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BANS ON POLITICAL DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION AND HOUSING

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INTRODUCTION

In several major cities and counties, in some territories, perhaps in the whole states of California and Montana, and to a small extent in Minnesota, private businesses may not discriminate against patrons based on certain kinds of political activities. In most of these jurisdictions (plus in South Carolina) it's also illegal to discriminate based on political activities in housing (and sometimes in commercial real estate transactions). Some of these bans are narrow, just protecting the decisions to belong to or support a political party.

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Others are broader, applying to political advocacy more generally, including political advocacy on the business's premises.

I don't know whether these rules are sound in essentially protecting political affiliation and political expression like how most antidiscrimination laws protect religious affiliation and religious expression. But I do believe they are generally constitutionally permissible in many situations, given that property owners generally don't have a First Amendment right to exclude speakers or speech they dislike, [1] and given the broad acceptance of bans on discrimination based on religious affiliation. And I think it's helpful to gather these rules so as to better understand the options that legislators have chosen with regard to this question, especially when evaluating similar new proposals.[2] This is particularly so given the interest in using public accommodations law as a model for limiting social media platforms' ability to block users based on their speech or political ideology.[3]

It's also helpful to see these rules when considering the implications of certain readings of public accommodation law more broadly. Say, for instance, that courts conclude that a wedding photographer has no First Amendment right to refuse to photograph a same-sex wedding in a state with a ban on sexual orientation discrimination by public accommodations. A photographer would then have no First Amendment right to refuse to photograph a Nazi or Communist event in a jurisdiction with a ban on political

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[1] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1979); Turner Broadcasting System v. FCC, 520 U.S. 180 (1994); Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006).

[2] *See, e.g.*, 2021 Minn. H.F. 1927; 2021 Haw. H.B. 852; 2021 Iowa H.S.B. 67.

[3] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225–26 (2021) (Thomas, J., concurring); *cf.* Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30 (D.D.C. 2019), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020) (holding that platforms weren't covered by D.C.'s ban on political affiliation discrimination, because the D.C. ban applies only to "physical places").

discrimination by public accommodations. Indeed, briefs and an opinion in such cases have drawn this analogy.[4]

Here, then, is the list of such bans that I have found, to accompany an older article of mine on laws banning political discrimination by employers.[5] I arrange these roughly in order from narrowest to broadest, but only roughly; the scope of some of them is hard to determine, and the scope of others doesn't fall on a neat spectrum.

I. POLITICAL PARTY MEMBERSHIP: D.C., FT. LAUDERDALE, BROWARD COUNTY (FLA.)

D.C., Ft. Lauderdale, and Broward County (Fla.) (which contains Ft. Lauderdale) ban discrimination based on political party membership, both as to public accommodations and as to housing.[6] The D.C. law also applies to "commercial space."[7]

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[4] *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740, 756 (8th Cir. 2019); Brief of Amicus Curiae Cato Institute, Eugene Volokh, and Dale Carpenter in Support of Petitioner, No. 13-585 (U.S. Dec. 13, 2013), *reprinted in* Eugene Volokh, *Amicus Curiae Brief:* Elane Photography, LLC v. Willock, 8 NYU J.L. & LIBERTY 116, 127 (2013); Appellants' Opening Brief, 303 Creative LLC v. Elenis, 2020 WL 417875, *39 (10th Cir. Jan. 22, 2020).

[5] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation,* 16 TEX. REV. OF L. & POL. 295 (2012). Note that prohibitions on discrimination based on "creed" only ban discrimination based on religious beliefs, not political beliefs. *See* Rasmussen v. Glass, 498 N.W.2d 508, 512 (Minn. Ct. App. 1993); Riste v. Eastern Washington Bible Camp, Inc., 605 P.2d 1294, 1295 (Wash. Ct. App. 1980), *superseded by statute as to other matters*, McCausland v. Bankers Life Ins. Co. of Nebraska, 757 P.2d 941, 943 n.2 (Wash. 1988); Augustine v. Anti–Defamation League of B'nai B'rith, 249 N.W.2d 547, 550–51 (Wis. 1977); Shuchter v. Division on Civil Rights, 285 A.2d 42, 42 (N.J. App. Div. 1971); Cummings v. Weinfeld, 30 N.Y.S.2d 36, 37 (Sup. Ct. 1941).

