ALAN WILSON
ATTORNEY GENERAL

September 12, 2012

Warren V. Ganjehsani, Esquire
General Counsel
S.C. Department of Public Safety
P.O. Box 1993
Blythewood, SC 29016

Dear Mr. Ganjehsani:

We received your letter on behalf of the South Carolina Department of Public Safety ("DPS") regarding enforcement of S.C. Code Ann. §56-5-3180(b) by the South Carolina Highway Patrol ("SCHP"). This statute provides that:

> [e]xcept when authorized by the provisions of Section 5-27-910, no person shall stand on a highway for the purpose of soliciting employment, business, or contributions from the occupant of any vehicle.[1]

By way of background, you inform us that:

> [i]n July 2012, SCHP observed individuals affiliated with the United Food and Commercial Workers International Union ("UFCW") distributing handbills in the right-of-way of a highway near the Perdue Farms plant in Dillon, South Carolina. SCHP was concerned for the safety of persons who might be injured as a result of UFCW's activities (including both motorists and those standing in the right-of-way), so the handbill distributors were asked to disperse. They complied without incident. SCHP was contacted shortly thereafter by UFCW's Assistant General Counsel. . . . She claimed in a letter . . . that [§56-5-3180(b)] was inapplicable because no "business" was being solicited and [§56-5-3180(b)] deprived UFCW of its First Amendment rights even if it did apply.

According to additional information in your request, the UFCW handbills provided the Perdue Farms workers with a UFCW authorization card to fill out if they chose representation by the UFCW.

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[1]In addition, we note §56-5-6190 provides that for offenses in Chapter 5 of Title 56, which would include §56-5-3180(b), individuals convicted of misdemeanors "for which another penalty is not provided" may be punished by a fine not to exceed one hundred dollars or a term of imprisonment not to exceed thirty days.

With this background in mind, you ask whether a court would likely find that UFCW's activity constitutes solicitation of "business" prohibited by §56-5-3180(b). If so, you ask whether a court could find that SCHP enforcement of §56-5-3180(b) infringes upon UFCW's First Amendment rights.

Law/Analysis

Generally in interpreting a statute, the primary purpose is to ascertain the intent of the Legislature. Multi-Cinema Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). When interpreting a statute, the legislative intent must prevail if such can be reasonably construed in the language used, which language must be interpreted in light of the intended purpose of the statute. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983). Moreover, in construing a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction for the purpose of limiting or expanding the statute's operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984).

Also, there is the long recognized rule that penal statutes must be construed strictly against the State and in favor of the defendant. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). However, such a rule of interpretation is not absolute in every instance. At the same time, the cardinal rule of statutory construction requires that the court endeavor to "ascertain and effectuate the intent of the legislature." Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289, 292 (2000). In an opinion of this Office dated July 14, 2006, we observed that:

> [a]s one court has put it,
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> > [t]he rule of strict construction applicable to the penal provisions of a statute, however, does not prevent a court from reading the statute in relation to the mischief and evil sought to be suppressed or prevent a court from giving effect to the terms of the statute in accordance with their fair and natural acceptation. While a penal statute is not extended by implication or intendment, its clear implication and intendment is not to be denied.., nor is a construction of a penal statute that will aid in its evasion to be favored ....
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> State v. Meinken, [10 N.J. 348,] 91 A.2d 721, 723 [1952]. In other words, courts make it clear that:
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> > [t]he rule of strict construction of criminal statutes cannot provide a substitute for common sense, precedent, and legislative history. The construction of a penal statute should not be unduly technical, arbitrary, severe, artificial or narrow. In this regard, while penal statutes are to be strictly construed, they need not be given unnecessarily narrow meaning in disregard of the obvious legislative purpose and intent .... In short, although criminal statutes are to be strictly construed in favor of the

> defendant, the courts are not authorized to interpret them so as to emasculate the statutes.
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> 72 Am. Jur.2d Statutes, §196 (2001).

