

# LGBT POLICY SPOTLIGHT: PUBLIC ACCOMMODATIONS NONDISCRIMINATION LAWS



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## EXECUTIVE SUMMARY

In many ways, the ability of lesbian, gay, bisexual, and transgender (LGBT) people to be in public and participate fully in daily American life is a top priority for advancing LGBT equality in 2018. At nearly every level of government, there are discussions happening about whether LGBT people need to be treated equally in public spaces ranging from stores to government buildings, and much is at stake.

- The U.S. Supreme Court is considering the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case, in which a business is asking the Court to grant them a Constitutional right to deny service to same-sex couples.
- Several states, including New Hampshire and Wisconsin, seek to expand nondiscrimination protections in public accommodations to include transgender people. By contrast, in Anchorage, Alaska, and Massachusetts, voters will go to the polls to vote on ballot measures that could permit businesses to deny services to transgender people.
- Advocates in countless cities and counties across the country are working to pass ordinances that would ensure access and fair treatment for all, regardless of sexual orientation or gender identity.

At the heart of these discussions are public accommodations—places of business, public transit, hotels, restaurants, and more—and the extent to which these public spaces must be open to all.

Into this context, the Movement Advancement Project (MAP) in partnership with the Equality Federation Institute, Freedom for All Americans, and the National Center for Transgender Equality, is releasing this report, *LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws*. This report examines the federal, state, and local landscape for public accommodations protections. Among its key findings:

### Public Accommodations Affect All Aspects of Daily Life

- Public accommodations laws include protections in a variety of settings, ranging from retail stores and restaurants to doctors' offices and government buildings, and the extent to which each law covers these various aspects of public accommodations varies by state.

- LGBT people in protected places of public accommodations have the right to: not be refused entry or services because they are LGBT, dress and present themselves in a manner consistent with their gender identity and expression, and be free from anti-LGBT harassment by staff or customers.

### Patchwork of Protections Leaves Half of LGBT People At Risk for Discrimination

- Laws protecting people from discrimination in public accommodations based on sexual orientation and gender identity exist in only 19 states and the District of Columbia.
- New analysis by MAP in this report shows that as of December 31, 2017, at least 313 cities and counties had local nondiscrimination ordinances prohibiting discrimination in public accommodations based on sexual orientation including 280 that also prohibit discrimination based on gender identity.
- There are no federal nondiscrimination protections in public accommodations for any of these characteristics.

### Many LGBT People Report Discrimination in Places of Public Accommodations

- A 2016 Center for American Progress survey found that fully one-quarter of LGBT respondents experienced discrimination because of their sexual orientation or gender identity in employment, housing, and/or public accommodations—and that transgender people and LGBT people with disabilities are particularly affected.
- The 2015 U.S. Transgender Survey found that 31% of transgender respondents reported experiencing discrimination in places of public accommodations in the past year when the staff knew or thought they were transgender.
- A Williams Institute analysis of public accommodations discrimination complaints filed in states with protections found that complaints were filed at similar rates to complaints alleging race and sex discrimination.

## Broad Public—and Business—Support for Nondiscrimination

- A 2016 PRRI poll found that more than six in ten Americans—and a majority of Americans in every state except Alaska—oppose allowing small business owners to refuse to provide products or services to LGBT people.
- A 2017 poll conducted by the Small Business Majority found that two-thirds (65%) of small business leaders say business owners should not be able to deny goods or services to someone who is LGBT.
- A September 2017 PRRI poll found that 72% of Americans support laws that protect LGBT people from discrimination in employment, housing and public accommodations.

## Growing Efforts to Limit and Undermine Nondiscrimination Protections for LGBT People

Four coordinated efforts are underway to limit and undermine public accommodations nondiscrimination protections for LGBT people, particularly for transgender people:

1. Bathroom bans that would limit transgender people's access to restrooms;
2. Ballot measures to repeal nondiscrimination protections;
3. State preemption of cities and counties prohibiting them from enacting local nondiscrimination ordinances; and
4. Creating religious exemptions to nondiscrimination laws to allow for discrimination against LGBT people.

This report offers an overview of the patchwork of nondiscrimination protections that mean that in the majority of states, people can be denied service at a restaurant, kicked out of a taxi cab, or denied access to a bathroom—just because of who they are or whom they love.



# WHAT DO PUBLIC ACCOMMODATIONS LAWS COVER?



**PUBLIC ACCOMMODATIONS ARE ESTABLISHMENTS THAT PROVIDE GOODS AND SERVICES TO THE GENERAL PUBLIC. DIFFERENT PUBLIC ACCOMMODATIONS LAWS COVER DIFFERENT SPECIFIC PLACES.**

## **PUBLIC ACCOMMODATIONS PROTECTIONS GENERALLY COVER:**

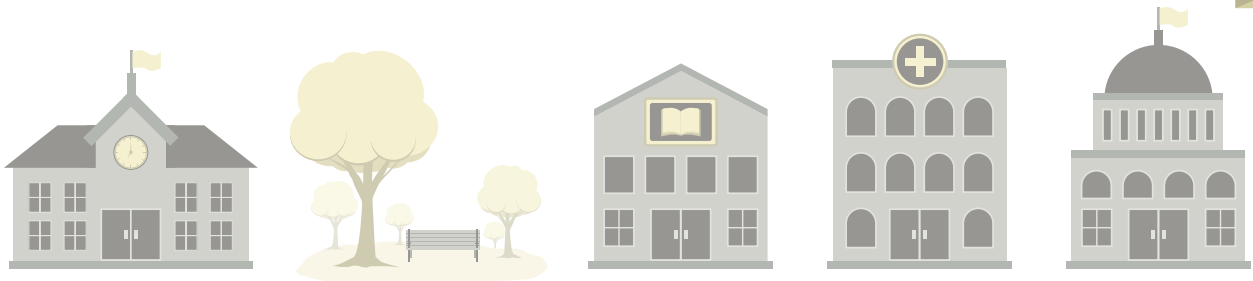
**ALWAYS**



RETAIL STORES, RESTAURANTS, BAKERIES, HOTELS, BANKS, GYMS, THEATERS, AND MANY OTHER PLACES

## **PUBLIC ACCOMMODATIONS PROTECTIONS SOMETIMES COVER:**

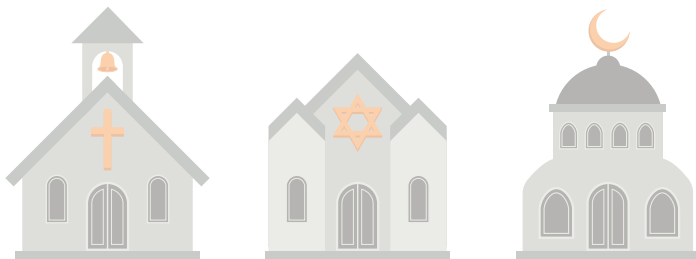
**SOMETIMES**



SHELTERS, SCHOOLS, UNIVERSITIES, PARKS, LIBRARIES, INSURANCE OFFICES, HOSPITALS, GOVERNMENT BUILDINGS, AND DOCTORS' OFFICES

## **PUBLIC ACCOMMODATIONS PROTECTIONS GENERALLY DO NOT COVER:**

**NEVER**



CHURCHES, SYNAGOGUES, MOSQUES, AND OTHER RELIGIOUS ORGANIZATIONS

## **LGBT PEOPLE IN PROTECTED PLACES OF PUBLIC ACCOMMODATION HAVE THE RIGHT TO:**



NOT BE REFUSED ENTRY OR SERVICES BECAUSE THEY ARE LGBT.



