



# Discriminatory Denial of Service

*Applying State Public Accommodations Laws to  
Online Commerce*

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UNDER LAW



# President's Statement

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**P**ublic accommodations laws are some of the most important civil rights protections in the United States. Many states and Congress enacted public accommodation laws in the 1950s and 1960s in response to staged protests and boycotts by African Americans and others opposed to and impacted by the painful brutality of segregation. Throughout this country's history, public accommodation laws have played a vital role in ensuring that all businesses are open to everyone and that marginalized individuals are not treated like second-class citizens.

Despite the advances our country has made in eradicating segregation and other forms of invidious discrimination, African Americans continue to suffer from structural and pervasive discrimination.

Discrimination continues to infect the marketplace, where consumers of color continue to receive worse treatment and experience unequal access to goods and services as a result of business owners' biases. Today, public accommodation laws remain vital by providing relief when consumers of color experience discrimination.

Our economy has evolved and consumers are increasingly engaging in online commerce. Not surprisingly, many threats to civil rights have moved online and are often driven by algorithmic data processing practices that quietly disenfranchise people of color by steering economic opportunities away from them. Our civil rights laws, however, have not kept up and do not protect against discrimination that happens on online platforms.

This report represents one of the first concerted efforts to map out the potential of our state public accommodations laws to respond to segregation and discrimination in the modern online economy. Some states are proactively leading the way; others need to do more. Public accommodation laws improve our country by ensuring our economy is an inclusive one where all people regardless of background or identity can participate free of discrimination. Discrimination has no place in our society, regardless of whether it happens online or in brick and mortar establishments. The Lawyers' Committee calls for and will continue to advocate for the strengthening of these vital protections.

# Executive Summary

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**W**hen a business posts a sign that says, “Whites Only,” it should not matter whether it is written in ink or pixels. The discrimination and harm are the same. However, laws prohibiting discrimination in such “places of public accommodation” vary significantly from one state to another. This report reviews the laws of all 50 states and the District of Columbia to assess whether each state’s anti-discrimination statute applies to entities operating through the Internet.

## Findings and Recommendations

- 1. Online businesses are subject to some anti-discrimination laws at the state level.**
- 2. In particular, California and New York public accommodations laws apply to online entities. Silicon Valley and Wall Street cannot discriminate online.**
- 3. Six states do not have any law generally prohibiting discrimination in public accommodations—online or offline. These states should enact new legislation.**

**4. Most states would benefit from clarifying their public accommodations laws to explicitly prohibit online discrimination.**

**5. Most states allow private lawsuits to vindicate civil rights violations. The rest should update their laws to give everyone the right to have their day in court.**

We conclude that many states have public accommodations laws that apply or are likely to apply to online entities. Consequently, tech companies have a legal duty not to discriminate in their provision of goods and services to the general public through the Internet. In particular, the public accommodations laws of California and New York apply to online entities, covering both Silicon Valley and Wall Street. It is less clear if public accommodation law applies in other states, and a minority of states do not have anti-discrimination laws that apply to online entities. We recommend that states enact legislation updating their public accommodations protections for the modern online economy.

Overall, our review concludes that state laws are fairly even-

ly dispersed on the question of whether online entities qualify as places of public accommodation. This is not surprising given the relative recency with which online platforms have become prime movers for commerce. However, this dispersion should not be construed as weakness in the majority of state statutes. In general, most states have statutory language that is inclusive enough to encompass online businesses. But only a handful of states have directly addressed the legal question so far. For the rest of the states, whether their statutes are likely or unlikely to cover online entities usually depends on whether the state requires a place of public accommodation to be a physical place, whether the word “place” can include entities operating without a fixed physical location, and whether the states’ courts are likely to defer to archaic decades-old decisions that may no longer make sense in the era of the Internet.

## State-By-State Breakdown

- ▶ Five states explicitly apply their public accommodations laws to online entities.
- ▶ Seventeen states are likely to apply their statutes to online

entities; their courts have not yet addressed the legal question.

- ▶ Fourteen states and the District of Columbia have unclear statutes and/or conflicting case law.
- ▶ Six states are unlikely to extend their public accommodations laws to online entities, but their courts could still reverse course.
- ▶ Two states have explicitly ruled that their statutes do not apply to the Internet.
- ▶ Six states wholly lack any meaningful protections against non-disability discrimination in public accommodations of any type, online or offline.

#### **States Without Any General Anti-Discrimination Law**

There are six states who either do not have a general-purpose public accommodations law at all or have a law that is so narrow as to be effectively meaningless for the protection of civil rights. These states are Alabama, Georgia, Mississippi, North Carolina, Texas, and Virginia. These states may protect disability accessibility, but do not protect against discrimination on the basis of race, gender, or other characteristics.

#### **States Explicitly Prohibiting Discrimination in Online Public Accommodations**

The public accommodations laws of five states currently apply to online businesses: California, Colorado, New Mexico, New York, and Oregon. It is particularly noteworthy that California's Unruh Act applies to online entities because

so many major tech companies are headquartered in Silicon Valley.

#### **States Likely to Prohibit Discrimination in Online Public Accommodations**

Seventeen states are likely to apply their public accommodations laws to the Internet, but their courts have not yet directly addressed the issue. These states' laws are likely to apply online because they are structurally similar to states that do cover online entities and/or they do not have limitations in text or case law that are likely to lead to a decision to exclude online entities. These states include Arizona, Arkansas, Connecticut, Hawaii, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Vermont, and West Virginia.

#### **States Whose Public Accommodations Laws are Unclear**

There are fourteen states (plus the District of Columbia) whose public accommodations laws are unclear about their applicability to online entities. This includes states who have broadly inclusive statutory language, but no case law guiding its interpretation, as well as states whose case law has conflicting tensions. We are also classifying a state as "unclear" if it has sufficiently broad statutory language and a mandate for generous construction, but case law from the pre-Internet era limits "place of public accommodation" to include only physical facilities, and the state's high court has not

Looking globally at the state of state public accommodations laws, our review concludes that state laws are fairly evenly dispersed on the question of whether online entities qualify as places of public accommodation.

## STATE-BY-STATE BREAKDOWN

Law Applies to Online Entities	Law is Likely to Apply to Online Entities	Unclear	Law is Unlikely to Apply to Online Entities	Law Explicitly Does Not Apply to Online Entities	No General Anti-Discrimination Law
California	Arizona	Alaska	Iowa	Florida	Alabama
Colorado	Arkansas	Delaware	Kansas	New Jersey	Georgia
New Mexico	Connecticut	District of Columbia	Maryland		Mississippi
New York	Hawaii	Idaho	Montana		North Carolina
Oregon	Massachusetts	Illinois	Rhode Island		Texas
	Michigan	Indiana	South Carolina		Virginia
	Minnesota	Kentucky			
	Missouri	Louisiana			
	New Hampshire	Maine			
	North Dakota	Nebraska			
	Ohio	Nevada			
	Oklahoma	Pennsylvania			
	South Dakota	Washington			
	Tennessee	Wisconsin			
	Utah	Wyoming			
	Vermont				
	West Virginia				

addressed the physicality requirement since the advent of the Internet. States whose statutes are unclear include Alaska, Delaware, District of Columbia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Nebraska, Nevada, Pennsylvania, Washington, Wisconsin, and Wyoming.

### States Unlikely to Prohibit Discrimination in Online Public Accommodations

In addition, there are six states who have restrictions limiting their public accommodations laws from applying to online entities, such as narrow statutory text or

case law holding that only physical facilities can be places of public accommodation. These states include Iowa, Kansas, Maryland, Montana, Rhode Island, and South Carolina.

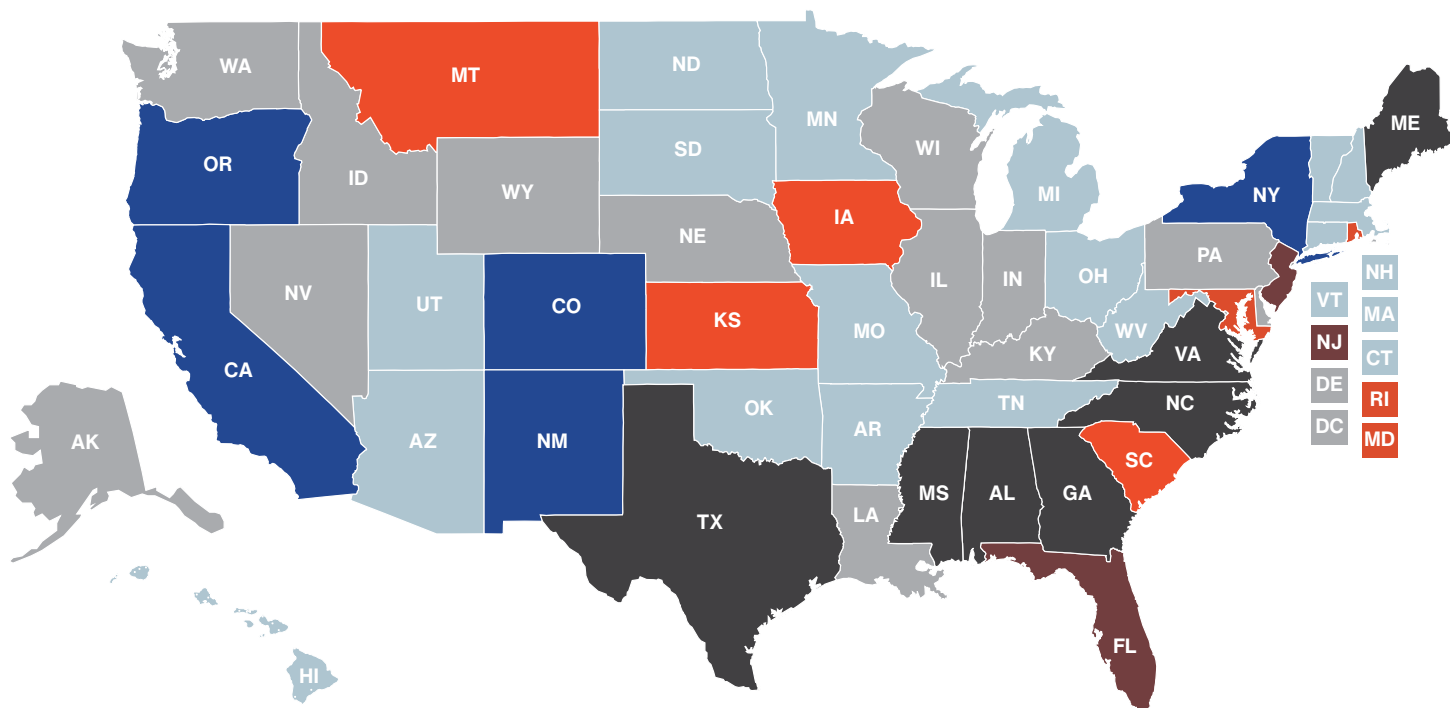
### States Explicitly Permitting Discrimination in Online Public Accommodations

There are only two states whose courts have definitively held that their public accommodations laws do not apply to online entities: Florida and New Jersey. A third such decision by a District of Columbia trial court currently is on appeal and therefore is not

considered to be a final judgment by this report.

