

MIAMI VALLEY RISK MANAGEMENT ASSOCIATION

LEGAL ALERT

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**RE: FIRST AMENDMENT CONSIDERATIONS WHEN BANNING DOOR-TO-DOOR
CANVASSING AND SOLICITING**

On February 2, 2012, the Sixth Circuit Court of Appeals decided the case of *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564 (6th Cir. 2012). At issue in the case were two City of Englewood Ordinances that effectively banned all door-to-door canvassing and soliciting between the hours of 6:00 p.m. and 9:00 a.m. The Sixth Circuit found portions of both Ordinances unconstitutional in violation of the First Amendment. The Ordinances, as well as the Court's reasoning, will be addressed more fully below.

The City of Englewood Ordinances:

This case analyzed both a 2004 and a 2005 Ordinance, hereinafter referred to as "the 2004 Ordinance" and "the 2005 Ordinance," that were adopted by the City of Englewood (the "City") in an effort to limit the time in which door-to-door solicitation of its residents could occur. To that end, the 2004 Ordinance required anyone, with the exceptions of newspaper sellers, certain vendors of goods or services, and persons under the age of 18, to obtain a license from the City if they wished to "peddle, vend, solicit or request contributions for any purpose, charitable or otherwise." The licensing requirement, however, did not apply to "canvassing," which was defined as "the house-to-house distribution of ideas, pamphlets, literature * * * or the collection of signatures or support for any purpose or case," so long as canvassers did not also solicit donations. The 2004 Ordinance also included a so-called "curfew provision" that prohibited "all canvassing, peddling, vending, soliciting and requests for contributions" every day of the week before 9:00 a.m. and after 6:00 p.m., "unless a later hour is approved by the City Manager for good cause."

The 2005 Ordinance, while keeping the same licensing requirement and curfew provision as the 2004 Ordinance, rescinded the City Manager's discretionary power to grant curfew waivers for good cause. However, the 2005 Ordinance included an additional provision requiring the City Manager to maintain a "do-not-solicit-list" to which any property owner could add his or her residence. According to the 2005 Ordinance, properties registered on the "do-not-solicit list" became off limits "for the purpose of Contact Canvassing, peddling, vending, soliciting or requesting contributions." All persons engaged in such activities were required to obtain a copy of the "do-not-solicit list" and present it when requested by City officials or residents. The 2005 Ordinance also prohibited anyone from "knock[ing] at the door or ring[ing] the doorbell of any residence * * * upon which is clearly displayed at the entrance a notice that reads 'NO SOLICITORS' or that otherwise clearly purports to prohibit peddlers, Contact Canvassers, vendors, solicitors, or persons requesting contributions[.]"

Factual Background:

On April 12, 2005, Ohio Citizen Action (“OCA”), a non-profit, public-interest group that advocates mainly on environmental issues, notified the City in writing of its intention to canvass the City that day from 4:00 p.m. to 9:00 p.m. Later that evening, the City’s Police Chief advised OCA’s canvassing director that although her members were in violation of the City’s curfew provision as part of the 2004 Ordinance, he would allow canvassing to continue until 8:00 p.m. that day. However, as part of subsequent conversations with OCA, the City made clear that it intended to strictly enforce the curfew provision in the future.

On July 25, 2005, OCA filed an action against the City pursuant to 42 U.S.C. § 1983, alleging that the 2004 and 2005 Ordinances violated the First and Fourteenth Amendments of the United States Constitution. As part of its suit, OCA challenged: (1) the 6:00 p.m. curfew imposed by both ordinances; (2) the City Manager’s discretion under the 2004 Ordinance to extend the curfew “for a good cause;” (3) the licensing requirements of both ordinances; and (4) the do-not-solicit provision of the 2005 Ordinance. In ruling on the matter, the District Court struck down the licensing requirements from both the 2004 and 2005 Ordinances and the do-not-solicit provision of the 2005 Ordinance. The District Court, however, upheld the requirement that all would-be canvassers obtain a copy of the do-not-solicit-list before going door-to-door and the so-called curfew provisions of both the 2004 and 2005 Ordinances. Both OCA and the City appealed from the District Court’s decision.

Legal Analysis:

Curfew Provisions of the 2004 and 2005 Ordinances Found Unconstitutional

As it relates to the so-called “curfew provisions” of the 2004 and 2005 Ordinances, OCA argued that the 6:00 p.m. curfew provision violated the First Amendment as a matter of law. Noting that the United States Supreme Court has yet to clarify what standard of review applies to ordinances regulating door-to-door canvassing, the Sixth Circuit applied the familiar time, place, and manner analysis. This analysis allows a governmental entity to impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided that such restrictions (1) prescribe adequate standards for administering officials to apply; (2) are narrowly tailored to serve a significant governmental interest; (3) and leave open ample alternatives for communication. In applying this standard, the Court noted that the governmental entity that enacts the regulation bears the burden of establishing each of the three elements.