DRESS AND PRESENT THEMSELVES IN A MANNER CONSISTENT WITH THEIR GENDER IDENTITY AND EXPRESSION.



BE FREE FROM ANTI-LGBT HARASSMENT BY STAFF OR CUSTOMERS.

## INTRODUCTION

Legislators and the public decided years ago that businesses that are open to the public should be open to everyone on the same terms. Businesses shouldn't be able to pick and choose whom to serve. That's why the federal Civil Rights Act of 1964 sought to ensure that people can participate in public life—taking public transit, eating at a restaurant, shopping at the grocery store—regardless of their race, religion, or national origin.<sup>1</sup> Later, Americans with disabilities were also protected from discrimination in public accommodations through the Americans with Disabilities Act.<sup>2</sup>

Public accommodations laws generally cover anywhere someone is when they are not at home or work, including retail stores, restaurants, parks, hotels, doctors' offices, banks, and sometimes, though not always, schools. Put broadly, **public accommodations laws protect the ability to be in public and participate fully in life.** When the Civil Rights Act of 1964 was passed, more than 30 states already had state laws prohibiting discrimination in public accommodations based on race, color, and national origin, though 20 states lacked such laws at the time.<sup>3</sup>

Today in the United States it is still the case that people can face discrimination based on their sexual orientation and gender identity, as well as other types of sex discrimination, in public accommodations in many states.<sup>4</sup>

Laws protecting people from discrimination in public accommodations based on sexual orientation and gender identity exist in only 19 states and the District of Columbia.<sup>4</sup> And there are no federal nondiscrimination protections in public accommodations for any of these characteristics.<sup>5</sup> As a result, just over half of lesbian, gay, bisexual, and transgender (LGBT) people in the United States live in a state where businesses could refuse to serve them because of who they are.<sup>6</sup>

This is despite public support for fair treatment. More than six in ten Americans—and a majority of Americans in nearly every state except Alaska—oppose allowing small business owners to refuse to provide products or services to LGBT people.<sup>7</sup> When it comes to public accommodations, opponents of nondiscrimination protections frequently latch onto claims by a tiny number of business owners who say they should be allowed to deny services to LGBT people because serving them would violate the business owner's religious beliefs. Those who oppose protecting LGBT people from

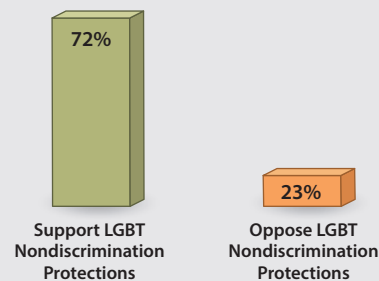
discrimination in public accommodations also often falsely claim that these laws may be abused to invade women's privacy and safety in restrooms.

This report provides an in-depth exploration of public accommodations nondiscrimination protections for LGBT people, including their scope, history, and the rationale behind them. It presents facts about the public safety debate. And it underscores the importance of public accommodation nondiscrimination laws, which ensure that all Americans can participate fully in life and that everyone is treated with dignity and respect as they shop, eat out, go to the movies, or go about the daily tasks of living.

### The Majority of Americans and American Businesses Support Nondiscrimination Protections

There is broad support for updating nondiscrimination laws to prohibit discrimination based on sexual orientation and gender identity, with more than seven in ten (72%) Americans saying they favor laws that would protect LGBT against discrimination in jobs, housing, and public accommodations, as shown in *Figure 1*.<sup>8</sup> Fewer than one-quarter (23%) of Americans oppose such laws.<sup>9</sup> Support for nondiscrimination laws has remained steady for the last year and a half—in May of 2015, a nearly identical number (71%) expressed support for LGBT nondiscrimination laws.<sup>10</sup> Additionally, half (50%) of Americans oppose laws that require transgender individuals to use bathrooms that correspond to their sex at birth rather than their current gender identity, compared to 38% who favor such laws.<sup>11</sup>

**Figure 1: The Majority of Americans Support Nondiscrimination Protections for LGBT People in Public Accommodations**



Source: PRRI, "PRRI August 2017 Survey," August 15, 2017.

<sup>a</sup> Unlike other federal civil rights laws, Title II of the federal Civil Rights Act does not enumerate sex as a characteristic on which discrimination is illegal.

Protections are particularly important for many LGBT people who are experiencing homelessness or poverty and may be particularly impacted by discrimination in places of public accommodation that provide social services like shelters, food banks, hospitals, and government benefit offices.

## LGBT PEOPLE EXPERIENCE PERVERSIVE DISCRIMINATION IN PUBLIC PLACES

The media frequently cites instances of discrimination against LGBT people in public accommodations as bakeries refusing to make wedding cakes for same-sex couples or florists or photographers refusing to provide other wedding-related services. While these instances have been argued before state courts and are currently under consideration by the U.S. Supreme Court,<sup>12</sup> wedding-related services and their denial for same-sex couples provide only a small glimpse into the discrimination faced by LGBT people in public places every day. The reality is that LGBT people face widespread discrimination in places of public accommodation and that discrimination occurs in more than just bakeries and flower shops.

**Reports of public accommodations discrimination by LGBT people.** A nationally-representative survey of LGBT people by the Center for American Progress shows that over the course of one year (2016), fully one-quarter of LGBT respondents experienced discrimination because of their sexual orientation or gender identity in employment, housing, and/or public accommodations—and that transgender people and LGBT people with disabilities are particularly affected (see *Figure 2*).<sup>13</sup> These experiences of discrimination have substantial impact on LGBT people. For example, the same survey found that ongoing discrimination in public accommodations discourages LGBT people from utilizing places of public accommodation. For example, 34% of LGBT people who experienced discrimination in the past year avoided public places like stores and restaurants, 47% made specific decisions about where to shop, 10% avoided public transit, and 18% avoided doctors' offices. *Figure 4* on the following page shows how this discrimination disproportionately affects transgender people and LGBT people with disabilities.