## What are public accommodations laws and why do they matter?

Public accommodation statutes are a cornerstone of civil rights law. They were one of the primary mechanisms used to end Jim Crow segregation and discrimination in everyday commerce. In general, a place of public accommodations is a business or other entity that offers goods or services to the general public. Classic examples



- Public accommodation law explicitly applies to online entities.
- Public accommodations law is likely to apply to online entities.
- Unclear if public accommodation law applies to online entities.
- Public accommodation law is unlikely to apply to online public entities.
- Public accommodation law does not apply to online public entities.
- No general-purpose public accommodations law.

in a brick-and-mortar context include restaurants, hotels, stores, gas stations, theaters, libraries, buses, banks, and stadiums. Public accommodations laws typically provide two kinds of protection: (1) they prohibit a business from discriminating in its provision of service on the basis of protected characteristics such as race, gender, religion, sexual orientation, or disability; and (2) they prohibit third-parties from discriminatorily interfering with someone seeking to patronize a business. *See, e.g.,* D.C. Code § 2-1402.31, 2-1402.61. For exam-

ple, these laws both forbid a lunch counter from denying service on the basis of race as well as bar a racist interloper from threatening those seeking equal access to the lunch counter. However, because states generally enacted public accommodations laws before the invention of the Internet, it can be unclear whether and how they apply to online commerce. Only a handful of states have directly addressed the question.

The Internet has created both new commercial, social, and economic opportunities and new avenues for

discrimination in such opportunities. Absent anti-discrimination protections, online businesses can refuse service on the basis of race or ethnicity, charge higher prices based on religion, provide subpar products based on gender or sexual orientation, or ignore the accessibility needs of persons with disabilities. Machine learning technologies and other advanced analytics can further exacerbate discrimination. If an artificial intelligence algorithm is trained on data tainted with systemic biases, it will incorporate, replicate, and regurgitate such biases. Digital



“Is this America, the land of the free and the home of the brave, where we have to sleep with our telephones off the hooks because our lives be threatened daily, because we want to live as decent human beings, in America?”

— Fannie Lou Hamer

redlining and data-driven segregation are not foreclosed unless the law forecloses them.

In addition, online threats, harassment, and intimidation from third parties often target people of color, women, LGBTQ individuals, religious minorities, immigrants, people with disabilities, and other marginalized communities. These hateful acts interfere with users’ right to equal enjoyment of online services, chill speech and civic engagement, and cause serious harm. When a user self-censors or quits an online platform after experiencing hateful harassment, that user is deprived of their equal right to enjoy the services offered by that business. A racist mob chasing someone out of a restaurant is no different from a racist mob chas-

ing someone off of a social media platform.

Fifty-five years ago, civil rights leader Fannie Lou Hamer asked, “Is this America, the land of the free and the home of the brave, where we have to sleep with our telephones off the hooks because our lives be threatened daily, because we want to live as decent human beings, in America?” Fannie Lou Hamer, Testimony before the Credentials Committee, Democratic National Convention (Aug. 22, 1964).<sup>1</sup> The communications technologies have advanced, but the function and harm of discriminatory animus has remained the same. The question we confront today is whether the law should treat prejudicial acts differently simply because the acts occur on or through the Internet.

### **Enforceability: Which states have a private right of action?**

Thirty-six states and the District of Columbia have a private right of action for their state public accommodations laws. This means these jurisdictions allow individuals to bring lawsuits to enforce their right to be free from discrimination in places of public accommodation. To the extent these states protect online public accommodations, individuals could bring lawsuits challenging online discrimination.

Eight states—Connecticut, Delaware, Kansas, Kentucky, New Hampshire, Oklahoma, Pennsylvania, and Wyoming—do not explicitly have a private right of action in their public accommodation

<sup>1</sup> <http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html>.



## Recommended Language for State Public Accommodations Law

The Lawyers' Committee for Civil Rights Under Law recommends that states use the following language if they need to update their public accommodations laws—or enact new ones:

**DISCRIMINATION IN PUBLIC ACCOMMODATIONS.** *It is unlawful to segregate, discriminate in, or otherwise make unavailable the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation on the basis of a person or class of persons' actual or perceived race, color, ethnicity, religion, national origin, sex, gender, gender identity, sexual orientation, or disability.*

**BURDEN OF PROOF IN DISPARATE IMPACT CASES.** *Unlawful discrimination in public accommodations based on disparate impact is established under this section if:*

- (1) a complaining party demonstrates that the respondent's action causes a disparate impact on the basis of a protected characteristic; and*
- (2) (A) the respondent fails to demonstrate that the challenged action is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; or*  
*(B) if the respondent does demonstrate that the challenged action is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests, the complaining party then shows that an alternative policy or practice could serve such interests with a less discriminatory effect.*

**PLACE OF PUBLIC ACCOMMODATIONS.** *The term "place of public accommodation" includes all businesses of any kind, whether for-profit or not-for-profit, that offer goods or services of any kind to the general public, whether for a charge or not for a charge. This includes businesses that offer goods or services through the Internet or any other medium of communications, regardless of whether or not they operate from a physical location.*

**EXCEPTIONS.** *The term "place of public accommodation" does not include a tax-exempt religious entity, a distinctly private club, or a distinctly private online discussion forum. A club or online discussion forum shall be deemed distinctly private if:*

- (1) Its primary purpose is expressive association;*
- (2) It is membership-based and has no more than 1000 members; and*
- (3) It does not regularly receive payment directly or indirectly from or on behalf of non-members for dues, fees, use of physical or online facilities, or goods or services of any kind, for the furtherance of trade or business.*

**INTERFERENCE WITH RIGHTS AND PRIVILEGES.** *It is unlawful for any person to:*

- (1) Withhold, deny, deprive, or attempt to withhold, deny, or deprive, any person of any right or privilege secured by this section;*
- (2) Intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce, any person with the purpose of interfering with any right or privilege secured by this section; or*
- (3) Punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by this section.*

Absent anti-discrimination protections, online businesses can refuse service on the basis of race or ethnicity, charge higher prices based on religion, provide subpar products based on gender or sexual orientation, or ignore the accessibility needs of persons with disabilities.

laws.<sup>2</sup> The lack of a private right of action significantly impairs civil rights protections in these states; they should enact legislation amending their statutes to give individuals the ability to have their day in court. In addition, as discussed above, there are six states that do not have substantive public accommodations laws at all: Alabama, Georgia, Mississippi, North Carolina, Texas, and Virginia.

**A brief note on methodology:**

In drafting this report, the Lawyers' Committee for Civil Rights Under Law and its pro bono outside counsel reviewed the statutes and case law of each state and the District of Columbia. However, there were two areas

we deemed beyond the scope of this initial edition of the report. First, we focused specifically on “omnibus” public accommodations statutes—i.e. those prohibiting discrimination on a wide range of protected characteristics such as race and gender—and did not evaluate the Americans with Disabilities Act (ADA) or state statutes focused narrowly on discrimination on the basis of disability. Second, we did not review the decisions of state civil rights commissions. Many states have such commissions and the decisions of such agencies may receive deference by state courts. We hope to expand this report to include such information in future editions.

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2 It is possible that courts in some of these states may have recognized a private right of action through an alternative legal vehicle. A comprehensive review of each states' case law on this issue is beyond the scope of this report. We hope to research this issue in a later edition of this report.

## ALABAMA

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Alabama’s public accommodation law does not protect any class other than persons with disabilities. See Ala. Code §§ 21-4-1 to -7.

## ALASKA

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Alaska’s public accommodation law is found within the Alaska Human Rights Law. Alaska Stat. Ann. § 18.80.230. It gives many examples of places of public accommodation including a broad catch-all of “all other public amusement and business establishments.” Alaska Stat. Ann. § 18.80.300.

Alaska protects against discrimination based on race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy, or parenthood in places of public accommodation. Alaska Stat. Ann. § 18.80.200. Alaska provides a private right of action. Alaska Stat. Ann. § 22.10.020.

In 1983 in *U.S. Jaycees v. Richardet*, the Supreme Court of Alaska found that a “place of public accommodation” requires a physical location. 666 P.2d 1008 (Alaska 1983). Their conclusion was based on the dictionary definition of the word “place,” and “the nature of the extensive list of examples of such ‘places’ contained in” the state civil rights law. *Id.* at 1011–12.

However, more recently in *Toliver v. Alaska State Comm’n for Human Rights*, the state Supreme Court emphasized that the Alaska Human Rights Law is to be construed broadly “to further the goal of eradication of discrimination.” 279 P.3d 619 at 624 (Alaska 2012) (“[W]e believe that the legislature intended to put as many ‘teeth’ into this law as possible.”).

Interpreting these two cases in concert, and noting that *Richardet* was decided before the advent of the Internet, it is unclear whether Alaska’s law applies to online entities.

## ARIZONA

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Arizona’s public accommodation law is found in the Arizona Civil Rights Act. Arizona broadly defines places of public accommodation as including “all establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public.” Ariz. Rev. Stat. Ann. § 41-1441.

Arizona forbids discrimination in places of public accommodation against any person based on race, color, religion, sex, national origin or ancestry. Ariz. Rev. Stat. Ann. § 41-1442. A private right of action is permitted. Ariz. Rev. Stat. Ann. § 41-1492.08.

There is no relevant Arizona case law interpreting what constitutes a place of public accommodation.

Given the broad and all-inclusive statutory language, it is likely that Arizona’s Civil Rights Act would apply to online entities.

## ARKANSAS

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Arkansas includes “any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public,” as a place of public accommodation. Ark. Code Ann. § 16-123-102.

