark Law Review) [hereinafter Lanning Expert Declaration] (“These public safety risks are magnified substantially by the imposition of gender-identity based access policies or social norms (‘GIBAPs’) that purport to create access rights to showers, locker rooms, and restrooms based solely upon patrons’ unverifiable self-declarations of their gender identities.”).

⁵⁰ Robert P. Jones, Betsy Cooper, Daniel Cox & Rachel Lienesch, *Majority of Americans Oppose Laws Requiring Transgender Individuals to Use Bathroom Corresponding to Sex at Birth Rather than Gender Identity*, PRRI (2016), <http://www.prrri.org/research/lgbt-2016-presidential-election/>. PRRI is a nonprofit organization that researches social, cultural, and religious issues. In a recent survey, PRRI posed the following question: “Do you favor or oppose laws that require transgender individuals to use bathrooms that correspond to their sex at birth rather than their current gender

Figure 4.



Like the general public,⁵¹ members of the trans community find the safety claims perplexing: “People aren’t getting raped and murdered . . . [t]hey are just going to the bathroom.”⁵²

Further, Americans overwhelmingly agree on the need for protections against discrimination for LGBT people, as Figure 5 shows. When polled in 2015, 71% of Americans said they favored protections for LGBT people “against discrimination in jobs, public accommodations, and housing,” down slightly from 2014, when 72% favored protections.⁵³ In pre-screened panels of respondents, more than three in four said it should be illegal for an employer “to fire someone for being gay or lesbi-

identity?” It found that “[64%] of Democrats oppose laws that would require transgender individuals to use bathrooms that correspond to their assigned sex at birth, compared to 27% who favor such laws. Republicans, in contrast, are evenly divided (44% favor, 44% oppose) on this issue.” *Id.*

Some Americans have little understanding of the issue beyond the slogan.

⁵¹ Michael Mayo, *A Common Sense Guide to the Bathroom Wars*, SUN SENTINEL (May 27, 2016), <http://www.sun-sentinel.com/news/fl-bathroom-wars-mayocol-b052916-20160527-column.html>.

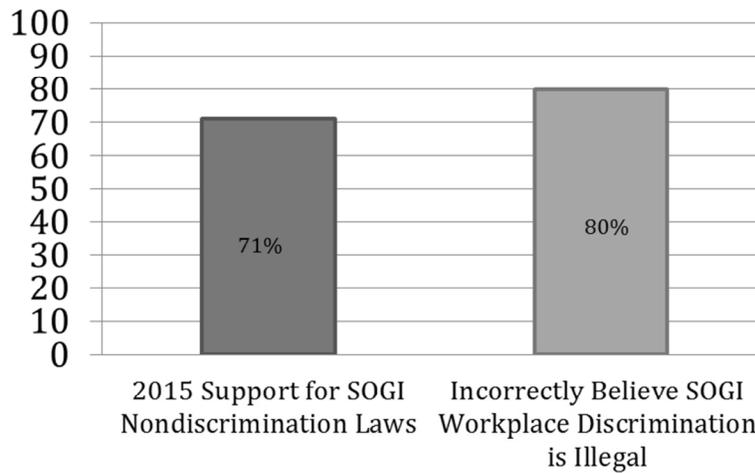
⁵² Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html>.

⁵³ Robert P. Jones, Daniel Cox, Betsy Cooper, & Rachel Linesch, *Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from 2015 American Values Atlas*, PRRI (Feb. 18, 2016), <http://www.prii.org/research/beyond-same-sex-marriage-attitudes-on-lgbt-nondiscrimination-and-religious-exemptions-from-the-2015-american-values-atlas/>. PRRI posed the following question: “Do you favor or oppose laws that would protect gay, lesbian, bisexual, and transgender people against discrimination in jobs, public accommodations, and housing?” A quarter of Americans responded in opposition and 5% responded that they “don’t know or refuse to answer.” *Id.*

In 2014, 72% favored laws protecting gay and lesbian people from job discrimination, compared to less than one-quarter (23%) who opposed. Robert P. Jones, Daniel Cox, & Juhem Navarro-Rivera, *A Shifting Landscape: A Decade of Change in American Attitudes about Same-Sex Marriage and LGBT Issues*, PRRI (Feb. 26, 2014), <http://www.prii.org/research/2014-lgbt-survey/>.

an.”⁵⁴ In fact, four of five Americans believe that it is already illegal to refuse to hire someone because of their sexual orientation or gender identity.⁵⁵

Figure 5.



Some read support for legal protections against LGBT discrimination as a reason to *reject* SOGI nondiscrimination laws. In this view, legal sanctions would not be warranted even if unjust discrimination occurs because “the market is already sorting these things out.”⁵⁶ Presumably, in this account fair-minded Americans will sanction those who act unjustly.⁵⁷

⁵⁴ Emily Swanson, *Americans Think It Should be Illegal To Fire Someone For Being Gay, Don't Realize It's Not Already*, HUFF. POST (June 19, 2014), http://www.huffingtonpost.com/2014/06/19/enda-poll_n_5509298.html.

⁵⁵ Jones et al., *supra* note 50.

⁵⁶ *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom (Heritage Backgrounder #3082)*, HERITAGE FOUND. (Nov. 30, 2015), <http://www.heritage.org/research/reports/2015/11/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom> (“It is hard to justify a federal law that would interfere in employment decisions to create special privileges based on sexual orientation and gender identity when the market is already sorting these things out. . . . SOGI laws are a solution in search of a problem.”).

⁵⁷ A number of factors make it unlikely that the market can police discriminatory conduct through, for example, public boycotts of known discriminators. The market cannot reasonably respond to discriminatory conduct on the scale that civil rights commissions do *if* the number of founded instances by the EEOC is an accurate glimpse of the scale. *See infra* notes 76–80 (reporting EEOC figures). That is, the public can sustain a boycott of one company—maybe two, maybe five, but certainly

As Figure 6 shows graphically, people *can* experience adverse treatment because of their LGBT status even in a world where most Americans support nondiscrimination laws, as they did in 2015. Although public sentiment against unjust discrimination is moving in the right direction, toward just treatment for *all* persons, we have not completed the transformation that critics contend erases the need for legal protection. The gray oval in Figure 6 highlights the gap between public support for nondiscrimination laws and the possibility that real people *can be treated adversely* based on an irrelevant characteristic, public sentiment notwithstanding. Further, emphasizing national public opinion ignores pockets of America where a community may find it acceptable to treat people badly because they are gay or trans.⁵⁸

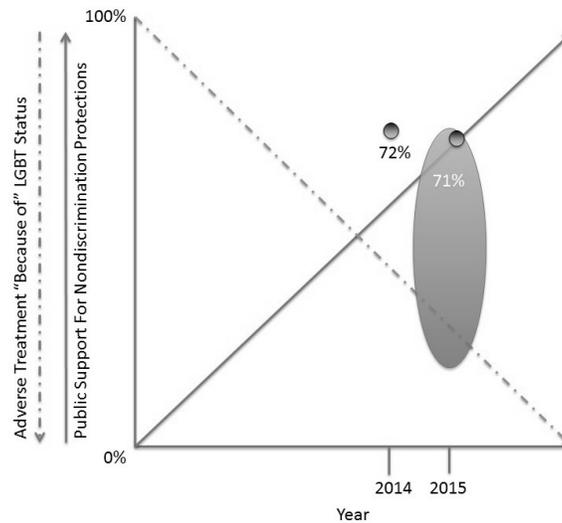
Being told “just wait, it is getting better” is cold comfort to someone treated unjustly today, as the real cases of discrimination documented below by civil rights commissions show. In this sense, justice delayed is justice denied.

not 40–50, year after year. Compounding this are information problems—how will the public know that the act occurred and—in the he-said, she-said nature of claims that one was treated badly because of her status and not her performance—how will the public reasonably determine which account better fits the facts?

⁵⁸ See, e.g., *Tennessee Hardware Store Puts Up “No Gays Allowed” Sign*, USA TODAY (Jul. 1, 2015), <http://www.usatoday.com/story/news/nation-now/2015/07/01/tennessee-hardware-store-no-gays-allowed-sign/29552615/>.

America remains a checkboard demographically in ways that matter to acceptance or rejection of LGBT people and perhaps also to the acceptability of rank discrimination against them. Rural and urban divides, educational attainment, religiosity, and political affiliation all matter to LGBT acceptance, with some parts of the country lagging others. See Karlyn Bowman, Andrew Rugg, & Jennifer Marsico, *Polls on Attitudes on Homosexuality and Gay Marriage*, AEI PUBLIC OPINION STUDIES (Mar. 2013), <https://www.scribd.com/document/131666438/Polls-on-Attitudes-on-Homosexuality-Gay-Marriage>; *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, PEW RES. CTR. (Mar. 20, 2013), <http://www.people-press.org/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/>.

Figure 6.



Ironically, some of those who claim SOGI nondiscrimination laws are unnecessary are passionate spokespersons “for those who refuse to bow down before, or offer sacrifices to, the false gods of the Sexual Revolution.”⁵⁹ Presumably these voices would believe that one owner forced out of business by laws that do not “respect . . . the conscience rights” of dissenters is one too many.⁶⁰ As I argue elsewhere, combining protections for people of faith with protections for sexual minorities is not only the

⁵⁹ Andrew T. Walker & Russell D. Moore, *Is Utah’s LGBT-Religious Liberty Bill Good Policy?*, ETHICS & RELIGIOUS LIBERTY COMM’N OF THE S. BAPTIST CONVENTION (Mar. 6, 2015), <http://erlc.com/resource-library/articles/is-utahs-lgbt-religious-liberty-bill-good-policy> (“Over time, law works in tandem with other cultural factors to alter attitudes and public opinion. Regardless of protections this bill might offer, it aids and abets the cultural forces that would render historic Christian beliefs on sexuality (and even marriage) suspect and eventually out of bounds. The symbolism of this law represents an historic and incremental concession to those who would leave no room in the public square for those who refuse to bow down before, or offer sacrifices to, the false gods of the Sexual Revolution.”).

⁶⁰ Robert P. George, *Marriage, Religious Liberty, and the “Grand Bargain,”* PUBLIC DISCOURSE (July 19, 2012), <http://www.thepublicdiscourse.com/2012/07/5884/> (“But there is, in my opinion, no chance—no chance—of persuading champions of sexual liberation (and it should be clear by now that this is the cause they serve), that they should respect, or permit the law to respect, the conscience rights of those with whom they disagree. Look at it from their point of view: Why should we permit ‘full equality’ to be trumped by bigotry? Why should we respect religions and religious institutions that are ‘incubators of homophobia’? Bigotry, religiously based or not, must be smashed and eradicated. The law should certainly not give it recognition or lend it any standing or dignity.”).

right and decent thing to do; it delivers more protections for religious believers and institutions than stand-alone measures can deliver.⁶¹

Arguments that a culture that sees the *need* for laws will police discrimination—whether or not such laws are enacted—ignore the lessons taught by race. Cultural and legal norms in America for 50 years have affirmed that no one should be treated inequitably because of the color of one’s skin, yet those norms have not sufficed to stamp out blatant discrimination. Consider Aram Gosdanian of Abbeyhill Realty and Management in Columbus, Ohio, identified by the Ohio Civil Rights Commission as the party captured recently on audio tape instructing an agent that:

A: I need white tenants, that is my absolute stipulation. I’ve got to turn that property back to White. No black tenants or we’re going to lose control over there Obviously we’re already losing control . . . I know—I know that everything I’ve just said is totally fucking illegal, but it’s my property and I don’t give a fuck. I’m not going to destroy my property. I can’t—if we put in more black families out there, we’re going to complete—it’s going to become the east side overnight. And that’s that.

B: Well it’s such a—that’s like—that area is like sectioned off from everything else. I mean, you—

A: Right, I know.

B: It’s like its own little community back—back there, it really is. Because it’s kind of hidden, too.

A: Right. I am absolutely going to start—once those are rented—probably around the first of the year, I’m going to start on the campaign of getting rid of every black tenant out there. Every single one.⁶²

On the same tape, the voice identified as Gosdanian instructs the listener:

A: Stop hiring black people to do anything in my company. Not another one.

B: She did a great job cleaning it. What can I tell you. . . .

⁶¹ Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN UNITED STATES AND EUROPE (Timothy S. Shah & Thomas F. Fatt, eds., 2016); Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights after Hobby Lobby*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders, Zoë Robinson, eds., 2016).

⁶² Exhibit F, Jason Hick v. Abbeyhill Realty & Management, LLC, Ohio Civ. Rts. Comm’n, COLH1(43074)01202016;22A-2016-01262F, 05-16-4464-8 (on file with Lewis & Clark Law Review). Investigators for the Ohio Civil Rights Commission identified Aram as the party captured on audio tape. *Id.* at 5.

A: Don't hire—I don't want anymore. No more. None. We are a racist company. That's going to be my logo. . . . These fucking niggers are so unfucking ungrateful in Old Village.⁶³

The Ohio Civil Rights Commission charged Abbeyhill Realty and Management and Gosdanian with violations of Ohio Revised Code sections 4112.02(H) and 4112.02(I),⁶⁴ but has yet to reach a final determination of whether illegal housing discrimination occurred.

