International Municipal Lawyers Association 2023 Annual Conference

Best Practices for Citywide Commitment to Racial Equity and Nondiscrimination Ordinances

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La Quinta, California
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Non-Discrimination Ordinances & *303 Creative*

1. Need for Public Accommodation NDOs
2. Country-Wide View
3. Durham's NDO
4. Administration & Enforcement
5. The Effect of *303 Creative* on NDOs

Need for Non-Discrimination Ordinances: A Look at Federal and State Protections

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Existing Federal Anti-Discrimination Laws

- Civil Rights Act of 1964
- Fair Housing Act of 1968
- Pregnancy Discrimination Act of 1978
- Equal Pay Act of 1963
- Equal Credit Opportunity Act of 1974
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act of 1990
- Immigration Reform and Control Act of 1986
- Voting Rights Act of 1965



Existing Federal Anti-Discrimination Laws

- Federal nondiscrimination laws covering public accommodations cover only race, color, religion, national origin, and disability.
- Federal law does not prohibit discrimination based on sex, gender identity or sexual orientation in public accommodations.

42 U.S.C. §2000(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of **race, color, religion, or national origin.**

Federal Case Law

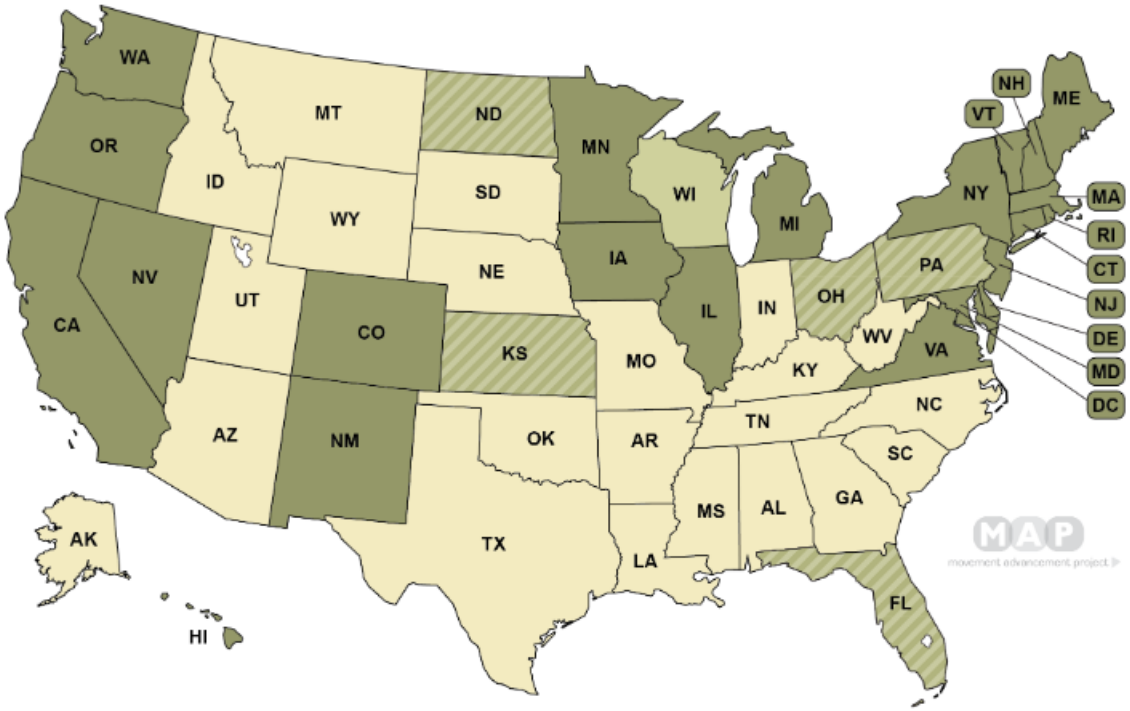
Bostock v. Clayton County, Georgia: The Supreme Court's ruling in June 2020 protects against employment discrimination on basis of sexual orientation and gender identity.

