

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4646

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL #3, et al.,

Appellants,

v.

MUNICIPALITY OF MT. LEBANON,

Appellee.

APPELLANTS' REPLY BRIEF

On Appeal from the December 10, 2004, Order of the United States District Court
for the Western District of Pennsylvania, at Civil Action No. 04-1651,
Granting Defendant's/Appellee's Motion for Summary Judgment

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U.S. Const. Amend. I passim

ARGUMENT

I. Mt. Lebanon’s Arguments Fail to Accord Sufficient Respect for the First Amendment Right to Engage in Political Activity *Anonymously*.

Mt. Lebanon’s argument that it needs “to know who is going door-to-door”¹ trivializes the important constitutional right to speak *anonymously*.² The Supreme Court in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton (“Watchtower”) recently resolved the balance between fighting crime or fraud and protecting door-to-door canvassers’ identity in favor of the latter.³ The certiorari question presented in Watchtower was whether a licensing requirement for door-to-door advocacy violated “the First Amendment protection accorded to *anonymous* pamphleteering or discourse.”⁴ In holding the ordinance unconstitutional, Watchtower was merely the latest Supreme Court decision

¹ Brief for Appellee at 29.

² Id. at 5 (“require a canvasser *merely* to register”); 6 (“it is difficult to think of less intrusive registration requirements than these”) (quoting district court opinion, JA 019); 25 (“Canvassers are free to go door-to-door after *simply* registering with the police department”); 25 (“must *simply* stop at the police department before beginning the activity”); 26 (“*simply* must apply for and receive a solicitation permit prior to engaging in their solicitation activity”). (All emphases added).

³ 536 U.S. 150 (2002).

⁴ Id. at 160 (emphasis added) (citation omitted).

affirming the importance of anonymous and pseudonymous political speech.

“Under our Constitution, anonymous [political speech] is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.”⁵

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind,” in both literature and politics.⁶ The tradition of anonymity in the advocacy of political causes is “most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton and John Jay, but signed ‘Publius.’”⁷

Mt. Lebanon’s claim that registration does not breach anonymity is misleading.⁸ Although canvassers are not required to identify themselves while going door to door, they are required to register with the police before canvassing. That registration is a public record open to inspection.⁹ Moreover, both registration and permitting operate as disclosure requirements vis-a-vis the *government*.

Shielding identity from *government* officials is often more important than

⁵ McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995).

⁶ Id. at 341-42.

⁷ Id. at 343 n.6.

⁸ See, Brief for Appellee at 9 n.2.

⁹ JA 132.

shielding it from private parties. The Supreme Court opinions highlighting the importance of *anonymous* political speech harken to pre-Revolutionary War “colonial patriots” fighting England’s repressive laws and acts.¹⁰ “Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”¹¹ The Court has most often referred to possible *government* retaliation – official repression – to justify protection for anonymous and pseudonymous speech. One can imagine the chill cast by a requirement that each SEIU canvasser must present him or herself personally at the police station before canvassing if the get-out-the-vote campaign were directed at defeating incumbent Mt. Lebanon council members, or if they were a civil rights group seeking to organize a referendum to oust the police chief over alleged racial profiling. This Court, albeit in dicta, recognized that “identification requirements” for solicitors and canvassers involve a substantial risk of dampening the exercise of First Amendment activities.”¹²

¹⁰ Talley v. State of California, 362 U.S. 60, 64-65 (1960).

¹¹ Id. at 64. See also, McIntyre, 514 U.S. at 341-42 (“The decision in favor of anonymity may be motivated by fear of economic or *official retaliation*, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”) (emphasis added).

¹² New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1264 (3d Cir. 1986), cert. denied, 479 U.S. 1103 (1987) (hereafter “NJCA”). Mt. Lebanon

(continued...)

In case after case, the Supreme Court has balanced government officials' claim that they need to know who is speaking in order to prevent some criminal mischief, versus the right to speak anonymously, and in these cases free speech almost always triumphs. The Court found that protecting Mrs. McIntyre's anonymity while she distributed unsigned leaflets criticizing her local school board was more important than Ohio's interest in "identify[ing] those who engage in fraud, libel or false advertising" in the election context.¹³ The Court ruled that protecting Manual Talley's identity while he distributed leaflets to organize an economic boycott of manufacturers who refused to hire "Negroes, Mexicans, and Orientals" was more important than the government's need to prevent "fraud, false advertising and libel."¹⁴ And protecting NAACP membership lists from Alabama and Arkansas government officials displeased with the civil rights organization's activities in the respective states was more important than any countervailing governmental interests in ensuring compliance with corporate-registration

¹²(...continued)
cites NJCA to support its argument that registration requirements for canvassers are constitutional. Brief for Appellee at 8-9. SEIU notes that NJCA did not resolve a challenge to the registration requirement. 797 F.2d at 1264. Even if it did, the Supreme Court's decision in Watchtower is superceding.