Yet, the bare statements reproduced above underscore that unjust treatment of African-Americans occurs *despite* legal sanctions against unjust treatment.⁶⁵ They underscore that unjust treatment occurs *despite* the dramatic shift in public opinion on questions of race since enactment of our foundational civil rights acts.⁶⁶ If cultural acceptance of a norm

⁶³ *Id.*

⁶⁴ OHIO REV. CODE ANN. § 4112.02(H) (LexisNexis 2017) (making it unlawful to discriminate on the basis of race when leasing housing); § 4112.02(I) (making it unlawful to retaliate against someone for engaging in protected activity to oppose unlawful discriminatory conduct).

⁶⁵ The United States has banned discrimination on the basis of race in housing for 50 years. 42 U.S.C. §§ 3601–19 (2012).

⁶⁶ Since the enactment of the Civil Rights Act, Americans have become increasingly intolerant of racial intolerance. Consider approval of marriages between “blacks and whites” as one barometer. Public support for marriages between blacks and whites has leapt from about 10% in 1964 to 87% in 2013 (although there is much progress still to be made). *See* Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), <http://www.gallup.com/poll/163697/approve-marriage-blackwhites.aspx> (“Approval [of interracial marriage] has generally increased in a linear fashion from Gallup’s first measure in 1958, reaching the majority threshold in 1997, and crossing the three-quarters line in 2004.”). Actual marriage across racial lines has leapt as well. In 1960, 0.4% of marriages were interracial. Naomi Schaefer Riley, *Intermarriage: A Real Measure of Race Relations*, N.Y. POST (Dec. 29, 2014), <http://nypost.com/2014/12/29/intermarriage-a-real-measure-of-race-relations/>. Now, “[i]nterracial marriage is booming.” *Id.*; *see also* DAPHNE LOFQUIST ET. AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 17–18 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (presenting 2010 Census data on family composition). “In 2013, a record high of 12% of newlyweds married someone of a different race, according to a Pew Research Center analysis of census data.” Wendy Wang, *Interracial Marriage: Who Is ‘Marrying Out,’* PEW RES. CTR. (June 12, 2015), <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/>. (“Of the 3.6 million adults who got married in 2013, 58% of American Indians, 28% of Asians, 19% of blacks and 7% of whites have a spouse whose race was different from their own.”). Not surprisingly given inter-marriage rates, “[m]ultiracial Americans account for 6.9% of adults, and they are growing at a rate three times as fast as the population as a whole.” George Gao, *15 Striking Findings from 2015*, PEW RES. CTR. (Dec. 22, 2015), <http://www.pewresearch.org/fact-tank/2015/12/22/15-striking-findings-from-2015/>. Americans see this as a positive development. “In 2014, 37% of Americans said having more people of different races marrying each other was a good thing for society, up from 24% four years earlier. Only 9% in 2014 said this trend was a bad thing for society, and 51% said it doesn’t make much difference.” Wang, *supra*.

against unjust treatment alone sufficed to eradicate or prevent discrimination, society would not need the laws under which Abbeyhill Realty and Management have been charged.

Some would say that the analogy to racial discrimination is problematic because our foundational civil rights laws responded to “*systematic state-enabled violence and degradation* suffered by African-Americans in the civil rights era.”⁶⁷ Many would challenge the premise that the harms experienced by LGBT people have not been state enabled, or widespread.⁶⁸ More fundamentally, the law should respond not just to widespread state-sponsored discrimination, it should respond to the tangible harms that flow from views about a person’s *status* that affect her ability to make a livelihood, secure housing, or frequent a restaurant like everyone else⁶⁹—whether ten people are harmed by those views or a thousand, and whether the government sanctioned that view at one time or not.

Critics of SOGI nondiscrimination protections marshal at least two other claims for why such laws are “unnecessary.”⁷⁰ First, some contend that the incidence of LGBT persons being treated adversely *because of be-*

⁶⁷ Roger Severino, *Mike Pence Promises to Protect Religious Freedom in Indiana*, DAILY SIGNAL (Jan. 15, 2016), <http://dailysignal.com/2016/01/15/pence-promises-to-protect-religious-freedom-in-indiana/> (emphasis added).

Institutionalized humiliation has been seen as the primary evil of discrimination, as Bruce Ackerman notes. BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 142 (2014). Nonetheless, nondiscrimination laws can also convey expressive messages of inclusion and serve other values, such as preventing the harm of being treated differently merely as a result of one’s status. *See infra* notes 69 and 87.

⁶⁸ *See, e.g.*, Dale Carpenter, *Flagrant Conduct: The Story of LAWRENCE V. TEXAS: How a Bedroom Arrest Decriminalized Gay Americans* (2012); Shannon Gilreath, *The End of Straight Supremacy: Realizing Gay Liberation* (2012); Dudley Clendinen, *J. Edgar Hoover, ‘Sex Deviates’ and My Godfather*, N.Y. Times (Nov 25, 2011), <http://www.nytimes.com/2011/11/27/opinion/sunday/j-edgar-hoover-outed-my-godfather.html> (describing how the director of the Federal Bureau of Investigation engaged in “a pattern of persecution that would destroy thousands of lives and careers . . . [by building] an intricate system of files on people of influence—personal and confidential, official and unofficial, and all full of dirt. The most damning were the voluminous ‘Sex Deviate’ files on famous actors, syndicated columnists, senators, governors, business moguls and princes of the Roman Catholic Church, just to name a few.”)

⁶⁹ Statement of Payton, *supra* note 20 (“Rather than bestowing special rights or privileges, the passage of House Bill No. 176 would provide a level playing field so that all persons can enjoy the fruits of their labor.”).

⁷⁰ *Preserve Freedom*, *supra* note 2 (“In recent years, there have been efforts to add sexual orientation and gender identity as protected classifications in the law—either legislatively or through executive action. These unnecessary proposals, often referred to as SOGI policies, threaten basic freedoms of religion, conscience, speech, and association; violate privacy rights; and expose citizens to significant legal and financial liability for practicing their beliefs in the public square.”).

ing gay or trans is speculative, at best.⁷¹ Second, even if unjust discrimination occurs, no one has proven it to be pervasive enough to merit explicit protection in the law.⁷²

It is surprisingly difficult to quantify how often LGBT people are denied services, housing, or jobs just for being gay or transgender. Absent laws banning illicit discrimination, state civil rights commissions do not and cannot pursue claims.⁷³

Yet, the idea that no one takes adverse action against gay or trans people *because of* their status is belied by data from the United States Equal Employment Opportunities Commission (“EEOC”), which investigates SOGI discrimination claims under its oversight authority for sex discrimination.⁷⁴

To be sure, not every adverse action that one person takes against another constitutes discrimination. A person “discriminates” against another only if, for example, they fire or refuse to hire another person “be-

⁷¹ Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, in JOHN CORVINO, RYAN T. ANDERSON, & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 201 (forthcoming 2017) (“Thus, SOGI laws are unlike other status protections. The need for them *hasn’t been established*, unless we count goals that a liberal society has no business using coercion to achieve.” (emphasis added)); Severino, *supra* note 67 (“Mistreatment of LGBT persons—to the extent it exists in an America, where every kind of sexual identity is celebrated in Hollywood, academia, law firms, big business, music, and media—cannot be compared to the systematic state-enabled violence and degradation suffered by African-Americans in the civil rights era.” (emphasis added)).

⁷² CORVINO ET AL., *supra* note 71 (“[SOGI Laws] regulate commercial decisions best handled by private actors, and educational decisions best handled by parents and teachers. They endanger religious liberty and privacy, professional freedom and speech. Indeed, national SOGI bills seem targeted to do so.”); Anderson, *supra* note 56 (“All citizens should oppose unjust discrimination, but sexual orientation and gender identity (SOGI) laws are not the way to achieve that goal. SOGI laws are neither necessary nor cost-free. . . . Rather, they trample First Amendment rights and unnecessarily impinge on citizens’ right to run their local schools, charities, and businesses in ways consistent with their values. SOGI laws do not protect equality before the law; instead, they grant special privileges that are enforceable against private actors. . . . These laws would impose ruinous liability on innocent citizens for alleged ‘discrimination’ based on subjective and unverifiable identities, not on objective traits.”).

⁷³ Olivera Perkins, *Discrimination Against Gays Legal in Ohio: Employment Is Fight Now That Gay Marriage Is Legal*, PLAIN DEALER (Cleveland) (July 2, 2015), http://www.cleveland.com/business/index.ssf/2015/07/discrimination_against_gays_le_1.html (“[G. Michael] Payton[, executive director of the Ohio Civil Rights Commission] said at various OCRC events held throughout the state, residents have shared with him and his staff real-life stories similar to the job interview scenario above. Sometimes they would inquire about filing charges with the OCRC against an employer who refused to hire them because of their sexual orientation. . . . ‘If they said, ‘I did not get a job because I am gay, Michael,’ Payton said, ‘I would tell them, ‘Sorry, I can’t help you.’””).

⁷⁴ See Wilson, *supra* note 35.

cause of” her race, sex, or other protected characteristic.⁷⁵ Absent a contractual obligation otherwise, workers can always be fired for simply failing to do the job, without more.

In 2015, the EEOC received 1,412 complaints of sex discrimination that implicated sexual orientation (271 cases) or gender identity (1,181 cases) and resolved 1,135 “LGBT charges.”⁷⁶ EEOC found no reasonable cause to believe discrimination occurred—that is, that an adverse action was taken *because* of a worker’s SO or GI—in nearly two-thirds of the cases.⁷⁷

However, EEOC found reasonable cause in 42 cases (3.7%) that year. Eighteen involved sexual orientation and 25 involved gender identity.⁷⁸ These bare statistics cannot convey the deep unfairness that some LGBT people have been subjected to. Consider the complaint filed by a gay man with the EEOC against Scott Medical Health Center. The EEOC determined that the:

⁷⁵ 42 U.S.C. §2000-e2 (2012).

⁷⁶ *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm, (last visited Jan. 20, 2017). 2015 resolutions may reflect complaints filed in a prior year. In 2014, the EEOC received 1,100 complaints. *Id.* These figures do not add to 100% because some cases are cleared before a determination of reasonable cause, through settlement or voluntary agreement by the employer to alter its practices. In 2015, 96 cases (8.5%, 12 sexual orientation and 85 gender identity) were settled, meaning the person bringing the complaint received benefits, ending the case, while 57 (5%, 6 sexual orientation and 53 gender identity) were withdrawn by the complainant after receiving benefits. The EEOC administratively closed 203 other cases (17.9%, 38 sexual orientation and 168 gender identity) due to administrative problems with the complaint, such as inability to contact the complainant.

⁷⁷ *Id.* No cause was found in 737 or 64.9% of cases in 2015. 110 cases involved claims of sexual orientation discrimination and 644 involved gender identity claims.

⁷⁸ *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Jan. 20, 2017).

One could narrate the relatively high rate of unfounded charges, *see supra* note 77 and accompanying text, as the system appropriately parsing valid from invalid claims. Others might see it as employers having to defend against unfounded charges. The risk of unfounded charges is a real cost of any nondiscrimination apparatus that should not be dismissed lightly. Nonetheless, LGBT persons as a class appear to file unfounded charges no more often than other categories. *Cf. All Statutes, FY1997–FY2016*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Jan. 20, 2017) (demonstrating similar clearance rates for all categories if Title VII claims in 2015: 65.2% involved no reasonable cause and 3.5% found reasonable cause); *Religion-Based Charges, FY1997–FY2016*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Jan. 20, 2017) (similar clearance rates for religious discrimination claims in 2015: 68.0% found no reasonable cause and 3.7% reflected reasonable cause).

[E]mployee's manager repeatedly referred to him using various anti-gay epithets and made other highly offensive comments about his sexuality and sex life. When the employee complained to the clinic director, the director responded that the manager was "just doing his job," and refused to take any action to stop the harassment, according to the suit.⁷⁹

Later the employee quit. The EEOC treated this as actionable sex discrimination.⁸⁰ As with any discrimination claim, the employee might really have been fired for neutral reasons, having nothing to do with his status, but the comments about his sexuality raise a factual question something more malign occurred.⁸¹

Even more stark is a case described by the Ohio Civil Rights Commission's executive director in testimony about a 2009 proposed SOGI nondiscrimination law.⁸² In *Maitland v. Aveda*, instructors at a beauty school allegedly harassed a young man by, among other things, telling him that "Jewish faggots" were not welcome at the school; he was removed from the class.⁸³

Some charge that the squishiness of categories like sexual orientation or gender identity in *some* state or local nondiscrimination laws means that employers will be subjected to "ruinous liability" based on "subjective and unverifiable identities, not on objective traits."⁸⁴ In at least

⁷⁹ *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 1, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm>.

⁸⁰ *Id.*

⁸¹ See Wilson, *supra* note 35.

⁸² Statement of Payton, *supra* note 20.