Arkansas protects against discrimination in places of public accommodation on the basis of “race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability.” Ark. Code Ann. § 16-123-107. Arkansas provides a private right of action. Ark. Code Ann. § 16-123-105.

There is no relevant Arkansas case law interpreting what constitutes a place of public accommodation.

Given the broad and all-inclusive statutory language, it is likely that Arkansas’ public accommodations law would apply to online entities.

## CALIFORNIA

California's civil rights protections apply to online entities, which is particularly noteworthy given that so many technology companies are located in Silicon Valley.

Many of California's anti-discrimination protections are codified in Unruh Civil Rights Act, which includes the state's public accommodations law. California has one of the broadest definitions of what constitutes a place of public accommodation, encompassing "all business establishments of every kind whatsoever." Cal. Civ. Code § 51.

California protects against discrimination based on sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information,

marital status, sexual orientation, citizenship, primary language, or immigration status. *Id.* There is a private right of action. Cal. Civ. Code § 52.

California courts have frequently interpreted what a place of public accommodation is, but the most relevant case is *White v. Square*, 446 P.3d 276 (Cal. 2019). In *White*, the court explicitly held that California's public accommodation law "applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store." *Id.* at 277–78. The court also affirmed that courts interpreting the Unruh Act "must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses." *Id.* at 279.

### Sometimes a Physical Location is Required to Qualify as a Place of Public Accommodation.

The question of whether or not an entity must operate from a physical location in order to qualify as a place of public accommodation has been frequently litigated in the context of membership organizations. There have been a series of cases in state courts, often involving the Boy Scouts of America and the United States Junior Chamber (better known as the Jaycees), debating whether such organizations are subject to public accommodations laws. While the judges looked at a number of factors, often the analysis focused on whether the organization operated from a physical location. If a state public accommodations law unambiguously requires a physical location, then it is unlikely to apply to online entities. However, many of these cases date to the 1970s or 1980s, prior to the advent of the Internet. If a court has not addressed the issue since that time, it may be unclear whether those precedents would, or should, be affirmed today.

**States that have a physical location requirement: Alaska, Delaware, Iowa, Maine, Montana, and Pennsylvania.** These states have case law that

requires a physical location, *but* only Delaware and Montana have cases from the 21st century on this issue. The courts in Alaska, Iowa, Maine, and Pennsylvania all decided this issue prior to the existence of the Internet. For example, in 1983 the Supreme Court of Alaska ruled that "place" meant that a physical location was required: "Thus, according to the 'common and approved usage' of this term, it would not encompass a service organization lacking a fixed geographical situs." *U.S. Jaycees v. Richardet*, 666 P.2d 1008, 1011 (Alaska 1983). See also *Gordy v. Bice*, CIV.A. 02A-10-003, 2003 WL 22064103, at \*4 (Del. Super. Ct. 2003); *U.S. Jaycees v. Iowa Civil Rights Comm'n*, 427 N.W.2d 450, 454 (Iowa 1988) ("We are persuaded by the literal and ordinary definition of the statutory term that the United States Jaycees is not a 'place' within our definition of 'public accommodation' . . . The ordinary usage of these terms connotes a spatial dimension which the Jaycees' membership, as such, does not possess."); *Jackson v. State*, 544 A.2d 291, 295–96 (Me. 1988); *Chapman v. eBay, Inc.*, 2014 WL 115595, at \*2 (D.

Mont. 2014) (unpublished); *Philadelphia Electric Company v. Pennsylvania Human Relations Commission*, 290 A.2d 699, 703 (Pa. 1972).

**States that clearly do not have a physical location requirement: California, Connecticut, Massachusetts, Minnesota, New York, Utah, and Vermont.**

For example, in *Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Opportunities*, the Supreme Court of Connecticut held that the Boy Scouts qualified as a place of public accommodation, because a “physical situs is not today an essential element of our public accommodation law.” 528 A.2d 352, 358 (Conn. 1987). In *Curran v. Mount Diablo Council of the Boy Scouts of America*, the Supreme Court of California held that the organization did not constitute a place of public accommodation, but affirmed that a physical location was not necessary. 952 P.2d 218 (Cal. 1998). The court held that a business establishment does not require a physical location. *Id.* at 248 (“It follows that the phrase ‘business establishments’ . . . means areas of activity, whether or not in public view, and whether or not at a physical location, that encompass proprietor-patron relationships.”). See also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (reviewing Minnesota’s

public accommodations statute); *Currier v. Nat’l Bd. Of Medical Examiners*, 965 N.E.2d 829 (Mass. 2012); *U.S. Power Squadrons v. State*, 452 N.E.2d 1199, 1203-04 (N.Y. 1983); *U.S. Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981).

**Do online businesses operate from physical facilities?**

Even if a public accommodations statute requires a physical location, that may not be an impediment to the application of such statute to online entities. Even online businesses operate from physical facilities. The Internet exists in the physical world and is not an ethereal construct. All online activity—including the commercial offering of goods and services through a website or app—occurs on computers in physical locations. See, e.g., *United States v. Microsoft*, 138 S. Ct. 1186, 1187 (2018) (addressing territoriality concerns for a search warrant for emails stored by a U.S. company in an overseas data center). Online activity therefore does occur at a physical “place”—the data center, corporate headquarters, or other facility from which the business offers its services. Delivering goods or services through the Internet is no different from delivering goods or services by mail, phone, or courier—at the other end of the communication there is an establishment rendering the service.

## COLORADO

Colorado defines “place of public accommodation” with an illustrative list, including a broad category of “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.” Colo. Rev. Stat. Ann. § 24-34-601. Colorado also prohibits the communication of the intent to deny an individual from the use of a place of public accommodation based on a protected characteristic. *Id.* at (2)(a).

Colorado protects against discrimination based on disability, race, creed, color, sex, sexual orientation,

marital status, national origin, or ancestry. *Id.* Sexual orientation includes “an individual’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual’s perception thereof.” Colo. Rev. Stat. Ann. § 24-34-301. Public accommodation laws are governed by the Colorado Civil Rights Commission. Colo. Rev. Stat. Ann. 24-34-307. A private right of action is permitted, but administrative remedies must be exhausted before judicial courts can review claims. Colo. Rev. Stat. Ann. 24-34-306.

In a recent decision, the United States District Court for the District of Colorado stated by implication

“[T]he Accommodation Clause ... prohibits discrimination against same-sex couples in the creation of wedding websites.”

— 303 Creative v. Elenis, 385 F. Supp. 3d 1147, 1153 (D. Colo. 2019).

that Colorado’s public accommodation law applies to online businesses. *303 Creative v. Elenis*, 385 F. Supp. 3d 1147, 1153 (D. Colo. 2019). “The Court assumes the constitutionality of the Accommodation Clause which prohibits discrimination against same-sex couples in the creation of wedding websites.” *Id.* The Court held that a website design company, which stated it would not build websites for same-sex weddings, was in violation of the communication clause of the state’s public accommodation law. *Id.*

## CONNECTICUT

Connecticut civil rights law considers a “place of public accommodation” to mean “any establishment which caters or offers its services or facilities or goods to the general public.” Conn. Gen. Stat. Ann. § 46a-63.

Discrimination in places of public accommodation based on race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, or status as a veteran is not permitted. Conn. Gen. Stat. Ann. § 46a-64. There is no private right of action for public accommodation violations in Connecticut. *See, e.g. Wright v. City of Hartford*, 97-cv-0570863S, 1998 WL 83670, at \*3 (Conn. Super. Feb. 13, 1998).

Connecticut courts have long held that places of public accommodation do not require a physical lo-

cation. “In conjunction, the unconditional language of the statute, the history of its steadily expanded coverage, and the compelling interest in eliminating discriminatory public accommodation practices persuade us that physical situs is not today an essential element of our public accommodation law.” *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights & Opportunities*, 528 A.2d 352, 358 (Conn. 1987).

While Connecticut courts have not yet explicitly held that their statute applies to online entities, it seems very likely that it does.

## DELAWARE

Under Delaware law, “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.” 6 Del. Code § 4502. The statute explicitly holds that it “shall be liberally construed to the end that the rights herein provided for all people . . . may be effectively safeguarded.” 6 Del. Code § 4501.

Delaware law protects against discrimination in places of public accommodation based on race, age, marital status, creed, color, sex, handicap, sexual orientation, gender identity, or national origin. 6 Del. Code § 4503. There is no private right of action for public accommodation claims; aggrieved parties must vindicate their rights through an administrative complaint process. 6 Del. Code § 4508.

In an unpublished opinion, the Superior Court of Delaware held that for the state’s public accommodation law to apply there must be a nexus between the cause of action and a physical location. The court’s rationale was based on other states’ interpretation of public accommodation law and the dictionary definition of “place.” *Gordy v. Bice ex rel. Bice*, CIV.A. 02A-10-003, 2003 WL 22064103, at \*4 (Del. Super. Ct. 2003).

Other unpublished court opinions have cited 6 Del. Code § 4501, which advocate a liberal interpretation of Delaware’s civil rights law. *See, e.g., Dover Downs*,

*Inc. v. Lee*, CIV.A. K11A-06003JTV, 2012 WL 2370379, at \*7 (Del. Super. Ct. 2012) (“[T]his Court recognizes that the ultimate purpose of public accommodation laws is to remove ‘the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.’”)

Reading together the broad and inclusive language in the statute and these unpublished lower court holdings, it is unclear whether Delaware’s public accommodations law would apply to online entities. It is worth noting that Delaware is the only state which defines a place of public accommodation as “any establishment” which offers goods and services to the general public that has also held that a physical location is required.

## **DISTRICT OF COLUMBIA**

The applicability District of Columbia’s public accommodations law to online entities is currently being litigated.

The District of Columbia Human Rights Act provides a lengthy list of examples of places of public accommodation. The list includes a broad catch-all category for “all places included in the meaning of such terms as ... establishments dealing with goods or services of any kind.” D.C. Code § 2-1401.02(24).

