

## EQUALIZING THE POLITICAL RIGHTS OF RENTERS AND HOMEOWNERS

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### ABSTRACT

*The promise of democracy has not been kept to renters. The First Amendment protects renters and homeowners alike from governmental speech suppression, but neither landlord-tenant law nor civil rights law secures renters' political rights from landlord interference. Landlords wield enormous power to censor what renters say, limit who they say it with, and even control what they hear—and renters rarely have legal recourse when landlords choose to exercise this power.*

*This Article analyzes the diminished political rights of renters and proposes new legislation to put renters and homeowners on equal ground. Rather than importing wholesale from First Amendment doctrine or elevating “political ideology” to a protected status, legislatures should enact a Renters Bill of Political Rights that protects renters—and those who wish to speak to renters—from landlord retaliation for their political activities. This approach is the most compatible with existing landlord-tenant law and avoids being underinclusive and overinclusive in the rights it protects. Above all, it enables renters to participate in American democracy without fear that they will lose their homes.*

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## INTRODUCTION

“Mr. Mortellaro, the reason for this letter is to kindly ask that you remove the signage from your window. In order to keep the building uniform from the outside, we require that all residents keep their decorations behind the window coverings that were provided at move in.”

Renters are all too familiar with notices like these that ask them to censor views that they could exercise freely—if only they were homeowners. These notices may take the guise of respectful requests, but in truth the landlord is demanding, not asking. I was given the choice to take down a political sign in my window—and allow my landlord to trample on my freedom of expression—or risk losing my right to live in my home. I took the sign down.

Even if my landlord had not ensconced an anti-signage rule into the lease I signed, defying the request may have led to my eviction a few months later. Unlike homeowners, renters are subject to the whims of their landlords when their lease term ends. In most jurisdictions, private landlords may increase the rent without limit, or refuse to renew a tenant’s lease altogether, for

almost any reason.<sup>1</sup> This leaves renters in a perilous position: even if they take no action that violates their lease terms, merely displeasing their landlord could cost them their home.

Some exceptions to the landlord's power over renters exist; housing laws often protect "important" rights from landlord interference, such as the right to lodge complaints about the landlord with the local housing authority.<sup>2</sup> But these exceptions are few. As my own story shows, despite the cultural and constitutional importance of freedom of expression, landlords usually may retaliate against tenants for their political activities and associations with impunity.<sup>3</sup> The fear of retaliation may discourage renters from participating in civic life as fully as homeowners and may contribute to renters' relatively lower voter turnout.<sup>4</sup>

This chilling effect on renters' political expression may be the most dramatic example of how renters' political rights are diminished compared to those of homeowners, but it is far from the only one. Renters also face structural barriers that restrict their access to political information. Access to private dwellings is governed by property law, which allows the property owner to eject door-to-door solicitors and campaigners from the premises (and claim trespass if the solicitor or campaigner refuses to leave).<sup>5</sup> This means that homeowners may choose whether to receive pamphlets, petitions, voter registration applications, or other political communications from canvassers who knock on the door.

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<sup>1</sup> *Rent Control Laws by State*, NAT'L MULTIFAMILY HOUSING COUNCIL (Aug. 29, 2018), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/>; Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521, 522 (2000).

<sup>2</sup> For a discussion of common anti-retaliatory-eviction laws, see Melissa T. Lonegrass, *Eliminating Landlord Retaliation in England and Wales—Lessons from the United States*, 75 LA. L. REV. 1071, 1095 (2015).

<sup>3</sup> Only a handful of jurisdictions protect renters from discrimination based on their political views. *E.g.*, D.C. CODE § 2-1402.21 (2001) (prohibiting discrimination in rental housing based on a renter's affiliation with, or endorsement of, a political party); SEATTLE, WASH. CODE §§ 14.08.020, 14.08.040 (2018) (prohibiting discrimination against renters based on their political beliefs, conduct related to those beliefs, and political affiliations). No state currently prohibits discrimination against renters based on political affiliation, political expression, or political beliefs. Stephen Mortellaro, *Political Discrimination in Renting: A 50-State Survey of Fair Housing Laws*, THE DEMOCRACY FILE (Dec. 5, 2018), <http://www.democracyfile.com/renters-political-rights/> (describing the classes protected by each state's fair housing act).

<sup>4</sup> See Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 906 (2011) (discussing empirical evidence showing that homeowners are more likely to vote than renters and noting the possibility that renters may be "ambivalent about voting for certain improvements or officials for fear of rent increases").

<sup>5</sup> See, *e.g.*, *Parkchester Watchtower Bible & Tract Soc. v. Metro. Life Ins. Co.*, 297 N.Y. 339, 348 (1948) (holding that landlord did not violate the First Amendment by refusing to allow uninvited Jehovah Witness ministers into apartment community to conduct door-to-door proselytizing); *but cf.* *State v. Fox*, 82 Wash. 2d 289, 292-93 (1973) (holding that a landlord cannot prohibit a tenant's invited guests from entering the property).

But landlords may completely (or selectively) bar canvassers from accessing the doorways of renters' units—regardless of whether the renters would have welcomed the canvass.<sup>6</sup> Limiting renters' opportunity to engage with the community on civic issues places them at an informational disadvantage and reduces their ability to participate in elections as informed voters. Canvassing restrictions in apartment buildings also place renters out of the reach of door-to-door voter registration drives and get-out-the-vote campaigns, increasing the likelihood that they simply will not vote.

These two issues—landlords policing renters' expressive activities and limiting renters' access to political information—combine to make political participation costlier for renters than for homeowners. This is a detriment not only to the renters themselves, but to the functioning of our democracy. As the renter population continues to increase,<sup>7</sup> the number of people free to contribute to the marketplace of ideas characteristic of American democracy will continue to dwindle and the quality of our political discourse will suffer.

Surprisingly little scholarship has offered solutions to this growing concern,<sup>8</sup> but as this Article shows, the political ills created by the landlord-tenant relationship can be cured. This Article proposes legislation to equalize the political rights of renters and homeowners. Dubbed the "Renters Bill of Political Rights," this proposal includes a cluster of reforms designed to (1) alleviate any fear that renters who express political views or associate politically may lose their housing or otherwise suffer at the hands of their landlord; and (2) increase renters' access to political information by allowing political canvassers to contact them in their homes.

To further illustrate the need for such legislation—and particularly for protecting a renter's right to politically express, associate, and receive information—Part I of this Article discusses traditional First Amendment doctrine and related state doctrines, most of which offer renters no protection against their landlords. Part II discusses existing renters' rights legislation and explains why such legislation falls short of safeguarding renters'

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<sup>6</sup> See *Parkchester*, 297 N.Y. at 348.

<sup>7</sup> Between 2010 and 2015 alone, the renter population in the United States increased by 9.3%, a net increase of 6.2 million renter households. *Renting Landscape in 30 Countries Around the World*, RENT CAFÉ (Feb. 12, 2018), <https://www.rentcafe.com/blog/rental-market/renting-landscape-30-countries-around-world/>. In 2016, 36.6% of the country's households were rental units. Anthony Cillifo, Abigail Geiger & Richard Fry, *More U.S. Households are Renting Than at Any Point in 50 Years*, PEW RESEARCH CENTER (July 19, 2017), <http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>.

<sup>8</sup> The seminal piece on renters' political rights law was published in the 1980s. See James E. Lobsenz & Timothy M. Swanson, *The Residential Tenant's Right to Freedom of Political Expression*, 10 UNIV. PUGET SOUND L. REV. 1 (1986) (discussing the limits of the expressive rights renters possess against their landlords).

political rights. Building on the information presented in these two parts, Part III explains and justifies the contents of the Renters Bill of Political Rights. The legislative language of this proposed bill is included in the Appendix.

This Article, and the legislation it proposes, is chiefly concerned with the rights of renters who do not receive federal housing assistance. In most circumstances, federal law offers such renters broader protections than the Renters Bill of Political Rights would.<sup>9</sup> There are some exceptions to this, and the Bill of Political Rights can be adapted to extend further protections to such renters as necessary to equalize their political rights.<sup>10</sup> Nonetheless, a full examination of the political rights of renters in federal housing programs is beyond the scope of this Article. Except where it indicates otherwise, this Article uses the terms “renters” and “landlords” to refer exclusively to renters and landlords whose relationships are not governed by the terms of federal housing programs.

