



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Southern California

March 20, 2019

Via Email

Honorable Members of the Aliso Viejo City Council
City Hall
12 Journey # 100
Aliso Viejo, CA 92656

Re: Aliso Viejo Municipal Code Section 4.04.100

Honorable Members of the City Council:

As explained in detail below, Aliso Viejo's prohibition on canvassing residential premises after dark Monday through Saturday or any time on Sunday or on any state or federal holidays violates the First Amendment rights of the Democratic Party of Orange County and its members. Aliso Viejo Municipal Code (AVMC) Section 4.04.100. Accordingly, I request that you cease enforcement of this section of the municipal code and then either repeal it or amend it so that it satisfies the First Amendment of the United States Constitution.

The Democratic Party of OC is the official political organization representing more than half a million registered Democratic voters in Orange County, California. The Democratic Party of OC conducts year-round grassroots field programs to register new voters, tries to increase voter turnout in every part of Orange County, and brings Democratic messaging directly to voters by phone, by mail, at events, and by canvassing at voters' residences. It would canvass at residences in Aliso Viejo on Sundays, state and federal holidays, and between 6 pm and 9 pm if the municipal code did not prohibit such canvassing.

Canvassing people in their homes to speak with them about politics, candidates, and upcoming elections is unquestionably protected by the First Amendment to the United States Constitution. *See, e.g., Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *ACORN v. City of Frontenac*, 714 F.2d 813, 816 (7th Cir. 1983). Section 4.04.100 significantly interferes with the Democratic Party of OC's ability to effectively canvass homeowners who have not posted a notice demonstrating their unwillingness to have solicitors and canvassers on their property. During the winter months, Section 4.04.100 has the effect of barring canvassing after about 5:15 pm or so, thereby preventing them from reaching substantial numbers of residents who work outside the home on a "traditional" 9-5 pm work schedule. Similarly, restricting canvassing on Sundays and state and federal holidays bars canvassing during a time that many residents will be at home because they do not work on those days.

The government may restrict canvassing activity protected by the First Amendment, but it bears the burden of demonstrating that its regulations are content neutral, are narrowly tailored to

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satisfy an important government interest, and leave open ample alternative means of communications. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989).

Numerous courts have considered the constitutionality of ordinances similar to Section 4.04.100, which prohibit residential canvassing either after 5 or 6 pm or after dark and on certain days of the week. These courts have repeatedly held that such ordinances are unconstitutional because they are not sufficiently tailored to the government's asserted interests. *See ACORN*, 714 F.3d at 818-20 (invalidating ordinance prohibiting solicitation and canvassing after 6 pm); *see also Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 572-80 (6th Cir. 2012) (invalidating city ordinance banning all door-to-door canvassing and solicitation between 6 pm and 9 am); *Citizens Action Coal. of Indiana, Inc. v. Town of Yorktown, Ind.*, 58 F. Supp. 3d 899, 912 (S.D. Ind. 2014) (prohibition on door-to-door canvassing and solicitation after the hour of 9:00 p.m. or sunset, whichever is earlier, violates the First Amendment); *Massachusetts Fair Share, Inc. v. Town of Rockland*, 610 F. Supp. 682, 688 (D. Mass. 1985) (citing ACORN's holding that "an ordinance that prevented charitable canvassing between the hours of 6:00 p.m. and 9:00 a.m. and on Sundays and legal holidays [was] unduly intrusive upon the first amendment rights of the plaintiff.").

The City cannot justify the significant restriction on the Democratic Party of OC's First Amendment rights posed by the time and day limitations on canvassing because there are numerous less restrictive means by which it could satisfy its asserted interests in protecting the privacy of its residents. For example, numerous courts have held that forbidding canvassing where residents have posted on their property "No Solicitation" signs is a far more narrowly tailored means of protecting residential privacy than barring solicitation during specific times or days when residents may well be home and are unlikely to have gone to bed. *See, e.g., Watchtower*, 536 U.S. at 168-69; *City of Wateska v. Illinois Public Action Council*, 796 F.2d 1547, 1556-57 (1986) (city has provided homeowners who are unwilling to be canvassed with a less restrictive means to protect their privacy by barring canvassing at home where No Solicitation signs are posted); *Fair Share, Inc.*, 610 F. Supp. at 689. Indeed, the City's ordinance already forbids people from entering on property to solicit or canvass at any time when there is a No Solicitors sign posted. AVMC Section 4.04.030.

The City also attempts to justify its restrictions on solicitation and canvassing as preventing fraud or other misrepresentations that "are or could be employed in" "soliciting or . . . the peddling of goods, wares, merchandise or services." AVMC Section 4.04.010. This interest is also insufficient under the First Amendment to justify the time limits as applied to the Democratic Party of OC's canvassing activity. While preventing fraud is a significant government interest, it is dubious that limiting the time during which canvassing is permitted does anything to further that interest for at least two reasons. First, people intent on defrauding homeowners or otherwise engaging in criminal activity can easily approach homes without canvassing or soliciting, i.e., in ways not covered by the ordinance's restriction on the time during which canvassing is permitted. *See, e.g., Ohio Citizen Action*, 671 F.3d at 574 ("There is no reason to believe. . . that a curfew on soliciting activities deters criminals from approaching private residences under different pretenses altogether, such as to ask for directions, or by faking medical emergencies."). Second, government may enforce extant penal laws barring fraud or other criminal offenses against people or their property. *Id.*; *Fair Share, Inc.*, 610 F. Supp. at 689

In addition, the City's legislative findings point to the possibility of fraud or misrepresentations that could be employed by people soliciting, i.e., requesting money or other personal or real

property, or otherwise attempting to get money from a resident by “the peddling of goods, wares, merchandise or services.” AVMC Section 4.04.010. However, members of the Democratic Party of OC never solicit funds or property when they canvass. Thus, the City cannot rely on an interest in preventing fraud that may accompany efforts to get money from residents to justify a restriction on the Democratic Party of OC’s canvassing activity, which involves no effort to obtain money or property from the people being canvassed.

Because numerous courts have already held that ordinances similar to AVMC Section 4.04.100 violate the First Amendment, we hope that the City will agree to cease enforcing the ordinance - at minimum as applied to the Democratic Party of OC's canvassing -- and then either repeal it or amend it so it satisfies the First Amendment. If the City refuses to do so, we are confident that a court would hold that Section 4.04.100 violates the First Amendment as applied to the Democratic Party of OC's canvassing activities. If a court were to so hold, the City would be liable for the Democratic Party of OC's attorneys' fees under 42 U.S.C. section 1988.

The Democratic Party of OC would like to canvass on Sundays in Aliso Viejo in the near future. Accordingly, we ask that you let one of us know by close of business March 27, 2019 whether the City will suspend enforcement of Section 4.04.100 against the Democratic Party of OC's residential canvassing activities until the City either repeals or amends the ordinance to comport with First Amendment standards.

Sincerely,



Peter J. Eliasberg
Chief Counsel
Manheim Family Attorney
for First Amendment Rights



Brendan Hamme
Staff Attorney

cc: Scott C. Smith, City Attorney