The District of Columbia prohibits discrimination in places of public accommodation based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business. D.C. Code §2-1402.31. A private right of action is permitted. D.C. Code Ann. § 2-1403.16

D.C. courts have repeatedly held that the DCHRA is to be broadly construed. *See, e.g., Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 731 (D.C. App. 2000); *Moonblatt v. D.C.*, 572 F. Supp. 2d 15, 28 (D.D.C. 2008). In *James v. Team Washington, Inc.*, the federal district court held in an unpublished

opinion that a physical location is not required to establish a DCHRA violation. “[I]t is not essential that the challenged conduct take place in a particular physical structure. What is important is whether the defendant, as an entity, qualifies under the law’s definition of a place of public accommodation and whether the plaintiff can prove that he was improperly denied access to the defendant’s goods or services.” 97-cv-00378, 1997 WL 633323, at \*2 (D.D.C. 1997).

However, in *Freedom Watch v. Google*, the U.S. District Court for the District of Columbia recently held that a place of public accommodation must be a physical location. 368 F. Supp. 3d 30, 39 (D.D.C. 2019). This case is currently on appeal to the D.C. Circuit.

“[I]t is not essential that the challenged conduct take place in a particular physical structure. What is important is whether the defendant, as an entity, qualifies under the law’s definition of a place of public accommodation and whether the plaintiff can prove that he was improperly denied access to the defendant’s goods or services.”

— *James v. Team Washington, Inc.*, 1997 WL 633323, at \*2 (D.D.C. 1997).

## Freedom Watch v. Google

In *Freedom Watch v. Google*, plaintiffs brought a public accommodations claim alleging that Google, Facebook, Twitter, and Apple discriminated against them on the defendants' online platforms. The United States District Court of the District of Columbia held that under the D.C. Human Rights Act, these online services did not qualify as places of public accommodation because they did not operate from a physical location. 368 F. Supp. 3d 30 (D.D.C. 2019). In support of its conclusion, the court cited a case from 1981, *U.S. Jaycees v. Bloomfield*, where the D.C. Court of Appeals held that the Jaycees organization was not a place of public accommodation because it did not operate from a fixed location. 434 A.2d 1379, 1381 (D.C. App. 1981).

However, the *Freedom Watch* trial court failed to conduct a thorough examination of the statutory text, binding case law, administrative decisions from the District's civil rights commission, and legislative history, all of which conflict with the court's holding. The plain text of the statute does not exempt online businesses and instead says a "place of public accommodation" includes "all places included in the meaning of such terms as ... establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). The D.C. Court of Appeals has consistently held that the DCHRA was explicitly written to be a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

It also is unclear whether the D.C. Court of Appeals today would affirm *U.S. Jaycees'* physical location requirement, given more recent case law and the development of the Internet. Since *U.S. Jaycees*, the D.C. Court of Appeals has held that business-

es that do not principally operate from physical locations within the District of Columbia may still be subject to the DCHRA so long as they are serving D.C. residents and otherwise satisfy the statutory definition. See *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000) (en banc) (Maryland grocer targeting ads to D.C. residents is subject to D.C. law); *Nat'l Org. for Women v. Mutual of Omaha Ins. Co., Inc.*, 531 A.2d 274 (D.C. 1987) (Nebraska insurer serving D.C. residents is subject to the DCHRA).

In *James v. Team Washington*, the federal district court distinguished commercial enterprises from service organizations like the Jaycees and held that operating from a specific physical location is unnecessary. CIV.A. 97-00378 TAF, 1997 WL 633323, at \*2 (D.D.C. Oct. 7, 1997). *James* held that a pizzeria in Virginia was a place of public accommodations when it provided delivery services to customers in the District of Columbia. The DCHRA prohibits "the improper denial of the full and equal enjoyment of the goods and services of a place of public accommodation" and it does not matter whether "the challenged conduct take[s] place in a particular physical structure." *Id.* (emphasis in original). These cases imply that an out-of-state business providing services to D.C. residents through the Internet (or phone or mail) may qualify as a place of public accommodation under the DCHRA.

The *Freedom Watch* lower court decision is currently on appeal to the D.C. Circuit. The Lawyers' Committee for Civil Rights Under Law and the Attorney General for the District of Columbia filed amicus briefs arguing that the DCHRA does apply to online businesses such as Google, Facebook, Twitter, and Apple.



## FLORIDA

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Florida's public accommodations law does not apply to online entities.

The Florida Civil Rights Act narrowly defines "public accommodations" as "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." Fla. Stat. Ann. § 760.02.

Florida protects against discrimination based on race, color, national origin, sex, pregnancy, handicap, familial status, or religion in places of public accommodation. Fla. Stat. § 760.08. There is a private right of action, but only after administrative procedures have been exhausted. Fla. Stat. Ann. § 760.07.

In *Warner v. Tinder, Inc.*, the United States District Court for the Southern District of Florida explicitly held that a phone-based app is not a place of public accommodation under the FCRA. 15-cv-23790, 2018 WL 1894726, at \*9 (S.D. Fla. 2018).

## GEORGIA

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Georgia's public accommodation law does not protect any class other than persons with disabilities. Ga. Code Ann. § 30-4-2.

## HAWAII

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Hawaii defines places of public accommodation with a lengthy list of examples, including a catch-all that encompasses any "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." Haw. Rev. Stat. Ann. § 489-2. The Hawaii statute explicitly specifies that the categories given in the list are "by way of example, but not of limitation." *Id.*

Hawaiian public accommodation law applies to discrimination based on race, sex, gender identity,

sexual orientation, color, religion, ancestry, or disability. Haw. Rev. Stat. §489-3. There is a private right of action. Haw. Rev. Stat. Ann. § 489-7.5.

Hawaiian courts have repeatedly held that as a remedial statute, the state's civil rights laws "are liberally construed to suppress the perceived evil and advance the enacted remedy." *E.g., Flores v. United Air Lines, Inc.*, 757 P.2d 641, 647 (Haw. 1988). "Accordingly, we liberally construe the scope of the protection against discrimination provided by [Hawaiian civil rights law], and we narrowly or strictly construe the scope of the exemption from prohibited discrimination provided by [it]." *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 928 (Haw. Ct. App. 2018).

While Hawaiian courts have not yet explicitly addressed the issue, Hawaii's public accommodations law is very likely to apply to online entities because of its broad and all-inclusive nature.

## IDAHO

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Idaho defines a place of public accommodation as "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." Idaho Code Ann. § 67-5902.

Idaho protects against discrimination in places of public accommodation based on race, color, religion, sex or national origin. Idaho Code Ann. § 67-5909. There is a private right of action, however a complaint must be filed with the commission as a condition precedent to litigation. Idaho Code Ann. § 67-5908.

There is no relevant case law from Idaho regarding the interpretation of what a place of public accommodation is. Because Idaho's statutory language mirrors other state's with broad and all-inclusive interpretations, its public accommodations law may apply to online entities. However, because of a dearth of case law, it is difficult to reach a definitive answer.

## ILLINOIS

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Illinois gives a long list of examples to illustrate what a place of public accommodation is, but specifically notes that the list is not limited to the given examples. 775 Ill. Comp. Stat. Ann. § 5/5-101. While most of the list is comprised of physical locations, the statute also contains several catch-all clauses that could encompass many types of online businesses, including:

- ▶ “A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.”
- ▶ “An auditorium, convention center, lecture hall, or other place of public gathering.”
- ▶ “A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.”
- ▶ “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.”
- ▶ “A museum, library, gallery, or other place of public display or collection.”

Illinois courts have held that non-listed entities must be sufficiently similar to listed places of public accommodation to qualify. “Where the entity accused of discrimination as a place of public accommodation is not enumerated specifically in the Act, a determination must be made whether it falls into the broad definition of that term by focusing on the language of the statute. . . . [W]hen a statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated persons or things will be interpreted as those ‘others such like’ the named persons or things.” *Gilbert v. Dep’t of Human Rights*, 799 N.E.2d 465, 468 (Ill. 2003).

Illinois protects discrimination against individuals in places of public accommodation based on race, color, religion, sex, national origin, ancestry, age, order of

protection status, marital status, physical or mental disability, military status, sexual orientation, gender identity, or pregnancy. 775 Ill. Comp. Stat. Ann. § 5/1-102–103. Illinois permits a private right of action. 775 Ill. Comp. Stat. Ann. § 5/7A-104.

Given the broad language of the statute, it is possible that Illinois would extend its public accommodation laws to include many categories of online entities if they are similar to enumerated types of entities, but there is insufficient case law to make a confident prediction.

## INDIANA

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Indiana Civil Rights Law holds that “public accommodation” means “any establishment that caters or offers its services or facilities or goods to the general public.” Ind. Code Ann. § 22-9-1-3. The statute states that it “shall be construed broadly to effectuate its purpose.” Ind. Code Ann. § 22-9-1-2.

Discrimination based on race, religion, color, sex, disability, national origin, or ancestry is not permitted in places of public accommodation. Ind. Code Ann. § 22-9-1-2. A private right of action is allowed. Ind. Code Ann. § 22-9-1-17.

There is no relevant case law in Indiana regarding the definition of a place of public accommodation.

Despite the broad interpretation of “place of public accommodation” demanded by the statute, the lack of judicial precedent makes it unclear if the Indiana Civil Rights Law would apply to online entities.

## IOWA

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Iowa defines places of public accommodation as “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[.]” Iowa Code § 216.2.

Iowa prohibits discrimination in places of public accommodation based on race, creed, color, sex, sexual orientation, gender identity, national origin, religion,

and disability. Iowa Code § 216.7. A private right of action is allowed, but only after administrative remedies are exhausted. Iowa Code § 216.15; *Nuss v. C. Iowa Binding Corp.*, 284 F. Supp. 2d 1187, 1196 (S.D. Iowa 2003).

Iowa courts have held that places of public accommodation require a physical location. “We are persuaded by the literal and ordinary definition of the statutory term that the United States Jaycees is not a ‘place’ within our definition of ‘public accommodation.’ . . . The ordinary usage of these terms connotes a spatial dimension which the Jaycees’ membership, as such, does not possess.” *U.S. Jaycees v. Iowa Civil Rights Comm’n*, 427 N.W.2d 450, 454 (Iowa 1988).

While this decision predates the advent of the Internet, Iowa public accommodations law is unlikely to apply to online entities due to this physicality requirement and a lack of countervailing statutory language or case law implying that a broader construction is appropriate. In addition, because Iowa’s law requires “a fee or charge” be assessed to qualify as a place of public accommodation, it may not apply to many types of online businesses—including social networks—that do not charge a fee for their services.