#### I. THE CONSTITUTIONAL DIMENSIONS OF POLITICAL SPEECH AND ASSOCIATION

Despite renters’ vulnerability to landlord interference when engaging in political activities, the need to safeguard such conduct from *government* oppression has been recognized as paramount since the ratification of the Bill of Rights. The Supreme Court has made unequivocally clear that “the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association.”<sup>11</sup> Nonetheless, many of the rationales for protecting renters’ political rights from landlord interference mirror the rationales for protecting such rights from the government. This Part provides an overview of the two relevant First Amendment doctrines—freedom of expression and freedom of association—and their state equivalents.

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<sup>9</sup> In addition to offering renters financial assistance, federal housing programs require landlords to have “just cause” to evict renters during or at the end of a lease term. For a summary of these federal just-cause eviction requirements, see generally Fred Fuchs, *Defending Against Eviction From Public and Federally Subsidized Housing*, 39 J. POVERTY L. & POL’Y 302 (2005), [http://www.povertylaw.org/files/docs/article/chr\\_2005\\_september\\_october\\_fuchs.pdf](http://www.povertylaw.org/files/docs/article/chr_2005_september_october_fuchs.pdf).

<sup>10</sup> For instance, the Eleventh Circuit has held that landlords may restrict door knocking campaigns in public housing. *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

<sup>11</sup> *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 203 (2014).

### A. Freedom of Expression

The freedom of expression encompasses the right to communicate ideas—whether orally, in writing, or through symbolic conduct that conveys a message.<sup>12</sup> The primary mode through which the First Amendment protects the freedom of expression is by prohibiting the government from regulating the content of a person’s speech.<sup>13</sup> “Content” refers to a communication’s subject matter, irrespective of the speaker’s view on that subject matter.<sup>14</sup> For instance, in the seminal case on content-based regulations, *Police Department v. Mosley*, the Supreme Court struck down an ordinance that prohibited picketing within 150 feet of a school building except for picketing that was related to a school labor dispute.<sup>15</sup> Although the ordinance was “viewpoint neutral” in that it allowed people on multiple sides of a labor dispute to picket, it was not “content neutral” because it only barred picketing that was not related to labor issues.<sup>16</sup> Such content-based regulations are presumptively unconstitutional and will be upheld only if the government can satisfy the extraordinary rigors of strict scrutiny, proving that the regulation is narrowly tailored to advance a compelling interest.<sup>17</sup>

A few exceptions to this doctrine exist. The government can prohibit speech that has little social value, such as obscenity,<sup>18</sup> child pornography,<sup>19</sup> and speech that is likely to incite imminent lawless action.<sup>20</sup> It also has greater power to regulate commercial speech to protect consumers from fraud, prevent illegal transactions, and advance substantial public interests.<sup>21</sup>

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<sup>12</sup> See *Spence v. Washington*, 418 U.S. 405, 406, 410-411, 415 (1974) (setting aside conviction of tenant convicted of desecrating the American flag because even though the desecration was not an oral or written communication, it was symbolic conduct “convey[ing] a particularized message” that “would be understood by those who viewed it”).

<sup>13</sup> *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See also Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1355-57 (2006) (elaborating on the differences between content discrimination and “viewpoint discrimination,” which refers to the censorship of disfavored perspectives on a topic instead of censorship of the topic entirely).

<sup>16</sup> See *Mosley*, 408 U.S. at 96-97.

<sup>17</sup> See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

<sup>18</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>19</sup> *New York v. Ferber*, 458 U.S. 747, 773-74 (1982).

<sup>20</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (striking down statute that prohibited the mere advocacy of crimes as an unconstitutional content-based regulation because it was not tailored to prohibit speech that incited “imminent” crimes).

<sup>21</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563-66 (1980) (establishing the intermediate scrutiny standard of review for regulations of commercial speech).

But these exceptions for low-value categories of speech are few—and of all types of expression, discussion of political issues is the *most* valuable.<sup>22</sup> The Supreme Court has characterized political speech as “the essence of self-government”<sup>23</sup> that lies upon the “highest rung of the hierarchy of First Amendment values.”<sup>24</sup> By shielding political expressions from government censorship, the Framers of the First Amendment sought “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>25</sup> Limits on an individual’s ability to express political views are thus the most intensely disfavored content-based regulations.<sup>26</sup>

This doctrine is perhaps best illustrated by *Boos v. Barry*.<sup>27</sup> A District of Columbia ordinance prohibited people from displaying any signs within 500 feet of a foreign embassy that brought its government into “public odium” or “public disrepute.”<sup>28</sup> The city maintained that its ordinance was necessary to prevent speech that could offend foreign diplomats and lead to international consequences. Nonetheless, the Supreme Court struck down the ordinance as a content-based regulation that unconstitutionally prohibited political expressions critical of foreign governments. The Court reasoned that a person’s political speech does not diminish in value simply because it may insult or offend a listener, even if that listener is a foreign government.<sup>29</sup>

This case makes clear that a speaker’s right to communicate political ideas supersedes a listener’s desire to avoid hearing them. But listeners also have a right to hear others’ speech that they *do* wish to hear. As the Supreme Court has emphasized,

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is

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<sup>22</sup> See *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>23</sup> *Garrison v. Louisiana*, 379 U.S. 64, 215-216 (1964).

<sup>24</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

<sup>25</sup> *Roth*, 354 U.S. at 484.

<sup>26</sup> *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (restrictions on core political speech “trench[] upon an area in which the importance of First Amendment protections is ‘at its zenith’”) (quoting *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987)).

<sup>27</sup> 485 U.S. 312 (1997).

<sup>28</sup> *Id.* at 315.

<sup>29</sup> *Id.* at 319, 321-22, 334.

unlawful. The First Amendment confirms the freedom to think for ourselves.<sup>30</sup>

*Martin v. City of Struthers* illustrates how this principle intersects with property rights.<sup>31</sup> In this case, the Supreme Court struck down an ordinance that prevented door-to-door campaigners from distributing literature at any person's residence in the city.<sup>32</sup> The Court held that the First Amendment protected both the right of a speaker to distribute literature *and* the right of a listener to determine whether to receive or refuse the literature. The Court reasoned that if a speaker is criminally sanctioned for delivering messages that an audience may be willing to hear, both the speaker and the listener are irrationally punished for engaging in public discussion.<sup>33</sup> Although some residents may be irritated by door knocking canvassers, annoyed residents could simply warn the canvassers to leave the property, and if the canvassers refused, they could be punished for trespassing.<sup>34</sup> Unlike the burdensome ordinance in *Martin*, this approach remedied the concerns of irritated homeowners while maintaining the constitutional right of receptive homeowners to receive political information from canvassers as they wished.<sup>35</sup>

But this case does not stand for the proposition that the government may never regulate how speakers and listeners may engage in political discourse. As long as its regulations are content-neutral, the government may impose reasonable time, place, and manner restrictions on expressive activities.<sup>36</sup> These restrictions satisfy constitutional scrutiny if they are narrowly tailored to advancing a significant government interest and leave open ample alternative avenues to communicate information.<sup>37</sup> For instance, the government may prohibit people from picketing a particular residence.<sup>38</sup> Unlike blanket restrictions on door knocking campaigns, restrictions protecting a homeowner from targeted protests are narrowly tailored to protect the homeowner's right to refuse to receive speech, and they leave ample opportunities for campaigners to communicate their message to

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<sup>30</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 356 (2010).

<sup>31</sup> 319 U.S. 141 (1943).

<sup>32</sup> *Id.* at 142, 149.

<sup>33</sup> *Id.* at 143-44.

<sup>34</sup> *Id.* at 146-47.