¹³ Id. at 337-40.

¹⁴ Talley, 362 U.S. at 61, 63-65.

requirements or collecting occupational license taxes.¹⁵ And, most importantly for this case, protecting the Jehovah’s Witnesses’ right to canvass anonymously outweighed Stratton, Ohio’s “three interests . . . served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents’ privacy.”¹⁶

II. Mt. Lebanon Has not Satisfied Its Burden to Prove That the Registration or Permit Requirements Prevent Crime.

Mt. Lebanon asserts that the Watchtower Court did not consider crime prevention as an interest to justify the licensing scheme.¹⁷ Mt. Lebanon also asserted this fact below and the district court accepted it. The assertion is, however, incorrect.

The crime-prevention argument was raised and the Supreme Court rejected it. The Watchtower Court wrote that, “The Village argues that three interests are served by its ordinance: the prevention of fraud, *the prevention of crime*, and the

¹⁵ See, National Ass’n for the Advancement of Colored People v. State of Alabama, 357 U.S. 449 (1958); and Bates v. City of Little Rock, 361 U.S. 516 (1960).

¹⁶ Watchtower, 536 U.S. at 164-65.

¹⁷ Brief for Appellee at 18.

protection of residents' privacy."¹⁸ After examining and rejecting the Village's anti-fraud justification, the Court again acknowledged the two additional interests in "protecting privacy" and "the prevention of crime."¹⁹ Two paragraphs later the Court addressed the crime-prevention argument, writing that, "it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance."²⁰

The Court noted that a permit requirement would not preclude people from pretending to "ask for directions or permission to use the telephone, or pose as surveyors or census takers" to gain access to the home.²¹ Only after this repeated acknowledgment of the Village's proffered interest in crime prevention, and rejection of it, did the Court indicate that the Village had not "assert[ed] an interest in crime prevention below...."²² Justice Breyer's concurrence suggested that the Village did not argue crime prevention below because the argument was "intuitively

¹⁸ 536 U.S. at 164-65 (emphasis added).

¹⁹ Id. at 168.

²⁰ Id. at 169.

²¹ Id.

²² Id.

implausible.”²³ Given the plenary review applicable in First Amendment cases, like Watchtower and this one,²⁴ regardless whether the lower courts reviewed the Village’s crime-prevention justification, it is clear the Supreme Court considered and rejected it.

While Watchtower does not foreclose a community from presenting compelling evidence demonstrating that a serious problem with canvassers exists, and that a licensing system “will in fact alleviate [crime] in a direct and material way,”²⁵ Mt. Lebanon has not met its burden. The evidentiary burden and evidence in the record are discussed more fully in Brief for Appellant at 26-33.²⁶

²³ Id. at 170.

²⁴ Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567-68 (1995).

²⁵ United States v. National Treasury Employees Union, 513 U.S. 454, 475 (1995), quoting Turner Broadcasting System, Inc. v. Federal Communications Comm’n, 512 U.S. 622, 664 (1994).

²⁶ SEIU did not cite to NJCA in its initial brief. But NJCA supports SEIU’s argument that there must indeed be a strong nexus between the regulation and the asserted interest. Even under intermediate scrutiny, “[t]he mere assertion of substantial government interests is not enough.... A valid time, place, and manner regulation must also ‘serve’ that significant government interest.” 797 F.2d at 1256 (citation omitted). Indeed, when “fundamental free speech interests are patently burdened, the district court not only is free to but indeed is required to overturn regulations that are premised on legislative assumptions contradicted by facts in the record.” Id. at 1257. NJCA struck down a 5:00 p.m. curfew and fingerprinting requirements imposed on door-to-door canvassers because the municipalities had

(continued...)

Mt. Lebanon asserts unequivocally and with great confidence that the registration requirement deters crime.²⁷ But the evidence belies that statement. Prior to 2002, when Mt. Lebanon amended the ordinance in response to the Watchtower decision,²⁸ the Municipality required not only registration, but a permit that included a criminal background check.²⁹ Despite that more exacting review process, “an increase in crime and fraud had been prevalent since 1984.”³⁰ The reason is that would-be criminals ignored the permit requirement. As Mt. Lebanon acknowledges, “a group of solicitors, *without permits*, burglarized several local communities, including in the Municipality. The Police chief further testified that in the prior four years there had been ten burglaries committed by solicitors *without*

²⁶(...continued)
failed to meet their evidentiary burden.

