

DOOR-TO-DOOR DEMOCRACY: EXPANDING CANVASSING RIGHTS TO PROMOTE DEMOCRATIC PARTICIPATION

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ABSTRACT

The act of going door-to-door for a political candidate or cause is a longstanding part of the American civic tradition. Political canvassing plays a vital role in our democracy—assisting citizens with voter registration, providing civic education, and increasing voter participation—which can play a critical role in building the political power of marginalized communities. Because of its importance in civic life, canvassing has long been protected under the First Amendment. However, canvassers continue to face restrictions that frustrate their exercise of this right. Municipalities regulate political, religious, and charitable canvassing in ways that likely violate the First Amendment while also disproportionately subjecting canvassers of color to arbitrary and illegal enforcement. Canvassers face seemingly insurmountable challenges when seeking to canvass residents of apartment buildings, which denies apartment residents access to the services provided to those who live in single-family homes. This Article seeks to equip advocates with strategies to protect and expand canvassing rights as a means of increasing democratic participation. The Article traces the history of First Amendment jurisprudence on canvassing, exploring legal arguments to expand canvassing rights and combat municipal canvassing restrictions. The Article also explores the complex legal landscape governing canvassing in apartment buildings and offers litigation and policy strategies for expanding the right to canvass—and the right to be canvassed—into both public housing and privately-owned, multi-unit buildings.

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I.
INTRODUCTION

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.¹

Texans call it “block-walking.” Minnesotans call it “door-knocking.” Washingtonians call it “door-belling.” Other regions simply refer to it as “canvassing.” Regardless of its name, the act of going door-to-door for a political candidate or cause is a longstanding part of the American civic tradition and the marketplace of ideas.² In an era of cynicism about politics,³ when foreign interference has shaken voters’ confidence in the information they obtain online⁴ and Super PAC-funded campaign advertisements flood the airwaves,⁵ face-to-face conversations at the door remain among the most effective methods of issue advocacy and voter engagement.⁶ Not only do these conversations humanize politics, but door-to-door campaigning can also serve as a critical means of delivering messages, mobilizing voters, and winning campaigns.⁷

1. *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943).

2. *See id.*

3. *See* Sheryl Gay Stolberg, *For ‘Millennials,’ a Tide of Cynicism and a Partisan Gap*, N.Y. TIMES (Apr. 29, 2013), <http://www.nytimes.com/2013/04/30/us/politics/for-millennial-voters-a-tide-of-cynicism-toward-politics.html> [<https://perma.cc/M66S-8M32>].

4. *See* DARRELL M. WEST, BROOKINGS INST., HOW TO COMBAT FAKE NEWS AND DISINFORMATION (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/> [<https://perma.cc/6LTX-M6SE>].

5. *See Super PACs*, OPENSECRETS.ORG BLOG, <https://www.opensecrets.org/pacs/super-pacs.php> [<https://perma.cc/66K8-5HK4>] (last visited Aug. 27, 2019); *Outside Spending*, OPENSECRETS.ORG BLOG, <https://www.opensecrets.org/outsidespending/> [<https://perma.cc/4J2S-G6WF>] (last visited Aug. 27, 2019); Michael Scherer, Pratheek Rebala, & Chris Wilson, *The Incredible Rise in Campaign Spending*, TIME (Oct. 23, 2014, 12:39 PM), <http://time.com/3534117/the-incredible-rise-in-campaign-spending/> [<https://perma.cc/J49L-FRR9>].

6. *See* Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 653 (2000) (concluding that “long term retrenchment in voter turnout is partly attributable to the decline in face-to-face political mobilization”).

7. *See id.* For example, canvassing played a critical role in the Alabama Senate special election in December 2017, in which Democrat Doug Jones defeated Republican Roy Moore. *See, e.g.*, Vann R. Newkirk II, *How Grassroots Organizers Got Black Voters to the Polls in Alabama*, THE ATLANTIC (Dec. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/12/sparking-an-electoral-revival-in-alabama/548504/> [<https://perma.cc/C5UQ-CA3K>] (“‘We knocked on over half a million doors,’ Shropshire said. ‘Those conversations weren’t just dropping a piece of literature at their door

Political canvassing plays a vital role in our democracy, assisting citizens with voter registration, providing civic education, and increasing voter participation—especially in politically marginalized communities where voter registration, turnout, and representation are disproportionately low.⁸ These politically marginalized communities include low-income people,⁹ people of color,¹⁰ formerly incarcerated people,¹¹ people with limited English proficiency,¹² people with disabilities,¹³ and young people.¹⁴ A study conducted by the Center for American Progress summarized the impact of canvassing on politically marginalized communities:

Studies show that voters contacted through canvassing and direct outreach efforts are more likely to participate in elections. One study found that, generally, one additional vote is produced for every 14 people contacted by canvassers, while some volunteer phone banks have been shown to produce one additional vote for

. . . our canvassers in many instances told people what they needed to go do to get ID if they needed it.”).

8. See DANIELLE ROOT & LIZ KENNEDY, CTR. FOR AM. PROGRESS, INCREASING VOTER PARTICIPATION IN AMERICA: POLICIES TO DRIVE PARTICIPATION AND MAKE VOTING MORE CONVENIENT 8, 42 (2018), <https://cdn.americanprogress.org/content/uploads/2018/07/10161310/VoterTurnout-report-8.pdf> [<https://perma.cc/EL38-YP5B>] (“Research shows that communities of color, young people, and low-income Americans are disproportionately burdened by registration barriers, inflexible voting hours, and polling place closures, making it more difficult for these groups to vote. Participation gaps persist along racial, educational, and income-level differences.”).

9. *Id.* at 13 (“A shocking 20-point gap exists in [voter] registration rates between Americans making less than \$25,000 per year and individuals making \$100,000 or more per year.”) (internal citation omitted).

10. *Id.* at 14 (“For example, in 2016, white voting-age citizens participated at a 63 percent rate, while voting-age citizens of color participated at a 53 percent rate.”) (internal citation omitted).

11. *Id.* at 33–34 (“[M]ore than 6 million American citizens [are] barred from exercising their fundamental right to vote because of ex-offender disenfranchisement laws . . . [However,] [a]n estimated 93 percent—or about 14 million—of formerly incarcerated people are eligible to vote based on current rights restoration laws. Despite this, participation is low. In 2008, when voter participation in the United States reached almost 62 percent, one study found that participation for eligible formerly incarcerated people in five states—Florida, Georgia, Michigan, Missouri, and North Carolina—averaged around 22.2 percent.”) (internal citations omitted).

12. *Id.* at 33 (explaining that, despite Voting Rights Act protections for eligible Americans with limited English proficiency, “some poll workers are not aware of these federal requirements, while some states place unnecessary restrictions on how many voters a language-proficient person can assist, which may prevent limited English speakers from receiving the assistance they need. Between 3 and 4 percent of Native Americans in Arizona, Nevada, South Dakota, and New Mexico—four states with large Native American communities—cited language as a problem that they encountered when voting.”) (internal citations omitted).

13. *Id.* at 14 (“Eligible Americans with disabilities are also less likely to be registered to vote—by about 2 percentage points—than people without disabilities.”) (internal citation omitted).

14. *Id.* (“Young people are particularly burdened by barriers in the voter registration process. According to the census, people ages 18 to 34 were registered at a rate of 64 percent in 2016, compared with 72 percent of citizens 35 years or older. In 2012, 18- to 29-year-old nonvoters most commonly cited ‘not being registered’ as their reason for not voting.”) (internal citations omitted).

every 20 people contacted. Other studies show that voter contact in majority-African American neighborhoods can increase participation between 7 and 14 percentage points. Direct voter outreach has proven especially effective for young people. During the 2012 election, young people who were contacted by a campaign were 1.4 times more likely to vote than those who were not contacted. And between 2013 and 2017, Virginia saw a 114 percent increase in early and absentee voting among Latinos, after partisan and nonpartisan organizations devoted significant resources toward in-language advertisements, polling, and canvassing in Latino communities.¹⁵

Reliable quantitative and qualitative research shows that canvassing is an effective campaign tactic, especially for campaigns seeking to increase voter turnout amongst underrepresented communities.¹⁶

Given the important role it plays in civic life, canvassing has long been recognized as protected under the First Amendment.¹⁷ However, canvassers continue to face restrictions that frustrate their exercise of this right. Municipalities continue to regulate political, religious, and charitable canvassing in ways that are likely unconstitutional under the First Amendment¹⁸ while also disproportionately subjecting canvassers of color to arbitrary and illegal enforcement.¹⁹ In recent years, these municipal restrictions have frequently taken the form of burdensome licensing and pre-approval requirements for door-to-door canvassers.²⁰ The courts have voided many canvassing restrictions,²¹ but the Supreme Court has left open the

15. *Id.* at 42.

16. *See id.*; Gerber & Green, *supra* note 6, at 653.

17. *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943).

18. An informal social media survey of field directors, organizers, and campaign staff surfaced canvassing restriction issues in recent years in multiple municipalities in Arizona, Colorado, Illinois, Maine, Maryland, and Michigan. V. Topping, Richard Graves, Eugenio Smith, Damon Hainline, Amy Mello, Vivianne Swerdlow, Amanda McClain-Snipes, & Maria Woodbury, FACEBOOK (Dec. 17, 2017) (on file with author). For an anecdotal account of canvassers, specifically canvassers of color, facing frequent harassment by police officers in Phoenix, Arizona, see Garrick McFadden, *Yes, It's Completely Legal for an Election Canvasser to Come to Your Door*, AZCENTRAL (May 10, 2018), <https://www.azcentral.com/story/opinion/op-ed/2018/05/10/canvassing-election-not-same-soliciting/596680002/> [<https://perma.cc/Q5UM-SWZ2>] (“Canvassing is not soliciting. Still, many remain confused over the difference between the two, including the Phoenix Police Department.”).

19. Molly Redden, *Cops, Threats, Stalking, Racial Slurs. Welcome to #CanvassingWhileBlack*, HUFFPOST (July 28, 2018), https://www.huffingtonpost.com/entry/campaigning-while-black_us_5b525588e4b0b15aba8edc1e [<https://perma.cc/69JJ-NR79>] (chronicling the stories of several people of color, including elected officials and candidates for office, who have experienced racial discrimination, including having the police called on them by residents assuming they were burglars, when canvassing.); *see also* McFadden, *supra* note 18.

20. *See* ROOT & KENNEDY, *supra* note 8; Gerber & Green, *supra* note 6.

21. *See* Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002) (holding that noncommercial canvassers could not be required to obtain a permit prior to engaging

possibility that such regulations, if content-neutral and based on an important government interest, could be crafted in a way that would survive its scrutiny.²²

In addition to municipal regulations, canvassers can face insurmountable challenges when seeking to canvass residents of apartment buildings.²³ In many jurisdictions, both public and private building managers strictly enforce no-trespass policies.²⁴ While the law on door-to-door canvassing of single-family homes on public streets is fairly straightforward,²⁵ the legal landscape for canvassing in apartment buildings is less clear.²⁶

This Article seeks to equip advocates with legal and policy strategies to protect and expand canvassing rights as a means of increasing democratic participation. Part I introduces and outlines the project. Part II briefly traces the history of First Amendment jurisprudence on canvassing and discusses the implications of recent First Amendment cases on municipal regulations of canvassers. Part III tackles the complex legal landscape governing apartment canvassing, including litigation and policy strategies for expanding the right to canvass—and the right to be canvassed—into both public and private apartment buildings. Part IV summarizes recommendations to litigators, and Part V concludes by assessing the

in door-to-door advocacy); *City of Watseka v. Ill. Pub. Action Council*, 479 U.S. 1048 (1987) (holding a canvassing curfew of 5 p.m. unconstitutional); *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 (1980) (holding a ban on door-to-door fundraising by nonprofits that use more than 25% of the proceeds for solicitors' salaries unconstitutional); *Martin*, 319 U.S. at 148–49; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing defendants' convictions for unauthorized solicitation for distributing religious literature and collecting donations for a religious cause); *Schneider v. State*, 308 U.S. 147 (1939) (reversing convictions for pamphleteers on the basis that ordinances banning literature distribution are unconstitutional); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (holding permit requirements for pamphlet distribution constitutionally void); *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250 (3d Cir. 1986) (holding that (1) requirements for non-commercial canvassers to be fingerprinted and (2) the Township's 9 p.m. canvassing curfew were constitutionally void), *cert. denied sub nom. Twp. of Piscataway v. N.J. Citizen Action*, 479 U.S. 1103 (1987).

22. See *Cantwell*, 310 U.S. at 307; *Watchtower*, 536 U.S. at 168 (implying that a narrow ordinance restricting canvassing could pass constitutional muster if tailored to a stated government interest).