<sup>35</sup> *See id.*

<sup>36</sup> *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

<sup>37</sup> *Id.*

<sup>38</sup> *Frisby*, 487 U.S. at 485 ("There simply is no right to force speech into the home of an unwilling listener.").

willing residents.<sup>39</sup> Similarly, the government may reasonably restrict the use of noise amplification equipment to protect others from noise pollution<sup>40</sup> and prohibit protesting near a neighborhood schoolhouse during class hours.<sup>41</sup>

Nonetheless, these time, place, and manner restrictions cannot be wielded as weapons to stifle political speech. A city cannot completely prohibit literature distribution,<sup>42</sup> nor can it require that all protests or pamphleteering activities be approved by city officials beforehand.<sup>43</sup> Moreover, the government cannot use the guise of a time, place, or manner restriction to achieve content regulation, such as by charging higher fees for parade permits based on a government official's belief that a parade's controversial message may necessitate greater security costs.<sup>44</sup>

Thus, the government has some power to regulate political speech, but this power is tightly confined. The thrust of First Amendment doctrine is to protect political expressions and preserve public discourse from arbitrary government interference. In addition to restricting governmental power to censor, the First Amendment also advances these goals by protecting another right: the freedom of association.

### *B. Freedom of Association*

The freedom of association is a close cognate of the freedom of expression. Associations enhance the speech of their individual members and empower members to speak collectively. Given the close relationship between these two freedoms, government interference with the right of people to organize and convene is curtailed by the First Amendment.<sup>45</sup>

At the heart of the freedom of association is the right for an association to exist. Absent a compelling reason, such as preventing people from associating for the collective purpose of committing violence, the government cannot seek to undermine or destroy a political association.<sup>46</sup> Even attacking an association indirectly, such as by forcing an unpopular organization to reveal its members and therefore exposing them to private retaliation, is prohibited.<sup>47</sup> The Supreme Court has determined that the

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<sup>39</sup> *Id.*

<sup>40</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989).

<sup>41</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 120-21 (1972).

<sup>42</sup> *Schneider v. New Jersey*, 308 U.S. 147, 161-62 (1939).

<sup>43</sup> *Lovell v. Griffing*, 303 U.S. 444, 451 (1938).

<sup>44</sup> *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135-37 (1992).

<sup>45</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

<sup>46</sup> *See id.* at 463-66.

<sup>47</sup> *Id.* at 466.

“[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>48</sup>

Similarly, the government typically cannot punish individuals merely because they associate with others. Even if an association advocates for illegal conduct, such as the violent overthrow of the government, a member cannot be successfully prosecuted unless that member personally engaged in illegal activity.<sup>49</sup> The government also cannot, in most circumstances, punish people based on their political affiliations. In *Branti v. Finkel*, the Supreme Court reinstated two assistant public defenders who were fired for refusing to affiliate with the Democratic Party.<sup>50</sup> The Court held that the government could only discharge employees based on their political associations when it could prove that such association was “an appropriate requirement for the effective performance of the . . . office involved.”<sup>51</sup>

Collectively, the freedoms of expression and association provide robust protections for citizens to express their political beliefs, both individually and with others. The First Amendment ensures that the coercive power of the state cannot destroy a person’s political rights. But as explained in the next section, these protections mean less to renters than to homeowners because renters have another coercive force to contend with: their landlords.

### C. State Action Doctrines and State Constitutions

The First Amendment safeguards the freedoms of expression and association only from governmental interference. Under the “state action” doctrine, the Constitution does not prevent landlords and other private parties from censoring and discriminating against others based on their political speech and affiliations.<sup>52</sup> In the seminal case *Lloyd Corporation v. Tanner*, the Supreme Court refused to order a shopping mall to allow campaigners to distribute handbills on its premises, reasoning that the First Amendment does not supplant private property owners’ control over their land.<sup>53</sup> Although the mall had opened its property to the public, it did not do so for the purposes of political speech, and even if it had, its property would

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<sup>48</sup> *Id.* at 462.

<sup>49</sup> See *Scales v. United States*, 367 U.S. 203, 229 (1961) (“If there were a . . . blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired.”).

<sup>50</sup> 445 U.S. 507, 519-20 (1980).

<sup>51</sup> *Id.* at 518.

<sup>52</sup> See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-70 (1972) (“[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property . . .”).

<sup>53</sup> *Id.* at 556, 567-70.

not have been transformed into a public forum.<sup>54</sup> Thus, the mall was within its rights to refuse to allow handbilling on its property—and people who ignored the mall’s wishes could be punished for trespassing.<sup>55</sup> Similarly, the New York Court of Appeals has held that a private landlord did not violate the First Amendment when it refused to admit door-to-door canvassers into its apartment building.<sup>56</sup>

Fortunately for renters, the Supreme Court has also held that state constitutions are not bound by the federal state action doctrine.<sup>57</sup> A few state constitutions, such as California’s and New Jersey’s, have gone beyond the First Amendment, extending their First Amendment analogues to protect the freedoms of expression and association against private interference.<sup>58</sup> But these state constitutions are the exception, not the rule;<sup>59</sup> and even those state constitutions that do prevent some types of private interference with political rights are not guaranteed to prevent *landlord* interference. For instance, although the California Constitution’s free speech clause has a narrower state action requirement than the U.S. Constitution,<sup>60</sup> the California Supreme Court has expressly ruled that it does not prohibit landlords from banning renter canvassing.<sup>61</sup>

Nonetheless, all levels of government remain empowered to safeguard individuals from private political censorship—including by protecting renters who engage in political activities from landlord retaliation—by enacting statutory protections. But like the federal and state constitutions,

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<sup>54</sup> *See id.* at 568-70. This case overturned *Food Employee Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315, 325 (1968), which had held that states could not punish persons for exercising their First Amendment rights inside of privately-owned shopping malls. *See also* *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (“[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court’s decision in the *Lloyd* case.”).

<sup>55</sup> *See id.* at 567-70. However, in a “company town” where a private property owner assumes the entire function of a municipality, the First Amendment applies against the property owner as if the property owner were a government entity. *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946).

<sup>56</sup> *Parkchester Watchtower Bible & Tract Soc. v. Metro. Life Ins. Co.*, 297 N.Y. 339, 348 (1948).

<sup>57</sup> *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

<sup>58</sup> *See generally* Lobsenz & Swanson, *supra* note 8, at 20 (discussing state constitutional protections for speech against private actors in Washington, California, and New Jersey).

<sup>59</sup> *Public Space, Private Deed: The State Action Doctrine and Freedom of Speech on Private Property*, 123 HARV. L. REV. 1303, 1306-1307 (2010) (explaining that most state supreme courts that have analyzed the issue “have echoed the Supreme Court’s conception by holding that state action is necessary to sustain even free speech challenges under state constitutions”).

<sup>60</sup> *Compare* *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 342 (1979) (holding that the California Constitution’s free speech clause prohibits privately-owned shopping centers from interfering with signature collection campaigns on the shopping center’s premises), *with* *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (reaffirming *Lloyd Corp. v. Tanner* and holding that union had no First Amendment right to picket at a shopping center).

<sup>61</sup> *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 808-811 (2001) (holding that “the actions of a private property owner constitute state action for purposes of California’s free speech clause only if the property is freely and openly accessible to the public” and determining that private apartment buildings are not publicly accessible).

existing renters' rights legislation falls far short of safeguarding renters' political rights.

## II. THE SHORTCOMINGS OF EXISTING FAIR HOUSING AND ANTI-RETALIATION LEGISLATION

Two types of legislation prohibit a landlord from punishing renters based on their personal characteristics or conduct: fair housing legislation and anti-retaliation legislation. Both offer renters some refuge from arbitrary landlord actions and equalize the rights of renters and homeowners in many respects. However, as this Part shows, neither type of legislation secures to renters the gamut of political rights enjoyed by homeowners.