²⁷ “[R]egistration requirement . . . does further the Municipality’s interest in preventing crime...” Brief for Appellee at 15; “Without a doubt, a registration requirement both deters and helps detect wrongdoing...” Id. at 15-16; “will certainly assist the police department in solving the crime....” Id.

²⁸ Brief for Appellee at 2.

²⁹ JA 084 (Nov. 25, 2002, public-hearing transcript (“transcript”); testimony from solicitor Roberts: “Our current ordinance does require a solicitation permit from everybody basically who goes door-to-door”).

³⁰ Brief for Appellant at 17; JA 085-86 (transcript).

permits in the Municipality. *Id.*”³¹ Therefore, contrary to Mt. Lebanon’s assertion that a licensing system “without a doubt” and “certainly” deters crime, the record in this case affirms the Supreme Court’s observation in Watchtower that a licensing system is “unlikely” to advance the asserted interest.

The problem is not with canvassers, like SEIU, the environmental groups whose organizations so often appear in the captions of these cases challenging canvassing laws, or the Jehovah’s Witnesses who have sought leave to file an amicus in this case. The problem, as documented by Mt. Lebanon, is with people posing as canvassers. These pretenders simply disregard the ordinance’s licensing requirements and risk far stiffer penalties by engaging in criminal conduct. The licensing requirements are in reality, and predictably so, ineffectual against these criminals.

III. Holding Unconstitutional Municipal Licensing Systems for Door-to-Door Canvassers Will Not Preclude Other Content-Neutral Time, Place and Manner Regulations or the Enforcement of Criminal Laws That Prohibit Directly the Underlying Criminal Conduct Targeted by the Registration Requirement.

Mt. Lebanon not only overstates the licensing system’s effectiveness, but it

³¹ Brief for Appellee at 17 (emphasis added).

also overdramatizes the consequences of this Court striking down the ordinance.³² Contrary to Mt. Lebanon's exaggerations, declaring the licensing requirements unconstitutional, as the Court did in Watchtower, will not preclude all regulation of canvassing. Mt. Lebanon's ordinance already regulates canvassing in other ways that SEIU does not contest. For instance, the ordinance restricts canvassing to the hours of 9:00 a.m. to 9:00 p.m.³³ It also empowers homeowners to prohibit solicitors by displaying no-solicitation signs.³⁴ Both are widely-used forms of regulation and neither is constitutionally objectionable.

Furthermore, Mt. Lebanon and other communities still have, and would continue to have, the ability to address *directly* the crime-prevention interest by enforcing the Pennsylvania Crimes Code. The licensing requirement on canvassers is merely an *indirect* means to address crime. It is, however, one that restricts speech. Historically, the Supreme Court has ruled that criminalizing directly the underlying anti-social activity is preferable to addressing it indirectly by burdening

³² See, e.g., Brief for Appellee at 6 (“Unless the lower court’s decision is affirmed, Mt. Lebanon and other Pennsylvania communities will have no ability whatever to prevent or prosecute violent crime and fraud in their neighborhoods by simply identifying the individuals and groups who go door-to-door along their streets. Canvassers would be subject to no regulation whatsoever...”).

³³ §307.6 (JA-131).

³⁴ §315 (JA-132).

speech. The availability of direct prohibitions also demonstrates that the speech restriction is not narrowly tailored.

For instance, in Schneider v. State of New Jersey, Town of Irvington, the Court struck down several ordinances that required pamphlet distributors to get a permit.³⁵ The licensing requirements were justified in different ways, some as a litter-prevention measures and others as necessary to prevent fraud, disorderly conduct or other trespasses.³⁶ In a response to these arguments, which bear close resemblance to Mt. Lebanon's that striking the licensing scheme would leave the municipality powerless to address the criminal conduct, the Court noted that, "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."³⁷

In Talley v. State of California, the Court used similar reasoning to strike down an ordinance that prohibited anonymous handbills.³⁸ More recently, the Court in McIntyre v. Ohio Elections Comm'n voided a statute that prohibited

³⁵ 308 U.S. 147 (1939).

³⁶ Id. at 162.

³⁷ Id. See also, Id. at 164 ("Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden.").

³⁸ 362 U.S. 60 (1960).

anonymous leaflets on election-related topics.³⁹ The Court responded to Ohio’s argument that the identification requirement was necessary to fight fraud by noting that the forced disclosure was not the “principal weapon” to combat the underlying criminal activity:

Ohio’s prohibition on anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify [the statute’s] extremely broad prohibition.⁴⁰

In this case, Mt. Lebanon’s ordinance is not the municipality’s “principal weapon” against home burglaries and other crimes committed by pretend canvassers. The Pennsylvania Crimes Code is the principal weapon, and it is a far more powerful one than the ordinance, a violation of which carries no jail time.⁴¹ And as in Watchtower, McIntyre, Talley and Schneider, the government’s ability to know in advance who is speaking to whom and when may be an “ancillary benefit” to fighting crime, but on balance it cannot justify the burden on free speech.