⁸³ *Id.*

⁸⁴ Anderson, *supra* note 56. A variant of this claim might contend that SOGI laws give LGBT people inordinate power to file unfounded charges. The ratio of founded to unfounded complaints, as determined by the EEOC, seems on par with other protected classes. See *supra* note 77. Some might also worry that protected class status allows LGBT persons to extract unwarranted concessions. Yet, LGBT people do not appear to file complaints at a significantly greater rate than individuals in other protected categories ask for accommodation. Across the 8,736,309 Americans who identify as LGBT, see Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INSTITUTE (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> (reporting 8,038,780 adults identified as lesbian, gay, or bisexual and 697,529 as transgender), 1452 filed complaints with the EEOC—or 0.016%. Compare this with the requests for religious accommodation brought by Muslim Americans recently reported by Professor Eugene Volokh. Eugene Volokh, *The EEOC, Religious Accommodation Claims, and Muslims*, WASH. POST (June 21, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/21/the-eeoc-religious-accommodation-claims-and-muslims>. From 2009 to 2015, the EEOC received 787 complaints. Assuming a level number of complaints per year, this yields 112 charges per year or a rate of roughly .0062%. See *America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015),

some cases, the baldness of the employer's actions suggest that *perceptions* of the employee's sexual orientation or gender identity drove the adverse treatment, not whether a worker did in fact qualify under a specific definition of gender identity or sexual orientation, however constructed. True, definitions matter—they place a worker in a protected class, permitting the state to police illicit treatment based on status—but it was the employer's *perception* of the person, not the squishiness of the category, that gave rise to liability. As explained below, careful definitions of gender identity give employers and public establishments clarity about when they have a duty to not make illicit distinctions based on a person's status in, say, employment or the offering of services and when they have no duty—cabining the risk of open-ended liability.

How pervasive unjust treatment should be to warrant a response in the law is a hard question. Consider the allegations in *Maitland v. Aveda* that “Jewish faggots” were not welcome as students. Jews represent a narrow slice of America.⁸⁵ Yet the harm that flows from sanctioning illicit treatment of a person because of her faith or her sexuality reverberates through society, just as the harm of racist actions do. The failure to civilly sanction unjust treatment conveys that it is okay for private actors to treat others badly based on irrelevant characteristics, even if governments should not.⁸⁶ When a group can be denied services at businesses on Main Street that freely serve others, it signals to that group that is inferior and not valued as members of the polity.⁸⁷

Some resist protections for LGBT persons because it will signal that *they, or their views, are no longer favored or welcome civilly.*⁸⁸ The law has ex-

<http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (estimating 1.8 million adult Muslims in the United States).

⁸⁵ See Michael Lipka, *How Many Jews Are There in the United States?*, PEW RES. CTR. (Oct 2, 2013), <http://www.pewresearch.org/fact-tank/2013/10/02/how-many-jews-are-there-in-the-united-states/> (reporting that “[t]here are about 4.2 million American adults who say they are Jewish by religion, representing 1.8% of the U.S. adult population. But there are roughly 5.3 million Jews (2.2% of the adult population) if the total also includes ‘Jews of no religion,’ a group of people who say they are atheist, agnostic or ‘nothing in particular’ when asked about their religion but who were raised Jewish or have a Jewish parent and who still consider themselves Jewish aside from religion”).

⁸⁶ CORVINO ET AL., *supra* note 71 (characterizing SOGI laws as “grant[ing] special privileges that are enforceable against private actors”).

⁸⁷ Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006); Nan. D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001) (describing the significance of citizenship).

⁸⁸ Andrew T. Walker & Russell D. Moore, *Is Utah's LGBT-Religious Liberty Bill Good Policy?*, ETHICS & RELIGIOUS LIBERTY COMM'N OF THE S. BAPTIST CONVENTION, (Mar. 6, 2015), <http://erlc.com/resource-library/articles/is-utahs-lgbt-religious-liberty-bill-good-policy> (“The symbolism of this law represents an historic and incremental concession to those who would leave no room in the public square for those who

pressive value, both when a legislature enacts protections and when it refuses to do so. But this supposition that SOGI nondiscrimination laws must take the form of “I win, you lose” overlooks the fact that nuanced laws can recognize the dignity of all in a plural society.⁸⁹ As Part V below argues, the real difficulties arise when policymakers write hamfisted laws that ignore the countervailing interests of religious believers in preserving their faith traditions.

III. SAFETY CONCERNS HAVE NOTHING TO DO WITH RISKS FROM TRANS PEOPLE

The bathroom narrative, opponents observe, is “like Jell-O. It’s so hard to fight.”⁹⁰ Like so many culture war questions, SOGI opponents and advocates present polar views of the connection to safety. Opponents see access to facilities for trans people, without regard to their gender identity, as a real threat to safety;⁹¹ advocates see this claim as a “cloak for prejudice.”⁹²

Although a slim fraction of the population, transgender people have long been members of our community.⁹³ They have used the restrooms for countless years without incident or anyone really pausing over it.

refuse to bow down before, or offer sacrifices to, the false gods of the Sexual Revolution.”).

⁸⁹ See Wilson, *supra* note 61 (discussing how Utah provided seamless access to marriage solemnization while preserving the ability of state-paid employees to stay in jobs at clerks’ offices, bypassing conflicts over religious conscience).

Importantly, unnuanced SOGI laws risk signaling exclusion of religious believers from the public square, too—requiring new models for sharing the public square. See Wilson, *supra* note 3.

⁹⁰ Katy Steinmetz, *Why LGBT Advocates Say Bathroom ‘Predators’ Argument is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/>.

⁹¹ See Introduction, *supra*; Kelsey Harkness, *Sexual Assault Victims Speak Out Against Washington’s Transgender Bathroom Policies*, DAILY SIGNAL (Jan. 25, 2016), <http://dailysignal.com/2016/01/25/sexual-assault-victims-speak-out-against-washingtons-transgender-bathroom-policies/>); Amanda Prestigiacomo, *5 Times ‘Transgender’ Men Abused Women and Children in Bathrooms*, DAILY WIRE (Apr. 22, 2016), <http://www.dailywire.com/news/5190/5-times-transgender-men-abused-women-and-children-amanda-prestigiacomo>.

Some opponents of LGBT protections seem motivated not by safety concerns, but by animus. Steinmetz, *supra* note 90 (“‘I don’t want men who think they are women in my bathrooms and locker rooms,’ a Marylander testified in a debate over this issue. ‘I don’t want to be part of their make-believe delusion.’”).

⁹² Steinmetz, *supra* note 90 (“Media Matters, a liberal media watchdog, has asked state leaders, law enforcement and school officials in places with these protections whether they’ve seen any increase in sexual assault or rape after passing these laws, and they have repeatedly said that they have not.”).

⁹³ Andrew R. Flores, Jody L. Herman, Gary J. Gates, & Taylor N. T. Brown, *How Many Adults Identify as Transgender in the United States*, WILLIAMS INSTITUTE (June

There have been “zero reported cases” of trans people attacking men, women, or children in any bathroom.⁹⁴ The law enforcement personnel who filed affidavits supporting North Carolina’s defense of H.B. 2 both acknowledge that trans people do not pose the safety risks North Carolina says prompted H.B. 2. Drawing on 33 years of experience, Sheriff Tim Hutchison notes that “[t]he risks of [laws permitting patrons to use the bathroom of their preference] do not come from transgender use of public facilities that do not line up with birth certificates;” they come from “non-transgender male sex offenders” who may exploit these laws “to obtain better access to their victims.”⁹⁵ Kenneth V. Lanning, a retired 30-year veteran of the FBI, also pointed to “the documented behavior patterns of male sex offenders and sexual offenses that *already* take place;” he cautioned that his report “is *not* about the treatment of transgendered persons, nor should it be misconstrued as hostile in any way to the civil rights of the transgendered.”⁹⁶

Other long-time law enforcement officials dismiss the connection between what bathroom trans people use and public safety as a “non-issue.”⁹⁷ Across 41 years in law enforcement, South Carolina Sheriff Leon Lott said he “has never hear[d] of a transgender person attacking someone in a restroom.”⁹⁸

The connection between the purported safety implications for the public and guaranteeing trans people “full enjoyment of facilities” rests instead on a cascade of factual assumptions about “situational and preferential sex offenders” who might prey on victims in sex-segregated facilities.⁹⁹ In a series of 57 paragraphs, Sheriff Hutchison constructs a series of hypothetical events that would have to happen for there to be greater risk for patrons using public facilities. Figure 7 presents a select number of steps in the chain of increased risk that Hutchinson posits. Together, this chain, Hutchinson believes, shows that “contentions that [laws guar-

2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> (estimating 0.6% of adults in the United States identify as transgender).

⁹⁴ Marcie Bianco, *Statistics Show Exactly How Many Times Trans People Have Attacked You in Bathrooms*, MIC.COM (Apr. 2, 2015), <https://mic.com/articles/114066/statistics-show-exactly-how-many-times-trans-people-have-attacked-you-in-bathrooms> (“Several states, including Arizona, Florida, Texas, and Kentucky, have considered or are considering enacting so called ‘bathroom bills,’ which restrict transgender people from using the bathroom in line with their gender identity, and are framed as ‘protective’ measures against ‘sexual predators.’”).

⁹⁵ Hutchison Expert Opinion, *supra* note 15.

⁹⁶ Lanning Expert Declaration, *supra* note 49 (emphasis added).

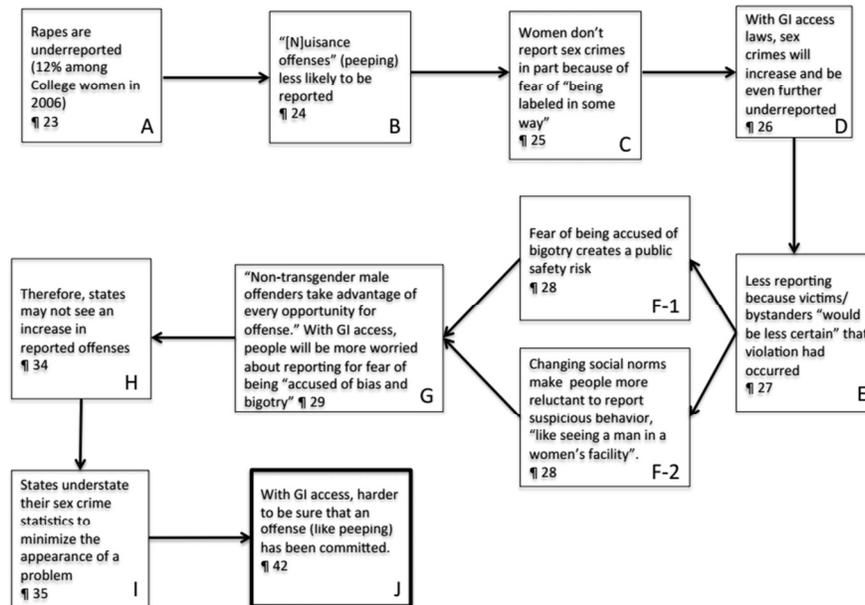
⁹⁷ Matthew Stevens, *Sheriff Lott Calls Bathroom Bill “Unnecessary” and “Unenforceable,”* WACH Fox 57 (Apr. 12, 2016), <http://wach.com/news/local/sheriff-lott-calls-bathroom-bill-unnecessary-and-unenforceable>.

⁹⁸ *Id.*

⁹⁹ Lanning Expert Declaration, *supra* note 49.

anteeing facility usage based on one's gender identity] have no effect on sex offenses are highly speculative."¹⁰⁰

Figure 7.



The complexity of Hutchinson's cascading events makes one wonder whether any increase in victimization will occur. Whether each supposition turns out to be true remains to be seen. But recent cases that have garnered considerable publicity test links in this chain of factual assumptions. Consider, for example, the trans woman who videotaped another patron in the fitting room at a Target store in Idaho.¹⁰¹ Hutchinson contends that some people will not know that they were victimized as a result of shifting norms around who should use what facility (Fig. 7, Box

¹⁰⁰ Hutchison Expert Opinion, *supra* note 15. Women who have asked their states to rethink SOGI nondiscrimination protections, fearing that sexual predators will pose as women to victimize others, acknowledge that men, not transgender women, preyed upon them. Harkness, *supra* note 91 (reporting that many of these women were victimized in locker rooms as children, where, for example, one woman reported that a coach "watched [her] in the shower—that was his thing" Some of the abusers used the private setting of a locker room or restroom to groom their victims—"grooming started at 8 and raping started at 9." One woman pointed to the "countless deviant men in this world who will pretend to be transgender as a means of gaining access to the people they want to exploit, namely women and children.").

¹⁰¹ Niraj Chokshi, *Transgender Woman Is Charged with Voyeurism at Target in Idaho*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/15/us/target-transgender-idaho-voyeurism.html>.

E). He also posits that many who are victimized will not report out of fear of being labeled bigots, something people presently fear, he says, because of changing cultural norms (Fig. 7, Box C).

However, in the Target incident, when the perpetrator, a trans woman, took out her phone and recorded another young woman undressing, the victim understood that a violation had occurred. It did not matter who the violator was—it could have just as well been a biological man dressed as a woman, a trans woman, or a biological man dressed as a man. In some accounts, the victim confronted the perpetrator; in others, the victim's mother did so.¹⁰² Presumably neither feared being labelled a bigot more than their understandable desire to hold the offender accountable for committing a felony.¹⁰³

It is true that Idaho does not ban gender identity discrimination,¹⁰⁴ muddying the question of whether the trans woman was legally permitted to be in the dressing room. But the trans woman's alleged crime rests not on being in the wrong changing room, but on illicitly taping another person in a state of undress, a felony in Idaho. In other words, the trans woman would have committed a crime whether or not Idaho had enacted a SOGI nondiscrimination law protecting trans people from discrimination. And the victim understood a crime may have been committed notwithstanding shifting norms around who should be in what changing room (Fig. 7, Box F-2).