### A. Fair Housing Legislation

Fair housing legislation, which exists at both the state and federal levels, prohibits housing discrimination against people based on their membership in certain protected classes. The federal Fair Housing Act,<sup>62</sup> for instance, prohibits discrimination against prospective or current renters and homeowners based on race, color, religion, sex, familial status, national origin, and disability.<sup>63</sup> Such discrimination may, among other things, take the form of refusing to rent or sell a dwelling, refusing to negotiate for the rental or purchase of a dwelling, placing different terms or conditions on the rental or sale of a dwelling, or offering different housing services or facilities.<sup>64</sup> A victim of this discrimination may file a civil suit<sup>65</sup> or request administrative enforcement from the Secretary of Housing and Urban Development.<sup>66</sup> Alternatively, the Secretary may initiate administrative enforcement *sua sponte* or refer a matter to the U.S. Attorney General for civil enforcement,<sup>67</sup> and the Attorney General may independently bring a civil action against any person or group that engages in a "pattern or practice" of prohibited discrimination or engages in discrimination that "raises an issue of general public importance."<sup>68</sup>

The Fair Housing Act reflects our country's commitment to civil rights and safeguarding people from being arbitrarily deprived of housing. But the Fair Housing Act was not designed to protect people from all manifestations

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<sup>62</sup> 42 U.S.C. §§ 3601-3619 (2012).

<sup>63</sup> 42 U.S.C. § 3604 (2012).

<sup>64</sup> *Id.*

<sup>65</sup> 42 U.S.C. § 3613 (2012).

<sup>66</sup> 42 U.S.C. § 3610 (2012).

<sup>67</sup> 42 U.S.C. §§ 3610, 3612 (2012).

<sup>68</sup> 42 U.S.C. § 3614 (2012).

of housing discrimination. Notably absent from the list of protected classes is “political associations,” “political beliefs,” “political activities,” or any other expressive or associative conduct that would be characterized as core political speech under the First Amendment.<sup>69</sup> Thus, if a landlord evicted or decreased services to renters based on their political party affiliation or because they affixed political signs in their apartments, the Fair Housing Act would provide these renters with no remedy.

Many jurisdictions have adopted their own state and local analogues of the Fair Housing Act.<sup>70</sup> Some of these analogues expand the list of protected classes to prohibit discrimination not covered in the Fair Housing Act, such as discrimination based on sexual orientation,<sup>71</sup> ancestry,<sup>72</sup> or source of income.<sup>73</sup> No state goes so far as to outlaw discrimination based on political activities,<sup>74</sup> but a few cities do. Seattle, for instance, prohibits housing discrimination based on “political ideology,” which is defined to include political beliefs, conduct related to those beliefs, and memberships in political parties and other political associations.<sup>75</sup> The District of Columbia offers narrower protection for people based on their political affiliation.<sup>76</sup>

But Seattle and D.C. are exceptional; fair housing legislation that prohibits political discrimination remains rare.<sup>77</sup> With few protections at the local level, and none at the state and federal levels, in most instances landlords can punish renters for their political activities with impunity.

Because fair housing legislation applies to renters and homeowners alike, its failure to protect political activities may appear to burden both groups equally. In one circumstance, this is true: just as a landlord could refuse to rent to a prospective tenant for political reasons, a property owner could refuse to sell to a prospective homeowner for political reasons. But after a housing transaction is completed, the burden falls asymmetrically on renters, who, unlike homeowners, can continue to suffer landlord retaliation for engaging in political activities. The next section discusses legislation that is designed to protect renters from retaliation. But anti-retaliation legislation, like fair housing legislation, usually fails to protect renters’ political rights.

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<sup>69</sup> See *supra* Part I.

<sup>70</sup> For a list of state fair housing laws, see Mortellaro, *supra* note 3.

<sup>71</sup> E.g., IOWA CODE § 216.8 (2017); R.I. GEN. LAWS § 34-37-2 (2018).

<sup>72</sup> E.g., CAL. GOV’T CODE § 12955 (2018); HAW. REV. STAT. § 515-3 (2018).

<sup>73</sup> E.g., OR. REV. STAT. § 659A.421(2) (2017); CAL. GOV’T CODE § 12955 (2018).

<sup>74</sup> Mortellaro, *supra* note 3.

<sup>75</sup> SEATTLE, WASH. CODE §§ 14.08.020, 14.08.040 (2018).

<sup>76</sup> Compare *id.*, with D.C. CODE § 2-1402.21 (2001).

<sup>77</sup> See Mortellaro, *supra* note 3.

### B. Anti-Retaliation Legislation

Most states, and many local governments have adopted legislation that prohibits landlords from retaliating against renters for narrowly-defined reasons.<sup>78</sup> These laws are typically modeled after the Uniform Residential Landlord and Tenant Act (URLTA), which was published by the National Conference of Commissioners on Uniform State Laws in 1972 and revised in 2015.<sup>79</sup> URLTA prohibits landlords from retaliating against a renter because the renter (1) complained to an appropriate government agency that the landlord violated the housing code or other law that protects the renter's health or safety; (2) complained to an appropriate government agency that the landlord violated fair housing legislation; (3) complained to the landlord about a lease violation; (4) exercised a right under the lease or law; (5) pursued or participated in an administrative or civil action against the landlord; and (6) joined or organized a tenant's union.<sup>80</sup>

As this short list illustrates, URLTA's anti-retaliation provisions do not offer comprehensive protection for renters who engage in political activity that the landlord may dislike. URLTA predominately protects renters by shielding them from retaliation for exercising a preexisting *housing* right. Four of the provisions prohibit retaliation because a renter complained to the landlord, an agency, or a court about violations of the lease or housing law; one protects renters who exercise a lease right.<sup>81</sup> Only one provision protects renters for engaging in conduct that approaches political activity: joining or organizing a "tenant's union."<sup>82</sup> But this narrow term seemingly protects renters only for associating to collectively bargain and advocate for housing rights, and excludes from protection renters who participate in other types of political associations.<sup>83</sup>

Nonetheless, when a renter's conduct falls into one of these protected categories, the protections the renter receives are robust. If a landlord engages in "retaliatory conduct" within six months of the renter engaging in

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<sup>78</sup> Lonegrass, *supra* note 2, at 1092.

<sup>79</sup> *Id.* at 1095; *Residential Landlord and Tenant Act 2015*, NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, <http://www.uniformlaws.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act%20015> (last visited Dec. 6, 2018) [hereinafter URLTA]. URLTA encompasses many aspects of the landlord-tenant relationship other than retaliation. For a list of states that have adopted URLTA provisions, see NAT'L CONF. OF STATE LEGISLATURES, STATE ADOPTIONS OF URLTA LANDLORD DUTIES, <http://www.ncsl.org/research/environment-and-natural-resources/state-adoptions-of-urlta-landlord-duties.aspx> (last visited Dec. 6, 2018).

<sup>80</sup> URLTA, *supra* note 79, § 901(a).

<sup>81</sup> *Id.* §§ 901(a)(1)-(3), (5)-(6).

<sup>82</sup> *Id.* § 901(a)(4).

<sup>83</sup> See Lonegrass, *supra* note 2, at 1095 (describing tenant's unions as "tenant's rights advocacy groups").

protected conduct, the landlord is presumed to have to illegally retaliated against the renter.<sup>84</sup> “Retaliatory conduct” includes increasing the rent, pursuing eviction, refusing to renew the lease, or materially altering the terms of lease (such as by decreasing services, imposing new rules, or selectively enforcing existing rules).<sup>85</sup> If the renter wins a retaliation claim, the renter may recover possession of the unit, opt to terminate the lease without penalty, and obtain three times the amount of periodic rent or actual damages.<sup>86</sup>

### III. CREATING AN EQUAL PLAYING FIELD: THE RENTERS BILL OF POLITICAL RIGHTS

Given the failure of existing constitutional doctrines and legislation to protect renters’ political rights, renters continue to suffer high transaction costs for participating in political activities. Many may find those costs too great to bear and forego such activities entirely for fear of landlord retaliation. Because homeowners do not have landlords and tend to live in stable housing arrangements, they continue to have measurable advantages over renters in the public sphere and are better positioned to have their voices heard in political discourse.

If the American promise of democratic self-governance is to be fulfilled, inequalities such as these cannot be tolerated. Expressive and associative rights must be protected from interference by both public and private actors, or else the inequities in the private sphere will inevitably lead to inequities in the public sphere. And policies designed to cultivate political participation cannot neglect political minorities such as renters,<sup>87</sup> or else those minorities will continue to be marginalized. If existing law does not account for these inequalities, then new law must be made—or the full promise of democracy will continue to be out of reach for many.