## KANSAS

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The Kansas Act Against Discrimination defines places of public accommodation by way of a short list of examples, but specifies that the list is not limited to the given examples. Kan. Stat. Ann. § 44-1002. The Act also defines places of accommodation as “any person who caters or offers goods, services, facilities and accommodations to the public.” *Id.*

Kansas prohibits discrimination in places of public accommodation based on race, religion, color, sex, disability, national origin or ancestry. Kan. Stat. Ann. § 44-1001. There is not a private right of action.

Kansas courts have held that the provisions of the Act “are to be construed liberally for the accomplishment of the purposes thereof.” *Jarvis v. Kansas Comm’n on Civil Rights*, 528 P.2d 1232, 1233 (Kan.

1974). However, Kansas courts have also found that the legislative intent of the Kansas Act Against Discrimination was to set the scope of public accommodations to only include “business establishments and those establishments traditionally considered public accommodations.” *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 406 (Kan. 1995) (finding the Boy Scouts was not a place of public accommodation).

While Kansas’ statute appears inclusive enough to apply to online entities, the *Seabourn* decision makes it unlikely that Kansas courts would hold that the statute applies to online businesses.

## KENTUCKY

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Kentucky broadly defines places of public accommodation as “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.” Ky. Rev. Stat. § 344.130.

Kentucky prohibits discrimination in places of public accommodation based on sex, race, color, religion, or national origin. Ky. Rev. Stat. § 344.120. There is not a private right of action for public accommodation violations in Kentucky. Ky. Rev. Stat. Ann. § 344.210.

There is no relevant caselaw regarding the interpretation of what a place of public accommodation from Kentucky. Because Kentucky’s statutory language mirrors other state’s with broad and all-inclusive interpretations, its public accommodations law may apply to online entities. However, because of a dearth of case law, it is difficult to reach a definitive answer.

## LOUISIANA

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Louisiana considers “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” as a place of public accommodation. La. Stat. Ann. § 51:2232.

Louisiana prohibits discrimination in places of public accommodation based on race, creed, color, religion, sex, age, disability, or national origin. La. Stat. Ann. § 51:2247. There is a private right of action in Louisiana. La. Stat. Ann. § 51:2264.

There is no relevant caselaw regarding the interpretation of what a place of public accommodation from

Louisiana. Because Louisiana’s statutory language mirrors other state’s with broad and all-inclusive interpretations, its public accommodations law may apply to online entities. However, because of a dearth of case law, it is difficult to reach a definitive answer.

## Does the Americans with Disabilities Act apply to the Internet?

There are parallels between omnibus public accommodations laws and the Americans with Disabilities Act (ADA). In addition to other legal protections, the ADA prohibits discrimination on the basis of disability in places of public accommodation. Many states, in turn, simply include disability as a protected characteristic in their omnibus public accommodations laws rather than have a separate statute. Consequently, in some states, courts may look to the Americans with Disabilities Act (ADA) for guidance on issues of first impression regarding the scope of “place of public accommodation.” Whether the ADA’s non-discrimination requirements apply to websites, mobile apps, and/or Internet-enabled instrumentalities of brick-and-mortar public accommodations currently is an unresolved legal question.

A full analysis of relevant ADA case law and state court case law pertaining to disability rights is beyond the scope of this report, but we include a few notes here to guide further research.

In *Robles v. Domino’s Pizza*, the Ninth Circuit examined whether a website or mobile app used to place an order for a brick-and-mortar restaurant had to comply with the ADA’s accessibility requirements. 913 F.3d 898 (9th Cir. 2019). The court held that it did—because the restaurant was a place of public accommodations, instrumentalities that facilitate

access to that physical business, such as its app used to order pizza, also had to be ADA compliant. *Id.* The Supreme Court recently denied certiorari. 140 S.Ct. 122, Case No. 18-1539 (2019).

Some other circuits have addressed whether the ADA requires places of public accommodation to operate from physical facilities, a question that is relevant to but not dispositive of the question of whether the ADA applies to the Internet. The First, Second, and Seventh Circuits have held that the ADA does not require places of public accommodation to operate from physical facilities. See *Joint Admin. Bd., Ret. Plan*, 268 F.3d 456 (7th Cir. 2001); *Pallozi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2nd Cir. 1999); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999); *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12 (1st Cir. 1994). The Third and Sixth Circuits, and an unpublished decision in the Eleventh Circuit, have held that the ADA does require a physical facility. See *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 754 (11th Cir. 2018) (unpublished); see also *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183 (3d Cir. 2010) (unpublished).

## MAINE

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Maine gives a very detailed and extensive list of places of public accommodation, but also has a catch-all category that includes any “establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.” Me. Rev. Stat. tit. 5, § 4553.

Maine prohibits discrimination in places of public accommodation based on of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry, gender identity, or national origin. Me. Rev. Stat. tit. 5, § 4591. There is a private right of action in Maine, but only after exhausting administrative remedies. Me. Rev. Stat. tit. 5, § 4621.

Maine courts have held that a place of public accommodation requires a physical facility. “An examination of the definition contained in 5 M.R.S.A. § 4553(8) reveals an obvious emphasis on some physical place or establishment offering goods, facilities or services to the general public. . . . It includes, but is not limited to, an extensive list of places such as inns, taverns, hotels, music halls, skating rinks, public libraries, public conveyances, public halls, and buildings occupied by two or more tenants.” *Jackson v. State*, 544 A.2d 291, 295–96 (Me. 1988).

*Jackson* was decided before the advent of the Internet, there is a lack of additional case law, and the statute contains a broad catch-all provision. We conclude it is unclear whether Maine’s statute would apply to online entities.

## MARYLAND

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Maryland gives a list of examples of places of public accommodation. Unlike many other states, however, Maryland does not provide a clear catch-all category. The broadest category is “a retail establishment [that] offers goods, services, entertainment, recreation, or transportation.” Md. Code Ann., State Gov’t § 20-301.

Maryland prohibits discrimination in places of public accommodation based on race, sex, age, color, creed, national origin, marital status, sexual orientation, gender identity, or disability. Md. Code Ann., State Gov’t § 20-304. There is a private right of action in Maryland, but only after administrative procedures are completed. Md. State Gov’t Code Ann. § 20-1013.

There is no relevant Maryland caselaw regarding the interpretation of what constitutes a place of public accommodation. Because Maryland’s statute is based on an exhaustive list of entities, if it applies to online entities at all it likely only applies to online businesses equivalent to the enumerated categories, such as online retailers or ride-hailing apps.

## MASSACHUSETTS

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Similar to many other states, Massachusetts provides an illustrative list of places of public accommodation, but includes a broad catch-all for “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public.” Mass. Gen. Laws Ann. ch. 272, § 92A. The examples given explicitly do not limit the “generality of this definition.” *Id.*

Massachusetts prohibits discrimination in places of public accommodation based on religious sect, creed, class, race, color, denomination, sex, gender identity, sexual orientation, nationality, or any physical or mental disability. Mass. Gen. Laws Ann. ch. 272, § 92A. There is a private right of action for public accommodation cases in Massachusetts. Mass. Gen. Laws Ann. ch. 151B, § 5; ch. 272 § 98.

Massachusetts courts have held that the definition of a place of public accommodation should be construed broadly. *See, e.g., Joyce v. Town of Dennis*, 705 F. Supp. 2d 74, 83 (D. Mass. 2010) (“The provision should be construed liberally and inclusively.”). The Massachusetts Supreme Judicial Court has held that the list of places of public accommodation was nonexclusive and was “not restricted to a person’s

entrance into a physical structure.” *Currier v. Natl. Bd. of Med. Examiners*, 965 N.E.2d 829, 842–43 (Mass. 2012) (adopting interpretation of the Massachusetts Commission Against Discrimination). “[S]tatutory protections extend to situations where services are provided that do not require a person to enter a physical structure, requiring equal access to the advantages and privileges of services and service providers.” *Id.* at 842. “To limit the statute’s reach to physical accessibility would be contrary to the goals of the statute and would allow any number of discriminatory actions that the statute prohibits.” *Id.* (citation and quotation marks omitted).

Because of its expansive statutory definition and the more recent, Internet-era, interpretation in *Currier*, Massachusetts’ public accommodations law is likely to apply to online entities.

## MICHIGAN

Michigan civil rights law considers “a business, educational institution, refreshment, entertainment, recreation, health, or transportation facility of any kind,” to be a place of public accommodation. Mich. Comp. Laws Ann. § 37.1301.

Michigan prohibits discrimination in places of public accommodation based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status. Mich. Comp. Laws Ann. § 37.2102. Michigan permits a private right of action. Mich. Comp. Laws Ann. § 37.2801.

There is no relevant caselaw regarding the interpretation of what a place of public accommodation from Michigan.

Because of the breadth of Michigan’s statutory definition, including coverage of “a business ... of any kind,” and its similarity to other states whose statutes are broadly interpreted like California and Minnesota, it is likely to apply to online entities.

## MINNESOTA

Minnesota defines places of public accommodation as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind.” Minn. Stat. Ann. § 363A.03.

Minnesota prohibits discrimination in places of public accommodation based on race, color, creed, religion, disability, national origin, marital status, sexual orientation, gender identity, or sex. Minn. Stat. Ann. §§ 363A.03; 363A.11. There is a private right of action. Minn. Stat. Ann. § 363A.33.

In *U.S. Jaycees v. McClure*, the Supreme Court of Minnesota found that a fixed, physical location is not required for the purposes of deciding if a busi-

“This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”

— *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

ness is a place of public accommodation, 305 N.W.2d 764, 773 (Minn. 1981). The court held that an organization’s facilities “are anywhere it promotes, solicits, and engages in the sale of memberships on an unselective basis.” *Id.* This was later affirmed by the United States Supreme Court in *Roberts v. U.S. Jaycees* when it upheld Minnesota’s finding that an organization without a fixed physical location was a place of public accommodation. 468 U.S. 609, 625 (1984). “Minnesota has adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct. This expansive definition reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.” *Id.* at 625–26.

While Minnesota courts have not yet explicitly addressed the question, it appears very likely that its public accommodations law applies to online entities because it applies to “a business ... of any kind” and does not have a physicality requirement.

## MISSISSIPPI

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Mississippi’s public accommodations law does not protect any class other than persons with disabilities. Ms. Code Ann. §§ 43-6-1 to 43-6-9.