[6] D.C. CODE §§ 2-1401.02(25), -1402.31(a); FT. LAUDERDALE (FLA.) CODE OF ORDINANCES §§ 29-2, -16, -21; BROWARD COUNTY (FLA.) CODE OF ORDINANCES §§ 16½-3, -34. There are similar ordinances in a few small towns: a suburb of Madison, and three Colorado resort towns. SUN PRAIRIE (WISC.) CODE OF ORDINANCES §§ 9.21.020, .030; CRESTED BUTTE (COLO.) MUN. CODE §§ 10-11-20, -30; ASPEN (COLO.) MUN. CODE § 15.04.570(a)(1), (b); TELLURIDE (COLO.) CODE § 10-6-10, -20.

[7] D.C. CODE §§ 2-1402.01, -1402.21(a).

Blodgett v. University Club reaffirmed the narrowness of the D.C. statute, holding that it doesn't apply to a club's ejecting a member because of his general political beliefs (as opposed to party affiliation).[8]

Arboleda v. Pines Master Management, Inc. (Broward County) concluded that bans on all political activity on a particular premises—in that case, bans on political uses of a condominium clubhouse—don't constitute political affiliation discrimination.[9] (The Broward County ordinance applies to housing as much as to public accommodations.)

II. "INVOLVEMENT" IN CANDIDATE CAMPAIGN GROUPS OR LOBBYING ORGANIZATIONS: MIAMI BEACH

Miami Beach (Fla.) bans discrimination in public accommodations and housing based on "[p]olitical group involvement," defined as "[1] ideological support of or opposition to, membership in, or donation of value [2] to an organization or person [3] which is engaged in supporting or opposing candidates for public office or influencing or lobbying any incumbent holder of public office."[10]

III. "POLITICAL AFFILIATION," WITH NO EXPRESS DEFINITION: CALIFORNIA, V.I., SHREVEPORT, WAYNE COUNTY (MICH.), ORANGE COUNTY (N.C.)

The Virgin Islands, Shreveport (La.), and Wayne County (Mich.) (which contains Detroit, and thus more than 15% of Michigan's

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[8] 930 A.2d 210, 221 (D.C. 2007).

[9] Notice of Dismissal, Arboleda v. Pines Master Management, Inc., No. HOF 1086-03-19 (Broward County Prof. Stds./Human Rts. Sec. Mar. 17, 2020); Final Investigative Report, *id.* (Mar. 13, 2020).

[10] MIAMI BEACH (FLA.) CODE OF ORDINANCES §§ 62-31, -87, -88; *see also* PINECREST (FLA.) CODE OF ORDINANCES §§ 16-92, -105.

population) ban discrimination in public accommodation and housing based on "political affiliation," without defining the term.[11] Orange County (N.C.) (in the Durham area) similarly bans discrimination in public accommodation based on "political affiliation."

In the related area of prohibitions on public employment discrimination based on political affiliation, courts have held that "[t]he term 'political affiliation' includes not only partisan political interests and concerns, but also beliefs and commitments,"[12] and refers "to commonality of political purpose and support, not political party membership."[13]

The California public accommodation statute doesn't specifically list political affiliation as a forbidden basis for discriminating in public accommodations or housing, but the California Supreme Court has read it as generally barring a wide range of "arbitrary discrimination," including—though in dictum—political affiliation discrimination:

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[11] V.I. STATS. tit. 10 § 64(3); ORANGE COUNTY (N.C.) CODE OF ORDINANCES § 12-54; SHREVEPORT (LA.) CODE OF ORDINANCES §§ 39-1, -2, -3; WAYNE COUNTY (MICH.) CODE OF ORDINANCES §§ 55-6, -10, -11; *see also* VERONA (WISC.) CODE OF ORDINANCES §§ 11-7-1, -4 (Madison suburb, forbidding discrimination based on "political alienation," almost certainly intended to refer to "political affiliation").

[12] Feick v. County of Monroe, 229 Mich. App. 335, 341 (1998); Monks v. Marlinga, 732 F. Supp. 749, 753 n.2 (E.D. Mich. 1990), *aff'd*, 923 F.2d 423 (6th Cir. 1991); *see also* Barry v. Moran, 661 F.3d 696, 703, 708 (1st Cir. 2011) (treating discrimination based on "political affiliation" as discrimination based on "association or support for a particular party, candidate or cause" or stemming from "conflict concerning the conduct of government, public policy or public controversies," and not limiting "political affiliation" to association with a "political group, party or faction"); Aiellos v. Zisa, No. CIV.A. 09-3076, 2009 WL 3424190, *7 (D.N.J. Oct. 20, 2009) (defining "political affiliation" as including "political affiliation with, for example, a candidate or a cause or a political position on a petition or referendum" and not just "affiliation with a political party").