At issue in this matter was the second requirement, *i.e.*, whether the content-neutral regulation enacted by the City was narrowly tailored to serve a significant governmental interest. In its attempt to meet its burden establishing the curfew provisions constitutionality, the City claimed that the curfew provisions serviced its interests by (1) protecting the privacy rights of its citizens, and by (2) preventing crime. The Sixth Circuit, however, determined that these interests, albeit significant, were not narrowly tailored to achieve these objectives.

As it relates to the City’s claim that the curfew provisions serves to protect the privacy interests of its residents, the Sixth Circuit, relying on the United States Supreme Court’s decision in *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002), found that because the City’s ordinance allowed residents to avoid being

inconvenienced by door-to-door canvassers by simply posting a “No Soliciting” sign on their property, and because the evidence provided by the City did not support its claim that residents were particularly protective of their privacy after 6:00 p.m., the curfew requirements were not narrowly tailored to serve the interests in protecting privacy rights.

Furthermore, as it relates to the City’s claim that the curfew provision also serves to prevent and reduce crime within the City, the Sixth Circuit noted that this argument generally focuses on either preventing crimes committed by persons who pose as canvassers, or ensuring the safety of the canvassers themselves. However, although the City claimed criminals posing as canvassers were a real threat that necessitated the curfew provisions, the Court determined that the City offered virtually no evidence of criminality by canvassers or solicitors to support this claim. In so holding, the Court noted:

There is reason to doubt the effectiveness of a soliciting curfew in reducing crime. In *Watchtower Bible and Tract Society*, in addressing a permitting requirement, the Supreme Court observed, ‘it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers.’

What seemed ‘unlikely’ with regard to a permitting requirement is equally so in the case of a curfew. There is no reason to believe (and [City] offers no evidence to support) that a curfew on soliciting activities deters criminals from posing as canvassers, or from approaching private residences under different pretenses altogether, such as to ask for directions, or by faking medical emergency. Therefore, we hold that the City’s 6 P.M. curfew is not narrowly tailored to its interest in preventing crime by door-to-door canvassers or by individuals posing as such. (Internal citations omitted.)

As this decision indicates, the Sixth Circuit paid particularly close attention to the statistical data provided by the City, something which the Court reproduced as an Appendix to its decision. According to the Sixth Circuit, the City’s data involving police service lacked clarity in several respects, most notably was the lack of any evidence presented by the City distinguishing between police service calls concerning solicitations of a commercial nature as opposed to that of a charitable nature. This was significant to the Court as the United States Constitution accords lesser protection to commercial speech than to other constitutionally guaranteed expressions. However, because the evidence presented by the City failed to demonstrate that the 6:00 p.m. curfew was necessary to protect its interest in crime prevention, the Court determined that the 2004 and 2005 Ordinances imposing a 6:00 p.m. curfew were unconstitutional as they were not narrowly tailored to advance the City’s significant governmental interest in preventing crime. Unfortunately, the Court’s decision does not shed any light on what type of “curfew provision,” if any, would pass constitutional muster.

Do-Not-Solicit-List Provision of the 2005 Ordinance Upheld as Constitutional

Although the curfew and licensing provisions were found unconstitutional, the Sixth Circuit upheld the do-not-solicit-list provision found in the 2005 Ordinance requiring would-be solicitors to carry the list when soliciting in the City. In so holding, although it seems to be

counterintuitive in light of its finding the curfew provisions unconstitutional, the Court found that this requirement did not infringe on First Amendment rights because the 2005 Ordinance did not require canvassers to divulge their identity to receive a copy of the list, and that there was nothing to suggest that obtaining the list was difficult or burdensome, or that it took an undue amount of time.

Conclusion:

Based on the Sixth Circuit's decision in *Ohio Citizen Action v. City of Englewood*, the issues involved in a public entity's enactment of restrictions regarding door-to-door solicitation is still very much uncertain. What is clear, however, is that any enactment is more likely to pass a constitutional challenge if it distinguishes between commercial purposes as opposed to other protected expressions. In turn, if an enactment is intended to regulate all forms of door-to-door solicitation, it must be able to pass a heightened standard and be based on actual evidence to establish the regulation will, in fact, address the significant interest for which it is alleged to protect. Furthermore, at least as it relates to this decision, it appears that the easiest way regulate door-to-door solicitation may simply be maintaining a do-not-solicit-list and provide "No Solicitation" signs to residents. Therefore, based on the law as it now stands, any public entity wishing to enact regulations limiting door-to-door solicitation with a "curfew provision" certainly faces an uphill battle when it comes to any constitutional challenges.