



## CITY OF NORMAN, OK STAFF MEMORANDUM

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**MEETING DATE:** 03/09/2023

**REQUESTER:** City Council Oversight Committee

**PRESENTER:** Anthony Purinton, Assistant City Attorney

**ITEM TITLE:** Regulation of Unsolicited Written Materials

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### BACKGROUND:

For the past 10+ years, the City Attorney's office has regularly updated Council on potential solutions to the City's longstanding issues with the haphazard distribution of unsolicited written materials on the lawns of private residences. This memo provides an update on current case law and gives some suggested next steps in the event the City wishes to move forward with previously recommended courses of 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, there have been other municipalities that have enacted ordinances aiming to curb similar "fly and fling" delivery methods that produce litter. For example, the Lexington-Fayette Urban County Government enacted an ordinance that 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). While on point, this case is not binding in Oklahoma and only has persuasive value in the 10<sup>th</sup> Circuit. Since the last memo on this subject, there has been no binding or relevant case law published that addresses this particular set of facts.

If the City were to pass an ordinance similar to the one in Lexington-Fayette, the 10<sup>th</sup> Circuit would likely consider the City's similar ordinance as a time, place, and manner restriction on speech, subject to intermediate scrutiny. To pass that standard, the City must show 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) that they leave open ample alternative channels for communication of information.

Narrow tailoring of restrictions on speech requires the City justify 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.

The last time this issue was presented to City Council, the City Attorney's office recommended developing a robust legislative record evidencing the concrete harms caused by the haphazard delivery of these materials, which has been completed. Photographic evidence of this type of advertising material in and around the City's stormwater collection grates were obtained over a prolonged period, indicating that (1) this type of material does contribute to blockages of stormwater collection grates and (2) this type of material likely makes it into the City's stormwater system, which results in the material polluting downstream outlets.

#### **RECOMMENDATION:**

While there has been no binding case law that has developed in the 10<sup>th</sup> Circuit since on this issue, the City could rely on cases in other Circuits for their persuasive value, such as the *Lexington-Fayette* opinion. However, the City's legal position and risk remain uncertain if this issue were to be litigated. Given that there may be economic impacts to private distribution companies, the risk of litigation if an ordinance was passed is high. Additionally, regardless of the constitutionality of any proposed regulation, the problems with enforcement that other memos have identified still exist, which pose logistical problems.