

September 21, 2022

By First Class Mail and Email to: rdenk@myplaw.com

Ryan B. Denk
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Re: Gardner's Non-Solicitation Ordinance and Enforcement

Dear Mr. Denk,

We are writing on behalf of Mr. Robert Bowen, a resident and political campaign volunteer, to express our concerns about the Gardner Police Department's threatened enforcement of an unpublished Gardner City non-solicitation ordinance. On September 4, 2022, Gardner Police Officer Faith Jolly, #716, harassed and threatened to arrest Mr. Bowen for engaging in constitutionally-protected political canvassing.

Officer Jolly's conduct raises serious constitutional concerns and undermines community involvement in the political process. For the reasons outlined below, we ask that you provide a timely response to our request for the City's non-solicitation ordinance, if such an ordinance does exist, and for you to take immediate action to inform the Gardner Police Department that political canvassing is protected speech under the First Amendment of the U.S. Constitution.

Background

On September 4, 2022, Mr. Bowen was canvassing for his political party on or around Walter Street and West 172nd Terrace. Mr. Bowen's canvassing activities included walking door-to-door and leaving political literature. After going door-to-door for some time, Mr. Bowen returned to his car to get more literature and to take a break from walking in the heat. When he did so, a woman who lived in the neighborhood began raising her voice at him and claiming that Mr. Bowen was sitting in his car suspiciously. Mr. Bowen explained that he was there to canvass and then left the woman to continue his political canvassing.

Approximately thirty minutes later, when Mr. Bowen returned to his car, he was confronted by Gardner Police Officer Faith Jolly, #716. Through his conversation with Officer Jolly, Mr. Bowen learned that the neighborhood woman called the police because she found Mr. Bowen to be suspicious. Officer Jolly told Mr. Bowen that he was violating Gardner's non-solicitation ordinance, but did not provide Mr. Bowen with a specific ordinance number or the language of the alleged ordinance. Instead, Officer Jolly threatened to



arrest Mr. Bowen if he continued to canvass in Gardner in the future. Mr. Bowen then drove off. Approximately five minutes later, Officer Jolly pulled Mr. Bowen over and ticketed him for allegedly failing to use his turn signal. Mr. Bowen believes that Officer Jolly targeted him for this minor traffic infraction because he was engaging in constitutionally-protected political speech activities.

Given Officer Jolly’s threat of arrest and prosecution, and targeting of Mr. Bowen for traffic enforcement, Mr. Bowen is afraid to continue his political canvassing in the city of Gardner.

Moreover, the Gardner non-solicitation ordinance in question does not appear to exist. According to the City’s website, Gardner, Kansas requires a permit from the Gardner Police Department for door-to-door soliciting, at an “annual fee of \$25 or a one day only permit for \$5 [...]”¹ No ordinance number is cited on this City webpage. Nor does this permit requirement list any criminal penalty for canvassing without a permit.

Legal Analysis

It is a well-established principle that “[t]he freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth [Amendment] against abridgment by a state.” *Schneider v. State*, 308 U.S. 147, 160 (1939). Although municipalities may regulate matters involving the interest of health, convenience, welfare, and public safety, the regulations “may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.” *Id.*

The Supreme Court of the United States has routinely held that canvassing for noncommercial causes—especially those of a political or religious nature—is activity protected by the First Amendment of the U.S. Constitution. *See, e.g., Lovell v. Griffin*, 303 U.S. 444 (1938) (finding a city ordinance requiring a permit to distribute literature was void on its face for violating the First Amendment); *Schneider v. State*, 308 U.S. 147 (1939) (holding that four municipal ordinances prohibiting distribution of handbills and other forms of literature unconstitutionally abridged the liberty of free speech); *Cantwell v. Conn.*, 310 U.S. 296 (1940) (finding that a statute which required a certificate from a municipal officer to solicit donations for religious, charitable, or philanthropic causes was an unconstitutional restraint on the free exercise of religion); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (holding that an ordinance prohibiting solicitation of members for an organization without a permit granted by the mayor and council of a city imposed an

¹ Gardner, Kansas, *Soliciting*, Neighborhood Safety (2022) <https://www.gardnerkansas.gov/government/departments-and-divisions-/police-department/programs-and-services/neighborhood-safety/soliciting>.



unconstitutional prior restraint upon, and abridged, the constitutionally guaranteed freedom of speech); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. Of Stratton*, 536 U.S. 150 (2002) (holding that a city ordinance that requires someone to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit to police did not pass First Amendment scrutiny).

Particularly, state action that has a chilling effect on the use of constitutionally protected speech violates the First Amendment of the U.S. Constitution. See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963). The Tenth Circuit has established that “any form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.” *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). Official retaliation occurs when (1) a person is engaged in constitutionally protected activity; (2) the state’s actions cause the person to “suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity”; and (3) the state’s adverse action was “substantially motivated as a response to the [person’s] exercise of constitutionally protected conduct.” *Id.*

It remains unclear whether the City of Gardner has a non-solicitation ordinance at all, much less one that prohibits political canvassing. However, if such an ordinance exists, it abridges the individual liberties secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion. Mr. Bowen was exercising his First Amendment right to canvass for a noncommercial political cause, which is an activity undoubtedly protected by the First Amendment. Officer Jolly’s harassment and threat of arrest are likely to cause a chilling effect on Mr. Bowen’s use of constitutionally-protected speech. Mr. Bowen is now understandably concerned that he will be unable to continue his political canvassing in the city of Gardner because of the harassment and threat of arrest that he received from this officer. Reasonable individuals, like Mr. Bowen, will refrain from exercising their First Amendment rights when doing so subjects them to the risk of being arrested. Moreover, Officer Jolly’s subsequent targeting of Mr. Bowen for traffic enforcement raises serious concerns of retaliation. Overall, Officer Jolly’s threats and ticketing of Mr. Bowen raise serious constitutional concerns, and any future prosecution of someone for political canvassing under a non-solicitation ordinance—if one exists—would be unconstitutional.

Further, such an ordinance would violate state law. Kansas statute provides that “[n]o city or county shall regulate or prohibit canvassing, polling, soliciting or otherwise approaching private residences for the purpose of distributing campaign literature or campaigning for a candidate for an elected office.” K.S.A. § 25-2712.



Conclusion

While nothing can change the fact that Mr. Bowen's constitutional right to free speech has already been violated, we request you take immediate action to train the Gardner Police Department on the First Amendment rights of political canvassers to ensure that such violations do not continue to occur in the future. This matter will become continually more pressing as the November midterm elections approach, and no political canvassers should be subjected to a chilling effect of their First Amendment rights to canvass within the city of Gardner. We further request you send us a copy of the City's non-solicitation ordinance, if such an ordinance does exist, in response to this letter.

If you would like to discuss this matter further, please do not hesitate to contact Sharon Brett at sbrett@aclukansas.org or Kayla DeLoach at kdeloach@aclukansas.org

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Kayla DeLoach".

Kayla DeLoach
Staff Attorney, ACLU of Kansas