Transgender people report particularly high rates of discrimination in public places. According to the 2015 U.S. Transgender Survey of nearly 28,000 people,

transgender respondents reported being denied equal treatment or service, verbally harassed, or physically attacked at many places of public accommodation.<sup>14</sup> In the past year, nearly one-third (31%) of respondents who visited a place of public accommodation where staff thought or knew they were transgender experienced mistreatment there because of being transgender. This included 14% of respondents who were denied equal treatment or service, 24% who were verbally harassed,

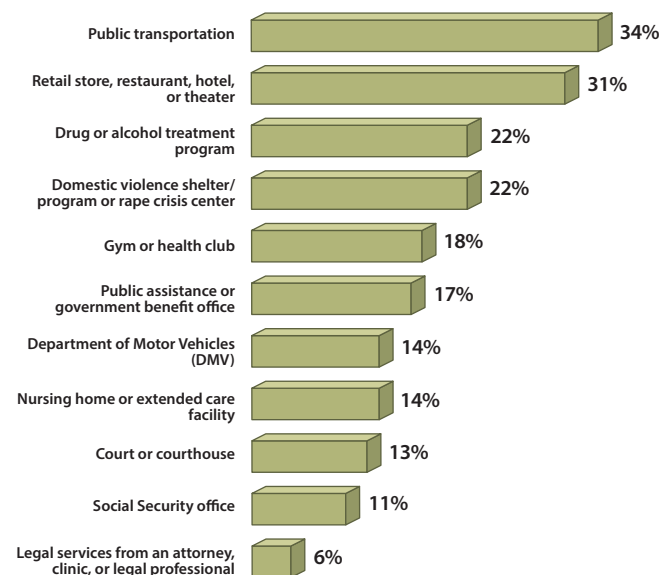
**Figure 2: One-Quarter of LGBT People Experience Discrimination in Employment, Housing, and/or Public Accommodations**



Source: Sejal Singh and Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," Center for American Progress, May 2, 2017.

**Figure 3: Transgender People Experience Discrimination in Many Public Places**

% of transgender respondents who were denied equal treatment or service, verbally harassed, or physically attacked in public accommodations in the past year where staff believed they were transgender



Source: James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.



and 2% who were physically attacked because of being transgender. As shown in *Figure 3* on the previous page, transgender people in the survey reported discrimination in a number of public places, including 34% who experienced discrimination on public transit, and 31% in retail stores, restaurants, hotels, or theaters. Further, transgender people of color and nonbinary respondents were more likely to report mistreatment.

It is evident that experiences of discrimination push LGBT people out of public life, especially transgender people and LGBT people with disabilities. Discrimination makes it difficult for LGBT people to go to restaurants and stores, use public transportation, and access key services for fear of discrimination.

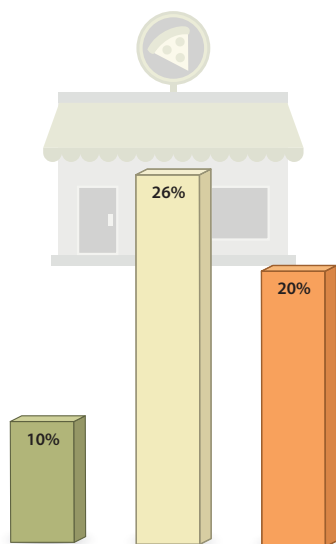
**Complaints of public accommodations discrimination filed with state agencies.** Another measure of the discrimination LGBT people experience in public accommodations comes from complaints filed with state agencies with public accommodations laws

covering sexual orientation and/or gender identity. The Williams Institute analyzed these complaints of sexual orientation and gender identity discrimination in public accommodations and found they were filed at similar rates to complaints of sex discrimination and race discrimination.<sup>15</sup> In fact, in states with LGBT-inclusive public accommodations laws, an average of four complaints of sexual orientation and gender identity discrimination in public accommodations were filed for every 100,000 LGBT adults each year, compared to an average of three complaints of race discrimination filed for every 100,000 adults of color, and one complaint of sex discrimination filed for every 100,000 women.<sup>16</sup> Notably, this study did not include states that lack LGBT-inclusive nondiscrimination protections and certainly not every person who experiences discrimination files a complaint with a state agency, but this analysis provides evidence of discrimination against LGBT people in public accommodations and demonstrates the utility of laws in existence.

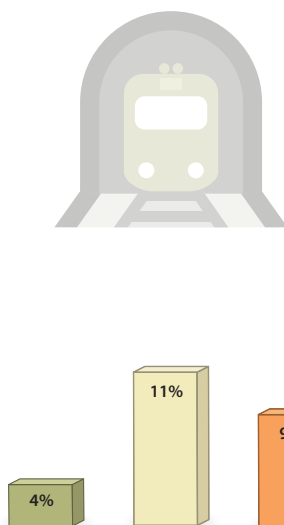
**Figure 4: Discrimination In Public Accommodations Impacts LGBT People's Ability to Be in Public Places With Transgender People and LGBT People with Disabilities are More Likely to Be Affected**

% of people who avoided these settings due to fear of discrimination

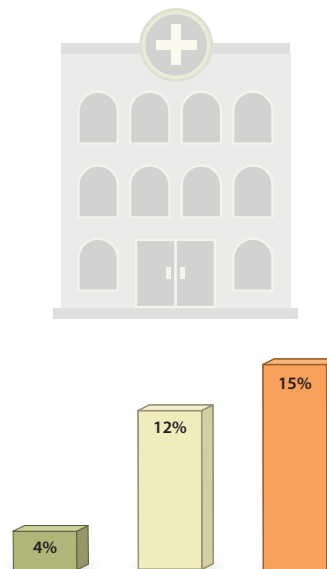
**Avoided public places such as stores and restaurants**



**Avoided public transportation**



**Avoided getting services they or their family needed**



■ LGBT People ■ Transgender People ■ LGBT People with Disabilities

Source: Sejal Singh and Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," Center for American Progress, May 2, 2017.

## STATE AND LOCAL LAWS PROVIDE PATCHWORK OF PROTECTIONS

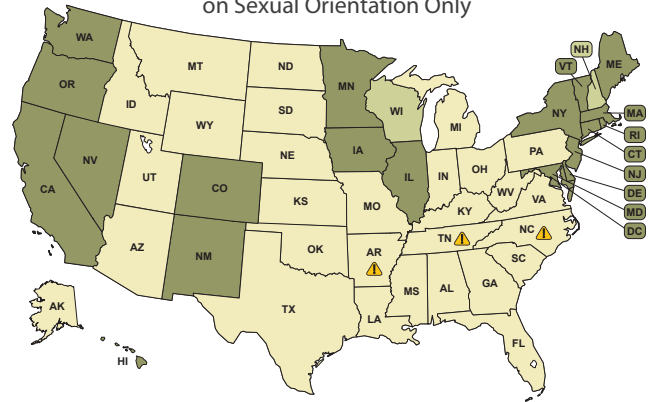
Despite the fact that LGBT people experience discrimination in public spaces like restaurants and on public transit and that the public supports nondiscrimination protections, currently there is no federal law that explicitly and broadly prohibits public accommodations discrimination on the basis of sexual orientation or gender identity. The Civil Rights Act of 1964 prohibits discrimination in places of public accommodation on the bases of race, color, religion, and national origin<sup>17</sup> and the Americans with Disabilities Act (ADA) mandates that public accommodations be accessible to people with disabilities,<sup>18</sup> but neither prohibit discrimination on the basis of sex, sexual orientation, or gender identity.