This Part proposes legislation aimed at ending the political inequalities between homeowners and renters: the Renters Bill of Political Rights (“Bill”). The Bill is designed to be adaptable to any jurisdiction that may wish to enact it—federal, state, or local. It targets the two predominant political disadvantages suffered by renters: the threat of landlord retaliation for participating in political discourse and the informational disadvantages associated with living in multifamily properties.

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<sup>84</sup> URLTA, *supra* note 79, § 903.

<sup>85</sup> *Id.* § 901(b).

<sup>86</sup> *Id.* § 902.

<sup>87</sup> For discussion of the size of the renter population in the United States, see *supra* note 7.

By focusing on these two narrow issues, the Bill does not seek to upend landlords' property rights, nor does it incorporate deeper reforms like just cause eviction or rent control. Rather, the Bill is targeted at protecting renters from landlord conduct that arbitrarily or unfairly restricts renters' political rights—at least to the extent that exercising those rights does not interfere with the landlord-tenant relationship. To maximize political palatability, many of the Bill's remedial provisions are modeled off existing laws, such as URLTA, because these laws reflect the compromises that have been struck with respect to how renters' rights should be enforced.

This Part proceeds by discussing the Bill's general protections for all renters before delving into additional protections that serve the interests of renters in multifamily properties. The full text of the Bill is presented in the Appendix.

#### *A. Generally Prohibiting Retaliation for Renters' Political Expressions and Associations*

At least three legislative approaches exist to protect renters from landlord interference with their political rights: (1) import the First Amendment freedom of speech and expression doctrines to define the meaning and scope of renters' political rights; (2) protect renters' political rights by placing them in a fair housing framework; or (3) protect renters' political rights through anti-retaliation legislation. Although each approach has advantages, the Renters Bill of Political Rights follows the third approach; it is the most politically feasible and most effectively serves the goal of equalizing renters' and homeowners' rights.

Under the first approach, legislation could simply declare that landlords may not establish any policy or lease provision that abridges the freedoms of speech, press, or association as those terms are defined in First Amendment doctrine.<sup>88</sup> In theory, this would provide the most "equal" treatment of homeowners and renters, as it would treat landlord and government restrictions on expression and association under the same rubric. But in practice, this approach would not ensure such equality. The terms "freedom of speech," "freedom of the press," and "freedom of association" are vague and subject to judicial explication, and courts may interpret them to offer only narrow protections for renters.

For instance, to protect the interests of the landlord, courts have restricted the scope of renters' expressive and associative rights in publicly-funded housing—a context where, because state action is present, the First

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<sup>88</sup> See *supra* Part I.A-B.

Amendment applies with full force.<sup>89</sup> For instance, the Eleventh Circuit has upheld restrictions on door-to-door canvassing in public housing properties<sup>90</sup> even though the Supreme Court has struck down analogous restrictions on canvassing homeowners.<sup>91</sup> The Eleventh Circuit has also allowed landlord policies that restrict renters in public housing from assembling and associating with their neighbors on the property.<sup>92</sup> These cases illustrate that even if the Renters Bill of Political Rights adopted the language of the First Amendment, there is no guarantee that renters' expressive and associative rights would be interpreted broadly enough by courts to offer the same degree of political freedom that homeowners enjoy.

To avoid this threat of under inclusion, the Renters Bill of Political Rights does not attempt to emulate the First Amendment. Instead, it specifically enumerates the protected political activities that renters may engage in.<sup>93</sup> As discussed in Part II, two traditional models exist for protecting specific rights from landlord interference: fair housing legislation and anti-retaliation legislation. Fair housing legislation protects both renters and homeowners from housing discrimination based on their membership in a protected class.<sup>94</sup> For people within those classes, it offers broader protection than anti-retaliation legislation, as it applies not only to current renters and homeowners, but also to prospective renters and homeowners.

Nonetheless, the Renters Bill of Political Rights does not include a general ban on political "discrimination," as jurisdictions like Seattle have adopted.<sup>95</sup> Instead, it proposes a narrower right to be free from landlord retaliation based on a renter's political speech and associations. The Bill is intended to *equalize* the political rights of renters and homeowners, and the fair housing approach would not serve this goal. At present, prospective homeowners generally have no right to be free from political discrimination when buying a home.<sup>96</sup> If protections for political expression or association

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<sup>89</sup> See generally Martin J. Rooney, *The Public Forum Doctrine and Public Housing Authorities: Can You Say That Here?*, 21 *BYU J. PUB. L.* 323 (2007) (discussing disagreement among courts as to the extent the First Amendment protects renters in public housing).

<sup>90</sup> *Daniel v. Tampa*, 38 F.3d 546, 548-50 (11th Cir. 1994) (upholding the trespass conviction of a canvasser who violated a public housing policy that allowed only "residents, invited guests of residents, and those conducting official business" access to the property).

<sup>91</sup> *Martin v. City of Struthers*, 319 U.S. 141, 142, 146-47, 149 (1943) (law that prohibited canvassers from "ring[ing] the door bell, sound[ing] the door knocker, or otherwise summon[ing] the inmate or inmates of any residence to the door" violated the First Amendment).

<sup>92</sup> *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 593 (11th Cir. 1993) (upholding trespass conviction of a renter who attempted to hold a Bible study in a common area).

<sup>93</sup> See *infra* Appendix: The Renters Bill of Political Rights [hereinafter Appendix] § 4.

<sup>94</sup> See, e.g., 42 U.S.C. §§ 3601-3619 (2012).

<sup>95</sup> SEATTLE, WASH. CODE §§ 14.08.020, 14.08.040 (2018).

<sup>96</sup> See 42 U.S.C. § 3604 (2012) (protecting homebuyers from discrimination based on "race, color, religion, sex, familial status, or national origin," but not political ideology or political affiliation).

were added for prospective renters as a fair housing protection, it would be overinclusive in the rights it protects for prospective renters and create an inequality for prospective homeowners, who do not enjoy such a right.

If protections for political expression and association were added for *both* renters and homeowners, the Bill would not create this inequality, but it would go further than merely equalizing the rights of renters and homeowners—it would *expand* them. This would rob the Bill of its core purpose—the equalization of renters’ and homeowners’ existing political rights—and would require different arguments to justify why political rights should be expanded generally.<sup>97</sup> To avoid exceeding the objective of fostering renter-homeowner equality, the Renters Bill of Political Rights does not follow the fair housing approach, and instead seeks to protect existing renters from landlord retaliation.

At the heart of the Bill is a provision that prohibits landlords from retaliating against a renter primarily because of the renter’s political beliefs or activities.<sup>98</sup> While this protection is rarely afforded to renters under existing anti-retaliation legislation, many of the Bill’s structural provisions resemble URLTA. “Retaliatory conduct” is defined similarly to URLTA’s definition of the term, and it includes landlord decisions to evict a renter, raise the rent, decrease services, increase obligations, or selectively enforce rules against the renter.<sup>99</sup> The Bill also creates a rebuttable presumption that if the landlord engaged in retaliatory conduct within six months of the renter engaging in a protected political activity, the primary motive of the landlord was to retaliate.<sup>100</sup> Landlords can rebut the presumption by proving that they would have taken the same action against the renter even if the renter had not engaged in protected activity. By keeping these structural provisions similar to URLTA, the Bill minimally intrudes on existing landlord-tenant regulatory frameworks and operates in a manner familiar to landlords.

Of course, the biggest difference between the Bill and URLTA is that the latter does not protect renters’ political rights. The Renters Bill of Political Rights prohibits landlords from retaliating based on a renter’s “political activities,” which encompasses seven categories of conduct:

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<sup>97</sup> Of course, the equalization rationale would hold that *if* a jurisdiction did create fair housing rights for political expression and association for prospective homeowners, it would also need to do so for renters—but this is outside the scope of this legislation.

<sup>98</sup> See *infra* Appendix § 4.

<sup>99</sup> Compare *infra* Appendix § 5(a), with URLTA, *supra* note 79, § 902.