23. Some campaigns imply to canvassers that they only have the right to canvass in a given apartment building if they live in that building. See *Canvassing Guidelines*, DEMOCRATIC PARTY OF VA. (Feb. 2016) <https://vademocrats.org/wp-content/uploads/2016/02/Canvassing-Guidelines.pdf> [<https://perma.cc/X67T-8FHK>] (last visited Sept. 16, 2019). Other campaigns remove “inaccessible” apartment buildings from their canvassing lists entirely. See Tim Hulley, *Canvassing Data Entry and Apartments*, NATIONBUILDER FAQs (Sept. 24, 2012), https://nationbuilder.com/timhulley/canvassing_data_entry_and_apartments [<https://perma.cc/8NYK-5YRF>]. A popular campaign vendor advertises its phone services as a stopgap for “urban centers where many apartment buildings require a code or key to enter.” *Door-to-Door Canvassing vs. Phone Calls: Choosing the Most Effective Way to Reach Out to Voters*, STONES' PHONES, <http://stonesphones.com/blog/door-door-canvassing-vs-phone-calls-choosing-most-effective-way-reach-out-voters/> [<https://perma.cc/JA68-EL9E>] (last visited Aug. 27, 2019).

24. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J. concurring); *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994).

25. See *infra* Part II.

26. See *infra* Part III.

impact canvassing has had on recent elections and highlighting the importance of canvassing to turning out underrepresented voters in the upcoming 2020 election cycle.

II.

COMBATting DOOR-TO-DOOR CANVASSING RESTRICTIONS

A. History of First Amendment Canvassing Protections

In the late 1930s and early 1940s, the U.S. Supreme Court decided a series of cases that solidified protections for the right to door-to-door distribution of literature under the First Amendment.²⁷ These early decisions predate the Court’s distinctions between intermediate and strict scrutiny that normally attend First Amendment case law; instead, the Court employed a balancing test, which it described as “the delicate and difficult task . . . [of] weigh[ing] the circumstances and [] apprais[ing] the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”²⁸ Under this test, the Court made clear that categorical bans on canvassing and burdensome requirements—such as background checks and pre-approval from law enforcement—were impermissible infringements on First Amendment freedoms; however, certain regulations, such as restricting canvassing to reasonable hours, would still be allowable.²⁹

In 1938, the Court held in *Lovell v. Griffin* that “[t]he liberty of the press . . . necessarily embraces pamphlets and leaflets . . . [which] have been historic weapons in the defense of liberty,” and that the “[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.”³⁰ Five years later, the Supreme Court directly addressed canvassing restrictions in *Martin v. Struthers* when striking down an ordinance that banned leaflet distribution by “ring[ing] the door bell, sound[ing] the door knocker, or otherwise summon[ing]” the residents of the home.³¹ *Martin*, a Jehovah’s Witness, was fined for knocking on doors to distribute invitations to a religious meeting.³² In considering whether the ordinance violated *Martin*’s constitutional rights, the Court “weigh[ed] the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its

27. See *Martin v. City of Struthers*, 319 U.S. 141, at 148–49 (1943); *Schneider v. State*, 308 U.S. 147, 147 (1939); *Lovell v. Griffin*, 303 U.S. 444, 444 (1938).

28. *Schneider*, 308 U.S. at 161.

29. *Id.* at 165.

30. *Lovell*, 303 U.S. at 452 (internal quotations and citations omitted) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)).

31. *Martin*, 319 U.S. at 142–43 (internal quotations omitted).

32. *Id.* at 142.

citizens, whether particular citizens want that protection or not.”³³

As modern First Amendment jurisprudence developed, the Supreme Court distinguished intermediate scrutiny for content-neutral restrictions of protected speech from strict scrutiny for content-based burdens on speech.³⁴ In cases on canvassing, the Court generally treated canvassing regulations that applied to all canvassers as content-neutral. In doing so, it applied an intermediate level of scrutiny to ensure that the regulations furthered an important government interest and were substantially related to that interest.³⁵

At the same time, the Court grappled with whether to treat canvassing, including requests for contributions (fundraising canvassing), as commercial—and therefore less protected—speech, or as more robustly protected canvassing speech. In *Village of Schaumburg v. Citizens for a Better Environment*, the Court struck down an ordinance banning door-to-door fundraising in which more than 25% of the fundraised proceeds went to employee expenses, including payroll.³⁶ The Court acknowledged that fundraising canvassing is a protected activity that was more than purely commercial speech, as it is “characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.”³⁷

Schaumburg left open the possibility that reasonable regulations of door-to-door fundraising would be permissible under intermediate scrutiny, as long as the government interest is sufficiently strong.³⁸ Permissible, reasonable regulations could presumably extend beyond regulations of purely religious or political speech.³⁹ In *Schaumburg*, the Court rejected the Village’s proffered justification of avoiding fraud by profit-making enterprises posing as charitable organizations, suggesting that existing laws criminalizing fraud were sufficient, and that a “[b]road prophylactic rule[] in the area of free expression [is] suspect.”⁴⁰

The Supreme Court most recently addressed canvassing restrictions in

33. *Id.* at 143.

34. *See City of Watseka v. Ill. Pub. Action Council*, 479 U.S. 1048 (1987); *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250 (3d Cir. 1986), *cert. denied sub nom. Twp. of Piscataway v. N.J. Citizen Action*, 479 U.S. 1103 (1987).

35. *See Watseka*, 479 U.S. at 1049 (White, J., dissenting) (“It is undisputed that the ordinance is content-neutral.”); *N.J. Citizen Action*, 797 F.2d at 1255 (“[I]t is also undisputed that a municipality may subject door-to-door solicitation to reasonable time, place, and manner restrictions that are content neutral.”).

36. *Vill. of Schaumburg v. Citizens for a Better Env’t.*, 444 U.S. 620, 636 (1980).

37. *Id.* at 632.

38. *Id.* at 636 (“[T]he 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest . . .”).

39. *Id.* at 632.

40. *Id.* at 637 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

2002.⁴¹ In *Watchtower Bible & Tract Society of N.Y. v. Village of Stratton*, the Court struck down an ordinance that required all canvassers to obtain permits before engaging in door-to-door solicitation.⁴² The case was brought by a congregation of Jehovah's Witnesses seeking injunctive relief from the canvassing requirements. The Village of Stratton defended its ordinance on the grounds that the permit requirement existed to "protect its citizens from fraudulent solicitation" and to prevent crime by burglars posing as canvassers.⁴³ The Court recognized these functions as legitimate government interests and weighed them against "the effect of the regulation on First Amendment rights," cautioning that "door-to-door distribution of circulars is essential to the poorly financed causes of little people."⁴⁴ *Watchtower* is widely cited by lower courts in striking down and enjoining enforcement of similar municipal ordinances.⁴⁵

Watchtower and earlier First Amendment cases on canvassing made clear that governments seeking to regulate purely political and religious canvassing that does not involve fundraising are not permitted to, for example, impose canvassing bans;⁴⁶ require pre-authorization in the form of permits, licenses, and background checks in order to canvass;⁴⁷ and restrict canvassing between the hours of 9 a.m. and 9 p.m. on any day of the week.⁴⁸ However, since *Watchtower*, the question of whether fundraising canvassers can be subjected to some of the above restrictions remains unsettled.⁴⁹

B. Content Analysis Under *Reed v. Town of Gilbert*

The Supreme Court's 2015 decision in *Reed v. Town of Gilbert* raised the already high constitutional bar for municipal canvassing regulations by widening

41. *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002).

42. *Id.* at 164 ("[T]he breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.").

43. *Id.* at 162–63.

44. *Id.* at 163 (quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)).

45. See, e.g., *SEIU, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 421 (3d Cir. 2006).

46. See *Martin*, 319 U.S. at 147–49.

47. See *Watchtower*, 536 U.S. at 168; *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

48. *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1262, 1265 (3d Cir. 1986) (holding that requirements for non-commercial canvassers to be fingerprinted and the Township's 9 p.m. canvassing curfew were both constitutionally void).

49. See *Rights of Canvassers in Pennsylvania*, ACLU OF PA., <https://www.aclupa.org/en/your-rights/rights-canvassers-pennsylvania> [<https://perma.cc/X36Y-42UU>] (last visited Mar. 18, 2020); see *Martin v. City of Struthers*, 319 U.S. 141, at 148–49 (1943); *Schneider v. State*, 308 U.S. 147, 147 (1939); *Lovell v. Griffin*, 303 U.S. 444, 444 (1938); see also *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 (1980); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.").

the scope of regulations that are subject to strict scrutiny.⁵⁰ Now, under *Reed*, policies that regulate fundraising canvassing differently from non-fundraising canvassing are likely to be classified as content-based and, according to longstanding First Amendment doctrine, subjected to strict scrutiny review.⁵¹ This highest level of scrutiny has been described as “strict in theory, but fatal in fact.”⁵² Under strict scrutiny, the challenged policy must further a compelling governmental interest and must be narrowly tailored to achieve that interest.⁵³ As a result, canvassing regulations, including regulations of fundraising canvassing, are now more likely to be held unconstitutional for burdening canvassers’ freedom of speech without adequate government need and narrow tailoring.⁵⁴

If applied literally, Justice Thomas’ opinion for six members of the Court in *Reed* could dramatically reshape First Amendment jurisprudence well beyond its application to canvassing cases.⁵⁵ Once called the “sleeper case” of the 2015 term, *Reed* is a seemingly innocuous case about church signs in a suburban town in Arizona.⁵⁶ In *Reed*, the leaders of Good News Community Church challenged the Town of Gilbert’s ordinance regulating signage on the basis that the regulations abridged their First Amendment rights.⁵⁷ The ordinance allowed the placement of temporary signs around the town without prior approval, but it allowed different sizes and lengths of time for posting depending on the category of sign (ideological, political, or directional event signs).⁵⁸ Good News Community Church, a small congregation without its own church building, rented space around town to hold its services.⁵⁹ The church posted signs announcing the location of its weekly

50. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

51. *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (applying strict scrutiny analysis to the restriction of expression “because of its message, its ideas, its subject matter, or its content”) (internal citations omitted).

52. *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (quoting Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). Adam Liptak describes this level of scrutiny as “like a Civil War stomach wound, [] generally fatal.” Adam Liptak, *Court’s Free-Speech Expansion Has Far Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html> [<https://perma.cc/2HD8-M2TX>]. While strict scrutiny is often fatal, a handful of First Amendment cases challenging content-based restrictions have survived it. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Burson v. Freeman*, 504 U.S. 191 (1992).

53. *See* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991).

54. *See* *Working Am. Inc v. City of Bloomfield*, 142 F. Supp. 3d 823, 832–33 (D. Minn. 2015) (finding that regulations that require fundraising canvassers to obtain permits are content-based and constitutionally void).

55. *See* Liptak, *supra* note 52.

56. Liptak, *supra* note 52.

57. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

58. *Id.* at 2224.

59. *Id.* at 2225.

service, and on more than one occasion, the church was issued a citation for failure to collect its signs in a timely manner in accordance with the ordinance.⁶⁰

The ordinance restricted event signs more heavily than signs classified as ideological or political, which it allowed to remain posted for longer periods of time.⁶¹ The Court illustrated its point:

If a sign informs its reader of the time and place a book club will discuss John Locke’s *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government.⁶²

Because Gilbert’s ordinance classified signs based on the type of message conveyed, the majority determined that this distinction amounted to a content-based classification, triggering strict scrutiny review.⁶³ The Court concluded that even if the town’s desire to “preserv[e] the Town’s aesthetic appeal and traffic safety” was understood as a compelling governmental interest, “the Code’s distinctions fail[ed] as hopelessly underinclusive.”⁶⁴ The ordinance’s restriction of event signs, which are “no greater an eyesore” than other, less restricted signage, and Gilbert’s failure to demonstrate how event signs are more of a threat to traffic safety than other signs, suggest that the governmental interest could not be “of the highest order.”⁶⁵

The church’s attorneys, from Alliance Defending Freedom, used the following slogan to describe the case: “small church sign, high constitutional stakes.”⁶⁶ *Reed* may indeed have high constitutional stakes well beyond church signage. While some commentators suggest this case may have effects as far-reaching as on commercial regulation,⁶⁷ others have suggested that the Court is likely to limit the scope of *Reed*’s reach in the future, or else be forced to “water down the

60. *Id.*

61. *Id.* at 2224–25.

62. *Id.* at 2227.

63. *Id.*

64. *Id.* at 2231.

65. *Id.* at 2231–32.

66. *Reed v. Town of Gilbert*, ALLIANCE DEFENDING FREEDOM (Aug. 4, 2015), <http://www.adfmedia.org/news/prdetail/7556> [<https://perma.cc/578X-4PD2>] (last visited Aug. 27, 2019). Alliance Defending Freedom, a legal nonprofit founded by leaders of the Christian Right, is widely known for its domestic and international efforts to criminalize homosexuality, earning the group the designation of “Extremist Group” on the Southern Poverty Law Center’s Designated Hate Group list. *Alliance Defending Freedom*, SOUTHERN POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [<https://perma.cc/K259-M3G4>] (last visited Aug. 27, 2019).

