



Office memorandum

DATE: April 5, 2021

TO: City of Norman Oversight Committee

FROM: Anthony Purinton, Assistant City Attorney

THROUGH: Kathryn Walker, City Attorney

SUBJECT: Regulation of Unsolicited Written Materials

BACKGROUND:

For the past 10 years, the City Attorney's office has regularly advised Council on potential solutions to the City's longstanding issues with the haphazard distribution of unsolicited written materials on private residences. This memo provides an update on current case law and gives some suggested next steps in the event the City wishes to take action. Attached below are all of the previous memos written by the City Attorney's office on this issue.

DISCUSSION:

As identified in prior memos submitted to this Committee, other municipalities have enacted ordinances aiming to curb similar "fly and fling" delivery methods. For example, a Lexington-Fayette Urban County Government ordinance requires unsolicited written material to be placed on one of six designated locations (e.g., a porch, securely attached to a front door, a mail slot). The Sixth Circuit has upheld that ordinance as a reasonable time, place, and manner restriction on free speech. *Lexington H-L Serv. Inc., v. Lexington-Fayette*, 879 F.3d 224 (6th Cir. 2018) However, the Sixth Circuit opinion is not binding in Oklahoma and only has persuasive value in the Tenth Circuit.

Since the last memo on this subject in 2019, there has been no binding or relevant case law published that addresses this particular set of facts. However, the Tenth Circuit's recent First Amendment opinions may be instructive of the City's next steps, if the City wishes to enact any regulations. The most helpful is *McCraw v. Oklahoma City*, which struck down Oklahoma City's prohibition on standing, sitting, or staying in public medians. The Court in *McCraw* found that the city's justifications for enacting the ordinance were insufficient and did not meet the standards required for a reasonable time, place, and manner restriction. *McCraw v. Oklahoma City*, 973 F.3d 1057, 1070 (10th Cir. 2020).

An ordinance similar to Lexington-Fayette's would be considered a time, place, and manner restriction on speech, subject to intermediate scrutiny. Intermediate scrutiny requires that the restrictions (1) do not depend on the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of information.

Narrow tailoring requires justifying both the “ends” and the “means” of the restriction. *Id.* at 1074. The City must justify the “ends” by showing that the City’s interests or recited harms are real – not simply supported by speculation or conjecture. The “means” (i.e., the restrictions used by the City to curb the haphazard distribution) must actually solve the harm, but must not burden substantially more speech than is necessary. *Id.* at 1071.

There are three general principles that can be distilled from the *McCraw* holding which provide some of the steps that should be taken by the City, prior to enacting any time, place, and manner restriction. First, the City should develop a robust legislative record evidencing the concrete harms caused by the haphazard delivery of these materials. Second, the City should engage in good-faith discussion and consideration of alternative courses of action that reach the same “end” goal, but that are less burdensome on speech. Finally, the City should ensure that any proposed restriction leaves open ample alternative channels for communication.

RECOMMENDATION:

As there has been no particularly predictive case law that has developed in the Tenth Circuit since 2019, the City’s legal position and risk remain the same. However, if the City wishes to pass a regulatory measure, the City’s next steps are more defined after *McCraw*. It is important to note that even if the City completes all of the steps outlined above, the City still risks First Amendment litigation and still risks an unfavorable ruling. Additionally, regardless of the constitutionality of any proposed regulation, the problems with enforcement that other memos have identified still exist, which pose logistical problems.