Proposed Federal Legislation

- **Equality Act:** proposed from 2015 to current 118th Congress—broader than ENDA and *Bostock* ruling—prohibits discrimination in employment based on sexual orientation and gender identity, but also in housing, public accommodations, public education, federal funding, credit, and jury service

State Anti-Discrimination Statutes

- Public accommodations
- Anti-bullying in school
- Anti-conversion therapy
- Transgender healthcare
- Education
- Child welfare services
- Parental recognition
- Hate Crimes



State law explicitly prohibits discrimination based on sexual orientation and gender identity *(22 states, 1 territory + D.C.)*

State explicitly interprets existing prohibition on sex discrimination to include sexual orientation and/or gender identity (see note) *(5 states)*

State law explicitly prohibits discrimination based on sexual orientation only *(1 state)*

No explicit prohibitions for discrimination based on sexual orientation or gender identity in state law *(22 states, 4 territories)*



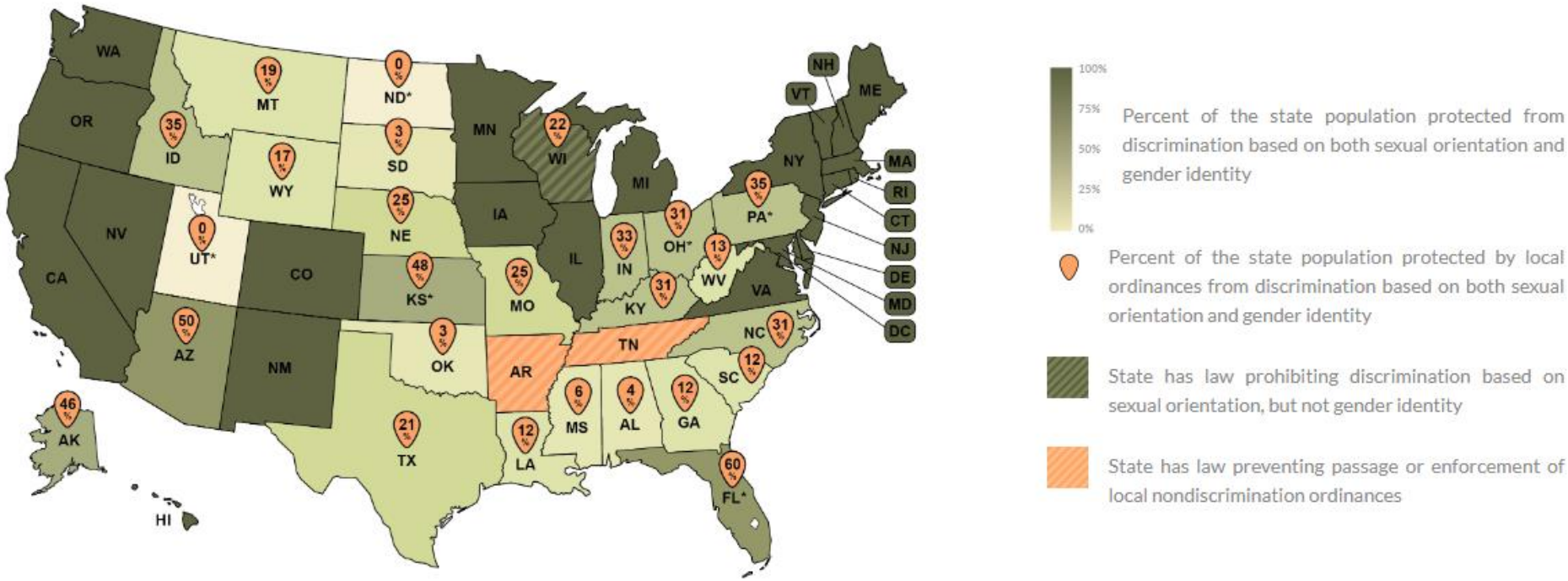
Source: Movement Advancement Project
Available at: https://www.lgbtmap.org/equality-maps/non_discrimination_laws

Article 48B.

Equal Access to Public Accommodations.

§§ 143-422.10 through 143-422.13: Repealed by Session Laws 2017-4, s. 1, effective March 30, 2017.

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Source: Movement Advancement Project
Available at: https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/

Why Local Non-Discrimination Ordinances?

- Provide safeguards for protected groups where they may not exist
- Additional means for enforcement as a deterrent for discrimination
- Political momentum and economic pressure to advance LGBTQ and other rights

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Common Categories Across Munis