67. Liptak, *supra* note 52 (explaining that the *Reed* ruling could affect the constitutionality of federal and state securities laws, among others).

potency of strict scrutiny.”⁶⁸

In her concurrence, Justice Kagan cautioned against the majority’s potentially far-reaching interpretation of the content-based test because this case could be decided on narrower grounds, as the municipality’s defense of its ordinance “[did] not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.”⁶⁹ However, a literal reading of the majority’s opinion in *Reed* suggests that *all* distinctions between topics should be considered content-based distinctions, subjecting them to strict scrutiny.⁷⁰ Justice Kagan—as well as many commentators—would prefer a more flexible standard under which content-based regulations rise to the level of strict scrutiny *only if* there is an indication that the alleged content discrimination is actually a cover for viewpoint-based discrimination.⁷¹ Instead, the majority has opted for a more rigid, and decidedly more expansive, approach to content analysis to more completely root out unconstitutional preferences in the regulation of speech.⁷²

68. Liptak, *supra* note 52; *see also* Anthony D. Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1139 n. 237 (2016); Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1995 (2016) [hereinafter Note, *Free Speech Doctrine*].

69. *Reed*, 135 S. Ct. at 2239 (Kagan, J. concurring).

70. *Id.* at 2227 (holding that the ordinance was a content-based regulation of speech because it applied different restrictions to different signs based on communicative content).

71. *Id.* at 2237–38 (Kagan, J. concurring). The question on many commentators’ minds seems to be whether this new standard for content analysis will result in the demise of regulations on commercial speech. *See, e.g.*, Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595, 601 (2019) (“If applied literally, the *Reed* decision’s insistence on application of strict scrutiny to all content-based distinctions could nullify just about any distinction among instances of speech based on whether they are economic or commercial in nature.”). The potential implications of deregulating commerce under *Reed*’s expansive content-based standard are certainly alarming and raise serious concerns for advocates of a more egalitarian, democratic society. *See, e.g.*, Blum, *supra*, at 639 (“Unions should resist the temptation to invoke or rely on the Court’s recent neoliberal First Amendment decisions for several reasons . . . [including that] the features that distinguish commercial and corporate speech from other forms of speech, including labor protest, demonstrate why there are compelling societal interests, rooted in knowledge and power differentials, in regulating commercial and corporate speech that do not apply to other kinds of speech. Unions should advance those compelling interests and defend the state’s regulatory authority . . . to defend regulatory systems that protect unions’ members and broader constituencies.”). However, it is likely that lower courts will rein in the overbreadth of the *Reed* decision when it comes to economic regulations. The Ninth Circuit has already declined to extend *Reed* to cases involving commercial and certain union regulations, though it is unclear whether other circuits and the Supreme Court will follow suit. *See Contest Promotions, LLC v. City and Cty. of San Francisco*, 704 Fed. App’x. 665, 667 n.1 (9th Cir. 2017) (“Plaintiff is incorrect that the Supreme Court’s recent decisions in *Sorrell v. IMS Health Inc.* . . . and *Reed v. Town of Gilbert* . . . supplant the longstanding . . . intermediate scrutiny framework under which we analyze commercial speech regulations.”); *see also* NLRB v. Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, 891 F.3d 1182 (9th Cir. 2018) (“Because the constitutionality of the challenged statute is not affected by the decision of the United States Supreme Court in *Reed v. Town of Gilbert*, . . . we deny Ironworkers’ motion to modify the extant consent decree.”).

72. *Reed*, 135 S. Ct. at 2226.

Though many believe that Justice Kagan's approach would have presented the more reasonable path forward, the majority's decision goes a step further in protecting speech from difficult-to-detect discrimination. Content-based regulations may have the impact of viewpoint discrimination even when not viewpoint-based—simply by virtue of who avails themselves of the forum of speech. For example, in *Reed*, the Town of Gilbert may not have meant to discriminate against a small church when it issued an ordinance restricting signage, but if small churches—more so than other event hosts—rely on posting signage around town, they will disproportionately suffer from the ordinance's restrictions. By contrast, a better-known, mainstream Protestant church—with its own building, regular service times, a large congregation, and sufficient funds to advertise its services via mailers to town residents—will necessarily rely less on posting event signs around town to spread its message.

The same is true of canvassing. A town may pass an ordinance restricting canvassing without any intent to discriminate against Democrats, Republicans, environmentalists, oil lobbyists, unions, or the Koch brothers. However, some groups avail themselves of canvassing more than others. A survey of those affected by canvassing regulations in case law is indicative of this trend. Those facing canvassing restrictions tend to belong to one of two general groups: (1) members of marginal religious sects, such as Jehovah's Witnesses, or (2) members of left-leaning political movements, including organizations like Working America;⁷³ N.J. Citizen Action;⁷⁴ Citizens for a Better Environment;⁷⁵ and activists, such as El Paso's champion of the poor, Chuy De La O,⁷⁶ and Black rights organizer, Anthony Mark Daniel.⁷⁷ This is likely not the result of selective enforcement, but rather selective use of canvassing as a means of communicating a message. As the Supreme Court explained in *Martin v. Struthers*, "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."⁷⁸

The canvassing example illustrates that there are modes of speech that speakers who hold particular viewpoints may be more likely than others to utilize. While content-neutral regulations of speech in such forums may indeed be viewpoint neutral from the perspective of the regulating body, the regulations will necessarily only impact the groups who actually use the method of speech. It is not clear whether Justice Kagan's more nuanced approach to strict scrutiny would excise such facially non-discriminatory regulations that disproportionately impact certain types of speakers—but the *Reed* majority's blunt tool will almost certainly strike down such restrictions on canvassing speech.

73. See *Working Am., Inc. v. City of Bloomington*, 142 F. Supp. 3d 823 (D. Minn. 2015).

74. See *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250 (3d Cir. 1986).

75. See *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 (1980).

76. See *infra* Part III.B.1.

77. See *infra* Part III.B.1.

78. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

C. *Reed's Implications for Municipal Canvassing Regulations*

On the same day that the *Reed* decision was announced, the Court remanded a case challenging a municipal panhandling ban, *Thayer v. City of Worcester*, for “further consideration in light of *Reed v. Town of Gilbert*.”⁷⁹ On remand, the district court found that the panhandling ban was content-based, as the ordinance regulated speech based on the type of message. As such, the court deemed Worcester’s ordinance subject to strict scrutiny—an exacting standard which the ordinance failed to meet.⁸⁰ The court cited several cases on panhandling bans that were resolved immediately following the *Reed* decision, explaining that “a protracted discussion of this issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content based and therefore, subject to strict scrutiny.”⁸¹

While these cases apply to individuals panhandling for personal need, this rationale can also apply to regulation of door-to-door fundraising, a contested but not entirely resolved form of regulating canvassing.⁸² Since *Reed*, only one district court case has addressed the door-to-door fundraising canvassing regulation issue. That case found that a Minnesota city’s license requirements for door-to-door fundraising solicitors were content-based and failed strict scrutiny review, rendering the challenged ordinance unconstitutional.⁸³

In that case, *Working America, Inc. v. Bloomington*, a membership-based economic justice advocacy organization challenged a Minnesotan city’s requirements that fundraising canvassers obtain permits prior to engaging in door-to-door solicitation. Explaining that “*Reed* compels the same conclusion here,” the district court found that “the Ordinance treats individuals differently depending on the function or purpose of their speech. For example, speech that has the function or purpose of generating money or property on behalf of a person, organization, or cause is ‘Regulated Activity,’ while speech that lacks such purpose is not.”⁸⁴ Analogizing this distinction to the Locke example used in *Reed*,⁸⁵ the Court explained that “because whether speech is ‘Regulated Activity’ [thus requiring a permit] can turn exclusively on the purpose or content of the message, the Ordinance is content based.”⁸⁶

Before *Reed*, political and religious canvassing was recognized as valued and

79. *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015).

80. *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015).

81. *Id.* at 233 (citing *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Col. 2015); *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015)).

82. *See Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 636 (1980).

83. *Working Am. Inc. v. City of Bloomington*, 142 F. Supp. 3d 823 (D. Minn. 2015).

84. *Id.* at 831.

85. *See supra* notes 57–62 and accompanying text.

86. *Working Am. Inc.*, 142 F. Supp. 3d at 831.

protected speech.⁸⁷ The Court's content analysis under the *Reed* standard suggests that governmental distinctions between non-fundraising and fundraising canvasses are content-based, thus subjecting canvassing regulations using such distinctions to strict scrutiny. As a result, *Reed* makes it even less likely that permit requirements or other related canvassing regulations will be upheld.

Constitutional protections of political and advocacy-centered canvassing should only be extended. While *Reed* has been described as far-reaching, it may already have been narrowed by lower courts and may be revisited by the Supreme Court in future terms.⁸⁸ The Court was right to extend its analysis in *Reed* to pan-handling bans by remanding *Thayer*, and it would be correct to affirm decisions like the one in *Working America*. The right to approach fellow citizens, whether on the street or door-to-door—to engage in conversations about political, religious, and ideological topics, and to ask for assistance in the form of a donation to a cause—is fundamental. The First Amendment ought to robustly protect it.

III.

LOCKED OUT: EXPANDING CANVASSING ACCESS TO APARTMENT BUILDINGS

While the First Amendment protects door-to-door canvassing of single-family homes,⁸⁹ the law is not as clear in its application to canvassing within apartment buildings. For canvassers, locked entrances and hostile apartment management often present insurmountable challenges to reaching tenants within the building.⁹⁰ In many jurisdictions, both public and private building managers strictly enforce no-trespass policies, leading in some cases to the arrest and prosecution of canvassers.⁹¹ When no-trespass policies are enforced against canvassers, the apartment manager—whether private or public—denies the individual households within the building the opportunity to accept or reject information from canvassers. This raises constitutional, common law, and public policy issues that I address here.

In this Part, I first explore the potential that apartment canvassing holds to educate, engage, and mobilize underrepresented voters in our democracy. I argue that the democratic goods brought by canvassers are *most* needed in apartment buildings, especially in low-income housing where residents are too often politically disenfranchised while also deeply impacted by public policy. I follow the discussion of the need for canvassing in apartments with litigation and policy advocacy strategies for expanding canvassing rights into apartment buildings. I first

87. See *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150 (2002).

88. See Note, *Free Speech Doctrine*, *supra* note 68.

89. See *supra* Part II.

90. See *supra* note 23 and accompanying text.

91. See, e.g., *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994). For further reference, see Note, *Free Speech Doctrine*, *supra* note 68.

look at existing case law and litigation strategies to protect canvassing in public housing, which requires an analysis of governmental regulations of speech in non-public forums. I then look at litigation strategies in privately owned and managed apartment buildings, a space where the First Amendment traditionally does not reach. I look at state constitutional and common law developments that expand speech rights and restrict property owners' ability to exclude, drawing on New Jersey's *State v. Shack* and California's *Pruneyard Shopping Center v. Robins* as examples.⁹² Finally, I conclude this Part with a discussion of potential policy solutions, including a case study of Minnesota's statute requiring apartment building landlords to allow candidates for office and campaign workers to go door-to-door within apartment buildings.

A. *The Need for Canvassing in Multi-Unit Buildings*

Voters who live in apartment buildings are often unreachable by voter registration and education drives and door-to-door canvassing. In many areas of the country, people who live in rental apartments are younger, lower-income, and more likely to be people of color than their single-family home-owning neighbors.⁹³ Because apartment tenants move, on average, more often than single-family homeowners, their voter registrations are less likely to be current, and they are less likely to know where their polling place is.⁹⁴ These underrepresented voters are often the hardest to reach and the most in need of voting-related information.

Single-family homes in competitive districts are often canvassed dozens of times during an election cycle.⁹⁵ These interactions offer the occupants of those homes a chance to register to vote, learn about upcoming elections, obtain information about how and where to vote, and receive assistance—for example, with

92. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *State v. Shack*, 277 A.2d 369 (N.J. 1971).

93. See generally JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., AMERICA'S RENTAL HOUSING 7 (2017).

94. See Chris Salviati, *Renters vs. Homeowners at the Ballot Box—Will America's Politicians Represent the Voice of Renters?*, RENTONOMICS (Oct. 30, 2018), <https://www.apartmentlist.com/rentonomics/renter-voting-preferences/> [<https://perma.cc/V2D5-DW8A>] (“[E]ven among individuals with an equal propensity to vote, actually doing so may be harder for renters. Renters move more frequently, which means that they must often undertake additional efforts to maintain an active voter registration. Furthermore, renters are more likely to work hourly wage jobs, and voting may require taking time off work that impacts their paychecks in a way that salaried workers need not worry about. Finally, renters are more likely than homeowners to be members of minority groups that may be subject to voter suppression tactics.”).