Whatever one thinks of this chain of events and whether it portends increased risk for the public, there is little “fit” between public safety and H.B. 2's mandate that North Carolinians use the bathroom matching one's sex at one's birth. Contrast that approach with a bill now before the Alabama legislature that would post an attendant to monitor the use of gender neutral bathrooms, a tangible, if likely expensive step to ensure public safety.¹⁰⁵

A second affidavit from retired FBI Special Agent Lanning makes a different connection to safety. Access to facilities based on one's gender

¹⁰² Nate Eaton, *Documents Detail Alleged Voyeurism Incident at Ammon Target*, E. IDAHO NEWS (July 13, 2016), <http://www.eastidahonews.com/2016/07/documents-detail-alleged-voyeurism-incident-ammon-target/>.

¹⁰³ Video voyeurism is a felony in Idaho. IDAHO STAT. § 18-6609 (2016). The elements of the crime are: “With the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of such person or another person, or for his own or another person's lascivious entertainment or satisfaction of prurient interest, or for the purpose of sexually degrading or abusing any other person, he uses, installs or permits the use or installation of an imaging device at a place where a person would have a reasonable expectation of privacy, without the knowledge or consent of the person using such place.” *Id.* These requirements do not vary by the identity of the perpetrator.

¹⁰⁴ See Appendix A.

¹⁰⁵ S.B. 1, 2017 Leg., Reg. Sess. (Ala. 2017).

identity “would create an additional risk for potential victims in a previously protected setting and a new defense for a wide variety of sexual victimization.”¹⁰⁶ Acknowledging that nothing prevents sexual predators today from cross-dressing to gain access to women and children as victims,¹⁰⁷ Lanning emphasizes the importance of definitions of gender identity in creating greater risk. “[P]atrons’ unverifiable self-declarations of their gender identities” would give them “access rights” they lack now.¹⁰⁸

Careful definitions of gender identity, as Lanning notes, can assist in parsing claims made for the purposes of victimizing others from requests to be treated in a dignified manner. In Utah and elsewhere, proving one’s gender identity requires medical evidence or a showing that a claim of gender identity is not being asserted for an improper purpose.¹⁰⁹ Thoughtful definitions are a hallmark of nuanced SOGI nondiscrimination laws. As the next Parts note, definitions of public accommodations also assist in placing out of bounds certain questions that properly belong to churches and houses of worship, like the nature of sexuality or gender.

Largely overlooked to date, but also worthy of our consideration, are safety for sexual minorities from laws requiring people to use the bathroom corresponding to their sex at birth. Consider my friend, Bree, who is genderqueer.¹¹⁰ When Bree is wearing his biker vest and a five-o-clock shadow, he belongs in the men’s room. But when Bree presents as a woman, he will cause less disruption and be more comfortable—and safe—in the women’s room.¹¹¹ And so too with transgender women. “There’s far more danger to her—a beautiful young woman in a dress and heels—being forced to use a male bathroom than her presence in a female toilet.”¹¹²

While doing little to advance safety, bathroom-of-one’s-birth laws have served to humiliate members of the public. Consider Cortney Bogorad who, in January 2015, was kicked out of Fishbone’s Rhythm Kitchen Café in downtown Detroit’s Greektown neighborhood after she was

¹⁰⁶ Lanning Expert Declaration, *supra* note 49.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *infra* note 135 and accompanying text.

¹¹⁰ See Evan Urquhart, *What the Heck is Genderqueer?*, SLATE (Mar. 24, 2015), http://www.slate.com/blogs/outward/2015/03/24/genderqueer_what_does_it_mean_and_where_does_it_come_from.html (“Genderqueer, along with the somewhat newer and less politicized term *nonbinary*, are umbrella terms intended to encompass individuals who feel that terms like *man* and *woman* or *male* and *female* are insufficient to describe the way they feel about their gender and/or the way they outwardly present it.”).

¹¹¹ See Philipps, *supra* note 52.

¹¹² Wayne M. Maines, *Why Toilets Matter to Trans Rights*, BBC NEWS (Apr. 12, 2016), <http://www.bbc.com/news/world-us-canada-36000356>.

mistakenly believed to be a man.¹¹³ The restaurant's security officer shouted, "[w]hatever man is in the restroom, come out now."¹¹⁴ Bogorad ignored the shouting until the officer physically ejected her from the bathroom.¹¹⁵ Bogorad's humiliation prompted her to file an eight-count lawsuit against the eatery.¹¹⁶ Arresting and handcuffing masculine-looking women for simply using public restrooms does little to advance public safety.

IV. AVOIDING THE IMPULSE TO HYPER-REGULATE IN EITHER DIRECTION

This leads us to what legislatures should require regarding access to facilities. Nowhere in the 36-page Houston HERO ordinance were public restrooms even mentioned.¹¹⁷ Likewise the Charlotte ordinance that promoted North Carolina's law: it was silent on whether trans people could demand to use a particular bathroom of their choosing.¹¹⁸

By being silent, Charlotte's ordinance, like Houston's, implicitly left businesses to decide matters for themselves, without a civil rights commission watching over their shoulders.¹¹⁹ This silence allows for reasona-

¹¹³ Katrease Stafford, *Lawsuit: Fishbone's Mistakes Woman for Man, Ejects Her*, DET. FREE PRESS (June 11, 2015), <http://www.freep.com/story/news/local/michigan/detroit/2015/06/11/fishbones-lawsuit-filed/71056630/>.

¹¹⁴ Deborah Hastings, *Detroit Woman Mistaken for Man, Thrown From Eatery: Lawsuit*, N.Y. DAILY NEWS (June 11, 2015), <http://www.nydailynews.com/news/national/detroit-woman-mistaken-man-thrown-eatery-lawsuit-article-1.2254972>.

¹¹⁵ *Id.*

¹¹⁶ Stafford, *supra* note 113.

¹¹⁷ Katherine Driessen, *Claims About Restroom Access Dominate HERO Debate*, HOUS. CHRON. (Oct. 15, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Claims-about-bathroom-access-dominate-HERO-debate-6572325.php>.

¹¹⁸ *See supra* note 30.

¹¹⁹ It is possible that without explicitly preserving discretion for businesses, a judge might interpret public accommodations laws prohibiting gender identity discrimination to make it unlawful for businesses to deny trans people access to restrooms matching their gender identity. Yet courts construing silent statutes have stressed that their decisions are fact-specific and rest on "an accepted and respected diagnosis," not one's unsupported assertion. Maine's highest court said:

[W]e do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion without the plans developed in cooperation with the school and the accepted and respected diagnosis that are present in this case. Our opinion must not be read to require schools to permit students casual access to any bathroom of their choice. Decisions about how to address students' legitimate gender identity issues are not to be taken lightly. Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the MHRA [Minnesota Human Rights

ble accommodations based on individual circumstances rather than a rigid rule.

Businesses have incentives to police safety in the bathrooms they provide as part of their ordinary duty to make their premises, like parking lots, safe.¹²⁰ Constrained by public opinion and market forces, however, businesses have no desire to frustrate access to bathroom facilities.

Ironically, North Carolina's then-Governor Pat McCrory¹²¹ says North Carolina's bathroom-of-your-birth law permitted businesses to "adopt their own policies—like Target has—instead of being mandated to allow men into women's restrooms by government."¹²² Whether North Carolina's legislative response rests on a misunderstanding of what Charlotte's ordinance would have actually required is up for debate. But trusting businesses to act reasonably in providing access to restroom facilities follows a tried-and-true model of assuming businesses will act reasonably unless evidence shows otherwise.

Massachusetts and a handful of states have taken another tack, eliminating discretion. They require businesses "to grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof *consistent with the person's gender identity*."¹²³ Like bath-

Act].

Doe v. Regional School Unit 26, 86 A.3d 600, 607 (Maine 2014).

Courts are unlikely to read SOGIs that do not explicitly create a *right* to use a facility of one's choosing as creating such a right. This has been true of cases examining employer responsibilities towards trans employees under a state nondiscrimination law that included gender identity. The Minnesota Supreme Court said:

To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, *a result not likely intended* by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender.

Goins v. West Group, 635 N.W.2d 717, 723 (Minn. 2001) (emphasis added).

¹²⁰ Rosa Nguyen, *Victim of Rape in Hotel Garage Awarded \$4 Million, Jury Rules*, BOS. GLOBE (Aug. 11, 2015), <https://www.bostonglobe.com/metro/2015/08/11/jury-awards-woman-who-was-raped-radisson-hotel-garage/Haj6J7H3iiKrtJGW0FJDL/story.html>.

¹²¹ Mark Joseph Stern, *It Looks Like Pat McCrory, North Carolina's Anti-LGBTQ Republican Governor, Is Out of a Job*, SLATE (Nov. 9, 2016), http://www.slate.com/blogs/outward/2016/11/09/north_carolina_gov_pat_mccrory_lost_thanks_to_hb2.html ("McCrory's loss can fairly obviously be attributed to his support of HB2.").

¹²² Lucas Grindley, *Donald Trump: Let Trans People Use Bathrooms That Match Their Identity*, ADVOCATE (Apr. 21, 2016).

As explained below, a statute, or at the least its legislative history, should make clear the legislature's intent to preserve the business owner's discretion to use her judgment about facility use that provides "equal access to facilities."

¹²³ An Act Relative to Transgender Anti-Discrimination, 2016 Mass. Acts ch. 134 ("An owner, lessee, proprietor, manager, superintendent, agent or employee of any

room-of-your birth laws, gender-identity-always-wins bathroom laws also hyper-regulate, forcing businesses to unnecessarily police bathroom usage. And as Part V explains, if care is not taken with the scope of public accommodations under laws erasing discretion, such laws may encroach on decisions made by faith communities in their own spaces, raising real religious liberty questions.

Hyper-regulating bathroom access in either direction is unnecessary. Indeed, legislators have expressed incredulity over the need for laws that either require bathroom access based on one's gender identity, or limit access to certain bathrooms. Newly elected Kentucky Governor Matt Bevin asked

“Is it an issue? Is there anyone you know in Kentucky who has trouble going to the bathroom? Seriously?” the Republican said. “The last thing we need is more government rules. I'm cutting red tape, not creating it. Making government rules for things that don't even need government rules would be silly.”¹²⁴

Then-South Carolina Governor Nikki Haley could see no need for forcing the hands of business to ensure trans people access to specific bathrooms: “[I]n South Carolina, we are blessed because we don't have to mandate respect or kindness or responsibility.”¹²⁵ Because “we're not hearing of anybody's religious liberties that are being violated, and we're again not hearing any citizens that are being violated in terms of freedoms,” a law dictating bathroom choice for transgender people is “[un]necessary.”¹²⁶

North Carolina's ordinance was adopted at a moment when the Federal government, in a series of Title IX “Dear Colleague” letters,¹²⁷ removed the discretion that schools had previously enjoyed to decide

place of public accommodation, resort or amusement that lawfully segregates or separates access to such place of public accommodation, or a portion of such place of public accommodation, based on a person's sex shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof *consistent with the person's gender identity.*” (emphasis added)).

¹²⁴ Graham, *supra* note 17.

¹²⁵ Andrew Shain, *SC Bill: Ban Transgender People from Choosing Their Bathroom*, STATE (Columbia, S.C.) (Apr. 6, 2016), <http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article70332857.html>.

¹²⁶ Andrew Shain, *SC Gov. Haley: Transgender Bathroom Bill Unnecessary*, CHARLOTTE OBSERVER (Apr. 7, 2016), <http://www.charlotteobserver.com/news/local/article70536742.html>.

¹²⁷ See *Dear Colleague Letter*, *supra* note 10; Wilson, *supra* note 35, at 399. In addition to its guidance on trans students and faculty access, in 2011 OCR released a “Dear Colleague” letter specifying needed steps to prevent sex-based harassment, violence, and assault. See Letter from Russlynn Ali, Ass't Sec'y for Civil Rights, U.S. Dep't of Education (Apr. 4, 2011), https://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf. Although not binding, such letters have persuasive force with administrators.

who uses what restroom facility. While schools may raise especially thorny considerations not presented by access to restrooms in public establishments like bars, restaurants, and theaters,¹²⁸ preserving room for discretion is important when facilities are scarce. South Dakota Governor Dennis Daugaard vetoed a bathroom-of-one's-birth measure aimed at schools, saying: "Local school districts can, and have, made necessary restroom and locker room accommodations that serve the best interests of all students, regardless of biological sex or gender identity."¹²⁹

Where legislators predict that allowing discretion will not suffice to provide needed access, they could follow Utah's example and place an affirmative duty on business owners to reasonably accommodate trans employees or patrons. In March 2015, Utah—the single most conservative state in the 2012 presidential election—enacted protections against discrimination for the whole LGBT community in housing and hiring.¹³⁰ Transgender employees were included in that law. Recognizing that employees must have access to bathroom facilities during the day, Utah directed employers to "afford reasonable accommodations based on gender identity to all employees" if they "designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities."¹³¹ Under

¹²⁸ See Alia Wong, *The K-12 Binary*, ATLANTIC (Jul. 9, 2015), <https://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/>.

¹²⁹ Matt Pearce, *South Dakota Governor Vetoes Transgender Bathroom Bill, Saying It 'Invites Conflict and Litigation'*, L.A. TIMES (Mar. 1, 2016), <http://www.latimes.com/nation/nationnow/la-na-south-dakota-transgender-bathrooms-20160301-story.html>.