## MISSOURI

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The Missouri Human Rights Act gives a long list of examples of places of public accommodation. Mo. Ann. Stat. § 213.010. The list is not exclusive though and includes a catch-all that includes “all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations.” *Id.*

Missouri prohibits discrimination in places of public accommodation based on race, color, religion, national origin, sex, ancestry, or disability. Mo. Ann. Stat. § 213.065. There is a private right of action. Mo.

“[T]he statute is a remedial and we must afford it a broad interpretation ‘in order to accomplish the greatest public good.’”

— Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 167 (Mo. Ct. App. 1999).

Rev. Stat. Ann. § 213.076.

Like many other states, Missouri courts have held that in determining what qualifies as a place of public accommodation, the statute should be broadly construed. “[T]he statute is a remedial and we must afford it a broad interpretation ‘in order to accomplish the greatest public good.’” *Missouri Comm’n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 167 (Mo. Ct. App. 1999).

While Missouri courts have not yet explicitly addressed the issue, its Act is likely to apply to online entities based on its catch-all language and broad construction.

## MONTANA

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In Montana, a place of public accommodation is defined with an illustrative list of examples. Places of public accommodations are explicitly not limited to the list, however. They include any “place that caters or offers its services, goods, or facilities to the general public.” Mont. Code Ann. § 49-2-101.

Montana prohibits discrimination in places of public accommodation based on race, creed, religion, sex, marital status, age, physical or mental disability, color, or national origin. Mont. Code Ann. § 49-2-

304. Montana permits a private right of action. Mont. Code Ann. § 49-2-501.

In *Chapman v. eBay, Inc.*, the District Court of Montana, held that eBay banning one of its users from the website did not violate the Montana Human Rights Act because it did not deny the plaintiff access to the company's "buildings, warehouses, or commercial facilities." 2014 WL 115595, at \*2 (D. Mont. 2014) (unpublished). This indicates that a physical presence may be necessary to be a place of public accommodation in Montana. Consequently, Montana's statute is unlikely to apply to online entities.

## NEBRASKA

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Nebraska gives a lengthy list of illustrations of places of public accommodation that includes a broad catch-all category. "[P]laces 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." Neb. Rev. Stat. Ann. § 20-133

Nebraska prohibits discrimination in places of public accommodation based on race, color, sex, religion, national origin, or ancestry. Neb. Rev. Stat. Ann. § 20-132. There is a private right of action. Neb. Rev. Stat. Ann. § 20-148.

There is no relevant Nebraska case law regarding the interpretation of what constitutes a place of public accommodation. Because Nebraska's statutory language mirrors other state's with broad and all-inclusive interpretations, its public accommodations law may apply to online entities. However, because of a dearth of case law, it is difficult to reach a definitive answer.

## NEVADA

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Nevada defines "place of public accommodation" with a long list of examples followed by catch-all language. Nev. Rev. Stat. Ann. § 651.050. These include:

- ▶ "Any motion picture house, theater, concert hall, sports arena or other place of exhibition or entertainment."
- ▶ "Any auditorium, convention center, lecture hall, stadium or other place of public gathering."
- ▶ "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."
- ▶ "Any museum, library, gallery or other place of public display or collection."
- ▶ "Any other establishment or place to which the public is invited or which is intended for public use."

Nevada prohibits discrimination in places of public accommodation based on race, color, religion, national origin, disability, sexual orientation, sex, gender identity, or gender expression. Nev. Rev. Stat. Ann. § 651.070. There is a private right of action in Nevada. Nev. Rev. Stat. Ann. § 651.075.

However, there is no relevant case law from Nevada courts regarding the interpretation of "place of public accommodation." Because Nevada's statutory language contains several broad catch-alls, its public accommodations law may apply to online entities. However, because of a dearth of case law, it is difficult to reach a definitive answer.

## NEW HAMPSHIRE

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New Hampshire provides a list of places of public accommodation, and includes a catch-all of any "other establishment which caters or offers its services or facilities or goods to the general public." N.H. Rev. Stat. Ann. § 354-A:2. The New Hampshire legislature has stated that the statute is intended to be broadly interpreted. "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." N.H. Rev. Stat. Ann. § 354-A:25.



Likewise, New Hampshire courts have held that the catch-all category is broadly interpreted. “The only limiting language on this otherwise expansive category is the exclusion of entities which by their nature are ‘distinctly private.’” *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 586, 825 A.2d 480, 485 (N.H. 2003).

New Hampshire prohibits discrimination in places of public accommodation based on age, sex, race, creed, color, marital status, physical or mental disability, or national origin. N.H. Rev. Stat. Ann. § 354-A:17. New Hampshire does not permit a private right of action.

While its courts have not yet explicitly addressed the issue, because of the broad and all-inclusive statutory language and the court’s decision in *Franklin Lodge of Elks*, New Hampshire’s public accommodations law is likely to apply to online entities.

## NEW JERSEY

The New Jersey Law Against Discrimination (NJLAD) provides an extensive list of examples of places of public accommodation, but explicitly states that the list is not exhaustive. N.J. Stat. Ann. § 10:5-5. Included within the list is the broad category of “any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind.” *Id.*

New Jersey prohibits discrimination in places of public accommodation based on race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality. N.J. Stat. Ann. § 10:5-12. New Jersey permits a private right of action. N.J. Stat. Ann. § 10:5-13.

“The statutory noun ‘place’ (of public accommodation) is a term of convenience, not of limitation.”

— National Organization for Women v. Little League Baseball, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974).

The NJLAD does not require a physical facility for an entity to constitute a place of public accommodation. In *National Organization for Women v. Little League Baseball*, a New Jersey appellate court held that a membership organization which does not operate from a “fixed parcel of real estate,” was still a place of public accommodation. 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974) (“The statutory noun ‘place’ (of public accommodation) is a term of convenience, not of limitation.”); see also *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1387 (D.N.J. 1986), *rev’d on other grounds*, 806 F.2d 468 (3d Cir. 1986) (citing *United States Jaycees v. McClure*, 305 N.W.2d 764, 773 (Minn.1981)) (“[A] ‘place of public accommodation or a facility’ is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation.”).

Recently, however, the United States District Court for the District of New Jersey explicitly held that a website is not a place of public accommodation under the NJLAD. *Demetro v. Nat’l Ass’n of Bunco Investigations*, 2019 WL 2612687 (D.N.J. June 25, 2019). There is more than meets the eye in this case, however.

## Demetro v. National Association of Bunco Investigations

In *Demetro v. National Association of Bunco Investigations*, plaintiff was a man of Romani ethnic descent who sued defendants, a nonprofit antifraud association for law enforcement officers and private investigators, for civil rights violations based on derogatory and bigoted content that NABI posted on its website about him. The United States District Court of the District of New Jersey dismissed some of the claims, including an alleged violation of the NJLAD's public accommodations protections. Specifically, with regard to the NJLAD's application to the Internet, it held that a website was not a place of public accommodation because: 1) a place of public accommodation must be a physical location, which a website is not; 2) the website did not engage in broad public solicitation; and 3) a website is dissimilar to the enumerated examples of places of public accommodation given in the NJLAD. 2019 WL 2612687, at \*14–15 (D.N.J. June 25, 2019) (“I hold that a ‘location’ in cyberspace, such as NABI’s website, is not a ‘place’ of public accommodation under the NJLAD.”).

While the holding of the federal district court is broad and sweeping, its rationale is rooted in the specific facts of this particular website and its relationship to the plaintiff. As such, it may not constitute the final word on this question of New Jersey law. First, New Jersey does not require its public accommodations to operate from fixed physical facilities. See *Nat’l Org. for Women v. Little League Baseball*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974); *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 627 F. Supp. 1381, 1387 (D.N.J. 1986), *rev’d on other grounds*, 806 F.2d 468 (3d Cir. 1986). The court analogized to the ADA’s public accommodations provisions, which the Third Circuit has held only applies to physical facilities, *id.* at 15, but this is not persuasive authority when there is New Jersey case

law interpreting the NJLAD on this issue. Second, much of the district court’s analysis relies on the fact that the defendants are an organization that only solicits membership narrowly from law enforcement and investigators, and its website similarly restricts access. *Id.* at \*14. Such a website may be similar to a private club, but it is not clear that this rationale would hold for a widely accessible site soliciting the business of the general public. Finally, it seems likely that if the court was considering a different type of website, like an online retailer of consumer goods or services, it might more readily see similarities with the NJLAD’s enumerated examples such as “any ... retail shop, store, establishment or concession dealing with goods or services of any kind.” N.J. Stat. Ann. § 10:5-5.

The court recognized, however, that NABI itself may qualify as a place of public accommodations under the NJLAD, even if its website on its own does not. *Demetro* at \*15-16. Had Demetro sought access to NABI’s website and been refused service in a discriminatory fashion, the court appears to allow that he may have had a viable claim (those were not the factual bases for his complaint). This analysis leaves open the possibility that a business operating a website may qualify as a place of public accommodations under the NJLAD and denying access to that business through its website could still qualify as a discriminatory practice. For example, if a social media company qualifies as a place of public accommodation, similar to Little League Baseball, then discriminatorily restricting access to that business through its online platform may violate the NJLAD.

Some claims remain in this case, which is ongoing, so it is unclear if the court’s rulings on the NJLAD will be appealed.

## NEW MEXICO

New Mexico’s public accommodations law applies to online entities.

The New Mexico Human Rights Act broadly defines places of public accommodation as “any establishment that provides or offers its services, facilities, accommodations or goods to the public.” N.M. Stat. Ann. § 28-1-2.

New Mexico prohibits discrimination in places of public accommodation based on race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap. N.M. Stat. Ann. § 28-1-7. There is a private right of action permitted. N.M. Stat. Ann. § 28-1-10.

In *Elane Photography v. Willock*, the Supreme Court of New Mexico affirmed a lower court’s finding that a commercial website constituted a place of public accommodation. 284 P.3d 428, 436 (N.M. App. 2012), aff’d, 309 P.3d 53 (N.M. 2013) (“The NMHRA was meant to reflect modern commercial life and expand protection from discrimination to include most

“The [Act] was meant to reflect modern commercial life and expand protection from discrimination to include most establishments that typically operate a business in public commerce.”

— *Elane Photography v. Willock*, 284 P.3d 428, 436 (N.M. App. 2012), aff’d, 309 P.3d 53 (N.M. 2013).

establishments that typically operate a business in public commerce.”).