95. See, e.g., Jean Hannah Edelstein, *‘Please Skip Our Door’: What I Learned Canvassing for Clinton in Philadelphia*, THE GUARDIAN (Nov. 7, 2016), <https://www.theguardian.com/us-news/2016/nov/07/hillary-clinton-philadelphia-canvassing-swing-state-election> [<https://perma.cc/A FJ4-EKVS>] (“Some people we spoke to were happy to see us. ‘You’re doing great work!’ Some people were less happy. ‘I’ve talked to ten of you in the last few days!’ said a woman in a house with jaunty autumnal decorations in her windows, before shutting her door.”).

submitting absentee ballots or arranging rides to the polls on Election Day.⁹⁶ Apartment tenants, by contrast, are rarely afforded access to the civic goods that are routinely delivered to their neighbors in single-family homes. Numerous hurdles to a more equitable distribution of those goods persist; for example, “No Trespassing” signs discourage canvassers from entering many apartment buildings and canvassers’ legal right to enter apartment buildings is unclear in most jurisdictions.⁹⁷

The information distribution and problem-solving services offered by canvassers to aid citizens in democratic participation is all the more important in an era of organized attacks on voting rights.⁹⁸ With harsh measures—ranging from “strict photo ID requirements to early voting cutbacks to registration restrictions”⁹⁹—making it harder to vote, canvassers across the nation can help voters navigate an increasingly complex and difficult voting process.¹⁰⁰

B. Litigation Strategies

This Section looks at litigation strategies in both public and privately-owned apartment buildings. It explores federal constitutional, state constitutional, and common law arguments for allowing canvassers access to multi-unit buildings.

1. Constitutional Arguments for Canvassing in Public Housing

When no-trespass policies are invoked against canvassers in public housing,

96. See, e.g., Joe Tarr, *The Fight to Save Democracy*, ISTHMUS (Sept. 13, 2018), <https://isthmus.com/news/cover-story/volunteers-pound-the-pavement-to-overcome-wisconsin-voter-suppression/> [<https://perma.cc/W8RQ-24GV>].

97. Minnesota protects canvassing in apartment buildings. MINN. STAT. ANN. § 211B.20 (West Supp. 2019). After an extensive search for similar state and local laws in other jurisdictions in the United States, it appears that Minnesota is unique in providing statutory protections for apartment canvassing.

98. See Tarr, *supra* note 96 (describing a volunteer effort to register voters in Wisconsin and help those without the required identification for voting to obtain free identification); see also *Modern Attacks on Voting Rights Act Resource Page*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/analysis/modern-attacks-voting-rights-act-resource-page> [<https://perma.cc/3B3E-F6D3>] (collecting state laws, advocacy resources, research, news, and commentaries related to attacks on voting rights at the state level).

99. *New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/new-voting-restrictions-america> [<https://perma.cc/F6UB-XK95>] (last updated July 3, 2019).

100. See BRENNAN CTR. FOR JUSTICE, *supra* note 98; see also Tarr, *supra* note 96. For examples of policies that have made voting more complex, see Sari Horowitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You’re Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html [<https://perma.cc/JT7R-AJNV>]; Ed Pilkington, *‘Born and Raised’ Texans Forced to Prove Identities Under New Voter ID Law*, THE GUARDIAN (Oct. 27, 2014, 10:49 AM), <https://www.theguardian.com/us-news/2014/oct/27/texas-vote-id-proof-certificate-minority-law> [<https://perma.cc/2DEH-2TCP>].

the state is, in effect, restricting speech on government-owned property.¹⁰¹ However, the analysis is more complicated than simply applying existing canvassing case law, discussed *supra* Part II, to the same speech within government-owned apartments. Here, the critical difference is the place—or forum—where the canvassing speech occurs, as courts generally treat public streets, sidewalks, and even private stoops¹⁰² differently from public housing complexes.¹⁰³

a. Public Forum Analysis

The First Amendment protections afforded to speech and other expressive activities depend upon the nature of the forum.¹⁰⁴ The Supreme Court classifies forums into three categories: traditional public forums, limited or designated public forums, and nonpublic forums.¹⁰⁵ Expressive activity is afforded the highest level of protection within traditional public forums, where restrictions on speech

101. The analysis and arguments in this Section on public housing also likely apply in the context of state university dorms. The state may claim that it needs to protect the privacy and safety of students from outside canvassers, which would likely satisfy the reasonableness test applied to speech restrictions in nonpublic forums. *See infra* Part III.B.1.b. However, advocates for canvassing rights can also argue that the need for voter registration, education, and mobilization efforts is greatest amongst college-age students living in dorms, many of whom may be voting for the first time, are not yet registered to vote, or are unaware of where and how to vote.

102. Though private stoops are not considered public forums for First Amendment purposes, the Court has recognized an implicit license to approach the front door of a home to knock or ring the bell. *See, e.g., Florida v. Jardines*, 569 U.S. 1, 8 (2013) (“‘A license may be implied from the habits of the country’, notwithstanding the ‘strict rule of the English common law as to entry upon a close.’ We have accordingly recognized that ‘the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.’ This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.”) (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922) and *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

103. *See De La O v. Hous. Auth.*, 417 F.3d 495, 503 (5th Cir. 2005) (“Public housing facilities such as those which HACEP operates have repeatedly been held to constitute non-public fora.”); *Vasquez v. Hous. Auth.*, 271 F.3d 198 (5th Cir. 2001) (holding that Housing Authority of the City of El Paso (HACEP) facilities are nonpublic forums); *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994) (finding that Florida’s public housing complexes are nonpublic forums); *Crowder v. Hous. Auth.*, 990 F.2d 586, 591 (11th Cir. 1993) (holding that a library in a public housing building was a nonpublic forum, but that a ban on hosting Bible study groups within the library was an unreasonable restriction that violated the First Amendment); *Daily v. N.Y.C. Hous. Auth.*, 221 F. Supp. 2d 390, 400–01 (S.D.N.Y. 2002) (“NYCHA has created a nonpublic forum at times and a limited public forum at other times [when opening the space for regularly scheduled educational activities], and the restrictions that were used to deny Daily access to the [public housing community center] must be examined to determine whether they were viewpoint neutral and reasonable in light of the purpose served by the [public housing community center].”); *see also* Martin J. Rooney, *The Public Forum Doctrine and Public Housing Authorities: Can You Say That Here?*, 21 *BYU J. PUB. L.* 323, 348 (2007).

104. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).

105. *Id.*

are limited to reasonable time, place, or manner restrictions and are subject to strict scrutiny. Restrictions on speech within nonpublic forums, however, are subject only to rational basis scrutiny.¹⁰⁶

The government-owned nonpublic forum is “a space that ‘is not by tradition or designation a forum for public communication.’”¹⁰⁷ In the nonpublic forum, the state has extensive latitude to regulate speech and expressive activities. As the Court recently explained in *Minnesota Voters Alliance v. Mansky*, a case concerning a prohibition on wearing political badges, buttons, or insignia inside polling places, “[t]he government may reserve [a nonpublic] forum ‘for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.’”¹⁰⁸ The Court further explained that it has “long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.”¹⁰⁹

When evaluating the constitutionality of enforcing a public housing no-trespass policy against canvassers, courts must first determine the type of forum that best describes the public housing in question. Though forum analysis is a fact-dependent inquiry that looks at the characteristics and uses of the specific forum, public housing is usually considered a nonpublic forum by courts.¹¹⁰ In some circumstances, such as when public housing common areas have been used for educational and social programs, these areas have been found to be limited public forums.¹¹¹ Whether the distinction between limited and nonpublic forum status makes a difference is debatable, as both are subject to the same relatively permissive standard of scrutiny.¹¹² As a result, courts are likely to give public housing

106. *Id.*

107. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (quoting *Perry*, 460 U.S. at 46).

108. *Id.* at 1885 (quoting *Perry*, 460 U.S. at 46).

109. *Id.* at 1885–86 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806–11 (1985); *Greer v. Spock*, 424 U.S. 828, 831–33 (1976); *Lehman v. Shaker Heights*, 418 U.S. 298, 303–04 (1974) (plurality opinion); *Minn. Voters All.*, 138 S. Ct. at 307–08 (Douglas, J., concurring in judgment)).

110. *See De La O v. Hous. Auth.*, 417 F.3d 495 (5th Cir. 2005); *Vasquez v. Hous. Auth.*, 271 F.3d 198, 202 (5th Cir. 2001); *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994); *Crowder v. Hous. Auth.*, 990 F.2d 586, 591 (11th Cir. 1993); *Daily v. N.Y.C. Hous. Auth.*, 221 F. Supp. 2d 390, 400–01 (S.D.N.Y. 2002).

111. *See, e.g., Daily*, 221 F. Supp. 2d at 400–01.

112. In a dissent to a denial of certiorari, Justice Thomas, joined by Justice Alito, suggested that there is no distinction between a limited public forum and nonpublic forum. *See Am. Freedom Def. Initiative v. Kings Cty.*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting from denial of certiorari) (“But if the government creates a limited public forum (also called a nonpublic forum)—namely, ‘a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects’—then speech restrictions need only be ‘reasonable and viewpoint neutral.’”) (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009)). Several lower courts have also commented on the apparent distinction without a difference. *See, e.g., Daily*, 221 F. Supp. 2d at 398 (“Somewhat

authorities broad latitude to regulate speech within their buildings regardless of whether they determine the space to be a nonpublic or limited public forum, evaluating such restrictions to ensure that they are viewpoint neutral and reasonable in light of the purpose served by the housing.

This does not mean, however, that enforcing no-trespass policies against canvassers and candidates for office is, or must remain, legally permissible. I next explore existing case law in which courts differ on whether restricting canvassing within public housing through enforcement of no-trespass policies against canvassers and candidates is a constitutionally permissible restriction of speech.

b. Case Law on Canvassing in Public Housing

In the past several decades, courts have heard relatively few cases challenging the enforcement of public housing no-trespass policies against canvassers.¹¹³ This is likely the result of several factors: (1) no-trespass policies have a chilling effect that keeps canvassers from attempting to go door-to-door in public housing; (2) no-trespass policies are typically enforced by first offering the canvasser an opportunity to leave the premises, an option that frustrates canvassers' speech as well as tenants' right to information, but which prevents the canvasser from being prosecuted; and (3) trespassing charges are low-level misdemeanors that prosecutors may decline to prosecute or may offer appealing plea deals for, resulting in few canvassers challenging the policies in court.

Compounding the difficulty of developing case law in this area, the cycle of electoral politics and the nature of grassroots field outreach are generally not conducive to litigation. Campaigns are typically short-term efforts, staffed by temporary organizers and volunteers who are unlikely to pursue time-consuming litigation that may not yield results by Election Day. Campaign organizers and volunteers are likely either to (1) circumvent no-trespass policies by canvassing with the understanding that they may be removed from the building at any time, or (2) skip unwelcoming buildings altogether.¹¹⁴

Presenting a legally cognizable claim to the court has also proven to be challenging. As the following paragraphs make clear, circuit courts of appeals and lower courts have split on whether public housing no-trespass policies against canvassers and political candidates warrant judicial intervention, or whether such policies are reasonable, viewpoint-neutral restrictions.

confusingly, the Supreme Court and lower courts also recognize another category, the limited public forum . . . Accordingly, some courts have taken to describing the limited public forum as a variety of the nonpublic forum.”); *see also* *Gentala v. City of Tucson*, 213 F.3d 1055, 1062 n.4 (9th Cir. 2000) (“[T]he distinction between a limited public forum and a nonpublic forum is a semantic distinction without an analytic difference [.]”).

113. This is based on an exhaustive search of cases available on LexisNexis and Westlaw.

114. *See, e.g.*, *Hulley*, *supra* note 23; *see also* *Daniel*, 38 F.3d at 550 (holding a canvasser's arrest for trespass did not violate the First Amendment).

i. The Eleventh Circuit: Daniel v. City of Tampa

The Eleventh Circuit was the first federal appeals court to directly address the issue of whether canvassing in public housing is protected under the First Amendment. Unfortunately for advocates of expanding canvassing rights, the court rejected the plaintiff's argument and held that the prohibition of political canvassing by nonresidents in a public housing development was reasonable and viewpoint neutral, and therefore not a violation of the plaintiff's First Amendment rights.¹¹⁵

The plaintiff, Anthony Mark Daniel, was a member of a Black rights organization who had been arrested on three separate occasions for trespassing on Tampa Housing Authority property under Florida's trespass-after-warning statute in 1991.¹¹⁶ On each of those occasions, Daniel was engaged in political activity, including protests and leaflet distribution in the Housing Authority buildings.¹¹⁷ He brought a lawsuit against the City of Tampa, challenging its enforcement of the trespassing statute against members of the public engaged in political speech on City Housing Authority property.¹¹⁸ The Middle District of Florida granted summary judgment for the City of Tampa, which Daniel appealed.¹¹⁹ The Eleventh Circuit upheld the summary judgment, explaining that the "the government need not permit all forms of speech on property that it owns and controls" and that the "Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose."¹²⁰

The Eleventh Circuit concluded that the public housing was a nonpublic forum and therefore speech restrictions need only be reasonable to satisfy First Amendment requirements. The City of Tampa argued that its policy was to prevent the sale and use of drugs by non-residents, in support of which it offered evidence that "nearly 90% of those arrested on Housing Authority property are non-residents."¹²¹ The Eleventh Circuit also considered the availability of "alternate means for distributing information to residents," citing Daniel's "unlimited access to the City-owned streets and sidewalks adjacent to the housing complex" as an indication that restricting him from the public housing complex was reasonable.¹²² Ultimately, the Eleventh Circuit held that it was reasonable for the City of Tampa to limit "access to the property . . . to residents, invited guests of

115. *Daniel*, 38 F.3d at 551.