In the absence of federal protections, some state and local governments have passed nondiscrimination laws and ordinances to protect LGBT people from discrimination in public places.

**State public accommodations laws.** Nineteen states and the District of Columbia have laws prohibiting discrimination on the bases of sexual orientation and gender identity in places of public accommodation, as shown in *Figure 5*.<sup>19</sup> These state laws provide vital protections in public accommodations to 47% of the country's LGBT population.<sup>20</sup> Two more states prohibit public accommodations discrimination on the basis of sexual orientation only, covering another 2% of the LGBT population. The first law was passed in 1977 in the District of Columbia (though it only covered

**Figure 5: Statewide Non-Discrimination Public Accommodations**

Nineteen States and DC Prohibit Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity. Two Additional States Prohibit Discrimination Based on Sexual Orientation Only



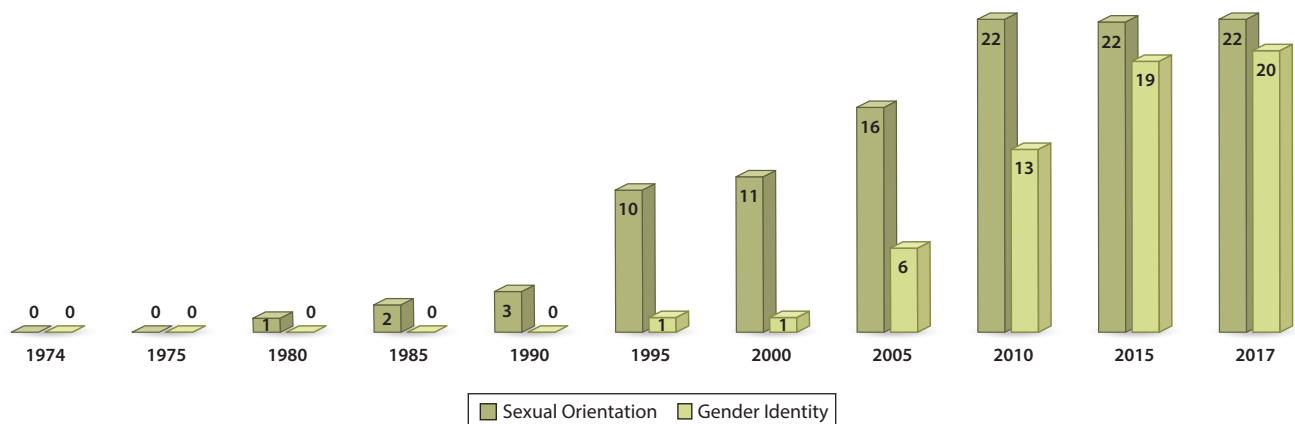
- Public accommodations non-discrimination law covers sexual orientation and gender identity (19 states + D.C.)
- Public accommodations non-discrimination law covers only sexual orientation (2 states)
- No public accommodations non-discrimination law covering sexual orientation or gender identity (29 states)
- ▲ State has law preventing passage or enforcement of local nondiscrimination laws

Source: MAP Equality Maps, State Nondiscrimination Laws: Public Accommodations, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws).

sexual orientation) and the most recent state to pass a public accommodations nondiscrimination law was Massachusetts as they updated their existing public accommodations law to include gender identity (see *Figure 6* for the rise in the number of states with nondiscrimination laws).






**Figure 6: States Have Increasingly Passed Laws to Prohibit Public Accommodations Discrimination Based on Sexual Orientation and Gender Identity**

Total Number of States with Public Accommodations Protections



Source: Original analysis, MAP, State Nondiscrimination Laws.

Table 1: State Public Accommodations Laws and Areas of Coverage

State	Covers Sexual Orientation and/or Gender Identity? 	State Law Explicitly Includes Restaurants, Hotels, Etc. 	State Law Explicitly Includes Schools 	State Law Explicitly Includes Public Transportation 	State Law Explicitly Includes Hospitals 
California	SO & GI	✓			
Colorado	SO & GI	✓	✓	✓	✓
Connecticut	SO & GI	✓			
Delaware	SO & GI	✓	✓	✓	✓
District of Columbia	SO & GI	✓			
Hawaii	SO & GI	✓		✓	✓
Illinois	SO & GI	✓	✓	✓	✓
Iowa	SO & GI	✓		✓	✓
Maine	SO & GI	✓	✓	✓	✓
Maryland	SO & GI	✓		✓	
Massachusetts	SO & GI	✓			✓
Minnesota	SO & GI	✓		✓	
Nevada	SO & GI	✓	✓	✓	✓
New Hampshire	SO only	✓		✓	✓
New Jersey	SO & GI	✓	✓	✓	✓
New Mexico	SO & GI	✓			
New York	SO & GI	✓	✓	✓	✓
Oregon	SO & GI	✓		✓	
Rhode Island	SO & GI	✓		✓	✓
Vermont	SO & GI	✓			
Washington	SO & GI	✓	✓	✓	
Wisconsin	SO only	✓			✓

Note: Some states have a broad, non-enumerated definition of public accommodations, which may cover schools, public transportation, and hospitals.

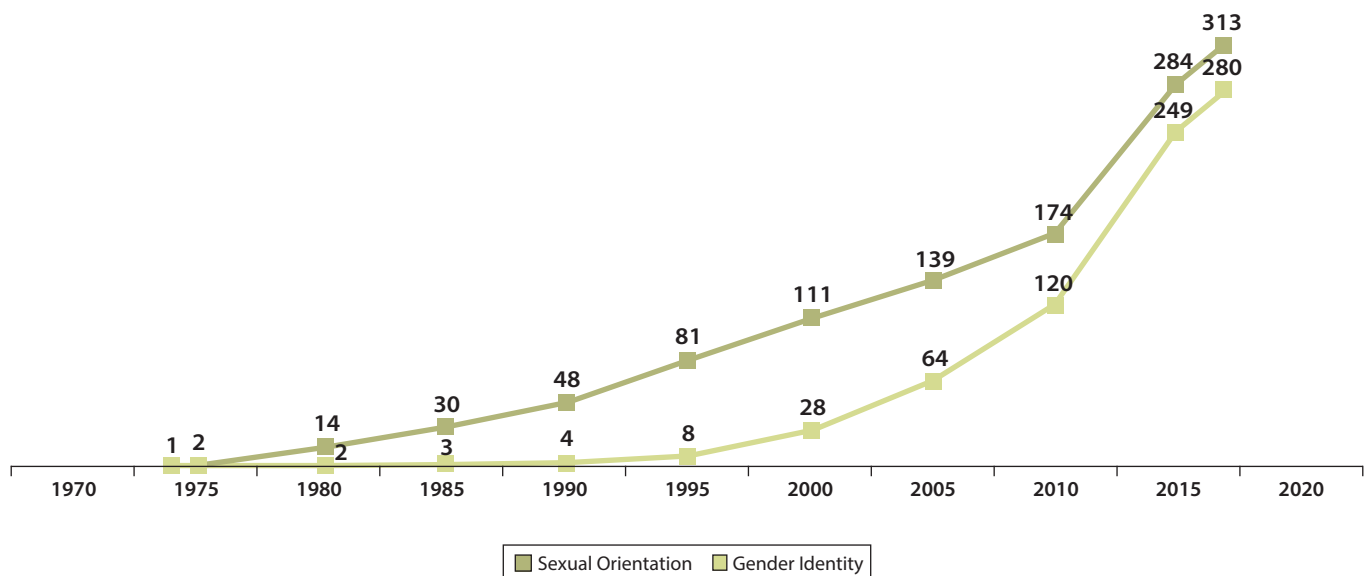
Unlike federal public accommodations laws which do not provide protections based on sex, the majority of states prohibit discrimination based on sex in public accommodation. Forty-four states and the District of Columbia have public accommodations laws that include sex.<sup>21</sup> This is important because a growing number of courts, both at the state and federal levels, have come to understand that discrimination based on gender identity and sexual orientation, particularly when it includes discrimination based on failure to adhere to sex stereotypes, is, in fact, discrimination based on sex.<sup>22</sup> Some courts and enforcement agencies have interpreted these laws to protect transgender people and lesbian, gay, and bisexual people.<sup>23</sup>