We recognize that day-to-day decisions as to whom to arrest are made primarily by law enforcement officers. Police officers and agencies are afforded by law broad discretion to carry out their arduous daily tasks of enforcing the law. This being the case, law enforcement officers should evaluate each particular situation as it arises and gauge whether there is a likelihood of a violation of the law. Law enforcement officers should be vigilant to enforce the criminal laws of this state, and to detect and bring criminals to justice. Op. S.C. Atty. Gen., July 2, 1996. Significantly, we adhere to our long-standing policy that the judgment call as to whether to prosecute a particular individual is warranted or is on sound legal ground in a particular case is a matter within the discretion of the law enforcement officer or local prosecutor, not this Office. See Ops. S.C. Atty. Gen., April 6, 2011; October 29, 2004; April 20, 2004; February 3, 1997. The law enforcement officer or the prosecutor is the person on the scene who can best weigh the strength or weakness of an individual case. Op. S.C. Atty. Gen., August 14, 1995; see §23-6-140 ["the patrol of the highways of the State and the enforcement of the laws of the State relative to highway traffic, traffic safety, and motor vehicles shall be the primary responsibility of the troopers and officers of the South Carolina Highway Patrol"]; Op. S.C. Atty. Gen., September 4, 2003 [advising that "the Highway Patrol is deemed by law as the agency with "primary responsibility" for enforcement of traffic safety in this State"]. It is the policy of this Office in the issuance of opinions to defer to the administrative agency charged with the enforcement of a particular area of law. Ops. S.C. Atty. Gen., September 8, 2005; October 27, 1999. Where an administrative decision in this regard has been made by the law enforcement agency responsible for enforcement, such as whether to enforce §56-5-3180(b), we will defer to the administrative authority or discretion of the law enforcement officer or agency. Op. S.C. Atty. Gen., March 30, 1988; see Op. S.C. Atty. Gen., June 28, 2011 [advising that this Office will defer to the police officer or prosecutor's ultimate judgment as to whether or not to prosecute an individual in question in a given case].

The questions you raise are the result of a dispute between DPS and the UFCW regarding the enforcement of §56-5-3180(b) under the circumstances presented in your letter. At this point, it is necessary to restate the position and policy of this Office concerning factual determinations. We have previously stated that, "[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as ... a court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions..." Ops. S.C. Atty. Gen., April 16, 2004; March 15, 2000. As a practical matter, we note that it would be impossible to render an opinion which could consider the legality of all potential activities. The task is made more difficult by the recognition that reasonable minds could disagree as to whether a particular activity was a violation of the statute. In short, this Office will not supersede the authority of a court to bring before it all of the facts relevant to a particular situation, nor will we attempt to provide a *per se* answer to a question where the particular facts are so crucial to an accurate response. While arguments may well be made in such a case regarding whether or not the UFCW was engaged in soliciting "business" in violation of §56-5-3180(b), such is a matter for a court of competent jurisdiction, not this Office, to determine. Id.; cf. Op. S.C. Atty. Gen.,

October 14, 1971 (recognizing "[i]t is the practice of this Office to refrain from rendering an opinion on any matter which is pending litigation," and explaining that the purpose of this policy is to allow the "orderly process of law to take its course without interference"). We must, therefore, adhere to the longstanding policy of this Office and respectfully decline to issue an opinion determining whether the UFCW's activities in these circumstances constituted a violation of §56-5-3180(b).

As a preliminary matter, it is axiomatic that a " statute may be invalid as applied to one state of facts and yet valid as applied to another." Dahnke-Walker Milling Co. v. Bondurant, 472 U.S. 491 (1985). However, whether this provision is unconstitutional as applied here would require an inquiry into the facts and circumstances surrounding a particular situation. As noted, such a factual determination must be undertaken only by a court and not an opinion of this Office. See Ops. S.C. Atty. Gen., November 23, 2010; January 22, 2008. Further, although the handbill distributors dispersed as requested by the SCHP, upon information and belief no tickets were issued by the SCHP. Thus, consideration of the constitutional question as applied here is premature. Op. S.C. Atty. Gen., June 4, 1990.