116. *Daniel v. City of Tampa*, 818 F. Supp. 1491, 1492 (M.D. Fla. 1993) (granting plaintiff's motion for preliminary injunction).

117. *Id.*

118. *Id.*

119. *Daniel*, 38 F.3d at 549.

120. *Id.* (quoting *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Adderley v. Florida*, 385 U.S. 39, 48 (1966)).

121. *Id.* at 548 n.2. The Court does not specify the time period in which the arrests were made.

122. *Id.* at 550 (citing *United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir. 1991)).

residents, and those conducting official business.”¹²³

While the Eleventh Circuit did not find a right to canvass in public housing, other federal and state courts that have considered the issue have reached different conclusions. I next explore subsequent cases, some of which follow *Daniel* and some of which do not.

ii. *The Fifth Circuit: The De La O Cases*

In a series of cases brought against the Housing Authority of the City of El Paso (HACEP), the Western District of Texas and the Fifth Circuit Court of Appeals considered the issue of whether door-to-door canvassing and literature distribution could be restricted in El Paso’s public housing complexes.

The first case, *De La O I*, was brought by Jesus ‘Chuy’ De La O, a resident of an apartment complex managed by HACEP.¹²⁴ A long-time political activist known as “a community watchdog,”¹²⁵ Chuy De La O went door-to-door in his housing complex to discuss his candidacy for El Paso City Council, to distribute campaign cards, and to ask for his neighbors’ votes.¹²⁶ HACEP staff informed Mr. De La O that his door-to-door solicitation of votes and distribution of literature was in violation of HACEP rules and ordered him to cease canvassing or face eviction. Upon request, the Executive Director of HACEP provided Mr. De La O with a written explanation of why he was prohibited from door-to-door canvassing, stating that:

[T]he Housing Authority does not allow political activity on Housing Authority property, except for Resident Association sponsored debates that allow all candidates for a specific office an equal opportunity to present their issues or agenda in one joint meeting that has been expressively [sic] approved by the Housing Authority.¹²⁷

The district court held that such a restriction on speech was neither reasonable nor viewpoint neutral, citing the fact that the complex residents’ association was permitted to endorse candidates and go door-to-door distributing leaflets within

123. *Id.* at 548, 551.

124. *De La O v. Hous. Auth.*, No. EP-98-CA-52-H, 1999 U.S. Dist. LEXIS 22032 at *2 (Feb. 11, 1999).

125. *El Paso del Norte Hall of Fame: Chuy De La O*, SIMPLE MINDED ENTERTAINMENT, http://www.simplemindedentertainment.com/hall_mem1.htm [<https://perma.cc/M5EB-DZ3W>] (last visited Aug. 27, 2019); Interview by Civil Rights in Black and Brown Oral History Project with Fernando Chacon, Chuy De La O’s Attorney, in El Paso, Tex. (July 20, 2015), <https://crbb.tcu.edu/clips/1108/el-paso-politics> [<https://perma.cc/72UV-XXWM>].

126. *De La O*, 1999 U.S. Dist. LEXIS 22032 at *3.

127. *Id.* at *7 (quoting Robert Alvarado, then-Executive Director of the Housing Authority, in Plaintiff’s Exhibit 2).

the housing complex.¹²⁸ The court further explained that the prohibition on distributing campaign literature was unreasonable in part because the evidence showed that “personal door-to-door campaigning by a candidate is a valuable campaign tactic, but that it is greatly enhanced by the ability to leave a physical tangible thing with the resident who is contacted.”¹²⁹

One year later, Chuy De La O and Roberto Vasquez, a candidate for public office and non-resident of HACEP housing, brought another suit, *Vasquez v. Housing Authority of El Paso (De La O II)*, challenging HACEP’s policy of excluding non-residents from door-to-door canvassing in its housing complexes.¹³⁰ In this case, Mr. Vasquez argued that HACEP’s policy violated his First Amendment right to canvass and distribute literature.¹³¹ Mr. De La O argued that the policy violated his right to receive information and express his views to candidates.¹³² The district court was not persuaded by their arguments and granted summary judgment for the defendants, finding that HACEP’s policy of restricting access to the housing complex to tenants, their guests, and those conducting official business was viewpoint neutral and “a reasonable means of combating . . . criminal activity.”¹³³ The district court pointed out that Vasquez had alternative means of communicating his message, including by speaking with residents on the “city-owned streets and sidewalks . . . adjacent to HACEP’s complexes.”¹³⁴

On appeal, the Fifth Circuit reversed the lower court’s grant of summary judgment and held that HACEP’s “regulations, as applied to political campaigners and their representatives, constitute an unreasonable restriction on De La O’s [F]irst [A]mendment right to receive political information.”¹³⁵ The Fifth Circuit agreed with the lower court that the housing complex was a nonpublic forum and that the policy was viewpoint neutral as it prohibited *all* nonresidents from door-to-door campaigning in the complex, but it took issue with the reasonableness of the policy.¹³⁶ The panel reached its 2-1 decision, which it acknowledged represented a significant departure from the Eleventh Circuit’s treatment of a nearly identical case, *Daniel v. City of Tampa*, for two key reasons: First, the court recognized the importance of door-to-door campaigning as a democratic good both for the speaker and listener, and second, the court did not uncritically accept the governmental interest in preventing crime as significant enough to overcome the importance of the speech right, even in a nonpublic forum.

128. *Id.* at *7–10.

129. *Id.* at *8–9.

130. *Vasquez v. Hous. Auth.*, 103 F. Supp. 2d 927 (W.D. Tex. 2000).

131. *Id.* at 930.

132. *Id.*

133. *Id.* at 933.

134. *Id.*

135. *Vasquez v. Hous. Auth.*, 271 F.3d 198, 201 (5th Cir. 2001).

136. *Id.* at 203–05.

To the first point, the Fifth Circuit explained that regulations of “rights so vital to the maintenance of democratic institutions” should not be diminished simply as a matter of “mere legislative preferences or beliefs respecting matters of public convenience.”¹³⁷ The panel went on to elaborate on the importance of door-to-door canvassing:

For many individuals, door-to-door political volunteers provide the main or only link to the election process, especially with respect to local elections where candidates may lack the resources for extensive media campaigns. In recognizing the importance of political canvassing, the Supreme Court stated: “Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.”¹³⁸

The Fifth Circuit cited *Heffron v. International Society for Krishna Consciousness*—a decision that limited the scope of First Amendment protections for leafleting—explaining that “consideration of a forum’s special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.”¹³⁹ It affirmed that the housing complex served the function of a neighborhood and the residents in it “generally conduct themselves like individuals in any other neighborhood in El Paso.”¹⁴⁰ Thus, residents “deserve access to political information in the same manner as other citizens of El Paso.”¹⁴¹

Secondly, and equally importantly, the Fifth Circuit pushed back on the Housing Authority’s stated interest in preventing crime as a justification for a complete ban on canvassing within the complex by outside candidates and campaigners. The court suggested that certain limits on hours and “requiring political campaigners to seek the same authorization as other individuals that have ‘legitimate business on the premises’ would be reasonable” measures to prevent crime in the complex.¹⁴² For this Fifth Circuit panel, however, HACEP’s policy simply went too

137. *Id.* at 204 (citing *Schneider v. State*, 308 U.S. 147, 161 (1939)).

138. *Id.* (quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)).

139. *Id.* (quoting *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 650–51 (1981)). In a controversial plurality decision, the Court in *International Society for Krishna Consciousness* held that a religious group could not leaflet freely throughout a state’s fairgrounds, and that it must limit its leafleting and proselytizing to its assigned booth.

140. *Id.*

141. *Id.*

142. *Id.* at 205.

far. It concluded that the “citizens of El Paso [] deserve access to political information and an unfettered role in the democratic process. The values at stake are a precious cornerstone in our nation’s political foundation.”¹⁴³

The decision was voted for en banc review,¹⁴⁴ but Chuy De La O died before the court reached a decision.¹⁴⁵ Roberto Vasquez had not joined the appeal.¹⁴⁶ Without a living plaintiff, the case (*De La O II*) was rendered moot.¹⁴⁷ In the coming years, De La O’s wife, Rosalina De La O, carried on Chuy’s crusade for canvassing rights in El Paso public housing by bringing another lawsuit (*De La O III*) against HACEP, challenging its rules against political canvassing in public housing.¹⁴⁸ While *De La O III* was pending, HACEP voluntarily amended its rules to allow non-residents to enter and engage in political and religious door-to-door canvassing.¹⁴⁹ The Fifth Circuit ultimately held that HACEP’s new policy was reasonable without determining whether its previous policy that banned canvassing by non-residents would pass constitutional muster.¹⁵⁰ After multiple lawsuits and years spent challenging HACEP’s policies, the De La Os ultimately prevailed in getting HACEP to adopt a more expansive policy allowing political canvassing in El Paso’s public housing complexes—but they were not able to secure binding case law for the Fifth Circuit on the rights of public housing tenants to access the information provided by non-resident political canvassers. Nonetheless, the *De La O Cases* have some important takeaways for advocates for the expansion of canvassing rights to public housing.

143. *Id.* at 206.

144. *De La O v. Hous. Auth.*, 289 F.3d 350 (5th Cir. 2002); *see also* *Vasquez v. Hous. Auth.*, 271 F.3d 207 (5th Cir. 2001) (Barksdale, J., dissenting) (arguing that the majority misevaluated the regulation, in that the regulation “need only be reasonable; it need not be the most reasonable or the only reasonable limitation”) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund.*, 473 U.S. 788, 808 (1985)).

145. *Court Drops Free-Speech Case After Plaintiff Dies*, PLAINVIEW DAILY HERALD (Sept. 30, 2002), <https://www.myplainview.com/news/article/Court-drops-free-speech-case-after-plaintiff-dies-8770301.php> [<https://perma.cc/HYJ6-FE7B>]; *see also* *De La O v. Hous. Auth.*, 417 F.3d 495, 498 (5th Cir. 2005).

146. *De La O*, 289 F.3d at 350.

147. *See De La O*, 417 F.3d at 498.

148. *See id.*

149. *Id.*

150. *Id.* at 504. While the court did not reach the constitutionality of banning non-residents from canvassing in public housing, the court did note that:

In *Daniel*, 38 F.3d at 550, the court considered a trespass statute that was nearly identical to the restrictions used by HACEP *before* the recent amendments and concluded that the trespass statute was perfectly constitutional, partly in light of the alternative means of communication left open to speakers. That is, even if denied access to the entire complex, speakers would have access to adjacent streets and sidewalks to disseminate their messages.

Id. It is not clear whether the court was merely stating what its sister circuit held in a similar case, or if it was signaling to HACEP that its new policy permitting non-residents to canvass within public housing might not be constitutionally required.

First, *De La O I* can be understood as prohibiting public housing authorities from restricting their tenants' First Amendment right to engage in political conversations with their neighbors, including door-to-door canvassing and literature distribution.¹⁵¹ This case is good law and can be cited by litigators in other federal jurisdictions as persuasive precedent. The *De La O I* court's acknowledgement of the value of door-to-door voter contact as a campaign tool is also notable. In similar cases that were decided differently, courts justify the restriction of canvassing within public housing by citing alternative means of communication, such as leaving literature in common areas or speaking with residents on the public sidewalks outside of the complex.¹⁵² Future litigants would do well to develop a factual record of (1) the unique nature and particular value of face-to-face conversations with voters, as compared to that of literature left in common areas or distributed via campaign mailings; and (2) the importance of having these conversations at voters' doors, when voters are less likely to be in a rush to come or go than when they are passing by on a street. In driving-based communities, where opportunities for face-to-face contact between canvassers and would-be voters are rare or non-existent, the importance of door-to-door canvassing is particularly pronounced. Don Green's quantitative studies on the efficacy of various campaigning tactics might provide helpful fodder for building the record to support canvassing as a particularly valuable form of speech that is unmatched by purported alternatives.¹⁵³

Second, Judge Politz's decision for the first Fifth Circuit panel to hear *De La O II*, though vacated, contains a persuasive argument for protecting the right to canvass in public housing and lists reasons to be skeptical of the Housing Authority's proffered justifications of promoting public safety and reducing crime. However, advocates for expanding canvassing rights should not ignore Judge Barksdale's dissent in *De La O II*, which argues that the majority "ignore[d] the Supreme Court's explanation of how to evaluate the reasonableness of a regulation."¹⁵⁴ She quotes *Cornelius* to support her argument: "[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the *most reasonable* or the *only reasonable limitation*."¹⁵⁵ It is perhaps an open question whether the evaluation of reasonableness in this context may include the kind of weighing of interests that the majority employed to reach its result.