The extent to which each state law covers various aspects of public accommodations vary as shown in *Table 1* on the previous page. For example in Colorado, the law explicitly provides protections against discrimination based on sexual orientation and gender identity in restaurants, hotels, schools, public transportation, and hospitals, while Wisconsin's law only explicitly prohibits discrimination in restaurants, hotels, and hospitals based on sexual orientation only.

**Local public accommodation nondiscrimination laws.** Throughout the remaining states without nondiscrimination protections prohibiting discrimination based on sexual orientation and gender identity, there are many cities and counties that have public accommodations nondiscrimination ordinances. The first nondiscrimination ordinance that prohibited discrimination based on sexual orientation was passed in Minneapolis, Minnesota in 1974. It was amended one year later to include protections for transgender people. Since then, over 300 cities and counties have passed local nondiscrimination protections prohibiting discrimination in public accommodations based on sexual orientation, including approximately 280 that also prohibit discrimination based on gender identity (see *Figure 7* below and *Figure 8* on the following page). Today, nearly every state has at least one local-level public accommodations ordinance, as shown in *Figure 9* on the next page). One of the most recent protections was passed in September 2017 in Birmingham, Alabama and it was the first LGBT-inclusive nondiscrimination ordinance in the state.

**Figure 7: Number of Cities and Counties with Public Accommodations Nondiscrimination Protections Increased Dramatically Since 1974**

Number of Cities and Counties with Public Accommodations Protections Cumulative by Year Passed



Source: Original analysis, MAP, Local Nondiscrimination Ordinances.

## Figure 8: The Passage of Local Public Accommodation Nondiscrimination Protections Based on Gender Identity Increased in Recent Decades

Figure 8a: Number of Protections Including Sexual Orientation Passed Each Year

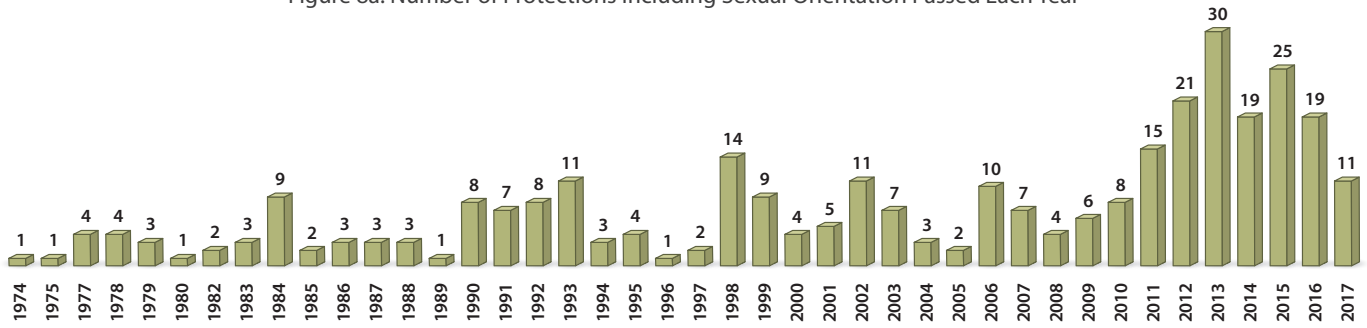
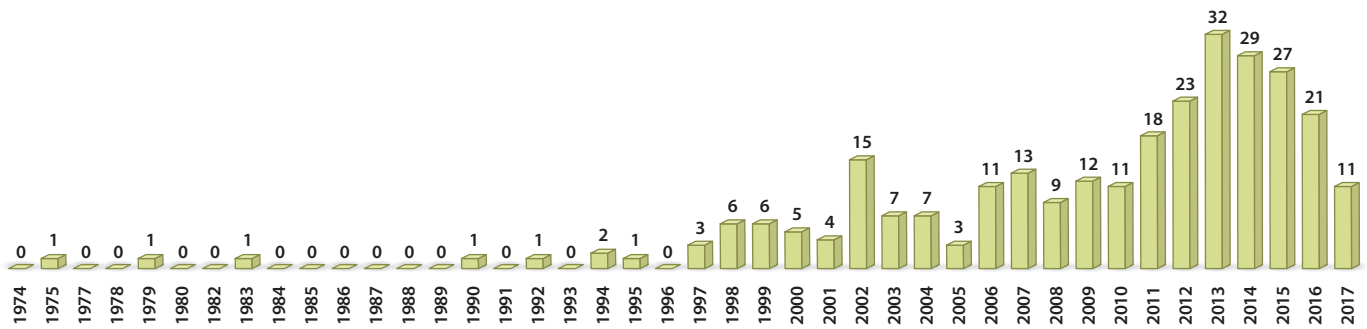


Figure 8b: Number of Protections Including Gender Identity Passed Each Year



Source: Original analysis, MAP, Local Nondiscrimination Ordinances.