[13] Smith v. Sushka, 117 F.3d 965, 970 n.6 (6th Cir. 1997); McCloud v. Testa, 97 F.3d 1536, 1549 (6th Cir. 1996); Williams v. City of River Rouge, 909 F.2d 151, 153 n.4 (6th Cir. 1990).

> Under the [Unruh Act], an individual who has [not violated any reasonable rules regulating the conduct of patrons or tenants] cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group. Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, *political affiliation*, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.[14]

An earlier decision likewise stated that, under the Unruh Act, a shopping center couldn't exclude prospective customers "who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union."[15]

IV. "POLITICAL AFFILIATION OR BELIEF": LANSING

Lansing (Mich.) bans discrimination based in public accommodations and housing on "political affiliation or belief," with no express definition.[16] This covers beliefs about politics that go

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[14] Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 117 (Cal. 1982) (emphasis added); David Ferrell, *4 Ejected From Cafe for Wearing Nazi Pins Win Civil Rights Case*, L.A. TIMES, Mar. 11, 1988. *But see* Williams v. City of Bakersfield, No. 1:14-CV-01955 JLT, 2015 WL 1916327 (E.D. Cal. Apr. 27, 2015) (stating that "the Unruh Civil Rights Act does not protect against discrimination based upon political affiliation or the exercise of constitutional rights," and not discussing the statement from *Marina Point*); Kenney v. City of San Diego, No. 13CV248-WQH-DHB, 2013 WL 5346813, *3 (S.D. Cal. Sept. 20, 2013) (agreeing with plaintiff's concession on that point, again without discussing the statement from *Marina Point*).

[15] *In re* Cox, 3 Cal. 3d 205, 217–18 (1970); *see also* McCalden v. Cal. Libr. Ass'n, 955 F.2d 1214, 1221 (9th Cir. 1990) (treating the *Cox* formulation as continuing to be good law), *superseded by rule as to other matters*, Harmston v. City & Cty. of San Francisco, 627 F.3d 1273, 1279–80 (9th Cir. 2010).

[16] LANSING (MICH.) CODE OF ORDINANCES §§ 297.02, .04.

beyond electoral politics—in the related area of prohibitions on public employment discrimination based on political belief, "political beliefs" has been defined to include any "matter of public concern as to how government should be conducted."[17]

V. "POLITICAL IDEAS": P.R., POSSIBLY MONTANA

Puerto Rico makes it both civilly actionable and a misdemeanor to discriminate in public accommodations or real estate transactions (with no limitation to housing) based on "political ideas."[18] Again, in the related area of prohibitions on public employment discrimination based on political ideas, "political ideas" has been defined to include any "matter of public concern as to how government should be conducted."[19]

The Montana Constitution provides,

> Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[20]

A Montana statute defines "civil right" to include "the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement"; that statute only applies this to "discrimination because of race, creed, religion, color, sex, physical or mental

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[17] Taliaferro v. State, 764 P.2d 860, 865 (Mont. 1988).

[18] P.R. STATS. tit. 1 § 13, tit. 33 § 4819; Olmo v. Young & Rubicam of P.R., Inc. (P.R. Mar. 10, 1981) 1981 WL 176523 [110 D.P.R. 740] (treating tit. 1, § 13 as creating a civil cause of action).

[19] Taliaferro v. State, 764 P.2d 860, 865 (Mont. 1988).

[20] MONT. CONST. art. II, § 4.

disability, age, or national origin,"[21] but the Montana Constitution appears to apply that to "political . . . ideas" as well.

VI. "POLITICAL OPINION," EXPRESSLY INCLUDING A BROAD RANGE OF VIEWS: MARYLAND COUNTIES

Harford, Howard, and Prince George's Counties (Md.), which include over 20% of the state's population, ban discrimination in public accommodations and housing based on "political opinion," defined (with immaterial variation among the ordinances) as "the opinions of persons relating to government, or the conduct of government; or related to political parties authorized to participate in primary elections in the State."[22]

VII. "ACTIVITIES OF A POLITICAL NATURE": CHAMPAIGN-URBANA

Champaign and Urbana (Ill.), home of the main University of Illinois campus, ban discrimination in public accommodations and real estate (both housing and commercial space) based on "activities of a political nature."[23]

It's not clear whether this covers just election-related activities or all activities related to the spread of political ideas more broadly. But it appears to cover political speech (e.g., wearing a MAGA hat or a Socialist Party T-shirt) on a business's property and not just general involvement in a group.