## NEW YORK

New York’s public accommodations law applies to online entities.

The New York State Human Rights Law provides a long list of places of public accommodation, similar to the District of Columbia and New Jersey. It contains a broad catch-all category which includes “wholesale and retail stores and establishments dealing with goods or services of any kind.” N.Y. Exec. Law § 292.

New York prohibits discrimination in places of public accommodation based on race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status. N.Y. Exec. Law § 296. New York allows a private right of action, but only after administrative remedies are exhausted. N.Y. Exec. Law § 298.

New York courts have interpreted the definition of place of public accommodation liberally. *See, e.g., Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016) (“Over the years, the statutory definition has been expanded repeatedly, ‘provid[ing] a clear indication that the Legislature used the phrase place of public accommodation ‘in the broad sense of providing conveniences and services to the public’ and that it intended that the definition of place of accommodation should be interpreted liberally.”). The Court of Appeals of New York has also held New York’s law does not require a physical location. The term “place” is “a term of convenience, not limitation” and “public accommodations are customarily supplied at fixed places, but not necessarily so.” *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1203 (N.Y. 1983).

In *Andrews v. Blick Art Materials*, the court explicitly held that a website is a place of public accommodation. 268 F. Supp. 3d 381, 399 (E.D.N.Y. 2017). “New York’s broad reading of the term ‘place’ and the

presumption that the NYSHRL should be interpreted consistently with the ADA suggests a finding that [a website] is a ‘place of public accommodation’ under the NYSHRL.” *Id.* at 399.

## **NORTH CAROLINA**

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North Carolina’s public accommodations law does not protect any class other than persons with disabilities, AIDS/HIV status, lawful use of a lawful product when not working, and military status. N.C. General Stat. § 168A-1 to 168A-2.

## **NORTH DAKOTA**

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North Dakota broadly defines a place of public accommodation as “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.” N.D. Cent. Code Ann. § 14-02.4-02.

North Dakota prohibits discrimination in places of public accommodation based on race, color, religion, sex, national origin, age, physical, or mental disability, status with regard to marriage, or public assistance. N.D. Cent. Code Ann. § 14-02.4-01. A private right of action is permitted in North Dakota. N.D. Cent. Code Ann. § 14-02.4-19.

There is no relevant North Dakota case law regarding the interpretation of what a place of public accommodation constitutes. Given the broad and all-inclusive language of North Dakota’s statute, it is likely to apply to online entities.

## **OHIO**

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The Ohio Civil Rights Act defines a place of public accommodation as “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 of which the accommodations, advantages, facilities, or privileges are available to the public.” Ohio Rev. Code Ann. § 4112.01(A)(9).

Ohio prohibits discrimination in places of public accommodation based on race, color, religion, sex, military status, national origin, disability, age, or ancestry. Ohio Rev. Code Ann. § 4112.02(G). Ohio allows a private right of action. Ohio Rev. Code Ann. § 4112.99.

Ohio courts have held that the statute should be liberally construed when deciding what constitutes a place of public accommodation. “When determining the scope of the ‘public accommodations’ amendments to Chapter 4112, the commission, initially, and the courts, upon review, are to construe those statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation.” *Ohio Civil Rights Comm’n v. Lysyj*, 313 N.E.2d 3, 6 (1974).

Ohio’s case law is limited and its statutory language is not as broad as other states, but it still includes a generous catch-all provision, its case law says it is to be liberally construed, and it does not appear to have a physical facility limitation. Therefore, it is likely to apply to online entities.

## **OKLAHOMA**

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Oklahoma broadly defines a place of public accommodation as “any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public.” Okla. Stat. Ann. tit. 25, § 1401.

Oklahoma prohibits discrimination in places of public accommodation based on race, color, religion, sex, national origin, age, or disability. Okla. Stat. Ann. tit. 25, § 1402. There is no private right of action in Oklahoma.

There is no relevant caselaw regarding the interpretation of what a place of public accommodation constitutes in Oklahoma. Given the broad and all-inclusive language of Oklahoma’s statute, it is likely to apply to online entities.

## OREGON

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Oregon's public accommodations law applies to online entities.

Oregon has adopted a broad definition of a place of public accommodation. It holds that 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," is a place of public accommodation. Or. Rev. Stat. Ann. § 659A.400.

Oregon prohibits discrimination in places of public accommodation based on race, color, religion, sex, sexual orientation, national origin, marital status, gender identity or age. Or. Rev. Stat. Ann. § 659A.403; § 174.100. Oregon permits a private right of action. Or. Rev. Stat. Ann. § 659A.890.

The United States District Court of the District of Oregon held that Airbnb, an online platform for vacation lodging rentals, fell within the definition of a place of public accommodation because Airbnb is a service offered to the public. *Harrington v. Airbnb, Inc.*, 348 F. Supp. 3d 1085, 1093 (D. Or. 2018). "It is irrelevant that Airbnb does not itself directly rent or own the accommodations being rented out because what Airbnb provides to the public is the service of using its online platform to browse, locate, book, and pay for accommodations in private homes." *Id.*

## PENNSYLVANIA

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The Pennsylvania Human Relations Act defines "place of public accommodation" as "any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public, including but not limited to" a list of examples. 43 Pa. Stat. Ann. § 954.

Pennsylvania prohibits discrimination in places of public accommodation based on race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin, sexual orientation, or

gender identity. 43 Pa. Stat. Ann. § 953. There is no private right of action for public accommodation violations in Pennsylvania. Pa. Stat. Ann. tit. 43, § 959.

There is divergent case law in Pennsylvania regarding the definition of places of public accommodation. In 1972 in *Philadelphia Electric Company v. Pennsylvania Human Relations Commission*, the court expressly held that a place of public accommodation must be a physical location. 290 A.2d 699, 703 (Pa. 1972). In the following year, however, the Pennsylvania Supreme Court held that the language of the Act was meant to be liberally construed and could encompass non-listed entities. *Pennsylvania Human Rel. Commn. v. Alto-Reste Park Cemetery Ass'n*, 306 A.2d 881, 886 (Pa. 1973). Notably, both of these decisions occurred long before the advent of the Internet.

Because Pennsylvania lacks recent case law on these issues, it is unclear whether its statute would apply to online entities.

## RHODE ISLAND

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Rhode Island provides a non-exclusive list of places of public accommodation. 11 R.I. Gen. Laws Ann. § 11-24-3 ("A '[p]lace of public accommodation, resort, or amusement' . . . includes, but is not limited to . . ."). There is not a catch-all category and most of the given examples require physical facilities; however, the listed category of "retail stores and establishments" could be interpreted to apply to some online entities.

Rhode Island prohibits discrimination in places of public accommodation based on race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression. 11 R.I. Gen. Laws Ann. § 11-24-2. There is a private right of action permitted in Rhode Island. 11 R.I. Gen. Laws Ann. §§ 11-24-4; 28-5-24.1.

There is no relevant case law from Rhode Island regarding the interpretation of what constitutes a place of public accommodation.

## Public Accommodations & Private Clubs

Businesses and other entities typically need to offer their goods or services to the general public to qualify as public accommodations. Clubs that are distinctly private in nature are often carved out from most public accommodations laws and their anti-discrimination requirements. In general, the purpose of these exemptions is to protect freedom of association in religious, fraternal, social, or other non-commercial, non-public settings. Determining if an entity is public or private, however, is a more complex analysis than just an examination of its ownership or clientele. In many states, the exemption for private entities or clubs is explicitly written into the statute.

### Examples of Private Entity Exceptions

*Any dwelling as defined in § 41-1491, or any private club, or any place which is in its nature distinctly private is not a place of public accommodation.*

— **Ariz. Rev. Stat. Ann. § 41-1441.**

*[B]ut “place of public resort, accommodation, assemblage, or amusement” does not include:*

- (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*
- (B) Any private club or other establishment not in fact open to the public.*

— **Ark. Code Ann. § 16-123-102.**

*A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:*

- (A) Has 350 or more members;*
- (B) Serves meals on a regular basis; and*
- (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.*

— **D.C. Code Ann. § 2-1401.02**

### Private Entity Analysis, if Not Defined by Statute

If the statute is not explicit, courts look at a variety of factors to determine if an establishment is public or private. Courts generally examine criteria such as the selectivity of membership, the intent of founding the organization, if the organization is operated for-profit, if the organization engages in commercial activity or just expressive association, and if the organization broadly solicits new members.

In the context of online public accommodations, online businesses offering goods or services in a commercial context will almost always be public. But entities that are non-commercial and serve as hubs for religious, fraternal, or social association—such as private discussion groups or church websites—may often qualify as private. Case-by-case analysis of the totality of the circumstances is necessary.

Rhode Island’s statute is unlikely to apply to online entities because it does not include broadly inclusive language or a catch-all provision, and it lacks case law supporting a generous interpretation. The one exception could be online retail stores, which could be within the scope of the statute.

## SOUTH CAROLINA

South Carolina gives an exhaustive list of qualifying businesses, including hotels, restaurants, gas sta-

tions, hospitals, retail or wholesale establishments, and places of amusement, exhibition, recreation, or entertainment. S.C. Code Ann. § 45-9-10. The statute also only defines an entity as a place of public accommodation if it is supported by state action. “Supported by state action” means “the licensing or permitting of any establishment or any agent of an establishment listed above . . . which has or must have a license or permit . . . to lawfully operate.” *Id.*

South Carolina prohibits discrimination in places of

public accommodation based on race, religion, color, sex, age, national origin, or disability. S.C. Code Ann. § 1-13-20. There is a private right of action for a public accommodations violation, but only after administrative remedies have been pursued. S.C. Code Ann. § 45-9-100; -110.

There is no relevant caselaw from South Carolina regarding the interpretation of what constitutes a place of public accommodation.

South Carolina’s public accommodations law is unlikely to apply to online entities due to its narrow scope. However, it could be interpreted to include online retail or wholesale stores, as well as online entertainment or exhibition venues. But even if it did, the licensing requirement under the “state action” clause means that many such businesses would not qualify and be subject to this law.

## **SOUTH DAKOTA**

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South Dakota broadly defines a place of public accommodation as “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.” S.D. Codified Laws § 20-13-1.

South Dakota prohibits discrimination in places of public accommodation based on race, color, creed, religion, sex, ancestry, disability, or national origin. S.D. Codified Laws § 20-13-23. There is a private right of action in South Dakota. S.D. Codified Laws § 20-13-35.1.