With this caveat in mind, in addressing questions of a constitutional nature this Office consistently advises that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits...." in enacting legislation. Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The Legislature is "presumed to have acted within ... [its] constitutional power despite the fact that, in practice, ... [its] laws result in some inequality ...." State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965). In conjunction with the presumption of constitutionality which must be given every statute enacted by the Legislature, it must also be noted that, if possible, a statute will be construed in a constitutional rather than an unconstitutional manner. Gardner v. S.C. Department of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). As the South Carolina Supreme Court instructed in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591, 597 (2001), "[a] possible constitutional construction must prevail over an unconstitutional interpretation." Further, an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Id.; Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). In other words, every doubt regarding the constitutionality of an act of the Legislature must be resolved favorably to the statute's constitutional validity. Id. More than anything else, only a court and not this Office may strike down an act of the Legislature as unconstitutional. While this Office may comment upon what a court may deem an apparent unconstitutionality, we will not declare a statute void. Put another way, a statute "must continue to be followed until a court declares otherwise." Ops. S.C. Atty. Gen., April 29, 2003; June 11, 1997.

You are concerned about the impact of the First Amendment upon the enforcement of §56-5-3180(b). The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech..." This provision is made applicable to the States by the Fourteenth Amendment to the United States Constitution. Gitlow v. New York, 268 U.S. 652 (1925). In addition, Article I, §2 of the South Carolina Constitution provides that "[t]he General Assembly shall make no law ... abridging the freedom of speech ..." See City of Landrum v. Sarratt, 352 S.C. 139, 572 S.E.2d 476 (Ct. App. 2002). Solicitation is a recognized form of speech protected by the First Amendment, but this right is not absolute. United States v. Kokinda, 497 U.S. 720, 725 (1990). In Cox v. Louisiana, 379 U.S. 536, 555 (1965), the United States Supreme Court emphasized that:

> [f]rom these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.

Public streets and sidewalks occupy a special position in terms of First Amendment protection. United States v. Grace, 461 U.S. 171, 180 (1983). They are "the archetype of a traditional public forum." Frisby v. Schultz, 487 U.S. 474, 480 (1988); see Todd v. Smith, 305 S.C. 227, 407 S.E.2d 644, 649 (Ct. App. 1991). Where a law regulates protected speech in a public forum, courts will apply the "time, place, and manner" test: "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Certain governmental objectives may take on a greater significance in one public location than in another. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 650-51 (1981).

A speech restriction is content-neutral if it is justified without reference to the content of the regulated speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Specifically, "the principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791 [emphasis added); see Ater v. Armstrong, 961 F.2d 1224, 1229-30 (6th Cir. 1992) ("[w]e cannot believe ... that Kentucky prohibited nearly all forms of pedestrian activity upon its roads, excepting only solicitation, because it wished to censor expression"). Therefore, a court must analyze whether the state, because it disagrees with the message individuals convey, has prohibited a person from "stand[ing] on a highway for the purpose of soliciting employment, business, or contributions from the occupant of any vehicle." The Ward court explained that "[t]he government's purpose is the controlling consideration. A regulation that serves

purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, 491 U.S. at 791.

As previously noted, it is undisputed that "[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 154-55 (1969); Cox, 379 U.S. at 554-55; see also Heffron, 452 U.S. at 650 ("[A] State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective"); accord City of Beaufort v. Baker, 315 S.C. 146, 432 S.E.2d 470, 472 (1993). It is also undisputed that restrictions on soliciting on public streets may be justified by concerns about traffic flow and safety. Ward, 491 U.S. at 791; Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); cf. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ["States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"]; Lytle v. Doyle, 326 F.3d 463, 470 (4th Cir. 2003) ["It is uncontested that the State may act to protect its substantial and legitimate interest in traffic safety"].