## Figure 9: Only Three States Lack any Public Accommodations Protections Based on Sexual Orientation at the State or Local Level and Four States Lack Such Protections Based on Gender Identity

Figure 9a: Sexual Orientation

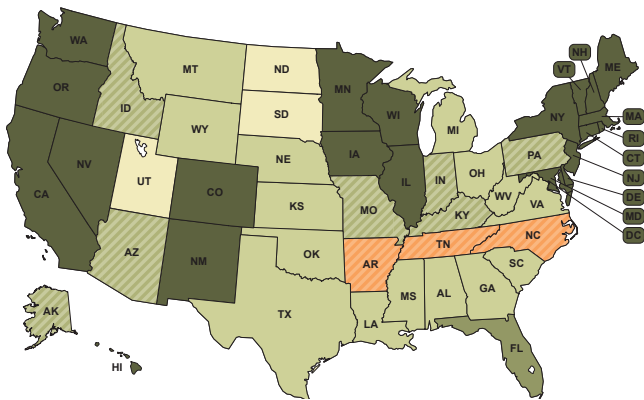
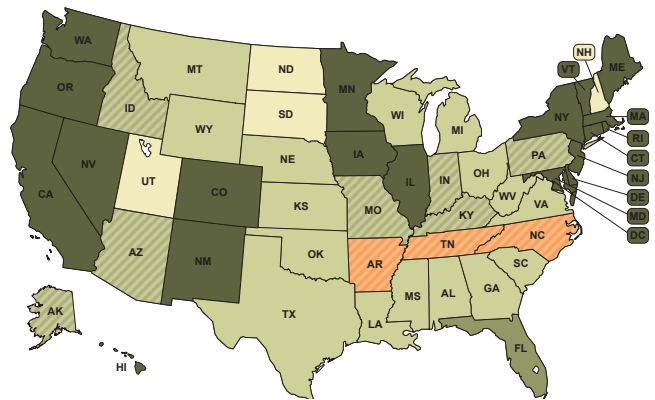


Figure 9b: Gender Identity



- State explicitly bans cities and counties from passing nondiscrimination provisions
- 0% of state population is protected from employment discrimination through local ordinances
- 1-24% of state population is protected from employment discrimination through local ordinances
- 25-49% of state population is protected from employment discrimination through local ordinances
- 50-99% of state population is protected from employment discrimination through local ordinances
- 100% of state population is protected from employment discrimination (statewide protection)

Source: MAP Equality Maps, State Nondiscrimination Laws: Public Accommodations, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws).

# PUBLIC ACCOMMODATIONS: A DAILY OCCURRENCE



CONSIDER THE MANY TIMES IN AN AVERAGE DAY THAT YOU MAY USE PUBLIC ACCOMMODATIONS, INCLUDING WHEN YOU...

## GO OUT TO DINNER OR DRINKS WITH A FRIEND

**Fact:** 12% of LGBT people report avoiding restaurants due to fear of discrimination.<sup>e</sup>

## TAKE THE BUS OR THE TRAIN TO WORK

**Fact:** 34% of transgender people reported experiencing discrimination in public transportation.<sup>a</sup>

**Most people** use at least one place of public accommodation every single day. Without nondiscrimination protections, these places are potentially unwelcoming or unsafe for LGBT people.

## EXERCISE AT THE GYM AFTER WORK

**Fact:** 18% of transgender people reported experiencing discrimination at a gym or health club.<sup>d</sup>

## NEED TO RENEW YOUR DRIVER'S LICENSE

**Fact:** 14% of transgender people reported experiencing discrimination at the DMV.<sup>b</sup>

## TAKE YOUR CHILD TO THE DOCTOR'S OFFICE

**Fact:** Nearly 56% of LGB people experienced at least one instance of discrimination or patient profiling when attempting to access health care.<sup>c</sup>

NOTE: All of the figures on this page referring to transgender people are based on survey respondents who visited a place of public accommodation in the past year where staff knew or thought they were transgender.

<sup>a</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

<sup>b</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

<sup>c</sup> Lambda Legal, "When Health Care Isn't Caring" (2010), available at <http://www.lambdalegal.org/publications/whenhealth-care-isnt-caring>.

<sup>d</sup> James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

<sup>e</sup> Sejal Singh and Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," Center for American Progress, May 2, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways>.

## INCREASING EFFORTS TO LIMIT AND UNDERMINE NONDISCRIMINATION PROTECTIONS

Even as a growing number of people in the United States recognize the importance of nondiscrimination protections for LGBT people, anti-LGBT advocates are working to dismantle nondiscrimination protections.

Efforts to limit and undermine nondiscrimination protections include four approaches—1) “bathroom bans” that prohibit transgender people from using the restroom in accordance with their gender identity; 2) attempts to repeal nondiscrimination protections at the ballot box; 3) utilizing state power to limit local authority to pass and enforce nondiscrimination ordinances; and 4) creating religious exemptions to nondiscrimination laws.

### Bathroom Bans

Opponents of LGBT equality have seized on some people’s unfamiliarity with transgender people and coupled that with people’s concerns about safety in places like restrooms (concerns that have nothing to do with transgender people). They’ve linked these unrelated issues and created a toxic attack that is used to make it virtually impossible for transgender people to go about their daily lives by passing so-called “bathroom ban” laws—state and local laws and explicitly single out transgender people and restrict their access to restrooms.

In March 2016, then Governor Pat McCrory signed North Carolina’s “Public Facilities Privacy & Security Act” (HB2). HB2, the first bathroom ban to become law and the beginning of an unprecedented attack on

transgender people’s access to public facilities that has pervaded the last two legislative sessions.<sup>24</sup> Under HB2, multiple-occupancy restrooms at public schools and public agencies could only be legally used by individuals in accordance with the sex listed on their birth certificate. HB2 also contained a targeted preemption clause, which is discussed later in this section.

In 2017, at least 19 bills specifically targeting transgender people’s access to public bathrooms were introduced in 16 state legislatures across the country, as shown in *Figure 10*.<sup>25</sup> In some states, such as Texas, similar language has been attached as amendments to unrelated bills in addition to the introduction of legislation specifically targeting public facility access.<sup>26</sup>

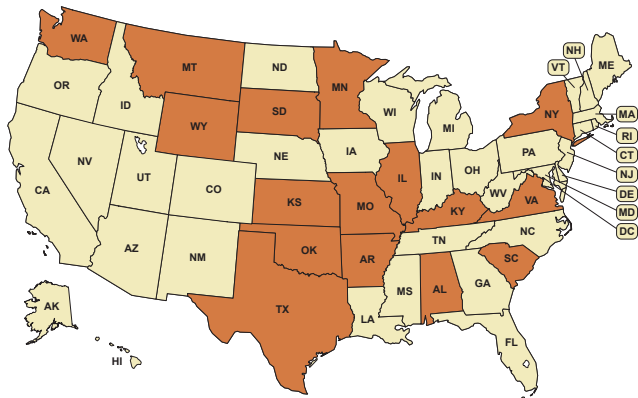
Bathroom ban laws undermine safety and privacy in restrooms for the public at large, and amplify the risks of discrimination and violence for transgender and gender non-conforming people.

A fact-based analysis shows that bathroom ban laws result in a host of negative consequences, and actually compromise, rather than protect, public safety and privacy. Policies and rhetoric like this embolden private citizens to take the law into their own hands, leading to aggressive confrontations, interrogations, or demands that other people using a restroom prove their sex.