151. *De La O v. Hous. Auth.*, No. EP-98-CA-52-H, 1999 U.S. Dist. LEXIS 22032 at *7 (Feb. 11, 1999).

152. *See Vasquez v. Hous. Auth.*, 271 F.3d 198, 201 (5th Cir. 2001) (Barksdale, J., dissenting); *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994); *Mendenhall v. Akron Hous. Auth.*, No. 5:09-cv-0072, at 10 (N.D. Ohio Oct. 30, 2009).

153. *See Gerber & Green, supra* note 6.

154. *Vasquez*, 271 F.3d at 207.

155. *Id.*

iii. Mendenhall v. Akron Metropolitan Housing Authority

In *Mendenhall v. Akron Metropolitan Housing Authority*, plaintiffs sought an injunction against the enforcement of a no-trespass policy against political canvassers in Akron public housing.¹⁵⁶ The Northern District of Ohio upheld the Akron Metropolitan Housing Authority's (AMHA) "blanket prohibition on door-to-door solicitation at the Towers [as] a reasonable and viewpoint neutral regulation of speech" in a nonpublic forum.¹⁵⁷ The district court explained that:

It is crucial to note that what Plaintiffs were precluded from doing, and what they seek an injunction permitting them to do, is knocking on doors of individual apartments located in residential high-rise buildings to solicit signatures and distribute literature regarding the recall campaign. There was no evidence that AMHA permits anyone access to these properties to go door-to-door for any reason, but instead has established a blanket prohibition on such conduct.¹⁵⁸

The district court found that, because the ban on door-to-door solicitation applied equally to everyone, it was viewpoint-neutral.¹⁵⁹ Further, it found the government's proffered reason for the restriction—to protect the safety of residents, many of whom are elderly and/or disabled—to be reasonable.¹⁶⁰ While the need to protect residents from those who pose as canvassers is insufficient to justify a policy restricting door-to-door canvassing in a neighborhood of single-family homes,¹⁶¹ AMHA's reasoning was found to be sufficient "under the less exacting standard applicable to nonpublic fora."¹⁶²

Further, the *Mendenhall* court explained that "when examining the reasonableness of restrictions on speech, the existence of alternative channels of communication is integral."¹⁶³ The court considered "a rather vast array of alternatives available to [the canvassers]," including:

solicit[ing] and distribut[ing] literature on the sidewalks outside the buildings or in the parking lots[,] . . . leav[ing] their literature with building employees for placement in the facility's resource room[,] . . . [seeking] permission to make an issue presentation regarding the recall petition[,] . . . mail[ing] the literature to

156. *Mendenhall v. Akron Hous. Auth.*, No. 5:09-cv-0072 (N.D. Ohio Oct. 30, 2009).

157. *Id.* at 8.

158. *Id.* at 9.

159. *Id.* at 8–9.

160. *Id.*

161. *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943) (arguing that burglars may pose as canvassers).

162. *Mendenhall*, slip op. at 10 (N.D. Ohio Oct. 30, 2009).

163. *Id.*

residents and includ[ing] instructions on how to contact the campaign to sign a petition.¹⁶⁴

Missing in the district court's analysis—likely because it was not adequately briefed by plaintiffs—was a discussion of the *quality* of the alternatives available to the canvassers, and whether those alternatives were either feasible or likely to result in the same quality and type of conversation with the voter.¹⁶⁵

As illustrated by the three cases discussed above, the question of whether the First Amendment protects the right to canvass in public housing has not been resolved by circuit and district courts. While the current score tips toward public housing authority managements' right to exclude outside canvassers, the case law is far from settled. In future cases, district and circuit courts may find the Fifth Circuit Court's reasoning in *De La O II* to be persuasive; other courts might be persuaded by a factual record that shows that alternative methods of communication, as proposed in *Daniel* and *Mendenhall*, are simply not sufficient to replace the value for both the speaker and listener of door-to-door communications.

2. *State Law on Canvassing in Public and Private Apartment Buildings*

While there may be room to expand canvassing rights under the First Amendment, as discussed above, the U.S. Constitution is not the only source of law for the right to canvass and to receive information from canvassers. State constitutions and common law offer promising paths to expand canvassing rights to both public housing and private apartment buildings in some states. The following provides a brief overview of the history and theory of the "New Judicial Federalism,"¹⁶⁶ in which state courts interpret their constitutions as more rights-protective than the federal Constitution. This Section then looks at two cases, *Walker v. Georgetown Housing Authority*¹⁶⁷—a relatively obscure but directly on point case—and

164. *Id.*

165. *See, e.g., id.* ("Although Plaintiffs contended that the only way to get their message to voters who live in AMHA's high-rises is to knock on individual doors, they failed to provide any compelling evidence to support this assertion. On the contrary, the evidence established that Plaintiffs would be permitted to solicit signatures and distribute literature on the sidewalks outside the buildings or in the parking lots. They could leave their literature with the building employees for placement in the facility's resource room. They also could have sought permission to make an issue presentation regarding the recall petition, but conceded that they did not wish to do so. And, of course, they could mail the literature to residents and include instructions on how to contact the campaign to sign a petition.")

166. The term "New Judicial Federalism" refers to "the fact that state judges in numerous cases have interpreted their state constitutional rights provisions to provide *more* protection than the national minimum standard guaranteed by the federal Constitution." ROBERT WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 114 (2009). *See also* G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 161–70 (1998).

167. *Walker v. Georgetown Hous. Auth.*, 677 N.E.2d 1125 (Mass. 1997).

*Pruneyard Shopping Center v. Robins*¹⁶⁸—a seminal case on state constitutions and public spaces owned by private entities—to highlight the potential of state constitutions to more expansively protect canvassing rights in public housing and privately-owned apartment buildings.

In addition to making state constitutional arguments, advocates seeking to expand the right to canvass in apartment buildings may find additional avenues in state common law. In this Section, I look at *State v. Shack*¹⁶⁹ and how state courts can balance the rights of private property owners and the rights of residents to receive information and services. I then look at landlord-tenant law for additional common law arguments in support of canvassing in apartment buildings.

a. State Constitutional Arguments

After many victories for civil rights and liberties under the Warren Court in the 1960s, many Americans came to see the United States Supreme Court as a bulwark for liberty.¹⁷⁰ However, as the Supreme Court's makeup changed and became more conservative in the 1970s, some advocates turned their efforts to state courts and state constitutions to advance individual rights and liberties, including speech rights. In what became known as the New Judicial Federalism of the 1970s, commentators and jurists alike encouraged the development of more expansive interpretations of state court constitutions.¹⁷¹

Justice Brennan reflected on the state of rights protection under federal versus state constitutions in the seminal law review article, "State Constitutions and the Protection of Individual Rights."¹⁷² Written on the heels of his dissent from the Supreme Court's decision in *Hudgens v. NLRB*,¹⁷³ a case holding that union members had no right to picket inside a privately owned shopping mall, Justice Brennan lamented the Supreme Court's turn from a liberal construction of the Bill of Rights and lauded the rise of "state courts [] construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased."¹⁷⁴ He embraced this development as "an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."¹⁷⁵

168. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

169. *State v. Shack*, 58 N.J. 297 (1971).

170. See Alpheus T. Mason, *Understanding the Warren Court: Judicial Self-Restraint and Judicial Duty*, 81 POL. SCI. Q. 523, 537 (1966) (explaining that Chief Justice Earl Warren viewed the Bill of Rights as "the heart of any constitution" and pursued an ambitious strategy of enforcing these rights).

171. See WILLIAMS, *supra* note 166 at 113–14.

172. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

173. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

174. Brennan, *supra* note 172, at 495.

175. Brennan, *supra* note 172, at 495.

In the early 1980s, New Jersey Supreme Court Justice Stewart Pollock explained his view of the relationship between the federal and state constitutions, calling the Bill of Rights to the U.S. Constitution “a floor for basic human liberty” while “the state constitution establishes a ceiling.”¹⁷⁶ He explained that, for rights made applicable to the states under the Fourteenth Amendment, the states could not drop below the standard established by the federal Constitution, but that the floor does not prevent state courts from interpreting their constitutions as more rights-protective than the U.S. Constitution. Justice Pollock shared the apt example of a young woman convicted of trespassing for distributing leaflets on a private college campus, and asked the audience: “Where would you look for the definition of her rights?”¹⁷⁷ Answering his own hypothetical, Justice Pollock explained:

If you considered her rights under the [F]irst [A]mendment, you might conclude her right to speak and to distribute the pamphlets should yield to the property rights of the university. That is, you might conclude that she did not have the right to distribute literature at a private college or university.¹⁷⁸

Justice Pollock then revealed that his hypothetical was a case that had been decided by one of his associates in *State v. Schmid*.¹⁷⁹ In this case, Chris Schmid, a representative from the Labor Party who had been distributing literature on Princeton University’s campus, sought to overturn his resulting trespass conviction.¹⁸⁰

In *State v. Schmid*, the New Jersey Supreme Court emphasized that the First Amendment is not binding on private property owners, pursuant to *Lloyd v. Tanner* and *Hudgens v. NLRB*.¹⁸¹ Under the federal analysis, the court determined the right to canvass on Princeton’s grounds was uncertain.¹⁸² However, Schmid argued that his rights were separately protected under the New Jersey Constitution’s speech provisions.¹⁸³ The court considered this claim carefully, tracing the history of state constitutionalism and citing the cases in which it and other state courts had more broadly interpreted individual rights under their own constitutions.¹⁸⁴ Critically, the New Jersey Supreme Court emphasized that its “State Constitution imposes upon the State government an *affirmative obligation* to protect fundamental individual rights,” and that these rights are “protectable not only against

176. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

177. *Id.* at 710.

178. *Id.*

179. *Id.*; see also *State v. Schmid*, 423 A.2d 615, 619 (N.J. 1980).

180. *Schmid*, 423 A.2d at 618.

181. *Id.* at 619 (citing *Lloyd v. Tanner*, 407 U.S. 551 (1972)).

182. *Id.* at 623; see also Pollock, *supra* note 176, at 710.

183. *Schmid*, 423 A.2d at 624.

184. See *id.* at 624–630.

governmental or public bodies, but under some circumstances against private persons as well.”¹⁸⁵ As such, federal requirements of government action “do not have the same force when applied to state-based constitutional rights.”¹⁸⁶

In resolving the case, the New Jersey Supreme Court looked to the state constitution and “found more sweeping provisions assuring freedom of speech and of assembly” that “affirmatively grant[] to every person the right to speak and the right to assemble.”¹⁸⁷ The court reversed the conviction on state constitutional grounds.¹⁸⁸

Just months before the New Jersey Supreme Court’s decision in *Schmid*, the Supreme Court affirmed the ability of state courts to interpret their state constitutions more expansively than the federal constitution in *Pruneyard Shopping Center v. Robins*.¹⁸⁹ Plaintiffs in the case were high school students who had been removed from the Pruneyard Shopping Center for distributing literature and collecting petition signatures.¹⁹⁰ Pruneyard argued that *Lloyd Corp. v. Tanner*, which held that the First Amendment did not apply to a privately owned shopping center that wished to exclude petitioners, foreclosed the State from requiring Pruneyard to allow petitioners to gather signatures and distribute literature on their private property “when adequate alternative avenues of communication are available.”¹⁹¹ However, the Court explained that the limits of the First Amendment did not preclude a more expansive reading of state constitutional speech provisions by a state court.¹⁹²

Pruneyard paved the way for state courts to consider—if they had not before—their ability to more expansively interpret the free speech, expression, and petition clauses of their state constitutions.¹⁹³ In the years that followed, many “state courts have addressed this issue of speech and property rights as a matter of state constitutional, statutory or common law.”¹⁹⁴ Others, like Massachusetts’,

185. *Id.* at 627–28 (emphasis added).

186. *Id.* at 628.

187. Pollock, *supra* note 176, at 710; *see also Schmid*, 423 A.2d at 628.

188. *Schmid*, 423 A.2d at 628.

189. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

190. *Id.* at 77.

191. *Id.* at 80–81 (citing *Lloyd v. Tanner*, 407 U.S. 551 (1972)).

192. *Id.* at 81.

193. *See* Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633, 634 (1991) (noting that, in the years since *Pruneyard* was decided, “nearly a dozen state appellate courts wrestle[d] with the *Pruneyard* issue under their respective constitutions.”).