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[21] MONT. CODE ANN. § 49-1-102(1).

[22] HARFORD COUNTY (MD.) CODE OF ORDINANCES §§ 95-3, -4, -6; HOWARD COUNTY (MD.) CODE OF ORDINANCES §§ 12.201, .207, .210; PRINCE GEORGE'S COUNTY (MD.) CODE OF ORDINANCES §§ 2-186(a)(3), (15), -220.

[23] CHAMPAIGN (ILL.) CODE OF ORDINANCES §§ 17-3, -56, -71; URBANA (ILL.) CODE OF ORDINANCES § 12-39, -63, -64.

VIII. POLITICAL BELIEFS, INCLUDING SPEECH: ANN ARBOR & MADISON

Two other prominent Midwestern college towns, Ann Arbor (Mich.) and Madison (Wisc.), ban discrimination based on "political beliefs," defined as "opinion, whether or not manifested in speech or association, concerning the social, economic, and governmental structure of society and its institutions," "cover[ing] all political beliefs, the consideration of which is not preempted by state, federal or local law," except "political beliefs that interfere or threaten to interfere with his or her job performance."[24]

It's not clear whether the "job performance" language, which appears in the definition of "political beliefs" that governs both discrimination in employment and discrimination in public accommodations, would be adapted to public accommodations, or rejected as inapplicable there.

IX. POLITICAL IDEOLOGY, INCLUDING SPEECH: SEATTLE

Seattle (Wash.) bans discrimination based on "political ideology," defined as:

> any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities,

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[24] ANN ARBOR (MICH.). CODE OF ORDINANCES §§ 9:151–:153; MADISON (WISC.) MUN. CODE §§ 39.03(1), (4), (5); *see also* LA CROSSE (WISC.) CODE OF ORDINANCES §§ 22-20, -25, -26 ("political activity," defined as "conduct which is generally protected by the First Amendment to the United States Constitution relating to government, the conduct of government, or concerned with the making of governmental policy and which is not preempted by State or Federal law"); *cf.* Wild v. Coopers Tavern, No. 20203078, at 2, 6 (Madison Eq. Opp. Comm'n Mar. 25, 2021) (considering a claim of discrimination against a woman because she had been posting "We Support our Madison Police" signs nearby, and rejecting it on the grounds that there was not sufficient evidence that the woman was actually treated differently because of her activity).

> whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not cause substantial and material disruption of the property rights of the provider of a place of public accommodation.[25]

The "conduct" "reasonably related to political ideology" language clearly covers displaying political messages while patronizing a business (e.g., wearing a "Make America Great Again" cap[26]). But it's uncertain whether:

(a) a business may prohibit wearing clothes bearing messages that offend employees or fellow patrons, on the theory that such offense is "substantial and material disruption" of the business's "property rights";

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[25] SEATTLE MUN. CODE §§ 14.06.020–.030, .08.020–.030; *see* Jason Rantz, *Seattle Bar Tried to Deny Service to Republicans Celebrating Kavanaugh*, KTTH-770 (Oct. 8, 2018, 10:42 AM), https://perma.cc/LPF5-ZL8K (discussing incident in which a bar at first refused to allow a political group to gather, but then apparently changed its mind, possibly because of a threat of litigation under the Seattle law); *cf.* Nate Christensen, *A Gym Banned a White Supremacist, but Seattle Law Is on His Side*, CROSSCUT, Feb. 14, 2018, https://crosscut.com/2018/02/a-gym-banned-a-white-nationalist-but-seattle-law-is-on-his-side; Birkeland v. City of Seattle's Seattle City Light, no. 2020-01281-CIE, at 15 (Seattle Office for Civ. Rts. June 9, 2021) (concluding that "political ideology" could cover beliefs such as support for renewable energy use by government entities, though concluding that plaintiff hadn't shown he was discriminated against based on those beliefs); Tsimerman v. Dep't of Fin. & Admin., no. 2016-00270-AC, at 5 (Seattle Office for Civ. Rts. Dec. 30, 2016) (likewise as to membership in a group called Stand Up America).

[26] *See* Favour v. Petco Animal Supplies Stores, no. 2020-01217-AC, at 7 (Seattle Office for Civ. Rts. Oct. 23, 2020) (ultimately holding that the plaintiff was discriminated against not based on his wearing the hat, but because he became belligerent while trying to return a dead pet fish); Hu v. Coury Restaurants, Inc., no. 18-01046-AC (Seattle Office for Civ. Rts. Mar. 29, 2019) (ultimately holding that the plaintiff was discriminated against not based on his wearing the hat, but because he became belligerent when an employee expressed some displeasure with his wearing the hat).

