STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

August 16, 1977

ATTORNEY GENERAL OPINION NO. 77-271

Mr. Dann L. Goode
Greenwood County Attorney
Greenwood County Courthouse
Eureka, Kansas 67045

Re: Cities--Ordinances--Canvassing and Solicitation

Synopsis: A city ordinance prohibiting door-to-door solicitation and canvassing for commercial purposes is unconstitutional. A city may constitutionally enact and enforce ordinances imposing reasonable regulations on persons engaged in such activities, but may not prohibit such activity altogether.

* * *

Dear Mr. Goode:

You request my opinion concerning section 5-301 of the Eureka city code which provides thus:

> "The practice of going on, in and upon private residences in the city by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise or services, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares, merchandise or services and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a disturbance and unlawful."

This language is virtually identical to that of an ordinance which the Court considered in Breard v. City of Alexandria, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920, 35 A.L.R.2d 335 (1951), and which the Court upheld against arguments that the ordinance constituted a constraint on interstate commerce, that it constituted an unreasonable regulation of a lawful business in violation of the due process clause, and that it constituted an abridgement of the First Amendment freedom of speech. In upholding the ordinance, the Court distinguished a municipal ordinance which had been held invalid in Martin v. City of Struthers, 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 (1943). The ordinance considered in that case forbade any person to summon the occupants of a residence to the door to receive advertisements, and it was held invalid as applied to the free distribution of flyers advertising a religious meeting. The Court there noted that the ordinance "was not directed solely at commerial advertising." 319 U.S. at 142, n. 1. The Court stated further, in Martin, supra:

> "The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder.
>
> * * *
>
> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."
>
> * * *
>
> A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers." 319 U.S. at 143-144, 146-147.

In the case of noncommercial door-to-door canvassing, such as for political or religious purposes, although the city may not prohibit such canvassing altogether, it may enforce reasonable regulations. In Hynes v. Mayor of Oradell, 425 U.S. 610, 48 L. Ed. 2d 243, 96 S. Ct. 1755 (1976), the Court stated:

> "There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. We cannot say, and indeed appellants do not argue, that door-to-door canvassing and solicitation are immune from regulation under the State's police power, whether the purpose of the regulation is to protect from danger or to protect the peaceful enjoyment of the home." 425 U.S. at 619.

The Court there held the municipal ordinance invalid because it was impermissibly vague and thus exercised a potentially inhibiting effect on speech.

The continuing validity of Breard v. City of Alexandria, supra, is open to question. In distinguishing the ordinance before it from that involved in Martin v. City of Struther, supra, the Breard Court appeared to emphasize the commercial character of the solicitations prohibited by that ordinance, as contrasted with the clearly noncommercial advertisements of a religious meeting involved in Martin v. City of Struther. In Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976), expressly held that commercial speech was entitled to First Amendment protection, and pointed out that the contrary notion had grown increasingly questionable in its recent decisions. Indeed, it pointed out that "[s]ince the decision in Breard . . . the Court has never denied protection on the ground that the speech in issue was 'commercial speech.'" 425 U.S. at 759. [Emphasis by the Court.] In effect, Breard is substantially discredited as authority for the proposition that door-to-door canvassing for commercial purposes may constitutionally be absolutely prohibited while door-to-door for noncommercial purposes may only be regulated, and may not be absolutely prohibited. In Martin v. City of Struther, the Court acknowledged that door-to-door canvassing and solicitation may sometimes be a "blind for criminal activities" and the safety of persons and security of their homes may warrant reasonable

regulations of such activity in the exercise of the municipal police power. These police power considerations are identical, of course, whether the solicitation has a commercial purpose or a religious or political one. The primary precedent for attempting to distinguish between commercial and noncommercial solicitation for the purposes of municipal regulation is Breard v. City of Alexandria, supra, and in my judgment, the basis of that distinction, that speech with some commercial features has a lesser dignity before the First Amendment than purely noncommercial speech, such as solicitation for religious or political purposes, is no longer valid.

Clearly, the city may enact and enforce ordinances imposing reasonable regulations of persons conducting door-to-door canvassing and solicitations. In my judgment, however, section 5-301 of the city code of the City of Eureka, absolutely prohibiting such activity, is overbroad on its face, and an unconstitutional exercise of the police power of the city.

Yours truly,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj