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Local Anti-Discrimination Ordinances and the First Amendment: Walking a Fine Line

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The U.S. Supreme Court has recognized that regulations banning sexual orientation discrimination "are well within the State's usual power to enact [if] a legislature has reason to believe ... that [the] group is the target of discrimination." *Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571-572 (1995).

This authority is not limited to sexual orientation discrimination. States and local units of government have the authority to ban discrimination against any class of persons that is "the target of discrimination." As a result, municipalities throughout the state of Michigan and the United States have prohibited discrimination on the basis of sexual orientation and transgender status; student status; being a caregiver; source of income; and a variety of other factors.

However, the authority of local government to offer protection against discrimination to additional classes of persons has not gone unchallenged. The United States Supreme Court will soon issue its opinion in *Craig v Masterpiece Cakeshop, Inc.*, and rule whether a bakery owner can be required to create a cake for a same-sex couple when the owner claims he has moral and religious objections to same-sex marriage.

The Colorado Court of Appeals held the owner of the bakery violated the state's public accommodation law, which extends protection to sexual orientation. The appellate court reasoned the public accommodation law was a neutral law of general applicability and those engaged in providing goods and services in the marketplace were bound by it. "Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, [the Act] prohibits it from picking and choosing customers based on their sexual orientation." *Craig v Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 291–292 (2015)

If the Supreme Court reverses the Colorado Court of Appeals' ruling, statutes and ordinances extending anti-discrimination protection to sexual orientation will doubtless face a barrage of First Amendment Free Exercise Clause challenges. Other protected classes could potentially be at risk of Free Exercise Clause challenges. However, even if the Supreme Court affirms the Colorado Court of Appeals, anti-discrimination ordinances remain subject to other First Amendment challenges.

It is not unusual for local anti-discrimination ordinances to contain language similar to the following:

> It is a violation of this Ordinance for any person to deny any other person the enjoyment of his/her civil rights or for any person to discriminate against any other person in the exercise of his/her civil rights. It is further a violation of this Ordinance for any person to have physical conduct or communication which refers to an individual protected under this article, when such conduct or communication demeans or dehumanizes and has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

While this prohibition on discriminatory communication would seem to be a logical extension of the general prohibition on discrimination, it is problematic from a First Amendment standpoint. There is no "hate speech" exception to the First Amendment. Speech at a public place on a matter of public concern is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. *Snyder v Phelps*, 562 U.S. 443, 458, (2011). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson,* 491 U.S. 397, 414 (1989).

In *R.A.V. v City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992), the Supreme Court held unconstitutional a St. Paul ordinance that stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know **arouses anger, alarm or resentment in others** on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Supreme Court reiterated that government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed. The Supreme Court explained the city made content-based distinctions about what speech was allowed and what speech was prohibited:

Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. at 391.

The lesson is that ordinances seeking to prohibit discrimination must be consistent with the First Amendment. An ordinance cannot ban speech based on its content – no matter how laudable the underlying reason for the prohibition. An ordinance that bans speech expressing discriminatory animus is just as unconstitutional as an ordinance that bans speech criticizing the government.

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