



Guidance on the New Jersey Law Against Discrimination **Following the U.S. Supreme Court's Decision in *303 Creative LLC v. Elenis***

This enforcement guidance¹ explains how the New Jersey Office of the Attorney General and the Division on Civil Rights (DCR) will apply the New Jersey Law Against Discrimination (LAD) to prohibit discrimination by places of public accommodation following the U.S. Supreme Court's recent ruling in [*303 Creative LLC v. Elenis*](#). The LAD prohibits places of public accommodation—that is, places open to the public—from discriminating on the basis of actual or perceived sexual orientation, gender, gender identity, gender expression, race, color, national origin, ancestry, religion, disability, and other protected characteristics. The ruling in *303 Creative* does not change how the LAD applies to the vast majority of public accommodations across the State, and DCR remains firmly committed to enforcing the LAD and safeguarding the rights of all New Jerseyans.

In *303 Creative*, the U.S. Supreme Court considered whether the First Amendment barred the application of a Colorado anti-discrimination statute, which prohibited places of public accommodation from discriminating on the basis of sexual orientation, to a web designer who intended to make customized websites for weddings but not to do so for same-sex weddings. The parties agreed that the web designer's websites were "original" and were "customized and tailored" for each customer, and that the websites the business designed were "expressive" and expressed the designer's own speech and message regarding her clients' weddings. The parties also stipulated that the web designer was willing to work with all people regardless of their protected characteristics and, in particular, would create custom graphics and websites for clients of any sexual orientation.² Based on those specific facts and stipulations, the Supreme Court held that the web designer had a First Amendment right not to make her customized website designs for same-sex weddings.

The Supreme Court's ruling does not change how the LAD applies to the vast majority of businesses and vendors that are open to the public in the State. The LAD prohibits places of public accommodation from unlawfully discriminating against patrons or prospective patrons—that is,

¹ The purpose of this guidance document is to clarify and explain DCR's understanding of existing legal requirements in order to facilitate compliance with the LAD. This guidance document does not impose any new or additional requirements that are not included in the LAD, does not establish any rights or obligations for any person, and will not be enforced by DCR as a substitute for enforcement of the LAD. This document does not provide legal advice and should not be treated as providing legal advice. Owners of places of public accommodation and others with questions about the LAD are encouraged to speak with a qualified attorney to address their specific questions.

² *303 Creative LLC v. Elenis*, No. 21-476, 2023 WL 4277208, at *1 (U.S. June 30, 2023).

denying them full or equal accommodations, advantages, facilities, privileges, or services—on the basis of actual or perceived sexual orientation, gender, gender identity, gender expression, race, color, national origin, ancestry, religion, disability, and other protected characteristics.³ This means that a place of public accommodation cannot refuse to serve a prospective patron, or treat a patron or prospective patron differently, based on a protected characteristic. The LAD also prohibits places of public accommodation from publishing, circulating, or displaying any communication or advertisement stating that the public accommodation will discriminate against or refuse to serve patrons based on a protected characteristic.⁴ In the overwhelming majority of cases, these prohibitions will continue to apply as they did before the Supreme Court’s decision.

The Supreme Court’s ruling exempts from anti-discrimination laws like the LAD only a narrow set of services offered by some places of public accommodation. In order to assert an exemption, at a minimum, a public accommodation must establish that (1) its creative services are “original” and “customized and tailored” for each customer; (2) the creation is “expressive” and expresses the creator’s own First Amendment-protected speech; and (3) the public accommodation’s refusal to provide the creative service to a customer is based on the message it conveys, not the customer’s identity or protected characteristic standing alone.⁵ As a practical matter, many of the products or services that meet that narrow definition—for example, a documentary film created by a movie director—are created by artists or businesses that fall outside the LAD’s definition of a public accommodation already. Moreover, because the overwhelming majority of places of public accommodation do not provide “customized,” “original,” and “expressive” products or services to the public that express the creator’s own speech, the Court’s decision does not exempt most places of public accommodation—or most goods and services—from the LAD. That is why, as the Court itself acknowledged, state civil rights law still applies to “a vast array of businesses” selling “innumerable goods and services.”⁶

First, public accommodations are not exempt from civil rights laws when they offer or sell products or services that are not “customized” or “original.” A grocery store, department store, or hotel that sells products off its shelves or makes its services and facilities available to all guests does not offer a “customized” or “original” product for customers. These places of public accommodation cannot refuse to serve a prospective customer or treat a customer differently because of their protected characteristic. Nor can their employees: An employee of a public accommodation cannot discriminate against a patron based on a protected characteristic, even if another employee is willing to serve that patron.

Second, even where a public accommodation does in fact offer “customized” products or services, it may be exempt from the LAD only where the customized products or services are “expressive” and reflect the designer’s own First Amendment-protected speech. Indeed, as the Court explained, the “typical application of a public accommodation law requiring an ordinary, non-expressive

³ N.J.S.A. 10:5-12(f). Places of public accommodation are also prohibited from engaging in harassment that is based on LAD-protected characteristics and that creates a hostile environment, and public accommodations must take reasonable steps to stop such harassment if they know or should have known about it. *Id.* 303 *Creative* does not affect such claims. Nor does it impact discrimination claims in the housing and employment contexts.

⁴ *Id.*

⁵ 303 *Creative*, 2023 WL 4277208, at *8-*9, *11.

⁶ *Id.* at *14.

business to serve all customers or consider all applicants” remains plainly lawful.⁷ For example, the following services, while sometimes customized, do not generally express the vendor’s own speech and are, therefore, not exempt from the LAD:

- A web platform that allows customers to design their own wedding websites and create their own content cannot refuse to serve LGBTQIA+ patrons.
- A caterer that customizes a menu for the events it caters cannot refuse to cater a meal for a same-sex wedding anniversary party.
- A hair salon cannot refuse to provide a customized haircut or create a customized hairstyle for a customer based on the customer’s gender identity.
- An event planner cannot refuse to work with a patron based on the patron’s race.

Finally, even where a creative professional offers an original, customized service or product that is “expressive” and expresses the creator’s own message, the Court has made clear that the creative professional is not automatically exempt from anti-discrimination laws like the LAD. If the business is a place of public accommodation, it still must offer the same message to all comers regardless of their protected characteristics. That follows from *303 Creative* itself, which exempts from civil rights enforcement certain refusals to provide specific products or services based on the message they contain, but not based on the customer’s identity or protected characteristic standing alone.⁸ Thus, even when a public accommodation creates an original, customized, expressive design that conveys a particular message, the public accommodation cannot refuse to create that same message for a different customer based on that customer’s protected characteristic

DCR will continue to enforce the LAD’s protections against discrimination in places of public accommodation, employment, and housing. To find out more about the protections the LAD provides, go to NJCivilRights.gov. Under the LAD, places of public accommodation are required to display the updated LAD [public accommodation discrimination poster](#) in locations easily visible to all persons patronizing or entering the place of public accommodation. DCR also has several [resources](#) that provide an overview of the LAD, including the following fact sheets that provide an overview of the LAD’s protections in public accommodations:

- [The New Jersey Law Against Discrimination](#)
- [Discrimination in Public Accommodations Based on Gender Identity or Expression](#)
- [Race Discrimination in Places of Public Accommodation](#)
- [Sexual Harassment in Places of Public Accommodation](#)

If you believe you have faced discrimination in violation of the LAD, you can file a complaint with DCR by visiting bias.njcivilrights.gov or calling 1-833-NJDCR4U (833-653-2748).

⁷ *Id.*

⁸ *Id.* at *12.