³⁹ 514 U.S. 334 (1995).

⁴⁰ Id. at 349-51.

⁴¹ §310 (JA-131).

IV. Mt. Lebanon's Arguments that the Ordinance is Content-Neutral Must be Rejected.

Mt. Lebanon's contention that the registration and permitting requirements are content-neutral misreads SEIU's argument and Supreme Court precedent.⁴² It also ignores the ordinance's plain language.

SEIU will not re-state the argument about how applying a registration requirement only to people who go door to door to discuss "issues of public or religious interest," and applying a permit requirement only to people who seek money for commercial sales or charitable contributions is content based.⁴³ SEIU's earlier brief covered that topic.⁴⁴

Mt. Lebanon does not respond to the first content-based distinction, namely, that only people who discuss "issues of public or religious interest" must register. The content-based nature of that distinction should be self evident.

Rather, Mt. Lebanon focuses on the second distinction. But contrary to Mt. Lebanon's contention, SEIU does not argue that the ordinance is "content-based" because it enforces the permitting requirement on charitable as well as commercial

⁴² Brief for Appellee at 20

⁴³ See, JA 128 (§303).

⁴⁴ See, Brief for Appellant at 33-38.

solicitors.”⁴⁵ Regulating both charitable and commercial speakers equally, as was done in Heffron v. International Soc. for Krishna Consciousness,⁴⁶ is not content-based regulation, and SEIU has not so argued.

SEIU argues that focusing on whether the canvasser/solicitor asks for money and distinguishing charitable from commercial solicitation makes the ordinance content-based. The Supreme Court so held in City of Cincinnati v. Discovery Network.⁴⁷ The Court ruled that an ordinance favoring non-commercial news racks over commercial ones was, “by any commonsense understanding of the term . . . ‘content based’” regulation.⁴⁸

Mt. Lebanon’s ordinance is plainly content-based and, therefore, subject to strict scrutiny. Since the Stratton Ordinance considered in Watchtower could not survive intermediate scrutiny, Mt. Lebanon surely cannot satisfy a more exacting

⁴⁵ Brief for Appellee at 20.

⁴⁶ 452 U.S. 640, 649 (1981) (“the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes.”).

⁴⁷ 507 U.S. 410, 429 (1993).

⁴⁸ Id. See also, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516-17 (1981) (plurality) (treating commercial and non-commercial billboards differently “distinguishes permissible and impermissible signs at a particular location by reference to their content”).

standard.

CONCLUSION

WHEREFORE, for the reasons set forth in the brief in chief and this reply brief, SEIU respectfully requests that this Court reverse the district court's grant of summary judgment for Mt. Lebanon and enter judgment for SEIU on its facial challenge to both the registration and permit requirements in the solicitation ordinance.

If this Court determines, however, that one or both licensing requirements are facially constitutional, or if the Court decides that SEIU does not have standing to bring a facial challenge to the permit requirements, SEIU respectfully requests that the Court remand the case to the district court for resolution of the First Amendment *as-applied* claims.

Respectfully submitted,

/s/ Witold J. Walczak

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May 6, 2005 (Correcting spelling and grammar errors in Appellants' Reply Brief,
which was filed on April 14, 2005)

CERTIFICATE OF COMPLIANCE

I, Witold J. Walczak, HEREBY CERTIFY that on this 6th day of May, 2005, that a word count conducted by Word Perfect software shows that the Reply Brief contains 3001 words and 306 lines.

/s/ Witold J. Walczak

Witold J. Walczak

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANTS' REPLY BRIEF (CORRECTED)** were sent, via First-Class Mail, to the persons listed below on May 6:

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certify that they are members in good standing of the bar of this Court.

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/s/ Douglas B. McKechnie
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CERTIFICATE OF IDENTICALNESS

I hereby certify that the electronic version of Appellants' Reply Brief filed today with the Court via email is identical to the hard-copy version of Appellants' Reply Brief filed with the Court via first-class mail.

/s/ Michael J. Healey
MICHAEL J. HEALEY

CERTIFICATE OF VIRUS SCAN

I hereby certify that I performed a virus scan on the electronic version of Appellant's Brief, before filing on May 6, using Norton AntiVirus 2004, which was updated on May 4, 2005.

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