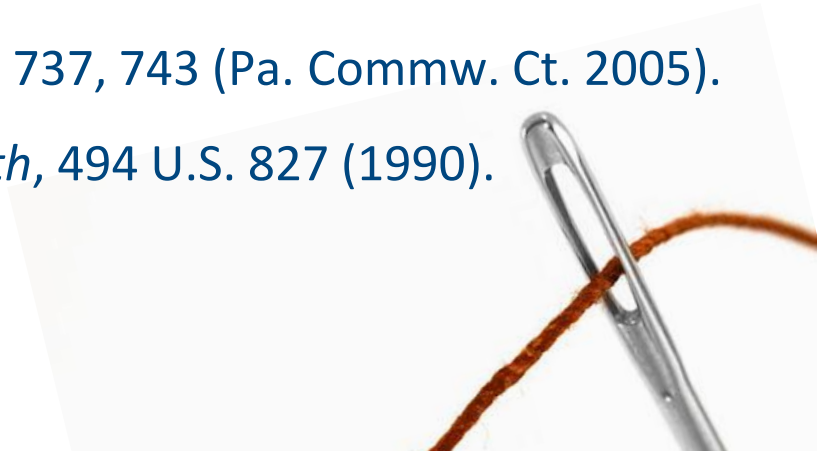
- Race
- Color
- Sex
- Disability
- Familial Status
- Gender
- Gender Identity
- Military Status
- National Origin
- Protected Hairstyle
- Sexual Orientation
- Age
- Mental Statue
- Source of Income
- Creed
- Ancestry
- Parental Status
- Criminal History

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The City of Durham's Approach

- **General Police Power**
- **No Preemption**
  - *Hutchinson Human Rel. Comm'n v. Midland Mgmt. Inc.*, 517 P.2d 158 (Kan. 1973).
  - *Hartman v. City of Allentown*, 880 A.2d 737, 743 (Pa. Commw. Ct. 2005).
- ***Exceptions -*** *Employment Division v. Smith*, 494 U.S. 827 (1990).

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Protections Under Durham's Ordinance

- Race
- Color
- Sex
- Disability
- Familial Status
- Gender
- Gender Identity
- Military Status
- National Origin
- Protected Hairstyle
- Sexual Orientation

https://library.municode.com/nc/durham/codes/code_of_ordinances?nodeId=PTIICOOR_CH34NSC

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NC 2023 HB 551

No county or city . . . may enact, maintain, or enforce any ordinance or resolution which prohibits an owner, lessee, sublessee, assignee, managing agent, or other person having the right to lease, sublease, or rent a housing accommodation from refusing to lease or rent the housing accommodation to a person because the person's lawful source of income to pay rent including funding from a federal housing assistance program.

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Contents of Durham Ordinance

General Prohibitions

- Discrimination in housing, places of public accommodations, and employment
- Interfering with evidence during an investigation of a discrimination complaint
- Coercion, intimidation, threatening a person for exercising rights under the NDO or aiding someone else in exercising their rights

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Contents of Ordinance

Statements of Interpretation and Effect

- Not to be interpreted or applied in conflict with any existing federal or state law
- Not to be construed to prohibit diversity and inclusion efforts
- Does not create a private cause of action under the Employment and Public Accommodations Ordinance

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Exceptions to Ordinance—Public Accommodation

- Religious organization that employs individuals of same religion
- Religious educational institution that limits admission or gives preference for admission to applicant of same religion
- Religious organization that limits non-commercial accommodations, facilities, membership, or privileges to persons of the same religion
- Private club, which is not open to the public, that limits services or amenities to members or gives preference to members

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Exceptions to Ordinance—Public Accommodation

- Giving preferential treatment to veterans and their families
- Using a person's unfavorable discharge as an employment criterion where authorized by federal or state law or due to a business necessity
- Bona fide seniority system or affirmative action plan

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Catchall Statement in NDO

Nothing in this article shall require any individual, business, club, institution, or membership organization to take action in violation of the rights granted by the Constitutions of the United States and the State of North Carolina.

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Administration & Enforcement of the NDO

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Fair Housing Enforcement Generally

- Fair Housing Assistance Program (FHAP) is an intergovernmental enforcement partnership between HUD and the state or local agencies
- Requires **substantial equivalence** to the Fair Housing Act of substantive rights, procedures, remedies and judicial review provisions
- Race, color, national origin, religion, sex, disability and familial status
- HUD provides FHAPs annual funding on a noncompetitive basis
- 6 agencies in North Carolina, approximately 77 FHAPs nationwide

Employment Enforcement Generally

- Fair Employment Practices Agency (FEPA)
- Only 1 in North Carolina at State level, approximately 90 FEPAs nationwide
- Worksharing agreement is required; Durham is working on this process
- Enforcement language needs to be evaluated by regional EEOC office
- Worksharing agreement is a lengthy process and has to the go before *THE* EEOC

Pro tip: Engage HUD and the EEOC before amending your ordinance!

NO equivalent opportunity for local governments regarding Public Accommodations Federal Law

- Less guidance
- Less funding
- Less training
- Less consistency
- Less perceived authority

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NDO Public Accommodations Process in Durham

- Intake form and interviewed of Complainant by the Intake Coordinator
- Review by Division Manager for jurisdiction.
- A charge/complaint of discrimination is drafted and reviewed and signed by Complainant.
- Notification letters sent within 10 days of the signed complaint.
- The complaint is assigned an Investigator.
- The Investigator's process includes RFIs and interviews.
- Settlement attempts are made throughout the investigation.
- A determination is issued. (Cause or No Cause)
- Cause determinations land on my desk.