In the wake of this misinformation and often vicious rhetoric, multiple news reports have surfaced all around the country of private citizens harassing people—whether or not they are transgender—based on the belief that they are using the “wrong” restroom. In Frisco, Texas, a man followed a non-transgender woman into the restroom at a hospital simply because he thought she “dressed like a man.”<sup>27</sup> In Danbury, Connecticut, a young woman who had recently donated her hair to cancer patients was approached by a stranger who yelled anti-transgender insults and epithets at her.<sup>28</sup> In May, a private security guard in a D.C. grocery store was charged with assault after attacking transgender woman trying to use the women’s restroom.<sup>29</sup>

Meanwhile, nondiscrimination laws in public accommodations have existed in many cities, counties, and states for a long time with no increase in public safety incidents.<sup>30</sup> In 2014, Media Matters contacted law enforcement officials in 12 of the states that prohibit discrimination against transgender people in places of public accommodation.<sup>31</sup> Not one state reported that the law had led to an increase in criminal activity in bathrooms.

**Figure 10: Sixteen States Introduced Transgender “Bathroom Bans” in 2017**



Source: Equality Federation, Legislative Action Center - Anti-Transgender Bills, current as of January 1, 2018. For updates see <http://www.equalityfederation.org/lac/antitrans>.

Existing criminal laws already protect people in restrooms and public spaces. Harming someone in a restroom is already illegal, and is punishable by a fine or jail time. Law enforcement officers can use these laws to hold perpetrators accountable and keep people safe.

Targeting transgender people through bathroom bans and suggesting that they pose a danger to others exacerbates the high rates of discrimination, harassment, and assault that transgender people face as public restrooms are already unsafe for many transgender and gender non-conforming people. Findings from the 2015 U.S. Transgender Survey reveal:<sup>32</sup>

- More than half (59%) of transgender respondents say they have avoided bathrooms in the last year because they were afraid of problems, such as being confronted by others.
- Nearly one-third (32%) of respondents limited the amount that they ate and drank to avoid using the restroom in the past year.
- Eight percent (8%) reported having a urinary tract infection, kidney infection, or another kidney-related problem in the past year as a result of avoiding restrooms.
- In the past year, respondents reported being verbally harassed (12%), physically attacked (1%), or sexually assaulted (1%) when accessing a restroom.

Fully including transgender people in all spaces, including restrooms and facilities, is at the heart of protecting anyone from discrimination on the basis of gender identity. Denying a transgender person the ability to use the proper restroom is a rejection of their basic dignity and ability to exist in public.

## Repeal Efforts

Amidst the increasing number of cities and counties with nondiscrimination protections as shown in Figure 7 on page 6, anti-LGBT advocates have mounted ballot initiatives to repeal existing nondiscrimination ordinances in a small number of cities and states.

Amidst the increasing number of cities and counties with nondiscrimination as shown in Figure 7 on page 6, anti-LGBT advocates have mounted ballot initiatives to repeal existing nondiscrimination ordinances in a small number of cities and states.

In 2015, Houston's Equal Rights Ordinance (known as HERO) was repealed by voters as opponents preyed

on fears surrounding bathroom myths. The ordinance was repealed in its entirety, removing protections in public accommodations as well as employment and housing for LGBT people and other unprotected groups including veterans.

In other areas, opponents have targeted specific components of nondiscrimination laws for repeal. By focusing repeal efforts on public accommodations and/or transgender people specifically, opponents are doubling-down on their fear-based campaign strategies and strengthening the unsubstantiated tie between bathroom safety risks and nondiscrimination protections.

These efforts are being met with mixed results. In Washington State, where the nondiscrimination law including sexual orientation and gender identity has existed since 2006, an effort to repeal public accommodations protections for transgender people failed to gather the requisite number of signatures to reach the ballot. A similar repeal effort in Massachusetts, where public accommodations for transgender people have only been in place since 2016, will appear on the ballot during the November 2018 election.

At the local level, opponents in Anchorage, Alaska collected enough signatures to qualify a ballot measure repealing public accommodations protections for transgender people.

## Preemption Laws

State legislatures around the country have taken steps to limit local authority through the use of laws that strip local governments of power and make existing municipal ordinances unenforceable, known as preemption laws. State preemption laws have broad impact, often explicitly limiting local control over fiscal policies such as minimum wage, paid family leave, and tax expenditures—as well as myriad other initiatives like nondiscrimination protections.

When it comes to nondiscrimination protections, there are two primary ways in which states are attempting to use preemption laws to invalidate local ordinances that prohibit discrimination based on sexual orientation and gender identity: broad preemption laws and laws such as those restricting bathroom access for transgender people which contain preemption clauses.<sup>33</sup>

1. **Broad preemption laws.** Broad preemption laws prohibit cities and counties from passing local nondiscrimination protections and also invalidate



existing local nondiscrimination ordinances throughout the state. Advocates of these laws claim they “improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations.” Yet there is little evidence to support the argument that the presence of a local nondiscrimination ordinance that offers protections beyond what is available at the state level has impacted the efficiency of business.

Two states have recently exerted explicit preemption over local cities and counties.<sup>34</sup> In 2011, Tennessee passed the misleadingly named “Equal Access to Intrastate Commerce Act” (HB600). This law prohibits the enforcement of any local nondiscrimination ordinances that offer protections that aren’t already provided by the state’s nondiscrimination law. Additionally, the law explicitly carves transgender people out of statewide nondiscrimination protections by defining “sex” to refer only to the gender designation on an individual’s birth certificate.

Arkansas passed the Intrastate Commerce Improvement Act (SB202) in 2015, invalidating the existing LGBT-inclusive nondiscrimination ordinance in the city of Eureka Springs. Advocates and local communities in the state are challenging the constitutionality of the law and five cities have passed new nondiscrimination ordinances since 2015. The new local ordinances are technically unenforceable but will be used in the legal challenge of the state law.

**2. Preemption Clauses within Bills Restricting Bathroom Access for Transgender People.** As mentioned earlier in this section, “bathroom bills” prohibit transgender people from using public facilities that correspond to their gender identity. In addition to passing these bathroom bills, legislatures in a number of states have advocated for preemption legislation limiting municipalities’ ability to pass ordinances that would permit transgender people to access facilities in accordance with their gender identity. The scope of these preemption efforts varies considerably, as some prohibit protections only in schools, while others bar protections in government or public buildings or even in private businesses.

The most notorious example of this type of legislation is North Carolina’s HB2, passed in 2016. The state passed HB2 in reaction to Charlotte adding sexual orientation and gender identity to its list of protected classes in February 2016. In addition to banning transgender people from using restrooms that match the gender they live every day (as discussed earlier in this section), HB2 specifically invalidated all local nondiscrimination and minimum wage ordinances and prohibited localities from passing new ones. The law also included a clause prohibiting North Carolina counties and cities from promoting diversity by requiring city contractors to be awarded only to private companies that had transgender-inclusive nondiscrimination policies. Although HB2 was repealed in March 2017, its replacement (HB142) still bars cities and counties from passing ordinances that provide nondiscrimination protections for LGBT people until December 1, 2020, and permanently bars cities from protecting transgender people’s access to restrooms.<sup>35</sup>

## Religious Exemptions

There is an orchestrated effort underway in the United States to undermine nondiscrimination protections by inserting religious exemptions into the laws establishing these protections. For example, in states with public accommodation nondiscrimination laws that prohibit businesses from refusing service to people based on their sexual orientation and gender identity, some business owners are suing for the right to refuse service because of their religious beliefs.