Here, §56-5-3180(b) is content-neutral, because on its face the statute is not focused on the content of the solicitation but, rather, on the conduct of solicitation on public highways and the clear ramifications of such conduct on safety and traffic flow. There is no doubt that soliciting in the roadway and trying to engage drivers is inherently dangerous, and it disrupts and slows traffic. To us, it defies common sense for the government to wait for accidents or serious injuries to happen in order to justify safety regulations. See United States Labor Party v. Oremus, 619 F.2d 683, 688 n.4 (7th Cir.1980) [in upholding a ban on in-the-roadway solicitation, court held that the State need not wait for personal injuries]; News and Sun–Sentinel Co. v. Cox, 702 F. Supp. 891, 900 (S.D. Fla. 1988) ("'[i]t requires neither towering intellect nor an expensive 'expert' study to conclude that mixing pedestrians and temporarily stopped motor vehicles in the same space at the same time is dangerous"). In protecting interests of public safety, the government is entitled to focus its efforts on solicitation, which itself usually requires a response from the person solicited and is, therefore, more distracting than informational advertising.[2] Clearly, the State's interest in protecting the "safety and convenience" of persons using public highways and streets is a valid governmental objective. Heffron, 452 U.S. at 650. There is no evidence the Legislature intended to suppress any speech with which they disagreed by passing §56-5-3180(b).

Other courts have found statutes similar to §56-5-3180(b) to be content-neutral and ultimately, constitutional. For example, in Houston Chronicle Publishing Co. v. City of League City, Texas, 488 F.3d 613, 621-22 (5th Cir. 2007), the court considered an ordinance prohibiting a person standing in a roadway from soliciting or distributing any material to a vehicle occupant stopped at a traffic light was intended to

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[2]Black's Law Dictionary 1392 (6th ed. 1990) defines "solicit" as:

> [t]o appeal for something; to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication.

promote public safety and held it to have no content-based discriminatory intent. In Ater, the court found that a statute treating individuals soliciting contributions differently than those distributing literature was content-neutral, because it was aimed at the "noncommunicative impact" of conduct rather than the substance of speech itself. Ater, 961 F.2d at 1228; see also Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494, 496-97 (5th Cir. 1989) [upholding Baton Rouge ordinance which reads: "no person shall be upon or go upon any street or roadway ... for the purpose of soliciting employment, business, or charitable contributions of any kind from the occupant of any vehicle"]; ACORN v. St. Louis County, 930 F.2d 591, 593 (8th Cir. 1991) (upholding statute which reads: "[n]o person shall stand in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle" against a First Amendment challenge); Denver Publishing Co. v. City of Aurora, 896 P.2d 306, 309 (Colo. 1995) ("[i]t shall be unlawful for any person to solicit employment, business, contributions, or sales of any kind, or collect monies for the same, from the occupant of any vehicle travelling upon any street or highway ..."); Zeiger v. State, 140 Ga. App. 610, 231 S.E.2d 494, 496 (1976) [the mere fact that the defendant was exercising his First Amendment rights does not shield him from the observance of normal traffic regulations; the fact that traffic did in fact have room to pass defendant who was standing on the highway while engaged in selling or giving away his newspapers without hitting him does not render the statute unconstitutional in its application].

"[A] regulation of the time, place, or manner of protected speech must also be narrowly tailored to serve the government's legitimate, content-neutral interests." Ward, 491 U.S. at 798 The regulation "need not be the least restrictive or least intrusive means of" achieving the government's goals, but it may not "burden substantially more speech than is necessary." Id. at 798-99. Put another way, the regulation must "focus[ ] on the source of the evils the city seeks to eliminate ... and eliminate[ ] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." Id. at 799 n.7. The Ward Court stated that a court must not second guess a responsible decision maker's means " 'concerning the most appropriate method for promoting significant government interests,' " or conflate the wisdom of a statute with its constitutionality. Id. at 800; see Ater, 961 F.2d at 1229; cf. Hill v. Colorado, 530 U.S. 703, 727 (2000) [courts owe deference to the laws state legislatures enact to accommodate competing public interests]; WDW Properties v. City of Sumter, 342 S.C. 6, 12-13, 535 S.E.2d 631, 634 (2000) [South Carolina courts generally give deference to a legislative body in its determination of a public purpose].