Public Accommodations Discrimination Enforcement in Durham

- Class 3 misdemeanor, fine of five hundred dollars ($500.00)
- Enforcement action brought under state law for an appropriate equitable remedy, including for a mandatory or prohibitory injunction commanding the defendant to correct the discrimination prohibited under the NDO
- Each day's continuing violation of any provisions of NDO are a separate and distinct offense for purposes of all remedies, including civil and criminal



303 Creative v. Elenis

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- Website designer wants to expand business to include wedding websites.
- Due to religious beliefs, she is against and does not want to work with same-sex couples.
- CADA law prohibits public accommodations from discriminating based sexual orientation.
- Website designer files case to seek injunction against Colorado from forcing her to create wedding websites for same sex couples.
- Colorado had not taken any enforcement action.

Stipulated Facts

- “Willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender” and “will gladly create custom graphics and websites” for clients of any sexual orientation;
- She will not produce content that “contradicts biblical truth” regardless of who orders it;
- Services that are “expressive” and her “original, customized” creations “contribut[e] to the overall message” her business conveys “through the websites” it creates

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Stipulated Facts

- Websites “will be expressive in nature, will be “customized and tailored” through close collaboration with individual couples, and will “express Ms. Smith’s and 303 Creative’s message celebrating and promoting” her view of marriage;
- Viewers of Ms. Smith’s websites “will know that the websites are her original artwork;”
- “There are numerous companies in the State of Colorado and across the nation that offer custom website design services.”

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Applying these principles to this case, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. 6 F. 4th, at 1176. We agree. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." App. to Pet. for Cert. 181a. They have stipulated that every website will be her "original, customized" creation. *Id.*, at 181a–182a. And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to "celebrate and promote the couple's wedding and unique love story" and to "celebrat[e] and promot[e]" what Ms. Smith understands to be a true marriage. *Id.*, at 186a–187a.

Compelled Speech

“As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide.”

“Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to ‘utter what is not in [her] mind’ about a question of political and religious significance.”

What is an Expressive Business?

“Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions.”

“All manner of speech—from “pictures, films, paintings, drawings, and engravings,” to “oral utterance and the printed word”—qualify for the First Amendment’s protections. . .”

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The Effect of *303 Creative* on NDOs

Catch all provision: "Nothing in this article shall require any individual, business, club, institution, or membership organization to take action in violation of the rights granted by the Constitutions of the United States and the State of North Carolina."

The Effect of *303 Creative* on NDO Enforcement

- Exception or Exemption to NDO?
- Expressive nature of business as a stop to investigation?
- Expressive nature of business as a defense to enforcement?
- Denial of service vs. statement of intended denial?

Additional Considerations?

- Could we see an executive order?
- Circuit-by-Circuit categories of expressive businesses?
  - *Updegrove v. Herring*, 2021 WL 1206805 (E.D. Va. 2021)
  - Virginia Values Act:
    - Unlawful to withhold/deny services because of sexual orientation
    - Unlawful to publish statement that services shall be withheld because of sexual orientation
  - Wedding Photography; wanting to deny services to same-sex couples; court found no standing

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“. . . Plaintiff has never actually acted in a way that would arguably violate the statute. Plaintiff has never been approached by anyone seeking his photography services for a same-sex wedding. Plaintiff also has never published any statement reflecting his decision not to provide wedding photography for same-sex weddings. At the moment, Plaintiff has no reason to suspect that Defendant might attempt to penalize him using a statute he has never violated.” 2021 WL 1206805 at *3.

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Additional Considerations?

"In certain civil rights claims, we have just learned, a plaintiff can establish subject matter jurisdiction merely by expressing 'worries' about the defendant's future course of conduct." *Bullock v. Revell Enterprise*, 2023 WL 4355036 at *1 (S.D. Miss. 2023) (citing *303 Creative v. Elenis*).

Court found standing for pre-enforcement challenge of School District's Code of Conduct prohibiting intentional misgendering of transgender students. *Parents Defending Education v. Olentangy Local School District Board of Education*, 2023 WL 4848509 (S.D. Ohio 2023).

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What about signage denying service?

- In district court case, web designer claimed intent to have signage informing potential customers of her unwillingness to provide wedding websites for same sex couples.
- SCOTUS does not address this – focus is on stipulated facts and compelled speech.



Source: National Museum of African American History & Culture at https://nmaahc.si.edu/object/nmaahc_2015.23

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Questions?

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