(b) the business may reject patrons wearing such clothes only if it can show more than mere offense; or
(c) the business may not reject patrons wearing such clothes at all, on the reasoning that "disruption" requires more than just a "heckler's veto" against unpopular messages[27] (and perhaps that the term is limited to content-neutral harms, such as conduct that is loud or that blocks walkways).

One nonprecedential Seattle Office for Civil Rights decision, involving a similar ban on employment discrimination based on political ideology, suggests the answer may be (b) or perhaps even (a).[28] In that case, an insurance agency employee was fired when customers learned from press coverage that the employee belonged to a white nationalist organization; the Office concluded that the firing was permissible because (1) the employee might discriminate against clients (even if there was no specific evidence that she had done so), (2) the Office of the Insurance Commissioner might investigate the employer because of that risk, (3) State Farm Insurance could cancel its contracts with the employer, (4) clients were upset with the employer after the employee's political group memberships became public, and some clients stopped doing business with the employer, and (5) the employer "received continued harassing phone calls and in-person visits from members of the public who were upset that [the employer] continued to employ a known white nationalist."[29]

Under the same reasoning, a business would be able to fire an employee—or deny service to a customer—who was (say) notoriously anti-American or anti-police or anti-military or Socialist, if it could show that the person's political beliefs sufficiently

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[27] *See generally* Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 923–28 (2015) (discussing the cases that generally reject the heckler's veto as a basis for restricting speech).

[28] Quinn v. Gibbens Insurance LLC, no. 2020-01277-PE (Seattle Office for Civ. Rts. Feb. 24, 2021).

[29] *Id.*

offended customers or business partners and could thus lead to lost business or to public hostility. Sufficiently unpopular beliefs would thus in practice be unprotected under the Seattle Office's interpretation because the business could always cite the threat of public hostility as a defense against a political discrimination claim.

However the ordinances are read, businesses retain the power to exclude people who had engaged in past violence, even far outside that business (since that would be discrimination based on past violent conduct, not based on political ideology). Query, though, whether they may consider membership in an ideological group that had been involved in past violent conduct—and the possible reaction of other patrons to the group in predicting a risk of violence. One nonprecedential case from the Seattle Office for Civil Rights says yes: the Office concluded that a restaurant may deny service to someone who was known to be a member of a political group (Patriot Prayer) that had apparently engaged in some political violence in the past, when the restaurant believed that the person and other patrons—who might be hostile to Patriot Prayer, and vice versa—might therefore come to blows.[30]

X. "EXERCISE OF POLITICAL RIGHTS AND PRIVILEGES": S.C. (HOUSING)

South Carolina bans "eject[ing] a citizen from a rented house, land, or other property because of political opinions or the exercise of political rights and privileges guaranteed to every citizen" by the state or federal constitutions or laws.[31] South Carolina law doesn't

[30] Gibson v. Mexico Seattle, LLC, No. 2019-01194-AC at 14, 18 (Seattle Office for Civ. Rts. Dec. 18, 2020).

[31] S.C. CODE § 16-17-560.

prohibit such discrimination in public accommodations, though it does prohibit it in employment.[32]

XI. "CLOTHING THAT DISPLAYS THE NAME OF AN ORGANIZATION": MINN. (PUBLIC ACCOMMODATIONS)

Minnesota bans public accommodations from discriminating against a person "solely because the person operates a motorcycle or is wearing clothing that displays the name of an organization or association"[33] (though excluding conduct that "poses a risk to the health or safety of another or to the property of another," or clothing that "is obscene or includes the name or symbol of a criminal gang"). This on its face covers all organization names, not just motorcycle clubs.

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[32] *Id.*

[33] MINN. STATS. § 604.12; *see* Verdict Summary, Binczik v. Billiard Street Café, JVR No. 1403260025 (Nov. 20, 2013) ("The jury, issuing a verdict in favor of the plaintiffs for a total of $5,600, determined the plaintiffs had been denied access to a place of public accommodation based solely on their operation of motorcycles and/or their wearing of clothing that displayed an organization name; held that the conduct of the plaintiffs did not pose a risk of health, safety, or property to others; and found the plaintiffs' clothing did not display obscene language or include the name or symbol of a criminal gang.").