Further, §56-5-3180(b) is narrowly tailored to serve the significant government public interest of enhancing public safety and reducing traffic congestion. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981); see also Heffron, 452 U.S. at 650 ("[A] State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."); Houston Chronicle Publishing Co., 488 F.3d at 622 [restricting solicitations at signal-controlled intersections serves "compelling interest at the heart of government's function: public safety"]. As noted, individuals are not excused from compliance with a traffic regulation simply because they are engaged in constitutionally-protected activities. The statute extends only to individuals standing on public highways and streets.[3] In

[3]In an opinion of this Office dated October 8, 1979, we observed the term "highway" is defined in §56-5-430 to include "[t]he entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular traffic." We therein interpreted the word "way" in the statute to include "all portions of the highway right of way." The opinion also

other words, the State is "eliminat[ing] no more activity than was considered necessary" to promote significant government interests. Ater, 961 F.2d at 1229 [noting that because Kentucky's legitimate interest would support prohibiting all activity, including solicitation, Kentucky could decide not to prohibit solicitation]. Moreover, the State need not devise the least restrictive regulation to curb the problem or not enforce §56-5-3180(b) because of imaginable alternative solutions. Ward, 491 U.S. at 800. Section 56-5-3180(b) does not substantially burden more speech than is necessary. We believe that a court would likely find the statute is narrowly tailored to serve a significant government interest. Id. at 799.

The courts cited above also found anti-solicitation ordinances focusing on conduct in the roadway are narrowly tailored. For example, in St. Louis County a county ordinance provided simply that "[n]o person shall stand in a roadway for the purpose of [solicitation]." In this case, the parties stipulated that the ordinance did not prohibit soliciting drivers from areas off the roadway. The court cited evidence introduced at trial that supported the argument that soliciting in a roadway is dangerous and slows traffic. Even though plaintiff's solicitors argued they were specially trained for roadway solicitation to minimize concerns for safety, the court concluded that the prohibition against solicitation in the roadway did not burden speech more than necessary to further the government's interest in traffic safety and was, therefore, narrowly tailored. St. Louis County, 930 F.2d at 593.

We further note that §56-5-3180(b) provides an exception, pursuant to §5-27-910, relaxing the anti-solicitation ban for contributions and solicitations by non-profit organizations under stringent circumstances.[4] Several states have similar provisions. Some courts have determined that such provisions allowing specified charitable solicitations in the roadway are valid against a First Amendment challenge. In Ater, the court held a Kentucky statute prohibiting persons from standing in public roadways, but

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recognized that "the act of standing on the highway for the named purposes is what is proscribed [by §56-5-3180(b)] whether traffic flow is impeded or not."

[4]In 1988 S.C. Acts 373, §3, the Legislature amended §56-5-3180(b) to include an exception under §5-27-910, which provides that:

> [a]ny rescue squad, volunteer fire department, or charitable or eleemosynary organization in this State may solicit funds from motorists on highways and streets located within a municipality with a permit issued by the governing body of the municipality or within the unincorporated areas of a county with a permit issued by the governing body of the county. The governing body may grant or deny a permit. Permits may be issued for more than one day but no organization may be issued more than two permits in any one calendar year. Permits may impose limits upon solicitation as the governing body of the municipality or county determines are necessary to protect the health and safety of motorists, pedestrians, and those soliciting for an organization and to ensure that solicitation does not unreasonably impede the flow of traffic. The governing body issuing the permit shall have responsibility for supervising the solicitation and enforcing the terms of the permit; provided, that the municipality or county is immune from liability as provided in the Tort Claims Act for any loss or injury occurring as a result of these solicitations.