In early 2017, the Washington Supreme Court ruled that a flower shop was in violation of the state’s nondiscrimination law when it refused to provide flowers for a same-sex couple’s wedding.<sup>36</sup> The florist argued that because of her religious beliefs, she should be able to refuse to serve same-sex couples who are marrying. The court countered that when she entered the commercial sphere, she agreed to abide by Washington’s laws, including its nondiscrimination laws.<sup>37</sup> In 2013, a taxi driver in Chicago told two men to leave the taxi after he saw them kissing. Lambda Legal sued the taxi company under the Illinois Human Rights Act, which prohibits discrimination on the basis of sexual orientation in places of public accommodation including taxis, and settled out of court.<sup>38</sup>

In 2018, the U.S. Supreme Court will decide the case of a Colorado bakery that refused to bake a cake for a same-sex couple's wedding.<sup>39</sup> Colorado has a law that prohibits places of public accommodation from discriminating on the bases of sexual orientation and gender identity, but the baker is arguing that he has an "artistic" free speech right under the First Amendment to refuse to bake for same-sex weddings.<sup>40</sup> The Colorado Appeals Court ruled that the baker must comply with Colorado law, and the state Supreme Court agreed. The baker filed for review by the U.S. Supreme Court, who agreed in June 2017 to take the case. This case has far reaching implications: should the Supreme Court rule in favor of the baker, it would open the door for businesses large and small, across the country, to refuse service to customers even if state law prohibits discrimination by businesses.

In states that currently lack public accommodation nondiscrimination protections, LGBT people are at risk for discrimination. For example, in Michigan, which does not prohibit discrimination in places of public accommodation, a pediatrician was able to legally turn away an infant for a newborn checkup because the baby had two mothers.<sup>41</sup> In 2017 a Mississippi law first passed in 2016 went into effect which bars the state from taking action against individuals who refuse to provide wedding-related services, accommodations, facilities, or goods if doing so would violate a "sincerely held religious belief or moral conviction" but only as it relates to a narrow definition of marriage, that sexual relations should be reserved to such a marriage, and that biological sex is immutable and determined at birth. The law also prohibits the state from taking action against an individual that limits access to sex-segregated spaces in accordance with the view that biological sex is immutable, which in practice would mean that the state is condoning prohibitions on allowing transgender people to use the restroom in accordance with their gender identity.

These efforts through the courts and the legislature to create a license to discriminate in public accommodations are not supported by the majority of Americans. A 2017 PRRI poll found that a majority (56%) of Americans oppose allowing small business owners to refuse service to gay and lesbian people, even if doing so goes against the business owner's religious beliefs.<sup>42</sup> Opposition to allowing discrimination in the provision of services has increased since earlier this year. In February 2017, two-thirds (64%) opposed allowing small businesses to refuse goods or services to gay and lesbian people, compared to fewer than one-third (32%) who supported such refusals.<sup>43</sup>

## DISCRIMINATION IS BAD FOR BUSINESS

While explicit preemption laws and repeal efforts are often framed with the goal of standardizing laws within the state to advance commerce, there is no evidence that the existence of nondiscrimination protections stunts the economy in any way. In fact, protecting every American from discrimination is good for the economy and actually promotes business. LGBT adults have a combined buying power of \$917 billion dollars,<sup>44</sup> and business leaders know that LGBT and ally consumers shop at businesses that support LGBT people. Ensuring places of public accommodations respect LGBT patrons drives business and encourages economic growth.

Conversely, research suggests allowing discrimination is bad for business and often discourages investment. A recent report from the Indiana Competes coalition found that cities and counties with nondiscrimination protections received 83% of the new economic investments in the state since April 2015, and 58% of the new jobs.<sup>45</sup>

Business leaders know that discrimination is bad for business. A poll conducted for the Small Business Majority found that entrepreneurs strongly believe small business owners should not be able to refuse goods or services to LGBT individuals or same-sex couples based on an owner's religious beliefs. Two-thirds (65%) of small business leaders say business owners should not be able to deny goods or services to someone who is LGBT based on the owner's religious beliefs and a majority (53%) strongly believe this.<sup>46</sup> Additionally, a majority of small business owners (55%) agree that nondiscrimination laws improve the business bottom line by attracting the best and brightest employees.<sup>47</sup>

Business leaders also know that good business practices start from the inside out—and prohibiting discrimination against their employees is simply good business. According to the Human Rights Campaign's 2017 Corporate Equality Index, 82% of the nation's leading Fortune 500 companies prohibit discrimination on the basis of sexual orientation and gender identity in order to recruit and retain the most talented workforce.<sup>48</sup> These companies are ensuring that every employee feels safe and welcome where they work so that they can be the most productive employees.

## ADVANCING NONDISCRIMINATION PROTECTIONS IN PUBLIC ACCOMMODATIONS

LGBT people report high rates of discrimination in public accommodations that can make daily life challenging. When people face discrimination on public transit, when eating at a restaurant, or using the restroom, they are forced to choose between retreating from public life and fully participating in their communities or providing for themselves and their families. Action is needed on a number of levels: federal, state, and local lawmakers must update the law to prohibit discrimination in public accommodations based on sex, sexual orientation, and gender identity and business owners should stand up for fairness and equality both in the workplace and for their customers, as it is good for their communities and their bottom lines.

Lawmakers, advocates, and businesses all play an important role in ensuring that when businesses serve the public, they serve all people, including:



### Lawmakers

- Ensure that nondiscrimination protections at all levels explicitly include sexual orientation and gender identity/expression
- Enact strong federal, state, and local laws prohibiting discrimination on the basis of sexual orientation and gender identity in employment and in housing, health care, and areas of public accommodation



### Advocates

- Push for LGBT-inclusive nondiscrimination protections at the local and state level
- Organize “open for business” coalition among local LGBT-friendly businesses



### Business Owners

- Join “open for business” coalition
- Become spokespeople for LGBT-inclusive policies
- Provide testimony in favor of LGBT-inclusive policies
- Institute company-wide policies that include protections for LGBT customers
- Train employees on LGBT cultural competency

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## ABOUT THIS SPOTLIGHT

This report is part of an ongoing series that will provide in-depth analyses of laws and policies tracked at the Movement Advancement Project's "Equality Maps," found at [www.lgbtmap.org/equality-maps](http://www.lgbtmap.org/equality-maps). The information in this report is current as of the date of publication; but the [online maps](http://www.lgbtmap.org/equality-maps) are updated daily.



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