In January 2017, Arkansas Governor Asa Hutchinson said he also could see no need for "legislation that would limit which restrooms transgender people could use at public schools." Associated Press, *Arkansas Gov. Asa Hutchinson: Bathroom Bill Unnecessary*, WASH. TIMES (Jan. 4, 2017), <http://www.washingtontimes.com/news/2017/jan/4/arkansas-gov-asa-hutchinson-bathroom-bill-unnecess>.

Questions swirling around access to facilities by transgender students in primary and secondary school have largely been federalized under the Obama Administration's regulations and guidance, see *Dear Colleague Letter*, *supra* note 10, and involve difficult evaluations of developmental psychology. See Wilson, *supra* note 35.

Some worry, for example, that younger students and high school adolescents may express a fleeting desire for another gender, but ultimately change their mind. See *id.* (sketching possibilities for accommodating students' competing interests and noting the importance of definitions of gender identity like Utah's, which referenced the AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013)'s criteria, which require for children that symptoms of a "marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics" last at least six months and be manifested by at least six specified criteria).

¹³⁰ See S.B. 297, 2015 Utah Laws Ch. 46; S.B. 296, 2015 Utah Laws Ch. 13; see also Robin Fretwell Wilson, *After Indiana: Harmonizing Gay Rights and Religious Freedom*, LIBR. L. & LIBERTY (Apr. 21, 2015), <http://www.libertylawsite.org/2015/04/21/after-indiana-harmonizing-gay-rights-and-religious-freedom/>.

¹³¹ UTAH CODE ANN. 1953 § 34A-5-109 (West 2015); 2015 Utah Laws Ch. 13; S.B. 296, lines 676–7913.

this common-sense approach, Utah also recognized that other employees have interests, too, as does the employer itself; it permitted employers to institute reasonable dress and grooming standards.¹³² The Utah Senate and House recognized that many Utahns have never interacted with a trans person, leading to possible unease—and concluded that concerns about privacy could be solved with nothing more than a \$100 lock on a bathroom door.¹³³ In multiuse bathrooms, patrons concerned about sharing space with a trans person can simply lock the stall—and men who might have used a urinal can use a stall instead.

Some employers, like some business establishments like gyms, have locker rooms and changing facilities where the pressure for a definite standard is at its peak.¹³⁴ How one defines gender identity can do a lot of constructive work to address privacy, as well as safety concerns. A definition that limits one's gender identity to the gender listed on one's birth certificate, as North Carolina does, never accommodates the gender-reassigned individual, whether during the transition process or after. Such "birth certificate" policies effectively dodge the hard, but soluble, question of how to give trans persons needed access to facilities, while being respectful of the privacy interests of all. By contrast, Utah recognized the need for clarity about when an employer must accommodate a given employee, but it also engaged the reality that some employees will undergo gender transition. Employees can show they meet the medical definition of a protected gender identity in a variety of ways, with medical history, treatment, or "other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose."¹³⁵

¹³² UTAH CODE ANN. 1953 § 34A-5-109 (West 2015); 2015 Utah Laws Ch. 13; S.B. 296, lines 676–79. ("This chapter may not be interpreted to prohibit an employer from adopting reasonable dress and grooming standards not prohibited by other provisions of federal or state law, provided that the employer's dress and grooming standards afford reasonable accommodations based on gender identity to all employees . . ."); *id.* ("This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, provided that the employer's rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.").

¹³³ Utah Senate Floor Debate on Senate Bill 296, Mar. 5, 2015, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18760&meta_id=548216.

¹³⁴ Athletic facilities are the most active area for Title IX waiver requests by religious universities that follow faith tenets in their operations—evidencing that they are the situs of competing privacy interests. The U.S. Department of Education's recent settlement with a Chicago school district over a transgender student's access to the locker room shows that it is possible to facilitate access to the locker room and changing facilities without ostracizing transgender students or discounting the privacy of others. *See* Wilson, *supra* note 35, at 471.

¹³⁵ UTAH CODE ANN. 1953 § 34A-5-109 (2015).

V. THE HYPE ABOUT SAFETY DISTRACTS FROM SERIOUS RELIGIOUS LIBERTY QUESTIONS

Safety aside, the capaciousness of what counts as a public accommodation does have implications for people of faith.¹³⁶ Many faith traditions speak to the nature of one's gender.¹³⁷

Yet many inartfully drafted SOGI nondiscrimination laws follow a pattern: they add (a) gender identity to their nondiscrimination protections, (b) fail to carefully define gender identity, *and* (c) do not take care to carefully circumscribe the scope of regulated public accommodations not to encompass churches, houses of worship, or other religious organizations that have views guided by faith convictions over sexuality. D.C., for example, directs that "All entities covered under the Act . . . shall allow individuals the right to use gender-specific restrooms and other gender-specific facilities such as dressing rooms, homeless shelters, and group homes that are consistent with their gender identity or expression."¹³⁸ It does not expressly leave aside houses of worship.¹³⁹ As a result, application of those rules to all public buildings will mean that churches

Newly proposed laws would place duties on businesses to accommodate trans people only when the person transitioning has undergone surgery but not when "preoperative, nonoperative, or [when the person] otherwise has genitalia of a different gender from that which the facility is segregated" for. H.B. 1011, 65th Leg., Reg. Sess. (Wash. 2017). For a discussion of the lengthy process for transitioning, during which trans individuals have needs for accommodation, see Wilson, *supra* note 35.

¹³⁶ Schools raise special considerations of how best to balance competing interests in privacy. Serious consideration needs to be given to whether to include all schools in the definition of a public accommodation in any state SOGI nondiscrimination law. Eight states include schools. *See* 775 ILL. COMP. STAT. 5/5-101(A) (2010); ME. STAT. tit. 5, § 4553(8) (2015); NEV. REV. STAT. § 651.050(3) (2015); N.J. STAT. ANN. § 10:5-5(1) (2015); N.Y. EXEC. LAW § 292; 43 PA. CONS. STAT. § 954(l) (2016); VT. STAT. ANN. tit. 9, § 4501(1) (2015); WASH. REV. CODE § 49.60.040(2) (2015). *See* Appendix A.

¹³⁷ POPE JOHN PAUL II, *THE THEOLOGY OF THE BODY* (1997) at 9.5 ("The theology of the body, which is linked from the beginning with the creation of man in the image of God, becomes in some way also a theology of sex, or rather a theology of masculinity and femininity, which has its point of departure here, in Genesis."); Richard Doster, *A Theology of Gender*, BYFAITH (Jan. 1, 2016), <http://byfaithonline.com/a-theology-of-gender/> (interviewing Sam Andreades, Presbyterian Church in America pastor, about his book on the theology of sex differences). *See also Comparison of 1925, 1963 and 2000 Baptist Faith and Message*, S. BAPTIST CONVENTION, <http://www.sbc.net/bfm2000/bfmcomparison.asp> (quoting the "Current Baptist Faith and Message Statement": "Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God's creation.").

¹³⁸ D.C. MUN. REGS. tit. 4, § 802 (2006).

¹³⁹ *Id.*

will be constrained in their decisions if churches count as places of public accommodation.

Contrast this with Colorado, which requires businesses to permit “gender-segregated facilities” to be used by persons “consistent with their gender identity.”¹⁴⁰ Colorado expressly leaves aside all churches, synagogues, mosques, and “other place[s] principally used for religious purposes,”¹⁴¹ avoiding needless encroachment on religious communities.

The Massachusetts Commission Against Discrimination inflamed concerns over the scope of SOGI nondiscrimination laws with its September 2016 “Gender Identity Guidance,” before eventually backpedaling.¹⁴² Initially, the Guidance said sex-segregated facilities in places of public accommodation “shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person’s gender identity;” the guidance gave as examples movie theater restrooms and locker rooms at gyms and health clubs, where religious convictions around sexuality are not obviously implicated.¹⁴³ Neither the statute nor the Guidance requires proof of one’s gender identity. Even though some faith traditions fiercely believe in segregation of the sexes as a matter of faith and do not recognize a person’s ability to change the sex given by God,¹⁴⁴ the Guidance further explained, “Even a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public.”¹⁴⁵ A footnote explained that “[a]ll charges, including those involving religious institutions or religious exemptions, are reviewed on a case-by-case basis.”

The state later adjusted the guidance to remove the reference to houses of worship as public accommodations.¹⁴⁶ While state law still does

¹⁴⁰ 3 COLO. CODE REGS. § 708-1 r. 81.11(B) (2014).

¹⁴¹ See Appendix A (“Place of public accommodation’ shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.”).

¹⁴² MASS. COMM’N AGAINST DISCRIMINATION, GENDER IDENTITY GUIDANCE (Sep. 1, 2016) at 4–5, <https://web.archive.org/web/20160915014340/http://www.mass.gov/mcad/docs/gender-identity-guidance.pdf> [hereinafter GENDER IDENTITY GUIDANCE] (specifying that public accommodations include not only to access to physical structures but to services like taxis and insurance companies and listing examples of situations that would violate the SOGI nondiscrimination law, such as a hotel declining to book a room, or a grocery store clerk refusing to bag groceries). The document has since been revised. MASS. COMM’N AGAINST DISCRIMINATION, GENDER IDENTITY GUIDANCE (Dec. 5, 2016), <http://www.mass.gov/mcad/docs/gender-identity-guidance-12-05-16.pdf> [hereinafter REVISED GENDER IDENTITY GUIDANCE].

¹⁴³ GENDER IDENTITY GUIDANCE, *supra* note 142, at 5.

¹⁴⁴ See *supra* note 137.

¹⁴⁵ GENDER IDENTITY GUIDANCE, *supra* note 142, at 4–5, 4 n.13.

¹⁴⁶ See REVISED GENDER IDENTITY GUIDANCE, *supra* note 142 (“No provision of G.L. c. 151B or G.L. c. 272 prohibits restrooms from being designated by gender. Prohibiting an individual from using a restroom or other sex-segregated facility consistent with their gender identity is a violation of G.L. c. 272, § 92A. Requiring an

not require proof of one's gender identity, it does not now force the hand of houses of worship on a question of faith,¹⁴⁷ a change which led the religious organizations to drop their suit.¹⁴⁸ Far better, of course, would have been to draft a public accommodations SOGI nondiscrimination law that made clear from the beginning that it governs only secular businesses, leaving faith communities aside from the law's reach.

The Iowa Civil Rights Commission reached a similar result to the original Massachusetts guidance. Iowa law, the commission notes, permits "gender-segregated restrooms" but cautioned that businesses which maintain "gender-segregated restrooms" must allow trans persons access

[To] those restrooms in accordance with their gender identity, rather than their assigned sex at birth. And, just as non-transgender individuals are entitled to use a restroom appropriate to their gender identity without having to provide documentation or respond to invasive requests, transgender individuals must also be allowed to use a gender-identity appropriate restroom without being harassed or questioned.¹⁴⁹

The Commission treats "[p]laces of worship (e.g. churches, synagogues, mosques, etc.) [as] generally exempt from the Iowa law's prohibition of discrimination, *unless* the place of worship engages in non-religious activities which are open to the public."¹⁵⁰ Duties would apply,

employee to provide identification or proof of any particular medical procedure (including gender affirming surgery) in order to access gender designated facilities, may be evidence of discriminatory bias."); Chris Johnson, *Anti-LGBT Group Withdraws Lawsuit against Mass. Trans Law*, WASH. BLADE (Dec. 12, 2016), <http://www.washingtonblade.com/2016/12/12/anti-lgbt-group-withdraws-lawsuit-against-mass-trans-law/>.

¹⁴⁷ Tyler O'Neil, *Mass. Churches Drop LGBT 'Accommodation' Lawsuit*, PJ MEDIA (Dec. 14, 2016), <https://pjmedia.com/faith/2016/12/14/mass-churches-drop-lgbt-accommodation-lawsuit/> ("[T]he restrictions would have required 'public accommodations' to open men's or women's restrooms—and locker rooms and changing rooms—to transgender people. Such places would also have been required to 'use names, pronouns, and gender-related terms appropriate to employee's state gender identity in communications with employee and with others.' These are no small asks for churches that accept biblical teaching that human beings are created male and female and hold that identifying with the opposite sex or mutilating one's body to match the opposite sex is a rejection of God's good creation.").

¹⁴⁸ Desiree Wiley, *Massachusetts Attorney General, Churches Compromise on Transgender Guidelines*, NBC BOSTON (Dec. 14, 2016), <http://www.nbcboston.com/news/local/Massachusetts-Attorney-General-Churches-Compromise-on-Transgender-Guidelines-406630965.html>.

¹⁴⁹ *Sexual Orientation and Gender Identity: A Public Accommodations Provider's Guide to Iowa Law*, IOWA CIV. RTS. COMM'N, https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_pa1.pdf (last visited Dec. 28, 2016).