194. James E. Lobsenz & Timothy M. Swanson, *The Residential Tenant’s Right to Freedom of Political Expression*, 10 U. PUGET SOUND L. REV. 1, 19 n.109 (1986) (collecting the following cases: “*Cologne v. Westfarms Assocs.*, 192 Conn. 48, 469 A.2d 1201 (1984) (women’s organization sought permission to solicit persons visiting shopping center to sign petitions in support of Equal Rights Amendment); *Batchelder v. Allied Stores*, 388 Mass. 83, 445 N.E.2d 590 (1983) (Congressional candidate sought permission to solicit signatures and distribute leaflets in a shopping center); *Woodland v. Michigan Citizens Lobby*, 128 Mich. App. 649, 341 N.W.2d 174 (1983) (citizens group

have made clear that federal First Amendment doctrines, like public forum doctrine, do not necessarily constrain their reading of their own state constitutions.¹⁹⁵ States with strong constitutional speech protections may be ripe for expanding canvassing rights both into public housing and private apartment buildings.

For example, in *Walker v. Georgetown Housing Authority*—a case similar to *Daniel*, *De La O*, and *Mendenhall*—the Massachusetts Supreme Judicial Court affirmed Housing Authority’s tenants’ constitutional right to receive communications from political canvassers seeking to go door-to-door in the complex.¹⁹⁶ Walker, a resident of public housing and candidate for the Housing Authority Board, challenged the Housing Authority’s ban on door-to-door campaigning as a violation of “the constitutional rights of tenants to campaign and solicit, to receive information, and to determine for themselves whom they will receive as visitors.”¹⁹⁷ Citing a long line of U.S. Supreme Court decisions upholding the right to canvass in residential neighborhoods,¹⁹⁸ the *Walker* court explained that the policy “[could not] survive the plaintiff’s constitutional challenge based on the First Amendment and cognate provisions of the Massachusetts Declaration of Rights.”¹⁹⁹ It reached a different conclusion from the Eleventh Circuit in *Daniel*.²⁰⁰ This was in part because it rejected the application of First Amendment

restrained from soliciting shoppers, gathering signatures, distributing literature, and making speeches on premises of shopping center); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980) (defendant prosecuted for trespass upon private property when he distributed and sold leaflets on private university campus); *Shad Alliance v. Smith Haven Mall*, 106 A.D.2d 189, 484 N.Y.S.2d 849 (1985) (anti-nuclear group sought permission to distribute leaflets on premises of shopping center); *State v. Felmet*, 302 N.C.173, 273 S.E.2d 708 (1981) (defendant charged with trespass when he solicited signatures for a draft protest in shopping center parking lot); *Oklahomans for Life, Inc. v. State Fair of Oklahoma, Inc.*, 634 P.2d 704 (Okla. 1981) (anti-abortion group sought damages when state fair refused to allow exhibit of abortion educational materials); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981) (anti-war group prosecuted for defiant trespass when they attempted to distribute leaflets on college campus); *Alderwood Associates v. Wash. Env’tl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (Environmental Council enjoined from soliciting signatures and demonstrating in shopping mall.”); *see also Berger*, *supra* note 193, at 634 n.9 (“The intervening years have seen nearly a dozen state appellate courts wrestle with the *Pruneyard* issue under their respective constitutions.”)).

195. *See, e.g.*, *Walker v. Georgetown Housing Auth.*, 677 N.E.2d 1125 (Mass. 1997).

196. *Id.* at 1128.

197. *Id.* at 1126.

198. *Id.* at 1127 (citing *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943); *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 628–32 (1980) (reviewing cases); *Schneider v. State*, 308 U.S. 147, 162 (1939)). *See also supra* Part II.A for a discussion of First Amendment canvassing case law.

199. *Walker*, 677 N.E.2d at 1127.

200. *Id.* at 1128 n.10 (“Our conclusion is not disturbed by the view expressed in *Daniel* . . . that the housing authority’s property in that case was a nonpublic forum . . . [T]he reasoning of the court in the *Daniel* case is questionable. It seems that, because the authority had limited access to its property, the court concluded that the property was not a public forum. The proper question, it seems to us, was whether the authority had a right to limit access in the first place.”) (internal citations omitted).

public forum doctrine to its own state constitutional free speech provision, expressing skepticism of the classifications as pretext for “conclusions [the Court] has reached on other grounds.”²⁰¹ By applying its own standard derived from the Massachusetts Constitution rather than relying upon the U.S. Constitution and doctrines developed by an increasingly conservative court, the Massachusetts Supreme Court strongly affirmed the right to canvass in public housing.²⁰²

The development of the New Judicial Federalism opened new avenues for vindicating constitutional rights, including opening new forums foreclosed to speakers and listeners through federal First Amendment law, as was the case in *Pruneyard Shopping Center v. Robins*, *State v. Schmid*, and *Walker v. Georgetown Housing Authority*. Advocates for expanding canvassing rights into both public housing and privately-owned apartment buildings may find willing partners in state courts that (1) interpret their constitutions as more robustly protective of speech than the U.S. Constitution and (2) do not apply the rigid federal doctrines of state action and forum analysis when interpreting their speech and relevant constitutional provisions.

b. Common Law Exceptions to Trespass and the Tenant's Right to Invitation

State common law can provide an additional source of law protecting canvassing in apartment buildings. In *Hudgens*, the court specifically referred to the possibility that statutory or common law “may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others” despite the Constitution not reaching the private actor.²⁰³ Advocates can argue that common law, specifically exceptions to trespass and the tenant’s right to invite guests, protects the right to canvass and be canvassed in apartment buildings and other residences inaccessible by public streets and sidewalks.

In 1971, the New Jersey Supreme Court held that a private farm owner could not exclude individuals providing health and legal services to migrant farm workers living on the farm in *State v. Shack*.²⁰⁴ Rather than decide the issue on constitutional grounds, the court resolved the issue under the state’s property law,

201. *Id.* at 1128 n.9 (“Because . . . ‘the Court uses public forum talk to signal conclusions it has reached on other grounds, it might be considerably more helpful if the Court were to focus more directly and explicitly on the degree to which the regulation at issue impinges on [F]irst [A]mendment interest in the functioning of the free flow of information.’”) (citing L.H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 (2d ed. 1988)); *see also id.* at 1128 (“We need not decide whether we would find the Supreme Court’s public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under our Declaration of Rights.”).

202. *See Walker*, 677 N.E.2d at 1127.

203. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

204. *State v. Shack*, 277 A.2d 369 (N.J. 1971).

explaining that the “right in [] real property of course is not absolute” and that “a maxim of the common law [was] that one should so use his property as not to injure the rights of others.”²⁰⁵ After weighing the property owner’s right to exclude and the importance of delivering medical and legal services to migrant farm workers, the court concluded that there was “no legitimate need for a right in the [property owner] to deny the [tenant] the opportunity available from . . . recognized charitable groups seeking to assist him.”²⁰⁶ The court further explained that “representatives of these agencies and organizations may enter upon the premises” to visit the migrant farmworker tenants at their living quarters.²⁰⁷

The court in *Shack* did not discuss landlord-tenant law in depth, but it did recognize the migrant worker’s right to “receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.”²⁰⁸ The tenant’s right to invite guests onto their leased property suggests that the tenant, not the landlord, has the right to decide whether or not to permit someone entry.²⁰⁹ This common law concept tracks with the Supreme Court’s reasoning for striking down a canvassing ban in *Martin v. City of Struthers*, as it is “the right of the individual householder to determine whether he is willing to receive [the canvasser’s] message.”²¹⁰

By balancing the need for entry and the property owner’s right to exclude, the *Shack* decision serves as a model for advocates seeking to expand canvassing rights into privately owned apartments.²¹¹ Canvassers can argue, like *Shack*, that the service they provide is of critical importance²¹² and that the property owner lacks a legitimate reason to exclude “recognized charitable groups” and official campaigns for public office from canvassing within their buildings.²¹³ Advocates should remind courts that canvassing involves much more than simply jockeying for votes; door-to-door canvassing often involves registering voters, providing

205. *Id.* at 373 (citing BROOM, LEGAL MAXIMS 238 (10th ed.1939); *Sic Utere Tu ut Alienum Non Laedas*, in 39 WORDS AND PHRASES 335).

206. *Id.* at 374.

207. *Id.*

208. *Id.*

209. Elena Goldstein, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215, 221 (2003) (further providing an in-depth discussion of common law arguments against public housing no-trespass policies). For an in-depth discussion of tenant political speech rights, see Lobsenz & Swanson, *supra* note 194 at 1, 27 (“In summary, the residential nature of the property, the public invitation to rent the premises, the political nature of election-related speech, the large numbers of residential tenants, and the preferred position of freedom of speech in our governmental system, all weigh heavily in favor of recognizing tenants’ claims to freedom of speech as superior to the property rights of landlords.”).

210. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

211. *See Shack*, 277 A.2d at 371–72; *see also Berger*, *supra* note 193, at 666.

212. *See supra* Part I; Part III.A.

213. *See Shack*, 277 A.2d at 374.

information on upcoming elections, assisting tenants with acquiring the required documents to vote, and offering absentee ballots or rides to the polls for those who are not able to get there on their own.²¹⁴

C. Local and State Policies to Protect the Right to Canvass Multi-Unit Buildings

Litigation on federal and state constitutional and common law claims may create a path into apartment buildings for canvassers, but pro-democracy advocates in state legislatures and city councils need not wait for the courts to address the issue. States and cities interested in making democracy more accessible to their apartment-dwelling residents can adopt policies that require apartment building owners to allow political canvassers access to their buildings.

Advocates can look to Minnesota, a state known for its high voter turnout and robust civic engagement,²¹⁵ as a model. Minnesota explicitly protects canvassing in apartment buildings.²¹⁶ Rather than criminalizing entry into apartment buildings to canvass—as many state trespass laws in effect do—Minnesota actually makes it unlawful to block entry to candidates and volunteer canvassers.²¹⁷ Minnesota’s Fair Campaign Practices Act requires apartment managers to grant candidates and their volunteers access to multi-unit buildings in order to “leave campaign materials for residents at their doors.”²¹⁸ The statute applies to “apartment house[s], dormitor[ies], nursing home[s], manufactured home park[s], [] other multiple unit facilit[ies] used as a residence, [and] area[s] in which two or more single-family dwellings are located on private roadways.”²¹⁹ This ensures that all residents, regardless of where they live, can access the information and services offered by local campaigns.

Minnesota’s statute includes safeguards to ensure that its canvassing exception to trespass law does not completely eviscerate the right of private property

214. See *supra* Part I; Part III.A; notes 137–143 and accompanying text.

215. See Peter Callaghan, *People Forget Babies: Minnesota Lawmakers Gear Up For the Census (and Just Maybe, Hold On to a Congressional Seat)*, MINNPOST (Feb. 26, 2019), <https://www.minnpost.com/state-government/2019/02/people-forget-babies-minnesota-lawmakers-want-to-gear-up-for-the-census-and-just-maybe-hold-on-to-a-congressional-seat/> [https://perma.cc/V4DU-9QMX] (“As with other measurements of civic involvement, Minnesota scores highly in Census participation rates. In 2010, its response rate to the initial contact by the Census Bureau was 81 percent, second among states.”); Rob Hotakainen, *Take a Ballot – and a Bow; The State Has the Nation’s Most Active Voters, a Study Finds*, STAR TRIBUNE, July 27, 2005, at B1, ProQuest, Document No. 427725326; Tim Pugmire, *It’s Official: Minnesota 2018 Voter Turnout Tops the Nation*, MPR NEWS (Nov. 27, 2018), <https://www.mprnews.org/story/2018/11/27/minnesota-2018-voter-turnout-tops-the-nation> [https://perma.cc/KT9C-JA3P].

216. MINN. STAT. ANN. § 211B.20 (West Supp. 2019)

217. See *id.*

218. *Id.*

219. *Id.* § 211.B20(1)(a).

owners to exclude people from their property.²²⁰ For example, the statute only requires that access be given to candidates and accompanying volunteers with official campaigns for offices that represent the area in which the building is located.²²¹ This threshold mandate—official candidacy through the formation of a campaign committee and required financial filings—significantly limits the universe of potential canvassers. These requirements balance the rights of apartment dwellers to access campaign information and resources with both the needs of campaigns to contact voters where they live and the rights of apartment building owners who wish to retain some control over who may enter their buildings.

Allowing official candidates and their volunteers access to canvass in apartment buildings is certainly a step in the right direction. However, limiting access to candidates only excludes other types of canvassers, like those advocating for ballot initiatives, legislative bills, or more general positions on issues of public concern. States and cities seeking to expand canvassing into apartment buildings will need to draw a line somewhere;²²² however, Minnesota's statute might be drawn too narrowly.