<sup>100</sup> *Infra* Appendix § 5(b).

- (1) expressing support for, or opposition to, any existing or potential law, government official, candidate, political party, ballot question, or other political cause;
- (2) signing, or refusing to sign, any petition;
- (3) contacting any government official for any reason or testifying before any government body;
- (4) affixing any political sign, banner, or flag in the dwelling unit, regardless of whether the sign, banner, or flag may be seen by other persons located inside or outside of the property;
- (5) joining, refusing to join, participating in, or refusing to participate in any political party or other lawful political association, whether formal or informal;
- (6) voting, or refusing to vote, in any election; and
- (7) registering to vote or not registering to vote.<sup>101</sup>

The first three categories safeguard the most basic form of political participation from landlord interference: expressing views on political issues. The first category lists several common types of political engagement—both electoral and legislative—and provides a broad catch-all provision at the end intended to protect a wide swatch of political causes that a renter may wish to speak about.<sup>102</sup> The second category explicitly protects a renter’s right to sign a petition—and to forbear from signing a petition, lest a landlord attempt to force a renter into supporting a particular cause.<sup>103</sup> The third category protects renters who wish to engage in discourse directly with government officials, and thus offers renters greater protection than existing anti-retaliation provisions that protect renters’ communications with state actors only when the renter is complaining about a violation of a housing law.<sup>104</sup> Each of these three categories encompasses conduct that homeowners already may freely engage in without fear of losing their home—and conduct that does not interfere with a landlord’s ability to manage a rental property.

The fourth category covers conduct that is likely to be the most controversial among landlords: protecting a renter’s right to visibly display political signage throughout their rental unit, including in windows.<sup>105</sup>

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<sup>101</sup> *Id.* § 4(a).

<sup>102</sup> *Id.* § 4(a)(1).

<sup>103</sup> *Id.* § 4(a)(2).

<sup>104</sup> Compare *id.* § 4(a)(3), with URLTA, *supra* note 79, §§ 901(a)(1)-(2).

<sup>105</sup> See *infra* Appendix § 4(a)(4).

Landlords commonly restrict signs in renters' windows for aesthetic purposes and to prevent misattribution of the renters' views to the landlord.<sup>106</sup> Fortunately, landlords can still advance these interests without such a broad restriction. The Bill does not disturb a landlord's ability to protect the property's aesthetics by fining renters who litter or damage the premises, and landlords can prevent misattribution by posting their own signs indicating that a renters' signs do not necessarily reflect the views of the landlord. The availability of these more narrowly-tailored means to protect aesthetics and prevent misattribution should be enough to safeguard a landlord's interests without abridging a renter's right to political expression in their own home.

The fifth category protects a renter's right to political association. This provision prevents landlords from retaliating against renters because they are members of a political party or any other political organization, such as a local community group or a chapter of a national advocacy organization.<sup>107</sup> This offers broader protections than laws like those in the District of Columbia that offer protections based only on a renters' political party membership.<sup>108</sup> However, it restricts protections to groups that are "lawful," allowing for landlords to take action against renters who associate with others for the purpose of violent, corrupt, or otherwise illegal political activities.

The final two categories, which are likely the least controversial, prevent landlords from retaliating against renters for voting, registering to vote, or refraining from doing either.<sup>109</sup> These provisions resemble existing laws in many states that prevent employers from coercing employees to participate, or not participate, in an election.<sup>110</sup> While renters and homeowners alike must worry about such retaliation from employers, only renters need be concerned about it from landlords. These two categories of protections ensure that, like homeowners, renters will not suffer from a loss of housing because of their electoral participation.

The enforcement mechanisms and remedies available to renters in the Bill mirror those available in URLTA. A renter can allege retaliation as a defense in an eviction action or bring an affirmative lawsuit against the landlord. If successful, the renter is entitled: (1) to remain in or recover

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<sup>106</sup> Lobsenz & Swanson, *supra* note 8, at 32-33.

<sup>107</sup> *Infra* Appendix § 4(a)(5).

<sup>108</sup> See D.C. CODE § 2-1402.21 (2009).

<sup>109</sup> *Infra* Appendix §§ 4(a)(6)-(7).

<sup>110</sup> *E.g.*, 25 PENN. STAT. § 3539 (1998) (prohibiting employers from threatening or firing employees for voting or refusing to vote); ARIZ. REV. STAT. § 16-402 (2018) (same); HAW. REV. STAT. § 11-95 (2018) (same).

possession of their unit, or to terminate their lease without penalty; (2) to receive treble damages or three times the periodic rent amount, whichever is greater; and (3) to recover equitable and declaratory relief.<sup>111</sup> These actions must be brought in court; to avoid placing financial burdens on local governments, the Bill does not create a separate administrative complaint process for renters. Additionally, the Attorney General (or equivalent local official) may bring civil actions to enforce the Renters Bill of Political Rights, similar to the Fair Housing Act.<sup>112</sup>

Collectively, these provisions protect renters from aggressive landlords who may wish to punish those who engage in the most basic forms of political participation. But these provisions alone do not safeguard forms of political expression that are unique to renters who live in multifamily properties. The next section discusses additional provisions of the Renters Bill of Political Rights that specifically address the needs of such renters.

#### *B. Protecting Renters' Political Rights in Multifamily Properties*

Because renters in multifamily properties—that is, apartment buildings and other structures that contain multiple units<sup>113</sup>—typically do not live in units that open to public streets, their ability to participate in neighborhood door knocking campaigns is limited compared to homeowners.<sup>114</sup> Landlord restrictions on this type of political activity are detrimental not only because renters cannot initiate such campaigns, but also because renters cannot receive information from their neighbors or others who conduct the campaigns. Renter populations may thus miss opportunities that homeowners enjoy to sign petitions, receive voter registration information, learn about candidates, or otherwise be educated about political issues and engage in community discourse.

Thus, to equalize the rights of renters and homeowners in this context requires special consideration be given to renters who live in multifamily properties. The Renters Bill of Political Rights accomplishes this by prohibiting landlord interference with reasonable door-to-door canvassing

<sup>111</sup> See *infra* Appendix § 5(c)(1).

<sup>112</sup> Compare 42 U.S.C. § 3614 (2012), with *infra* Appendix § 7.

<sup>113</sup> For a statistical breakdown of how many renters live in multifamily properties versus single-family properties, see U.S. Census Bureau, *American Housing Survey: Table 1 General Housing Data* (2015), [https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s\\_areas=a00000&s\\_year=n2015&s\\_tableName=Table1&s\\_byGroup1=a1&s\\_byGroup2=a1&s\\_filterGroup1=t1&s\\_filterGroup2=g1](https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=a00000&s_year=n2015&s_tableName=Table1&s_byGroup1=a1&s_byGroup2=a1&s_filterGroup1=t1&s_filterGroup2=g1).

<sup>114</sup> See *Parkchester Watchtower Bible & Tract Soc. v. Metro. Life Ins. Co.*, 297 N.Y. 339, 348 (1948) (although public streets have traditionally been used to exercise the freedoms of speech and assembly, a hallway in an apartment building “is hardly an appropriate place at which to demand the free exercise of those ancient rights”).

efforts within the property—whether conducted by renters who live on the property (“renter-canvassers”) or people who live outside the property (“outside canvassers”). The specific activities the Bill protects mimics the rights that canvassers enjoy when conducting campaigns with homeowners who live on public streets, including:

- (1) knocking on the door of a renter’s dwelling unit, between the hours of 9:00 a.m. and 9:00 p.m., to—
  - (A) discuss with the neighboring renter any existing or potential law, candidate, government official, political party, ballot question, or other political issue or cause;
  - (B) encourage the neighboring renter to vote or register to vote; or
  - (C) distribute to the neighboring renter a voter registration application, petition, political leaflet, or any other written or electronic political material;
- (2) distributing a voter registration application, petition, political leaflet, or any other written political material by placing it in front of, or sliding it under, the door of a renter’s dwelling unit.<sup>115</sup>

Because the Bill is focused exclusively on equalizing the *political* rights of renters and homeowners, it specifies these protected canvassing activities in detail—and limits them to discussing and distributing materials related to politics. The Bill does not disturb a landlord’s right to prevent canvassers from conducting religious proselytizing, commercial solicitation, or any other type of door knocking campaign that has no nexus with political expression.