¹⁵⁰ *Id.* (emphasis added).

for example, to an on-site “independent day care or polling place located on the premises of the place of worship.”¹⁵¹

The question of the scope of SOGI nondiscrimination laws is of particular urgency in places like Pennsylvania, where 32% of Pennsylvanians live under municipal SOGIs.¹⁵² Many counties and cities in Pennsylvania have enacted SOGI nondiscrimination ordinances that inadvertently, or perhaps by design, spill over to religious places.¹⁵³

Consider Philadelphia. It bans discrimination based on sexual orientation and gender identity, but defines gender identity as one’s “[s]elf-perception, or perception by others, as male or female, and shall include an individual’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but not be limited to, individuals who are undergoing or have completed sex reassignment.”¹⁵⁴ The ordinance extends the duty not to discriminate to include all public accommodations, which are defined as “[a]ny place . . . whether licensed or not, which solicits or accepts the patronage . . . of the public” and does

¹⁵¹ *Id.*

¹⁵² These numbers were reached by using data from *Pennsylvania Local Anti-Discrimination Ordinances Prohibiting Discrimination Based on Sexual Orientation and/or Gender Identity*, MAZZONI CTR. (May 17, 2016), <https://www.mazzonicenter.org/resources/pennsylvania-local-anti-discrimination-ordinances-prohibiting-discrimination-based-sexual> to create searches at *American Fact Finder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Jan. 24, 2017).

¹⁵³ Harrisburg bans discrimination based on sexual orientation and gender identity, but defines gender identity arguably with reference to evidence as “[t]he gender, male or female, of a person, including those persons who are changing or have changed their sex,” HARRISBURG, PA. CODE § 4-101.1 (2017)—a duty applicable to all public accommodations, which are defined as “Any place which is open and accepts or solicits the patronage of the general public, including but not limited to inns, taverns, resorts, places of recreation or amusement, hotels, motels, clinics, hospitals, swimming pools, barbershops, beauty parlors, retail stores, parks, bowling alleys, gymnasiums, public libraries, and all governmental facilities,” *id.*, and does not explicitly carve out churches or houses of worship. The City of York bans discrimination based on sexual orientation and gender identity, but defines gender identity without reference to evidence as “one’s personal sense of their gender. For transgender people, their birth-assigned sex and their own sense of gender identity do not match,” CITY OF YORK, PA. CODE § 185.04 (2016)—a duty applicable to all public accommodations, which are defined as “provision of service; or any place which is open to, accepts or solicits the patronage of the general public; or offers goods or services to the general public; the Commonwealth of Pennsylvania, and all political subdivisions, authorities, boards and commissions thereof, including the City of York. The term ‘public accommodation’ shall not include any accommodations which are in their nature distinctly private, personal and confidential,” *id.*; it does explicitly carve out churches or houses of worship. CITY OF YORK, PA. CODE § 185.10 (2016).

¹⁵⁴ PHILA. CODE § 9-1102(k).

not explicitly carve out churches or houses of worship.¹⁵⁵ Now consider the impact on just one faith tradition, Catholicism. Philadelphia is home to 46 Catholic schools, 158 parishes, and the Cathedral Basilica of Saints Peter and Paul.¹⁵⁶ A SOGI nondiscrimination law that includes religious institutions will have an outsized impact in a city with such an extensive religious presence.

CONCLUSION

Removing common-sense discretion from businesses by hyper-regulating bathrooms is not likely to promote public safety or religious liberty. Laws that hyper-regulate access to facilities do, however, interfere with efforts at mutual accommodation—namely, the enactment of non-discrimination laws that protect both LGBT people and the integrity of religious communities and people of faith. It is possible to allow businesses to open restrooms and other facilities to transgender persons in a way that ensures the safety, dignity, and privacy of all their patrons. This is possible without sacrificing the discretion of religious groups to determine questions of sexuality important to their faith communities.

¹⁵⁵ PHILA. CODE § 9-1102(w) (“Any place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public; including all facilities of and services provided by any public agency or authority; any agency, authority or other instrumentality of the Commonwealth; and the City, its departments, boards and commissions.”).

¹⁵⁶ See ARCHDIOCESE OF PHILA., <http://archphila.org/parishes/> (last visited Jan. 24, 2017); ARCHDIOCESE OF PHILA. SCHS., <http://www.aopcatholicschools.org/find-a-school/> (last visited Jan. 24, 2017) (listing 69 schools in a 10-mile radius); CATHEDRAL BASILICA OF SAINTS PETER & PAUL, <http://cathedralphila.org/> (last visited Jan. 24, 2017).

APPENDIX A: A STATE-BY-STATE SUMMARY OF SOGI LAWS

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
AL		n/a	n/a	
AK	ALASKA STAT. § 18.35.230(2) (2015)	“[P]ublic facilities’ means recreation camps, picnic areas, theaters, places of entertainment, churches, fair buildings, and places with permanent facilities for public use.”	“sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin”	
AZ	ARIZ. REV. STAT. ANN. § 41-1441(2) (2016)	“Places of public accommodation’ means all public places of entertainment, amusement or recreation, all public places where food or beverages are sold for consumption on the premises, all public places which are conducted for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public. Any dwelling as defined in section 41-1491, or any private club, or any place which is in its nature distinctly private is not a place of public accommodation.”	“race, color, religion, sex, national origin or ancestry”	
AR	ARK. CODE ANN. § 16-123-102(7) (2015)	“Place of public resort, accommodation, assemblage, or amusement’ means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits	“race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, but 'place of public resort, accommodation, assemblage, or amusement' does not include:</p> <p>(A) Any lodging establishment which contains not more than five (5) rooms for rent and which is actually occupied by the proprietor of such establishment as a residence; or</p> <p>(B) Any private club or other establishment not in fact open to the public."</p>		
CA	CAL. CIVIL CODE § 51(b) (West 2016)	"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."	"sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information"	SO: 1992; GI: 1993.i
CO	COLO. REV. STAT. § 24-34-601 (2014)	"As used in this part 6, 'place of public accommodation' means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but 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	"disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry"	SO & GI: 2008.ii

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THE NONSENSE ABOUT BATHROOMS

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		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. 'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes."		
CT	CONN. GEN. STAT. § 46a-63 (1) (2016) CONN. GEN. STAT. § 46a-64 (b)(1) (2016)	"Place of public accommodation, resort or amusement' means any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent." "The provisions of this section with respect to the prohibition of sex discrimination shall not apply to (A) the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or (B) separate bathrooms or locker rooms based on sex. (2) The provisions of this section with respect to the	"race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability or physical disability"	SO: 1991; GI: 2011.iii

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>prohibition of discrimination on the basis of age shall not apply to minors or to special discount or other public or private programs to assist persons sixty years of age and older. (3) The provisions of this section with respect to the prohibition of discrimination on the basis of physical disability shall not require any person to modify his property in any way or provide a higher degree of care for a physically disabled person, including, but not limited to blind or deaf persons, than for a person not physically disabled. (4) The provisions of this section with respect to the prohibition of discrimination on the basis of creed shall not apply to the practice of granting preference in admission of residents into a nursing home as defined in section 19a-490, if (A) the nursing home is owned, operated by or affiliated with a religious organization, exempt from taxation for federal income tax purposes and (B) the class of persons granted preference in admission is consistent with the religious mission of the nursing home. (5) The provisions of this section with respect to the prohibition of discrimination on the basis of lawful source of income shall not prohibit the denial of full and equal accommodations solely on the basis of insufficient income.”</p>		
DE	DEL. CODE ANN. tit. 6, § 4502(14) (2014)	“A ‘place of public accommodation’ means any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. This definition includes state agencies, local government agencies, and state-funded agencies performing public functions. This definition shall apply	“race, age, marital status, creed, color, sex, physical disability, sexual orientation, gender identity or national origin”	SO: 2009; GI: 2013.iv

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	DEL. CODE ANN. tit. 6, § 4504(a) (2014)	to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.” “A place of public accommodation may provide reasonable accommodations based on gender identity in areas of facilities where disrobing is likely, such as locker rooms or other changing facilities, which reasonable accommodations may include a separate or private place for the use of persons whose gender-related identity, appearance or expression is different from their assigned sex at birth, provided that such reasonable accommodations are not inconsistent with the gender-related identity of such persons.”		
DC	D.C. CODE § 2-1402.02(24) (2015)	“‘Place of public accommodation’ means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and	“race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an	SO: 1977; GI: 2005.v

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bathhouses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 2-1402.67. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:</p> <p>(A) Has 350 or more members;</p> <p>(B) Serves meals on a regular basis;</p> <p>and</p>	<p>intrafamily offense, and place of residence or business”</p>	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.”		
FL	FLA. STAT. § 760.02(11) (2016)	<p>“Public accommodations’ means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:</p> <p>(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.</p> <p>(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.</p> <p>(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.</p> <p>(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically</p>	“race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.”		
GA		n/a	n/a	
HI	HAW. REV. STAT. § 489-2 (2015)	<p>“Place of public accommodation’ means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:</p> <p>(1) A facility providing services relating to travel or transportation;</p> <p>(2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;</p> <p>(3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;</p> <p>(4) A shopping center or any establishment that sells goods or services at retail;</p> <p>(5) An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31;</p> <p>(6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;</p> <p>(7) A barber shop, beauty shop, bathhouse, swimming pool,</p>	“race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability”	SO & GI: 2006.vi

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;</p> <p>(8) A park, a campsite, or trailer facility, or other recreation facility;</p> <p>(9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;</p> <p>(10) A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment;</p> <p>(11) A mortuary or undertaking establishment; and</p> <p>(12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.</p> <p>No place of public accommodation defined in this section shall be requested to reconstruct any facility or part thereof to comply with this chapter.”</p>		
ID	IDAHO CODE § 67-5902(9) (2016)	<p>“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”</p>	<p>“race, color, religion, sex or national origin or disability”</p>	
IL	775 ILL. COMP. STAT. 5/5-101(A) (2010)	<p>“Place of public accommodation’ includes, but is not limited to:</p> <p>(1) an inn, hotel, motel, or other place of lodging, except for an establishment located within a</p>	<p>“race, color, religion, sex, national origin, ancestry, age, order of</p>	SO & GI: 2005.vii

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>building that contains not more than 5 units for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;</p> <p>(2) a restaurant, bar, or other establishment serving food or drink;</p> <p>(3) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;</p> <p>(4) an auditorium, convention center, lecture hall, or other place of public gathering;</p> <p>(5) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;</p> <p>(6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;</p> <p>(7) public conveyances on air, water, or land;</p> <p>(8) a terminal, depot, or other station used for specified public transportation;</p> <p>(9) a museum, library, gallery, or other place of public display or collection;</p> <p>(10) a park, zoo, amusement park, or other place of recreation;</p> <p>(11) a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education;</p> <p>(12) a senior citizen center, homeless shelter, food bank, non-sectarian adoption agency, or other social service center establishment; and</p> <p>(13) a gymnasium, health spa,</p>	<p>protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service”</p>	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	775 ILL. COMP. STAT. 5/5-102.1 (2010)	<p>bowling alley, golf course, or other place of exercise or recreation.”</p> <p>“(a) It is not a civil rights violation for a medical, dental, or other health care professional or a private professional service provider such as a lawyer, accountant, or insurance agent to refer or refuse to treat or provide services to an individual in a protected class for any non-discriminatory reason if, in the normal course of his or her operations or business, the professional would for the same reason refer or refuse to treat or provide services to an individual who is not in the protected class of the individual who seeks or requires the same or similar treatment or services.</p> <p>(b) With respect to a place of public accommodation defined in paragraph (11) of Section 5-101, the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation.”</p>		
IN	IND. CODE § 22-9-1-3(m) (2016)	“‘Public accommodation’ means any establishment that caters or offers its services or facilities or goods to the general public.”	“race, religion, color, sex, disability, national origin, or ancestry”	
IA	IOWA CODE § 216.2(13) (2016)	“a. ‘Public accommodation’ means each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization	“race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or	SO & GI: 2007.viii