Granting the public full access to apartments for canvassing would be more in line with the spirit of the First Amendment and the free marketplace of ideas, but such policies are likely to run into political and constitutional friction. Property owners' concerns and desire to retain the right to exclude likely underpin Minnesota's candidacy requirements. The statute takes the gatekeeper role away from the private apartment owner, but the policy meets reluctant property owners on middle ground by allowing only those regulated by the state as official candidates to canvass on private property.²²³ Beyond political pushback from landlords, states that expand exceptions to trespass law may face challenges to their policies under the Takings Clause of the Constitution.²²⁴ States may seek to balance these competing interests by playing a gatekeeping role in limiting the types of speakers that are granted access to canvass on private property. While Minnesota chose to limit this category to candidates,²²⁵ other jurisdictions should consider expanding protections to include volunteers and staff for ballot measure committees and nonprofits. Doing so would allow for more robust protections of speech while still safeguarding their policies from property owners' political and constitutional attacks.²²⁶

220. *See id.* § 211.B20(1)(a)(1)–(3), (2)(1)–(6).

221. *Id.* § 211.B20(1)(a)(1)–(3).

222. *See infra* Part III.D for a discussion of potential Takings Clause issues arising out of apartment canvassing legislation.

223. *See* § 211B.20.

224. *See Berger, supra* note 193, at 678–83 (1991) (discussing constitutional limits imposed by the Takings Clause on states requiring that private property be opened as a forum for speech).

225. *See* § 211B.20.

226. Both ballot measure committees and nonprofits are regulated and require significant levels of compliance. *See, e.g., Iowa Campaign Finance and Ballot Measure Guide*, BOLDER ADVOCACY

D. A Note on Takings Claims

Pruneyard raised complex issues of judicial federalism, such as whether an expansive interpretation of speech rights under the California Constitution ran afoul of a federally protected guarantee against the taking of property without just compensation under the Takings Clause of the Fifth Amendment of the U.S. Constitution.²²⁷ The Court explained:

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.” . . . When “regulation goes too far it will be recognized as a taking.”²²⁸

The Court concluded that there had been no taking; the state was free to liberally construe its own constitution and the shopping center had “failed to demonstrate that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’”²²⁹

In the intervening years, the Court has more broadly interpreted the Takings Clause—for example, by finding takings in the permanent use of a small portion of a residential rooftop for cable wires²³⁰ and by granting beach visitors a small easement on beach property.²³¹ While the logic of *Pruneyard* should still govern any case challenging the statutory or common law recognition of canvassing rights on private property, advocates should take note of the potential takings claims that may arise.²³² A taking does not foreclose governmental incursion onto private

(June 2014), <https://www.bolderadvocacy.org/wp-content/uploads/2018/06/Iowa.campaign.updated.6.19.14.pdf> [<https://perma.cc/C7KR-8PP9>]; *State Filing Requirements*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/state-filing-requirements-nonprofits> [<https://perma.cc/CK3T-Q3ZD>] (last visited Aug. 27, 2019); *Supporting or Opposing Ballot Measures in California: What Do You Need to Disclose?*, BOLDER ADVOCACY (Oct. 2016), <https://www.bolderadvocacy.org/wp-content/uploads/2016/10/Supporting-or-Opposing-Ballot-Measures-in-California-What-Do-You-Need-to-Disclose-Oct-2016.pdf> [<https://perma.cc/5PLE-TGR7>].

227. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77, 82–84 (1980).

228. *Id.* at 82–83 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

229. *Pruneyard Shopping Ctr.*, 447 U.S. at 81, 84 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

230. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

231. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

232. *See Berger*, *supra* note 193, at 682–84. For a more in-depth discussion of the implications

property rights, but it does require just compensation, which “in most instances [in which private property must remain open to speech] would appear to be nominal.”²³³ As such, the Takings Clause should not prevent local and state jurisdictions from following in Minnesota’s footsteps by enacting policies to protect the right to canvass on private property.

IV.

GUIDANCE FOR DEMOCRACY ADVOCATES AND GRASSROOTS CAMPAIGNS: SUMMARY OF RECOMMENDATIONS

This Part briefly synthesizes the previously discussed litigation and policy strategies and provides recommendations for campaigns and advocates. When devising strategies for expanding canvassing rights, advocates should consider the appropriate time frame for reform and the types of canvassing in greatest need of protection. For example, a local nonprofit seeking to build its base through paid fundraising canvassing may benefit from a long-term litigation strategy challenging municipal restrictions on door-to-door fundraising. However, advocates seeking to increase voter participation in an upcoming election might be better served by lobbying their city council to pass an apartment canvassing ordinance.

Campaigns and electoral advocacy organizations that seek to expand the electorate through grassroots mobilization often rely on canvassing. However, short-term electoral campaigns rarely have the time and legal resources to address systemic issues that hinder the efficacy of their grassroots organizing programs. As a result, canvassing restrictions that affect campaigns often go unchallenged.²³⁴ For shorter term campaigns, I suggest a two-pronged strategy to expand canvassing rights: partnering with litigators should legal issues related to canvassing arise, and proactively working to pass local apartment canvassing protections. For longer-term base-building organizations, I suggest adopting the same strategies while additionally taking on longer-term efforts to address canvassing roadblocks that may be out of reach or of less interest to short-term campaigns, including challenging restrictions on fundraising canvassing.

A. *Building Relationships Between Grassroots Campaigns and Litigators*

Electoral organizations would be well-served to partner with attorneys for guidance on navigating local canvassing laws and to provide support should legal issues arise during the campaign. Conversely, lawyers who seek to provide movement defense and support to community organizations and activists should build relationships with local electoral organizations. Specifically, attorneys with

of *Pruneyard*, *Loretto*, and *Nollan* on the recognition of speech rights on private property, see Berger, *supra* note 193, at 678–84.

233. Berger, *supra* note 193, at 683.

234. See discussion *supra* notes 112–113.

expertise in First Amendment issues, such as state affiliates of the American Civil Liberties Union, may be able to provide guidance on canvassing rights and assistance with educating local municipalities and police departments on existing canvassing case law.²³⁵ Attorneys and organizers with expertise in this area can provide canvassing “Know Your Rights” (KYR) materials and trainings for campaign staff and volunteers.²³⁶ Campaigns in localities with aggressive enforcement of canvassing laws and apartment trespassing policies should consider establishing a connection with local criminal defense attorneys in the unfortunate event that campaign staff or volunteers are issued a citation or arrested while canvassing.²³⁷ Further, campaigns seeking to build apartment-organizing programs in which apartment residents organize their buildings or permit canvassers to enter their building should consider whether such activities put their apartment-dwelling supporters at risk of retaliatory action from their landlords. If so, the campaign should maintain ongoing relationships with local housing attorneys and legal services organizations to assist its staff, volunteers, and supporters with any landlord-tenant issues that may arise.

Additionally, campaigns and impact litigators who seek to establish or clarify First Amendment law on canvassing should communicate with each other regarding their goals and potential for collaboration on challenging canvassing regulations. By developing an impact litigation strategy in coordination, campaigns and litigators can identify ideal scenarios for a legal challenge. For example, if the campaign and litigators wish to challenge the enforcement of no-trespass policies against canvassers in public housing, the campaign can prepare canvassers who are willing to participate in litigation for the potential of arrest and, if appropriate, counsel the canvassers not to accept a plea that would compromise their ability to challenge the trespassing policy.²³⁸ Coordination in advance of an arrest or threatened enforcement of canvassing regulations will help the campaign and litigators make strategic decisions in developing an impact litigation strategy.

235. See *supra* Part II for a discussion of canvassing case law.

236. See, e.g., ACLU OF PA., *supra* note 49 for an example of “Know Your Rights” materials compiled by an ACLU state affiliate.

237. Some public defender offices seek to build relationships with local community organizations and activist groups, such as The Legal Aid Society of New York’s Community Justice Unit. See *Community Justice Unit*, LEGAL AID SOC’Y, <https://www.legalaidnyc.org/programs-projects-units/community-justice-unit/> [<https://perma.cc/45DP-8CPR>] (last visited Dec. 17, 2019). Such organizations may have an interest in partnering with community organizers and groups to provide movement defense support.

238. The Supreme Court recently addressed the availability of appeal based on the underlying unconstitutionality of a criminal statute after the defendant had plead guilty in *Class v. United States*, 138 S. Ct. 798 (2018). Based on this case, it is likely that a defendant could accept a plea and go on to challenge the as-applied constitutionality of enforcing no-trespass policies against canvassers in public housing.

B. *Enacting Apartment Canvassing Protections*

Local progressive electoral organizations and campaigns that seek to expand the electorate would be well-served by securing access to apartment canvassing for the reasons discussed in Part III of this Article. Campaigns should note that this process may be lengthy and, as such, it is best initiated long before preparation begins for Get-Out-the-Vote initiatives and Election Day. Campaigns and electoral organizations that have relationships with local and state government should consider lobbying for apartment canvassing protections in advance of voter education and mobilization efforts. Minnesota's law²³⁹ can serve as an example of one method of expanding access to apartment canvassing, though advocates should consider the implications of requiring candidates to be present²⁴⁰ as well as the potential harms of using the criminal legal system as a method of enforcing the law.

Beyond passing local protections, advocates could make inroads to canvassing in public housing by lobbying local public housing authorities to interpret and issue guidance that their no-trespass rules do not apply to canvassing activities protected under the First Amendment. Chuy de la O's work lobbying HACEP can serve as an example—and cautionary tale—of what coordinating with the local housing authority can look like.²⁴¹

Concerns regarding the safety and privacy of apartment residents should be addressed by advocates. Advocates should remind city councilmembers, state legislators, and public housing authorities that ample criminal provisions exist to prevent and protect against the conduct they fear. Criminal laws across the country already cover, for instance, disorderly conduct, criminal harassment, trespass into an individual apartment unit, fraud, and other illegal activities. Given that such laws already address the conduct that landlords fear, more harm than good results when canvassers are unable to provide a civic good—information and assistance in voting—to apartment building dwellers in most need of those services.

C. *Challenging Municipal Restrictions on Canvassing*

Environmental, labor, and other public interest groups that engage in canvassing outside of the electoral cycle often do so to educate the public, build their membership, and engage constituents around legislative campaigns.²⁴² In addition to facing the same issues as electoral advocacy groups and campaigns, some base-building public interest groups face specific issues related to fundraising canvassing. These groups often engage canvassers who fundraise to offset the cost of the

239. See discussion *supra* Part III.C.

240. See discussion *supra* Part III.C.

241. See *supra* Part III.B.1.b.2.

242. See, e.g., *Working Am., Inc v. City of Bloomington*, 142 F. Supp. 3d 823 (D. Minn. 2015); see also *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 (1980).

canvassing program and the group's advocacy on behalf of its members.²⁴³ Municipalities across the country target such fundraising canvassing for additional regulations, for example by requiring pre-registration with the municipality.²⁴⁴

Organizations that utilize fundraising canvassing within municipalities that enforce—or threaten to enforce—canvassing regulations can and should challenge the constitutionality of such laws. In a post-*Reed* First Amendment landscape, such regulations against fundraising canvassing are likely unconstitutional. While canvass directors and grassroots organizers may be inclined to simply send their canvassers to another township or avoid a certain neighborhood where the police get called, these organizations and other groups engaging in grassroots field campaigns will benefit when municipal governments and police forces are educated on the right to canvass and to receive canvassers. Advocacy groups should partner with lawyers to send letters and make calls to local governments and law enforcement advising them that their actions are unconstitutional. Should the municipality continue enforcement, these advocacy groups will be well-situated to bring a challenge to the law, following Working America's lead in Minnesota.²⁴⁵

V. CONCLUSION

Canvassing has the power to increase voter turnout amongst traditionally underrepresented groups, thereby augmenting their political power and bolstering the overall health of our democracy. It has the potential to influence the outcome of elections and strengthen political engagement more generally—for instance, by inspiring the canvassed and canvassers alike to take on larger roles in civic life.

As the 2020 election cycle nears, candidates, campaigners, voting rights advocates, and proponents of free speech should not overlook the importance of door-to-door voter contact. Any advocate of democratic participation has a stake in protecting canvassing rights and expanding such rights to places that need canvassers most—namely, public and private apartment buildings. Municipalities across the country continue to enforce arguably unconstitutional canvassing restrictions, especially against canvassers of color who are disproportionately targeted by police. Building managers continue to enforce no-trespass policies against canvassers, depriving their tenants of the civic goods canvassers provide to their usually better-off neighbors in single-family homes.

Advocates have many tools at their disposal to protect and expand canvassing rights, including litigation and policy advocacy at the state and local levels. Litigation may be brought under federal and state constitutional claims and claims

243. See *Working Am., Inc.*, 142 F. Supp. 3d at 823; see also *Vill. of Schaumburg*, 444 U.S. at 620; *supra* notes 36–40 and accompanying text.

244. *Working Am., Inc.*, 142 F. Supp. 3d at 823.

245. See *supra* note 83 and accompanying text.

arising out of state common law. Policy advocates can look to Minnesota's robust democracy as a model. Protecting our door-to-door democracy may not be as glamorous as planning large scale campaign events or as "cutting-edge" as taking on Russian collusion, but it is equally important to ensuring a thriving democracy in 2020 and beyond.