Canvassers must also confine their activities to the hours between 9:00 a.m. and 9:00 p.m. This provision—which echoes similar time, place, and manner restrictions in First Amendment jurisprudence<sup>116</sup>—is designed to prevent unreasonable nighttime canvassing. It allows a landlord to bar such

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<sup>115</sup> *Infra* Appendix §§ 4(b), 6.

<sup>116</sup> *See, e.g.*, *Occupy Sacramento v. Sacramento*, 878 F. Supp. 2d 1110, 1119 (E.D. Cal. 2012) (upholding ordinance that prohibited overnight expressive activities in public park as a reasonable time restriction that protected the health, safety, and comfort of the public); *see also* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294-96, 299 (1984) (holding that restricting protestors from camping overnight in public parks was a reasonable time, place, or manner restriction that advanced park preservation).

activities outside of the proscribed hours, whether conducted by the tenants themselves or by outside canvassers.

Separate provisions protect the interests of renters who do not wish to be targeted by door knocking campaigns. Any canvasser who harasses, defames, intimidates, threatens, stalks, advocates violence against, directs hate speech at, invades the privacy of, or otherwise menaces a renter, guest, or landlord falls outside of the protection of the Bill, as does any canvasser who trespasses on a renter's unit (or other restricted area).<sup>117</sup> These protections stem from the Supreme Court's reasoning in *Martin* when it struck down municipal anti-canvassing laws: residents who do not wish to receive information from canvassers may order the canvasser to leave them alone and pursue a trespass action against a canvasser who does not abide by those wishes.<sup>118</sup> By protecting only those canvassers who respect a renter's right to refuse to engage with them, the Bill equalizes the rights of renters and homeowners both to access political information and shields renters who, like homeowners, would rather opt out of such campaigns.

Furthermore, to protect renters and landlords alike, the Bill allows landlords of multifamily properties to require that outside canvassers provide identification information at least 24 hours before entering the property.<sup>119</sup> This is a departure, albeit a necessary one, from the First Amendment norms that protect canvassers of single-family homes. The Supreme Court has held that governments may not require political advocates to obtain a permit before participating in door knocking activities, even if the permit is automatically given upon request.<sup>120</sup> The Court emphasized that permit requirements stifle political speech by destroying the canvasser's anonymity (and thus making the speaker vulnerable to retaliation), violating the rights of patriotic citizens who strongly believe in "uninhibited debate," and preventing spontaneous door knocking.<sup>121</sup>

A permitting requirement poses the same harms irrespective of whether the government or the landlord dispenses permits. Nonetheless, the Renters Bill of Political Rights includes a limited permitting requirement because of the unique harms that outside canvassers could inflict on the landlords and residents of multifamily properties. When conducting door knocking campaigns in neighborhoods of single-family homes, uninvited canvassers

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<sup>117</sup> *Infra* Appendix §§ 4(c), 6(c).

<sup>118</sup> *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

<sup>119</sup> *Infra* Appendix § 6. This provision does not apply to renter-canvassers because they already have access to the property and landlords possess identifying information for all renters.

<sup>120</sup> *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002).

<sup>121</sup> *Id.* at 166-67.

may enter the outdoor area of a property to knock on the resident's door.<sup>122</sup> In contrast, canvassers in multifamily properties typically must continue through the outdoor area of the property, enter a building, and then navigate through common areas to reach the doors of residents. This exposes the landlord of a multifamily property to risks of property damage and trespassing in restricted areas in a way that does not impact residents of single-family homes. The heightened potential of harm also affects renters in multifamily properties, who could suffer from property damage to shared amenities.

To ameliorate these concerns, the Bill proposes a modest permitting requirement that minimally intrudes on the rights of outside canvassers to access the property. The Bill allows landlords of multifamily properties to collect outside canvassers' names, addresses, and the names and addresses of their organization (if any).<sup>123</sup> This allows landlords to take action against any outside canvasser who engages in unlawful activity on the property. It likewise deters people from using the Bill to enter the property for improper purposes. Nevertheless, the Bill allows outside canvassers to submit this information in writing or by email as little as 24 hours before beginning their activities.<sup>124</sup> This notice period ensures that landlords receive identification information before the canvassing begins even if the landlord is not personally present to greet the canvassers. It may not allow for spur-of-the-moment canvassing, but this provision delays canvassing activities for only a minuscule period. Moreover, although the permitting requirement does not allow for complete canvasser anonymity, it does ensure canvasser confidentiality. The Bill prohibits the landlord from using or sharing an outside canvasser's identification information for any purpose except as necessary to pursue legal action against the canvasser or as otherwise required by law.<sup>125</sup> Lastly, the Bill does not allow landlords to deny or revoke permits unless the outsider canvasser engages in behavior that falls beyond the Bill's protections.<sup>126</sup>

Finally, the Bill offers remedies to both renter-canvassers and outside-canvassers who experience retaliation. If a landlord retaliates against a renter-canvasser for engaging in protected canvassing activities, the Bill affords that renter the same enforcement mechanisms and remedies that

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<sup>122</sup> See *Martin*, 319 U.S. at 146-48.

<sup>123</sup> *Infra* Appendix § 6(b).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* §§ 6(b)-(c).

were outlined in Part II.A.<sup>127</sup> Outside canvassers whose rights are violated can similarly bring a civil action against the landlord and are entitled to comparable remedies: treble damages and equitable relief.<sup>128</sup> The availability of these remedies and private rights of action, in addition to the opportunity for the attorney general to enforce the Bill in court,<sup>129</sup> provide landlords with a strong incentive to respect renters' political rights in multifamily properties.

#### CONCLUSION

The Renters Bill of Political Rights aims to approximate for renters the political rights to express, associate, and receive information that homeowners enjoy without fear of landlord interference. Although the Bill does not offer as broad of protections as the First Amendment or fair housing legislation, it achieves its purpose by protecting renters from retaliation. It also benefits from posing a lesser burden on landlords than either of the other approaches. This feature alone may not guarantee that a legislature will muster the political will to pass the Bill, but the costs associated with this legislation are offset by the benefits to renters—and our democracy—of allowing renters to engage in our political processes freely. For the sake of both renters' rights and the vitality of open and diverse discourse in our democracy, jurisdictions should safeguard the political rights of renters—and the Renters Bill of Political Rights provides the opportunity to do so.

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<sup>127</sup> *Id.* § 5(c).

<sup>128</sup> *Id.* § 6(d).

<sup>129</sup> *Id.* § 7.

## APPENDIX: MODEL LANGUAGE FOR THE RENTERS BILL OF POLITICAL RIGHTS

**A BILL**

To protect renters' rights of political expression and association, and for other purposes.

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Renters Bill of Political Rights".

**SEC. 2. PURPOSES**

The purposes of this Act are—

- (1) to protect renters from landlord retaliation for engaging in political expression or association;
- (2) to enable renters to receive political information from their neighbors and political canvassers; and
- (3) to otherwise equalize the political rights of renters and homeowners.

**SEC. 3. DEFINITIONS.**

In this Act:

- (1) **DWELLING UNIT.**—The term "dwelling unit" means—
  - (A) a structure or part of a structure that is leased for use as a home, residence, or sleeping place by one person or more persons; or
  - (B) a structure or part of a structure that is furnished, with or without rent, as an incident of employment for use as a home, residence, or sleeping place by one or more persons.
- (2) **LANDLORD.**—The term "landlord" means a person who owns a dwelling unit that is leased to a renter and any agent of that person.
- (3) **LEASE.**—The term "lease" means any written agreement,

including amendments or addenda, or oral agreement for a duration of less than 1 year, providing for use, possession, and occupancy of a dwelling unit.

- (4) **MULTIFAMILY PROPERTY.**—The term “multifamily property” means any property owned by a landlord that contains more than one dwelling unit.
- (5) **RENTER.**—The term “renter” means a person who has entered into a lease with a landlord to use, possess, and occupy a dwelling unit owned or leased by the landlord.