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	IOWA CODE § 216.7(2) (2016)	<p>or association utilizing the place, establishment, or facility, provided that any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers gratuitously shall be deemed a public accommodation if the accommodation receives governmental support or subsidy. Public accommodation shall not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the nonmembers for fee or charge or gratuitously, it shall be deemed a public accommodation during such period.</p> <p>b. 'Public accommodation' includes each state and local government unit or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise. This paragraph shall not be construed by negative implication or otherwise to restrict any part or portion of the preexisting definition of the term 'public accommodation.'"</p> <p>"This section shall not apply to: a. Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose."</p>	disability"	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
KS	KAN. STAT. ANN. § 44-1002(h) (2015)	“Public accommodations’ means any person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not limited to, any lodging establishment or food service establishment, as defined by K.S.A 36-501 and amendments thereto; any bar, tavern, barbershop, beauty parlor, theater, skating rink, bowling alley, billiard parlor, amusement park, recreation park, swimming pool, lake, gymnasium, mortuary or cemetery which is open to the public; or any public transportation facility. Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.”	“race, religion, color, sex, disability, national origin or ancestry”	
KY	KY. REV. STAT. ANN. § 344.130 (West 2015)	“As used in this chapter, unless the context requires otherwise, ‘place of public accommodation, resort, or amusement’ includes 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, except that: (1) A private club is not a ‘place of public accommodation, resort, or amusement’ if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests; (2) ‘Place of public accommodation, resort, or amusement’ does not include a rooming or boarding house containing not more than one (1) room for rent or hire and which is within a building occupied by the	“familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person’s status as a qualified individual with a disability”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>proprietor as his residence; and (3) 'Place of public accommodation, resort, or amusement' does not include a religious organization and its activities and facilities if the application of KRS 344.120 would not be consistent with the religious tenets of the organization, subject to paragraphs (a), (b), and (c) of this subsection. (a) Any organization that teaches or advocates hatred based on race, color, or national origin shall not be considered a religious organization for the purposes of this subsection. (b) A religious organization that sponsors nonreligious activities that are operated and governed by the organization, and that are offered to the general public, shall not deny participation by an individual in those activities on the ground of disability, race, color, religion, or national origin. (c) A religious organization shall not, under any circumstances, discriminate in its activities or use of its facilities on the ground of disability, race, color, or national origin."</p>		
LA	LA. STAT. ANN. § 51:2232(9) (2015)	<p>"'Place of public accommodation, resort, or amusement' means 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. However, 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</p>	<p>"race, creed, color, religion, sex, age, disability, or national origin"</p>	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		only to its members and their bona fide guests.”		
ME	ME. STAT. tit. 5, § 4553(8) (2015)	<p>“Place of public accommodation’ means a facility, operated by a public or private entity, whose operations fall within at least one of the following categories:</p> <p>A. An inn, hotel, motel or other place of lodging, whether conducted for the entertainment or accommodation of transient guests or those seeking health, recreation or rest;</p> <p>B. A restaurant, eating house, bar, tavern, buffet, saloon, soda fountain, ice cream parlor or other establishment serving or selling food or drink;</p> <p>C. A motion picture house, theater, concert hall, stadium, roof garden, airdrome or other place of exhibition or entertainment;</p> <p>D. An auditorium, convention center, lecture hall or other place of public gathering;</p> <p>E. A bakery, grocery store, clothing store, hardware store, shopping center, garage, gasoline station or other sales or rental establishment;</p> <p>F. A laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, dispensary, clinic, bathhouse or other service establishment;</p> <p>G. All public conveyances operated on land or water or in the air as well as a terminal, depot or other station used for specified public transportation;</p> <p>H. A museum, library, gallery or other place of public display or collection;</p>	“race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin”	SO & GI: 2005.ix

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>I. A park, zoo, amusement park, race course, skating rink, fair, bowling alley, golf course, golf club, country club, gymnasium, health spa, shooting gallery, billiard or pool parlor, swimming pool, seashore accommodation or boardwalk or other place of recreation, exercise or health;</p> <p>J. A nursery, elementary, secondary, undergraduate or postgraduate school or other place of education;</p> <p>K. A day-care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment;</p> <p>L. Public elevators of buildings occupied by 2 or more tenants or by the owner and one or more tenants;</p> <p>M. A municipal building, courthouse, town hall or other establishment of the State or a local government; and</p> <p>N. Any establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.</p> <p>When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this subchapter, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for the residential purposes is covered by this subchapter. The covered portion of the residence extends to those elements used to enter the place of public accommodation, and those exterior and interior portions of the residence available to or used by customers or clients, including rest</p>		

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	ME. STAT. tit. 5, § 4553(8-B) (2015)	rooms.” “Public accommodation’ means a public or private entity that owns, leases, leases to or operates a place of public accommodation.”		
MD	MD. CODE ANN., STATE GOV’T § 20-301 (West 2015)	“In this subtitle, ‘place of public accommodation’ means: (1) an inn, hotel, motel, or other establishment that provides lodging to transient guests; (2) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food or alcoholic beverages for consumption on or off the premises, including a facility located on the premises of a retail establishment or gasoline station; (3) a motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment; (4) a retail establishment that: (i) is operated by a public or private entity; and (ii) offers goods, services, entertainment, recreation, or transportation; and (5) an establishment: (i) 1. that is physically located within the premises of any other establishment covered by this subtitle; or 2. within the premises of which any other establishment covered by this subtitle is physically located; and (ii) that holds itself out as serving patrons of the covered establishment.”	“race, sex, age, color, creed, national origin, marital status, sexual orientation, gender identity, or disability”	SO: 2009; GI: 2014.x

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	MD. CODE ANN., STATE Gov'T § 20- 303 (West 2015)	<p>“(a) This subtitle does not apply:</p> <p>(1) to a private club or other establishment that is not open to the public, except to the extent that the facilities of the private club or other establishment are made available to the customers or patrons of an establishment within the scope of this subtitle;</p> <p>(2) with respect to sex discrimination, to a facility that is:</p> <p>(i) uniquely private and personal in nature; and</p> <p>(ii) designed to accommodate only a particular sex; and</p> <p>(3) to an establishment providing lodging to transient guests located within a building that:</p> <p>(i) contains not more than five rooms for rent or hire; and</p> <p>(ii) is occupied by the proprietor of the establishment as the proprietor’s residence.</p> <p>(b) (1) (i) In this subsection the following words have the meanings indicated.</p> <p>(ii) “Equivalent private space” means a space that is functionally equivalent to the space made available to users of a private facility.</p> <p>(iii) “Private facility” means a facility:</p> <ol style="list-style-type: none"> 1. that is designed to accommodate only a particular sex; 2. that is designed to be used simultaneously by more than one user of the same sex; and 3. in which it is customary to disrobe in view of other users of the facility. <p>(2) Except as provided in paragraph (3) of this subsection, this subtitle applies, with respect to gender identity, to all facilities in a place of public accommodation.</p> <p>(3) This subtitle does not apply, with</p>		

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		respect to gender identity, to a private facility, if the place of public accommodation in which the private facility is located makes available, for the use of persons whose gender identity is different from their assigned sex at birth, an equivalent private space.”		
MA	MASS. GEN. LAWS ch. 151B, § 4(18) (2016)	“Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.”	“race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry”	SO: 1989; GI: 2016.xi
MI	MICH. COMP. LAWS § 37.2301(a) (2015)	“Place of public accommodation’ means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution 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. Place of public accommodation also includes the facilities of the following private clubs: (i) A country club or golf club. (ii) A boating or yachting club. (iii) A sports or athletic club.	“religion, race, color, national origin, age, sex, or marital status”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		(iv) A dining club, except a dining club that in good faith limits its membership to the members of a particular religion for the purpose of furthering the teachings or principles of that religion and not for the purpose of excluding individuals of a particular gender, race, or color.”		
MN	<p>MINN. STAT. § 363A.03(34) (2015)</p> <p>MINN. STAT. § 363A.26 (2015)</p>	<p>“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.”</p> <p>“Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination;</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized; or</p>	“race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex”	SO & GI: 1993.xii

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		(3) taking any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its religious beliefs.”		
MS		n/a	n/a	
MO	Mo. REV. STAT. 213.010(15) (2015)	<p>“Places of public accommodation,’ all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement, including, but not limited to:</p> <p>(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;</p> <p>(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment;</p> <p>(c) Any gasoline station, including all facilities located on the premises of such gasoline station and made available to the patrons thereof;</p> <p>(d) Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment;</p> <p>(e) Any public facility owned, operated, or managed by or on behalf</p>	“race, color, religion, national origin, sex, ancestry, or disability”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	MO. REV. STAT. 213.065(3) (2015)	<p>of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds;</p> <p>(f) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment;"</p> <p>"The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or patrons of a place of public accommodation as defined in section 213.010 and this section."</p>		
MT	MONT. CODE ANN. § 49-2-101(20) (2015)	<p>"Public accommodation' means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, barbering nonchemical, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, resthouse,</p>	<p>"sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin"</p>	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	MONT. CODE ANN. § 49-1-102 (2015)	<p>theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.”</p> <p>“(1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to: (a) the right to obtain and hold employment without discrimination; and (b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement. (2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1). Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.”</p>		
NE	NEB. REV. STAT. § 20-133 (2015)	<p>“As used in sections 20-132 to 20-143, unless the context otherwise requires, places of public accommodation shall mean all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, and accommodations for the peace, comfort, health, welfare, and safety of the general public and such public places providing food, shelter, recreation, and amusement including, but not limited to:</p> <p>(1) Any inn, hotel, motel, or other establishment which provides lodging</p>	“race, creed, color, sex, religion, national origin, or ancestry”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	NEB. REV. STAT. § 20-137 (2015)	<p>to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;</p> <p>(2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but not limited to any such facility located on the premises of any retail establishment;</p> <p>(3) Any gasoline station, including all facilities located on the premises of such station and made available to the patrons thereof;</p> <p>(4) Any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment;</p> <p>(5) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation, and any such facility supported in whole or in part by public funds; and</p> <p>(6) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment and which holds itself out as serving patrons of such covered establishment.”</p> <p>“Any place of public accommodation owned by or operated on behalf of a religious corporation, association, or society which gives preference in the</p>		

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		use of such place to members of the same faith as that of the administering body shall not be guilty of discriminatory practice.”		
NV	NEV. REV. STAT. § 651.050(3) (2015)	<p>“Place of public accommodation means:</p> <p>(a) Any inn, hotel, motel or other establishment which provides lodging to transient guests, except an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as the proprietor’s residence;</p> <p>(b) Any restaurant, bar, cafeteria, lunchroom, lunch counter, soda fountain, casino or any other facility where food or spirituous or malt liquors are sold, including any such facility located on the premises of any retail establishment;</p> <p>(c) Any gasoline station;</p> <p>(d) Any motion picture house, theater, concert hall, sports arena or other place of exhibition or entertainment;</p> <p>(e) Any auditorium, convention center, lecture hall, stadium or other place of public gathering;</p> <p>(f) Any bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment;</p> <p>(g) Any laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, office of an accountant or lawyer, pharmacy, insurance office, office of a provider of health care, hospital or other service establishment;</p> <p>(h) Any terminal, depot or other station used for specified public</p>	“race, color, religion, national origin, disability, sexual orientation, sex, gender identity or expression”	SO: 1999; GI 2011. xiii

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>transportation;</p> <p>(i) Any museum, library, gallery or other place of public display or collection;</p> <p>(j) Any park, zoo, amusement park or other place of recreation;</p> <p>(k) Any nursery, private school or university or other place of education;</p> <p>(l) Any day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service establishment;</p> <p>(m) Any gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation;</p> <p>(n) Any other establishment or place to which the public is invited or which is intended for public use; and</p> <p>(o) Any establishment physically containing or contained within any of the establishments described in paragraphs (a) to (n), inclusive, which holds itself out as serving patrons of the described establishment.”</p>		
NH	N.H. REV. STAT. ANN. § 354-A:2(XIV) (2015)	<p>“Place of public accommodation’ includes any inn, tavern or hotel, whether conducted for entertainment, the housing or lodging of transient guests, or for the benefit, use or accommodations of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public. ‘Public accommodation’ shall not include any institution or club which is in its nature distinctly private.”</p>	<p>“age, sex, race, creed, color, marital status, physical or mental disability . . . In addition, no person shall be denied the benefit of the rights afforded by this section on account of that person’s sexual orientation.”</p>	SO: Enacted 1997.xiv

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	N.H. REV. STAT. ANN. § 354-A:18 (2015)	“Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.”		
NJ	N.J. STAT. ANN. § 10:5-5(1) (2015)	“‘A place of public accommodation’ shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming	“race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality”	SO: 1992; GI: 2006.

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry, gender identity or expression or affectional or sexual orientation in the admission of students.”</p>		
NM	N.M. STAT. ANN. § 28-1-2(H) (2015)	<p>“‘[P]ublic accommodation’ means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.”</p>	<p>“race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or</p>	<p>SO & GI: 2003xv</p>

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
			physical or mental handicap”	
NY	N.Y. EXEC. LAW § 292 & 296 (McKinney 2016)	“When used in this article . . . 9. The term ‘place of public accommodation, resort or amusement’ shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour	“race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status”	SO: 2002. xvi, xvii

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other</p>		

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	<p>N.Y. EXEC. LAW § 296 (McKinney 2016)</p>	<p>provision of law. For the purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private. No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words 'New York state' in its announcements shall be deemed a private exhibition within the meaning of this section.”</p> <p>“Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”</p>		

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
	N.Y. EDUC. LAW § 313 (McKinney 2016)	“[E]xcept that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members or to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained. Nothing herein contained shall impair or abridge the right of an independent institution, which establishes or maintains a policy of educating persons of one sex exclusively, to admit students of only one sex.”		
NC		n/a	n/a	
ND	N.D. CENT. CODE § 14-02.4-02(14) (2016)	“‘Public accommodation’ means every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity. ‘Public accommodation’ does not include a bona fide private club or other place, establishment, or facility which is by its nature distinctly private; provided, however, the distinctly private place, establishment, or facility is a ‘public accommodation’ during the period it caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity.”	“race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance”	
OH	OHIO REV. CODE ANN. § 4112.01(A) (9) (West 2015)	“‘Place of public accommodation’ means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement	“race, color, religion, sex, military status, national origin, disability, age, or ancestry”	

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		of which the accommodations, advantages, facilities, or privileges are available to the public.”		
OK	OKLA. STAT. tit. 25, § 1401 (2015)	<p>“As used in this act unless the context requires otherwise:</p> <p>(1) ‘place of public accommodation’ includes 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: except that</p> <p>(i) a private club is not a place of public accommodation, if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests;</p> <p>(2) ‘place of public accommodation’ does not include barber shops or beauty shops or privately-owned resort or amusement establishments or an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of the establishment as his residence.”</p>	“race, color, religion, sex, national origin, age, or disability”	
OR	OR. REV. STAT. § 659A.400 (2015)	<p>“(1) A place of public accommodation, subject to the exclusions in subsection (2) of this section, means:</p> <p>(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.</p> <p>(b) Any place that is open to the public and owned or maintained by a public body, as defined in ORS</p>	“race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age”	SO & GI: 2007. xviii