There is no relevant case law from South Dakota regarding the interpretation of what constitutes a place of public accommodation. Given the broad and all-inclusive language of South Dakota’s statute, it is likely to apply to online entities.

## **TENNESSEE**

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Under the Tennessee Human Rights Act, a place of public accommodation is defined as “any place, store

or other establishment, either licensed or unlicensed, that supplies goods or services to the 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.” Tenn. Code Ann. § 4-21-102.

Tennessee prohibits discrimination in places of public accommodation based on race, creed, color, religion, sex, age or national origin. Tenn. Code Ann. § 4-21-501. There is a private right of action in Tennessee. Tenn. Code Ann. § 4-21-311.

In *Arnett v. Domino’s Pizza*, a Tennessee court held that the pizza delivery business was a place of public accommodation under the THRA despite the fact that food was not consumed on the premises. 124 S.W.3d 529 (Tenn. Ct. App. 2003). In its ruling, the court emphasized that the intent of the statute was to prohibit discrimination and concluded that as an establishment which supplies goods and services to the public, Domino’s qualified as a place of public accommodation. *Id.* at 539.

Because Tennessee’s statutory language is broad and all-inclusive, combined with the reasoning of *Arnett*, its public accommodations law is likely to apply to online entities.

## **TEXAS**

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Texas’s public accommodation law does not protect any class other than persons with disabilities. Tex. Hum. Res. Code Ann. § 121.003.

## **UTAH**

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The Utah Civil Rights Act prohibits discrimination “in all business establishments and in all places of public accommodation, and by all enterprises regulated by the state of every kind whatsoever.” Utah Code Ann. § 13-7-3. The Act defines a place of public accommodation as “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 or charge.” Utah Code Ann. § 13-7-2.

Utah also takes the additional step of prohibiting discrimination in “enterprises regulated by the state.” Utah Code Ann. § 13-7-1.

Utah prohibits discrimination in places of public accommodation based on race, color, sex, pregnancy, religion, ancestry or national origin. Utah Code Ann. § 13-7-3. Utah permits a private right of action for public accommodation claims. Utah Code Ann. § 13-7-4.

The UCRA itself states that it should be liberally construed, and this has been reaffirmed by Utah courts. Utah Code Ann. § 13-7-1; *Elks Lodges No. 719 & No. 2021 v. Dept. of Alcoholic Bev. Control*, 905 P.2d 1189, 1204 (Utah 1995) (“If reasonable minds may differ about the meaning or interpretation of a particular phrase, section 13-7-1 compels us to err toward over-protection of the enlisted classes rather than toward under-protection.”).

Utah courts have also applied the language of “all enterprises regulated by the state of any kind whatsoever” in a generous fashion. In *Beynon v. St. George-Dixie Lodge No. 1743*, the Supreme Court of Utah held that a private club was still subject to the Utah Civil Rights Act, even though it was not a “place of public accommodation,” because it was a business regulated by the state through the club’s liquor license. 854 P.2d 513, 516–17 (Utah 1993) (“Utah’s Act covers more than public accommodations; it also applies to ‘all enterprises regulated by the state of any kind whatsoever.’ . . . [T]he Elks may not avail itself of the benefits of a liquor license and the license’s concomitant state regulation without complying with the legislature’s mandate to end discrimination in certain regulated enterprises.”).

Based on the broad and all-inclusive statutory language and the state’s case law, Utah’s public accommodations law is likely to apply to online entities.

## VERMONT

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The Vermont Fair Housing and Public Accommodations Act defines places of public accommodation. 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.” Vt. Stat. Ann. tit. 9, § 4501.

Vermont prohibits discrimination in places of public accommodation based on race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity. Vt. Stat. Ann. tit. 9, § 4502. A private right of action is allowed. Vt. Stat. Ann. tit. 9, § 4506.

Vermont courts have held that “[a]s a remedial statute, [Vermont’s public accommodation law] must be liberally construed in order to suppress the evil and advance the remedy intended by the Legislature.” *Human Rights Commn. v. Benv. and Protective Or. of Elks of U.S.*, 839 A.2d 576, 582 (Vt. 2003). Furthermore, Vermont courts have held that organizations without a physical location can still be considered places of public accommodation. *Id.* at 586 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 611 (1984)).

Based on the broad statutory language and the case law holding that there is no physicality requirement, Vermont’s public accommodations law is likely to apply to online entities.

## VIRGINIA

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The Virginia Human Rights Act, Va. Code §§ 2.2-3900 *et seq.*, condemns discriminatory practices in a policy statement, but does not provide any substantive legal rights beyond those provided by other laws. “Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures, and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.” Va. Code § 2.2-3903.



## WASHINGTON

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The Washington Law Against Discrimination (WLAD) provides an illustrative list of places of public accommodation, expressly stating that the list is not exhaustive. Wash. Rev. Code Ann. § 49.60.040. The list contains several broad categories that may be interpreted to include online entities, including the “use of any place or facilities”:

- ▶ “For the sale of goods, merchandise, services, or personal property.”
- ▶ “For the rendering of personal services.”
- ▶ “Where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge.”
- ▶ “Where the public gathers, congregates, or assembles for amusement, recreation, or public purposes.”

Washington prohibits discrimination in places of public accommodation based on 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. Wash. Rev. Code Ann. § 49.60.215. Washington permits a private right of action for public accommodation violations. Wash. Rev. Code Ann. § 49.60.340.

There is conflicting caselaw in Washington concerning places of public accommodation. In *Fell v. Spokane Transit Authority*, the Washington Supreme Court interpreted the state public accommodation statute as requiring a physical place. 911 P.2d 1319, 1329 (Wash. 1996) (en banc) (“The statute speaks to places and facilities. A service like paratransit service is not a place or facility.”). This seems to be inconsistent with a more recent decision by a federal district court *Long v. Live Nation Worldwide*, where the U.S. District Court for the Western District of Washington found that a ticket sales website violated WLAD when it prevented a disabled user from identifying

which stadium seats were wheelchair accessible, which prevented the plaintiff from attending a football game. 16-cv-1961, 2018 WL 3533338 (W.D. Wash. 2018). The court treated the inaccessibility of the website as an impediment to the plaintiff’s equal right to access the stadium, holding that WLAD was equivalent to the ADA on this issue.

More generally, Washington has interpreted “place of public accommodation” to be broadly defined and liberally construed by the courts. *E.g.*, *Fraternal Or. of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Or. of Eagles*, 59 P.3d 655, 671 (Wash. 2002) (“The Legislature mandated not only a liberal interpretation of the WLAD, it also intended a liberal reading of what constitutes a ‘public accommodation.’”).

Because of the conflicting case law, it is unclear whether Washington’s public accommodations statute applies generally to online entities.

## WEST VIRGINIA

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West Virginia defines places of public accommodation as “any establishment or person . . . which offers its services, goods, facilities or accommodations to the general public.” W. Va. Code Ann. § 5-11-3. West Virginia permits a private right of action, however administrative remedies must be pursued first. W. Va. Code Ann. § 5-11-13.

West Virginia prohibits discrimination in places of public accommodation based on race, religion, color, national origin, ancestry, sex, age, blindness or disability. W. Va. Code Ann. § 5-11-2.

West Virginia courts have held that their Human Rights Act is to be liberally construed. *E.g.*, *Israel by Israel v. W. Virginia Secondary Schools Activities Commn.*, 388 S.E.2d 480, 488 (W. Va. 1989). In fact, the Supreme Court of West Virginia has held that an organization without a public facility can still be a place of public accommodation. *Id.* at 489 (“[W]e reject the [ ] argument that because the general public does not participate in interscholastic sports and because it does not operate any facility that is

open to the public, it does not fall within the public accommodations definition.”).

Because of the broad and all-inclusive definition and the lack of a physicality requirement, West Virginia’s public accommodations law is likely to apply to online entities.

## **WISCONSIN**

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Wisconsin defines places of public accommodation “to be interpreted broadly to include, but not be limited to, places of business or recreation,” a list of additional covered entities, and “any place where accommodations, amusement, goods, or services are available either free or for a consideration.” Wis. Stat. Ann. § 106.52

Wisconsin prohibits discrimination in places of public accommodation based on sex, race, color, creed, disability, sexual orientation, national origin or ancestry. Wis. Stat. Ann. § 106.52. There is a private right of action. *Id.*

There is no relevant case law regarding the interpretation of “place of public accommodation” from Wisconsin. Consequently, it is unclear if the statute would apply to online entities.

## **WYOMING**

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Wyoming broadly defines places of public accommodation as “all places or agencies which are public in nature, or which invite the patronage of the public.” Wyo. Stat. Ann. § 6-9-101.

Wyoming prohibits discrimination in places of public accommodation based on race, religion, color, sex or national origin. Wyo. Stat. Ann. § 6-9-101. There is no private right of action in Wyoming. *See* Wyo. Stat. Ann. § 6-9-102.

There is no relevant Wyoming case law regarding the interpretation of “place of public accommodation.” Consequently, it is unclear whether Wyoming’s public accommodations law applies to online entities.

## About this report

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Comments, corrections, questions, and other concerns about the report? Please contact David Brody, [dbrody@lawyerscommittee.org](mailto:dbrody@lawyerscommittee.org), or Sean Bickford, [sbickford@lawyerscommittee.org](mailto:sbickford@lawyerscommittee.org). This is Version 1.0 of this report. We will incorporate updates and revisions into future versions.

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### **Sean Bickford**

Sean Bickford is the Legal Fellow for Privacy and Technology at the Lawyers' Committee. He is an honors graduate from the University of North Carolina School of Law, where he was a member of the North Carolina Law Review, served as President of the ACLU student chapter, and founded the Information & Privacy Law Society. Before joining the Lawyers' Committee, he worked at the Future of Privacy Forum and the UNC Center for Civil Rights.



The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity —work that continues to be vital today.

The Lawyers' Committee's digital justice team works to counter data-driven discrimination, online white supremacy, and online voter suppression. Hate incidents are surging across the United States, devastating individuals and entire communities. The James Byrd, Jr. Center to Stop Hate at the Lawyers' Committee seeks to strengthen the capacity of community leaders, law enforcement, and organizations around the country to combat hate. Those experiencing hate incidents may visit [www.8449nohate.org](http://www.8449nohate.org) or call our support hotline, 1-844-9-NO-HATE.

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