**SEC. 4. RETALIATION AGAINST RENTER FOR POLITICAL EXPRESSIONS OR ASSOCIATIONS PROHIBITED GENERALLY.**

- (a) **IN GENERAL.**—A landlord may not engage in any conduct described in section 5 if the landlord’s sole or primary motivation is to retaliate against a renter for the renter’s political beliefs or for the renter’s political activities, including—
  - (1) expressing support for, or opposition to, any existing or potential law, government official, candidate, political party, ballot question, or other political issue or cause;
  - (2) signing, or refusing to sign, any petition;
  - (3) contacting any government official for any reason or testifying before any government body for any reason;
  - (4) affixing any political sign, banner, or flag in the dwelling unit, regardless of whether the sign, banner, or flag may be seen by other persons located inside or outside of the property;
  - (5) joining, refusing to join, participating in, or refusing to participate in any political party or other lawful political association, whether formal or informal;
  - (6) voting, or refusing to vote, for or against any candidate, political party, or ballot question; and
  - (7) registering to vote or not registering to vote.
- (b) **ADDITIONAL PROTECTIONS FOR RENTERS’ POLITICAL CONDUCT ON MULTIFAMILY PROPERTIES.**—A landlord of a multifamily property may not engage in any conduct described in section 5 if the landlord’s sole or primary motivation is to retaliate against a renter for the renter’s political beliefs, for engaging in any activities prescribed in subsection (a), or for engaging in any of the following activities—

- (1) knocking on the door of a neighboring renter's dwelling unit, between the hours of 9:00 a.m. and 9:00 p.m., to—
    - (A) discuss with the neighboring renter any existing or potential law, candidate, government official, political party, ballot question, or other political issue or cause;
    - (B) encourage the neighboring renter to vote or register to vote; or
    - (C) distribute to the neighboring renter a voter registration application, petition, political leaflet, or any other written or electronic political material; and
  - (2) distributing a voter registration application, petition, political leaflet, or any other written political material by placing it in front of, or sliding it under, the door of a neighboring renter's dwelling unit.
- (c) EXCEPTIONS.—A landlord may not be liable for retaliation under this section if—
- (1) a renter intentionally harasses, defames, stalks, intimidates, threatens, advocates violence against, directs hate speech at, invades the privacy of, or otherwise menaces the landlord, a neighboring renter, or a guest;
  - (2) a renter trespasses on a neighboring renter's dwelling unit;
  - (3) a renter trespasses on an area of the property that renters are not normally permitted to enter; or
  - (4) a renter commits a criminal act.

## **SEC. 5. RETALIATORY CONDUCT.**

- (a) PROHIBITED CONDUCT.—Conduct considered retaliatory under section 4 includes any the following conduct engaged in, or threatened by, a landlord—
- (1) evicting a renter;
  - (2) refusing to renew a renter's lease;
  - (3) increasing a renter's rent or fees;
  - (4) increasing a renter's obligations or liabilities;
  - (5) decreasing a renter's services or amenities;
  - (6) imposing new rules on a renter or a guest;

- (7) selectively enforcing existing rules against a renter or a guest;
  - (8) harassing, defaming, intimidating, stalking, threatening, advocating violence against, directing hate speech at, invading the privacy of, or otherwise menacing a renter, a renter's family member, or a guest; and
  - (9) committing a criminal or other illegal act against a renter, a renter's family member, or a guest.
- (b) PRESUMPTION OF RETALIATORY CONDUCT.—
- (1) IN GENERAL.—If a renter engaged in conduct protected by section 4, and a landlord took any action against that renter described in subsection (a), the landlord's conduct is presumed to be retaliatory conduct.
  - (2) EXCEPTION.—If the landlord notified the renter of the landlord's intention to take any action against the renter described in subsection (a) before the renter engaged in conduct protected by section 4, the landlord's conduct is not presumed to be retaliatory conduct.
  - (3) REBUTTING THE PRESUMPTION.—A landlord may rebut a presumption of retaliatory conduct by proving, through clear and convincing evidence, that the landlord independently had just cause to take action against the renter and would have taken the same action if the renter had not engaged in an activity protected by section 4.
- (c) RENTER'S REMEDIES.—
- (1) RENTER'S PRIVATE RIGHT OF ACTION.—A renter may sue a landlord for retaliation, and if the renter proves that the landlord engaged in any conducted described in subsection (a) with the sole or primary motive to retaliate against the renter for engaging in activities protected by section 4, the renter is entitled to—
    - (A) remain in possession of the dwelling unit, recover possession of the dwelling unit, or terminate the lease and receive back from the landlord any unearned rent;
    - (B) three times the actual damages, or three times the periodic rent amount, whichever is greater;

- (C) reasonable attorney's fees, expert witness fees, and court costs;
  - (D) a negative injunction forbidding the landlord from retaliating against the renter or any similarly-situated renter; and
  - (E) any declaratory or equitable relief the court deems just.
- (2) DEFENSE AGAINST EVICTION ACTION.—A renter may defend against an eviction action by presenting evidence that the landlord's sole or primary motive for pursuing eviction is to retaliate against the renter for engaging in activity protected by section 4, and if the defense is successful, the renter is entitled to—
- (A) remain in possession of the dwelling unit, recover possession of the dwelling unit, or terminate the lease and receive back from the landlord any unearned rent;
  - (B) three times the actual damages, or three times the periodic rent amount, whichever is greater;
  - (C) reasonable attorney's fees, expert witness fees, and court costs;
  - (D) a negative injunction forbidding the landlord from retaliating against the renter or any similarly-situated renter; and
  - (E) any equitable relief the court deems just.

## **SEC. 6. CANVASSING RIGHTS IN MULTIFAMILY PROPERTIES.**

- (a) IN GENERAL.—Between the hours of 9:00 a.m. and 9:00 p.m., a landlord of a multifamily property must allow any person who does not have a lease with the landlord onto the property to allow that person to—
- (1) knock on the door of any or each renter's dwelling unit to
    - (A) discuss with the renter any existing or potential law, candidate, government official, political party, ballot question, or other political issue or cause;

- (B) encourage the renter to vote or register to vote; or
  - (C) distribute to the neighboring renter a voter registration application, petition, political leaflet, or any other written or electronic political material; or
- (2) distribute a voter registration application, petition, political leaflet, or any other written political material by placing it in front of, or sliding it under, the door of any or each renter's dwelling unit.
- (b) REGISTRATION.—The landlord may require any person who enters the property pursuant to subsection (a) to provide at most 24 hours' notice to the landlord and register the person's name, address, and the name and address of any organization the person may be representing, provided that the landlord may not use this information or disclose this information to any third party for any reason except as required by law or to the extent necessary to take legal or administrative action against the person or organization.
- (c) EXCEPTIONS.—A landlord may deny access or remove from the property any person who enters the property pursuant to subsection (a) but—
- (1) does not engage in an activity protected by subsection (a), or lingers on the property longer than is reasonably necessary to engage in an activity protected by subsection (a);
  - (2) harasses, defames, intimidates, stalks, threatens, advocates violence against, directs hate speech at, invades the privacy of, or otherwise menaces the landlord, a renter, or a guest;
  - (3) trespasses on a renter's dwelling unit;
  - (4) trespasses on an area of the property that renters are not normally permitted to enter; or
  - (5) commits a criminal act.
- (d) PRIVATE RIGHT OF ACTION.—Any person denied access to or removed from a multifamily property in violation of this section is entitled to:
- (1) treble damages;
  - (2) reasonable attorney's fees, expert witness fees, and court costs;

- (3) an injunction ordering the landlord to allow the person, and any similarly-situated person, to enter the property to engage in an activity protected by subsection (a); and
- (4) any declaratory or equitable relief the court deems just.

**SEC. 7. ATTORNEY GENERAL ENFORCEMENT.**

The Attorney General may bring a civil action against a landlord for declaratory or equitable relief as is necessary to carry out this Act.

**SEC. 8. EFFECTIVE DATE.**

This Act shall take effect 30 days after enactment.