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		174.109, regardless of whether the place is commercial in nature. (c) Any service to the public that is provided by a public body, as defined in ORS 174.109, regardless of whether the service is commercial in nature.”		
PA	43 PA. CONS. STAT. § 954(1) (2016)	“The term ‘public accommodation, resort or amusement’ means any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants or eating houses, or any place where food is sold for consumption on the premises, buffets, saloons, barrooms or any store, park or enclosure where spirituous or malt liquors are sold, ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises, drug stores, dispensaries, clinics, hospitals, bathhouses, swimming pools, barber shops, beauty parlors, retail stores and establishments, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, gymnasiums, shooting galleries, billiard and pool parlors, public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of	“race, color, sex, religious creed, ancestry, national origin or handicap or disability”	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		this Commonwealth, nonsectarian cemeteries, garages and all public conveyances operated on land or water or in the air as well as the stations, terminals and airports thereof, financial institutions and all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof, but shall not include any accommodations which are in their nature distinctly private.”		
RI	11 R.I. GEN. LAWS § 11-24-3 (2015)	“A ‘Place of public accommodation, resort, or amusement’ within the meaning of §§ 11-24-1–11-24-3 includes, but is not limited to: (1) inns, taverns, roadhouses, hotels, whether conducted for the entertainment or accommodation of transient guests or of those seeking health, recreation or rest; (2) restaurants, eating houses or any place where food is sold for consumption on the premises; (3) buffets, saloons, barrooms, or any stores, parks, or enclosures where spirituous or malt liquors are sold; (4) ice cream parlors, confectioneries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or beverages of any kind are retailed for consumption on the premises; (5) retail stores and establishments, dispensaries, clinics, hospitals, rest rooms, bath houses, barber shops, beauty parlors, theaters, motion picture houses, music halls, airdromes, roof gardens, race courses, skating rinks, amusement and recreation parks, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors, swimming pools, seashore accommodations and boardwalks, and	“race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression”	SO: 1995; GI: 2001. xix

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		public libraries; (6) garages; (7) all public conveyances operated on land, water or in the air as well as their stations and terminals; (8) public halls and public elevators of buildings occupied by two (2) or more tenants or by the owner and one or more tenants; and (9) public housing projects. Nothing in this section shall be construed to include any place of accommodation, resort, or amusement which is in its nature distinctly private.”		
SC	S.C. CODE ANN. § 45-9-10(B) (2015)	“Each of the following establishments which serves the public is a place of public accommodation within the meaning of this chapter if discrimination or segregation by it is supported by state action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station; (3) any hospital, clinic, or other medical facility which provides overnight accommodations; (4) any retail or wholesale establishment; (5) any motion picture house, theater, concert hall, billiard parlor,	“race, color, religion, or national origin”	

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>saloon, barroom, golf course, sports arena, stadium, or other place of amusement, exhibition, recreation, or entertainment; and</p> <p>(6) any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.</p> <p>(C) 'Supported by state action' means the licensing or permitting of any establishment or any agent of an establishment listed above, subject to the exclusion provided in Section 45-9-20, which has or must have a license or permit from the State, its agencies, or local governmental entities to lawfully operate."</p>		
SD	S.D. CODIFIED LAWS § 20-13-1(12) (2015)	<p>"Public accommodations,' any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously. Public accommodation does not mean any bona fide private club or other place, establishment, or facility which is by its nature distinctly private, except when such distinctly private place, establishment, or facility caters or offers services, facilities, or goods to the general public for fee or charge or gratuitously, it shall be deemed a public accommodation during such period of use."</p>	"race, color, creed, religion, sex, ancestry, disability, or national origin"	
TN	TENN. CODE ANN. § 4-21-102(15) (2015)	<p>"Places of public accommodation, resort or amusement' includes any place, store or other establishment, either licensed or unlicensed, that supplies goods or services to the</p>	"race, creed, color, religion, sex, age or national origin"	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		general public or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds, except that: (A) 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 (B) Its facilities or services are available only to its members and their bona fide guests;"		
TX		n/a	n/a	
UT	UTAH CODE ANN. § 13-7-2(1)(a) (2015)	"Place of public accommodation' includes every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or charge, except, an establishment that is: (i) located within a building that contains not more than five rooms for rent or hire; and (ii) actually occupied by the proprietor of the establishment as the proprietor's residence."	"race, color, sex, religion, ancestry, or national origin"	
VT	VT. STAT. ANN. tit. 9, § 4501(1) (2015) VT. STAT. ANN. tit. 9, § 4502(1) (2015)	"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." "Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations,	"race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity"	SO: 1992; GI: 2007.xx

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		<p>advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others.”</p>		
VA	VA. CODE ANN. § 2.2-3900 (2015)	<p>“A. This chapter shall be known and cited as the Virginia Human Rights Act.</p> <p>B. It is the policy of the Commonwealth to:</p> <p>1. Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of</p>	“race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability”	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		individuals within the Commonwealth; and 2. Protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.”		
WA	WASH. REV. CODE § 49.60.040(2) (2015)	“Any place of public resort, accommodation, assemblage, or amusement’ includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery	“race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability”	SO & GI: 2006. xxi

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State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
		schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution."		
WV	W. VA. CODE § 5-11-3(j) (2015)	"The term 'place of public accommodations' means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private. To the extent that any penitentiary, correctional facility, detention center, regional jail or county jail is a place of public accommodation, the rights, remedies and requirements provided by this article for any violation of subdivision (6), section nine of this article shall not apply to any person other than: (1) Any person employed at a penitentiary, correctional facility, detention center, regional jail or county jail; (2) any person employed by a law-enforcement agency; or (3) any person visiting any such employee or visiting any person detained in custody at such facility."	"race, religion, color, national origin, ancestry, sex, age, blindness or disability"	

State	Citation	Definition of Public Accommodation	Protected Classes	Date SOGI Enacted
WI	Wis. STAT. § 106.52(1)(e) (1) (2015)	<p>“Public place of accommodation or amusement’ shall be interpreted broadly to include, but not be limited to, places of business or recreation; lodging establishments; restaurants; taverns; barber, cosmetologist, aesthetician, electrologist, or manicuring establishments; nursing homes; clinics; hospitals; cemeteries; and any place where accommodations, amusement, goods, or services are available either free or for a consideration, subject to subd. 2.</p> <p>“Public place of accommodation or amusement’ does not include a place where a bona fide private, nonprofit organization or institution provides accommodations, amusement, goods or services during an event in which the organization or institution provides the accommodations, amusement, goods or services to the following individuals only:</p> <p>a. Members of the organization or institution.</p> <p>b. Guests named by members of the organization or institution.</p> <p>c. Guests named by the organization or institution.”</p>	“sex, race, color, creed, disability, sexual orientation, national origin or ancestry”	SO: 1982. xxii
WY	WYO. STAT. ANN. § 6-9-101(a) (2015)	<p>“All persons of good department are entitled to the full and equal enjoyment of all accommodations, advantages, facilities and privileges of all places or agencies which are public in nature, or which invite the patronage of the public, without any distinction, discrimination or restriction on account of race, religion, color, sex or national origin.”</p>	“race, religion, color, sex or national origin”	

i Assemb. 2601, 1991-1992 Calif.Leg.Reg.Sess. (Feb. 11, 1992); Assemb. 196, 2003-2004 Leg., Reg. Sess. (Cal. 2003) (enacted 2003, became effective January 1,

2004).

ⁱⁱ Colorado Anti-Discrimination Act, S. 08-200, 2008 Leg., (Co. 2008).

ⁱⁱⁱ An Act Concerning Discrimination on the Basis of Sexual Orientation, Pub. Acts No. 91-58 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 46a-64c (West 2009)); An Act Concerning Discrimination, H.R. 6599, 2011 Leg., Reg. Sess. (Conn. 2011).

^{iv} An Act to Amend Titles 6, 9, 18, 19, 25, and 29 of the Delaware Code Relating to Discrimination in Employment, Public Works Contracting, Housing, Equal Accommodations and the Insurance Business, ch. 90, sec. 4, 77 Del. Laws 264 (2009) (codified as DEL. CODE ANN. TIT. 6, § 4604 (West 2013)); Gender Identity Nondiscrimination Act, S. 97, 147th Gen. Assemb. (Del. 2013).

^v Human Rights Act of 1977, D.C. Law 2-38, title II, 24 D.C. Reg. 6038 (Dec. 13, 1977) (codified at D.C. CODE § 2-1402.21 (LexisNexis 2012)); Human Rights Clarifications Amendment Act of 2005, Council Bill 16-389 (D.C. 2005).

^{vi} Hawaii did enact a Bill in 2011 to clarify existing law with regard to sex discrimination on the basis of gender identity in employment. *See* A Bill for an Act Relating to Civil Rights, Act 76, sec. 3, 2006 Haw. Sess. Laws 214, 215 (codified as HAW. REV. STAT. § 489-3 (West Supp. 2012)); H.R. 546, 26th Leg. (Haw. 2011).

^{vii} An Act Concerning Human Rights, Pub. Act No. 93-1078, art. 1, 2004 Ill. Laws 4837, 4838 (codified as 775 ILL. COMP. STAT 5/102(A) (West 2011)).

^{viii} An Act Relating to the Iowa Civil Rights Act and Discrimination Based Upon a Person's Sexual Orientation or Gender Identity, S. 427, 82d Gen. Assemb., Reg. Sess. § 1 (Iowa 2007).

^{ix} P.L. 2005, c. 7, §1 (Me. 2005).

^x H.R. 51, ch. 120, sec. 3 2009 Md. Laws 540, 554 (codified at MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis Supp. 2013)); Fairness for All Marylanders Act of 2014, 2014 Md. Legis. Serv. ch. 474 (West) (codified at MD. CODE ANN., STATE GOV'T § 20-101(e)).

^{xi} An Act Making It Unlawful to Discriminate on the Basis of Sexual Orientation, 1989 Mass. Acts 516; An Act Relative to Transgender Anti-Discrimination, S.735, 189th Gen. Ct. (Mass. 2016).

^{xii} H.R. 585, 2015 Sess., 89th Leg. (Minn. 2015).

^{xiii} Assemb. 311, 1999 Sess., 70th Leg. (Nev. 1999); Assemb. 211, 2011 Sess., 76th Leg. (Nev. 2011).

^{xiv} An Act Amending the Law Against Discrimination to Prohibit Discrimination on Account of a Person's Sexual Orientation, ch. 108, 1997 N.H. Laws 88, 92 (codified as N.H. REV. STAT. § 354-A:10 (2009)).

^{xv} An Act Relating to Human Rights, S. 28, 46th Leg., 1st Sess. (N.M. 2003).

^{xvi} Secs. 2, 7, §§ 291, 296(2) 2002 N.Y. LAWS at 46, 48 (codified as amended at N.Y. EXEC. LAW §§ 291, 296(2) (McKinney 2013)).

^{xvii} Courts have interpreted provisions of the Human Rights Laws to cover transgender people. *See also* Sexual Orientation Non-Discrimination Act of 2002, ch. 2, § 5, 2002 N.Y. SESS. LAWS 48-56 (McKinney 2002).

^{xviii} The Oregon Equality Act of 2007, S. 2, 74th Leg., Reg. Sess. (Or. 2007).

^{xix} An Act Relating to Civil Rights, ch. 32, sec. 7, 1995 R.I. Pub. Laws 83 (codified as R.I. GEN. LAWS ANN. § 11-24-2 (Supp. 2013)); An Act Relating to Civil Rights, H. 5920A, Gen. Assemb. (R.I. 2001).

^{xx} An Act Relating to Discrimination on the Basis of Sexual Orientation, No. 135, 1992 Vt. Acts & Resolves 26, 30-31 (codified as VT. STAT. ANN. tit. 9, § 4502(a) (Supp. 2013)); S. 0051, 2007-2008 Leg., Reg. Sess. (Vt. 2007). *See also* 1 V.S.A § 144; S. 51, 2007 Vt. Laws 41 (legislative history).

^{xxi} An Act Relating to the Jurisdiction of the Washington Human Rights Commission, ch. 4, 2006 Wash. Sess. Laws 12 (codified as WASH. REV. CODE § 49.60.215

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^{xxii} An Act to Amend 15.04 (1) (G), 16 .765 (1) and (2) (a), 21 .35, 66.39 (13), 66.395 (2m), 66.40 (2m), 66.405 (2m), 66.43 (2m), 66.431 (3) (E) 2, 66.432 (1) and (2), 66.433 (3) (a) and (C) 1 . B and (9), 101 .22 (1), (Lm) (B), (2m) and (4n), 101 .221 (1), 111 .31 (1) to (3), 111 .32 (5) (a), 111 .70 (2), 111 .81 (9) (B), 111 .85 (1), 227.033 (1), 230.01 (2), 230.18, 234.29 and 942.04 (1) (a) to (C) and (3) ; And to Create 111 .32 (4s) and (5) (I) of the Statutes, Relating to Prohibiting Discrimination Based Upon Sexual Orientation, Assemb. 70, 1981 Assemb. (Wis. 1982).