which created limited exception for solicitation of contributions along roadways, was narrowly tailored to serve significant governmental interest; statute was intended to promote legitimate goal of safety on public roadways and, by prohibiting distribution of literature in roadways, statute eliminates no more activity than was considered necessary to further goal. Ater, 961 F.2d at 1228. Also, in People v. Tosch, 114 Ill.2d 474, 501 N.E.2d 1253 (1986), the court upheld a statute that banned roadway solicitation except for charitable organizations engaged in statewide campaigns. The court explained:

> [a]s is stated in the quotation from the opinion in Jenkins v. Wu (1984), 102 Ill.2d 468, 82 Ill.Dec. 382, 468 N.E.2d 1162, a State may treat different classes of persons differently, and absent a fundamental right may differentiate between persons similarly situated if there is a rational basis for doing so. The enactment of subsections 719 (a) and (b) shows that the General Assembly has determined that soliciting rides or business on the public highways creates problems concerning the health, safety and welfare of the citizens of this State. It has apparently also decided that solicitation of charitable contributions stands on a different footing than solicitation for other purposes and results in benefits to the public which offset the risks inherent in solicitation on the highways. We find the classification reasonably related to a legitimate governmental objective. . .

Tosch, 501 N.E.2d at 1256-57. By way of further illustration, the plaintiffs in One World One Family Now v. City of Miami Beach, 175 F.3d 1282 (11th Cir. 1999) were non-profit groups wishing to set up sidewalk tables to pass literature. They claimed a Miami Beach ordinance enacted to control pedestrian traffic flow and preserve the aesthetics of a popular tourist street was content-based, because the ordinance permitted restaurant cafe tables on the sidewalks but prohibited the non-profit groups' portable tables to distribute literature. The court, however, concluded that this differential treatment between "nonprofit and commercial tables [did] not turn the ordinance into a content-based one ... unless we were to interpret the ordinance as preferring food for the body over food for the soul, which we decline to do." Id., 175 F.3d at 1287.

As previously stated, however, an opinion of this Office is not the proper means to resolve the constitutionality of this statute.[5] We can only state, based upon our analysis, that a court would likely find §56-5-3180(b) is reasonably related to a legitimate governmental objective and content-neutral.

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[5]We note that some authorities have determined such provisions to violate the free speech guarantee of the First Amendment. See, *e.g.*, Bischoff v. Florida, 242 F.Supp.2d 1226 (M.D. Fla. 2003) [exemption in Florida statute permitting highway solicitations on behalf of registered §501(c)(3) charities violated United States Constitution]; Op. Del. Atty. Gen., July 8, 2002 [exception in state motor vehicle law that allowed solicitations on roadway by some charitable organizations, but barred solicitations by others, was not content-neutral and therefore violated First Amendment]; Op. Tex. Atty. Gen., Dec. 4, 1995 [state statute that permitted local governments to enact charitable exceptions to ban on roadway solicitations would be unconstitutional unless local ordinance was narrowly tailored].

Conclusion

The State has the power to limit pedestrian activities upon its roadways. The purpose of §56-5-3180(b) is not to censor or inhibit expression. Rather, the Legislature's intent clearly is vehicle and pedestrian safety, and the convenience of persons using public highways and streets by proscribing the solicitation of motorists. This Office defers to the discretion of the SCHP and the DPS as to whether to prosecute a particular individual pursuant to the statute. Based upon the applicable law discussed above, it is our opinion that a court would likely conclude §56-5-3180(b) is content-neutral on its face and, therefore, constitutional. However, only a court may declare a law unconstitutional. As such, we advise that §56-5-3180(b) remains valid and enforceable until a court rules otherwise.

Further, only a court could determine whether §56-5-3180(b) is unconstitutional as applied to the situation presented in your letter. We have repeatedly stated that this Office cannot and does not resolve factual disputes or make findings of fact. Therefore, while the statute speaks for itself, this Office cannot in an opinion determine how a particular set of facts might apply to the law in a particular instance. Only a court of competent jurisdiction can make such a determination.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Deputy Attorney General