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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

Appellants filed this 42 U.S.C. §1983 civil rights suit for declaratory and injunctive relief in the United States District Court for the Western District of Pennsylvania, which properly exercised jurisdiction under 28 U.S.C. §§1331, 1343 and 2201. Appellants, an unincorporated labor organization and two individuals, alleged that Appellee Municipality of Mount Lebanon's Ordinance, Municipal Code, Chapter VIII Part 3, violated the First Amendment to the United States Constitution by requiring door-to-door canvassers to register with, or get a permit from, the local police department. The district court's December 9, 2004, Memorandum Opinion and Order of Court, entered on December 10, granted Appellee's motion for summary judgment. The Order decided all outstanding claims and is, therefore, final.

On December 14, 2004, Appellants filed a timely Notice of Appeal to this Court. This Court has jurisdiction under 28 U.S.C. §1292(a)(1) to hear the appeal.

## STATEMENT OF ISSUES

1. Is Mt. Lebanon's content-based *registration* requirement for charitable solicitors, who do not ask for financial contributions, referred to in the ordinance as *canvassers*, a facially-unconstitutional-speech restraint that violates the First Amendment and the Supreme Court's decision in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)? The issue was pled in the Verified Complaint, JA 028, 035 and 036 (¶¶1, 42 and Relief ¶I), and argued in Plaintiffs' Memorandum in Support of Motion for Summary Judgment, JA 147-53. Mt. Lebanon opposed the argument in a Memorandum in Response to Plaintiffs' Motion for Summary Judgment. JA 197-203. The Court ruled on the issue in a December 9, 2004, Memorandum Opinion. JA 015-19.
2. Does SEIU have standing to raise a facial and overbreadth challenge under the First Amendment to Mt. Lebanon's *permit* requirement for charitable solicitors who include a financial appeal? The issue was raised in Plaintiffs' Memorandum in Support of Motion for Summary Judgment. JA 145-46. Mt. Lebanon opposed the argument in a Memorandum in Response to Plaintiffs' Motion for Summary Judgment. JA 197-203. The Court ruled on the issue in a December 9, 2004, Memorandum Opinion. JA 019-20.

3. Is Mt. Lebanon's content-based *permit* requirement for charitable solicitors who include a financial appeal, referred to in the ordinance as *solicitors*, a facially-unconstitutional-speech restraint that violates the First Amendment and the Supreme Court's decision in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)? The issue was raised in Plaintiffs' Memorandum in Support of Motion for Summary Judgment. JA 153-55. Mt. Lebanon opposed the argument in a Memorandum in Response to Plaintiffs' Motion for Summary Judgment. JA 197-203. The Court ruled on the issue in a December 9, 2004, Memorandum Opinion. JA 015-19.

## STATEMENT OF THE CASE

Appellants are an unincorporated labor organization, Service Employees International Union, Local #3 (“SEIU”), and two individuals working with national voter-registration groups. JA 028-29 (Verified Complaint ¶¶1, 4 and 5).<sup>1</sup> Appellee, Municipality of Mt. Lebanon (“Mt. Lebanon”), is a municipal subdivision organized and operating under the Pennsylvania law. JA 030 (¶8).

Appellants (hereafter referred to collectively as “SEIU”) filed on October 28, 2004, a civil rights complaint under 42 U.S.C. §1983 in the United States District Court for the Western District of Pennsylvania against Mt. Lebanon and another municipality not party to this appeal, Monroeville. JA 028-43. The suit claimed that both Mt. Lebanon’s and Monroeville’s ordinances imposed an advance-registration and permitting requirement on door-to-door canvassers that violated free-speech guarantees under the First Amendment to the U. S. Constitution. JA 031 (¶15) and JA 035 (¶42). SEIU filed, simultaneous with the Verified Complaint, a Motion for Temporary Restraining Order and/or Preliminary Injunction to enjoin Mt. Lebanon and Monroeville officials from enforcing the canvassing ordinance and “from requiring Plaintiffs or anyone else engaged in non-commercial door-to-door solicitation or canvassing to register, secure a permit or pay a fee.” JA 044-50.

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<sup>1</sup> Unless otherwise specified, cites to “¶” refer to paragraphs in the Verified Complaint.

SEIU sought the injunction to facilitate a door-to-door voter education and registration campaign planned for the upcoming weekend, which was just days before the November 2 Presidential election. JA 051.

On October 29, 2004, the district court convened a hearing on SEIU's motion. The immediate disputes against both municipalities settled, as explained below, without the court taking evidence or testimony. JA 218-46.

SEIU settled claims against Monroeville after the municipality agreed that under its ordinance the canvassers did not need to register, obtain a permit or pay a fee. SEIU dismissed Monroeville from the litigation by consent order. JA 134-35.

SEIU also resolved the preliminary-injunction motion with Mt. Lebanon through a consent order that delineated the terms under which canvassers could canvass in the municipality until Election Day. JA 136-39. The consent order with Mt. Lebanon also agreed to "resolve the case in chief with regard to the constitutionality of Chapter VIII, Part 3 of the Mt. Lebanon Code through summary judgment motions, without the need for any additional discovery, on a schedule set by the Court." Id.

On December 9, 2004, the Honorable Arthur J. Schwab ruled on cross-motions for summary judgment, granting Mt. Lebanon's and denying SEIU's motion. JA 022. The clerk's office entered the order on December 10, 2004. JA

026. Judge Schwab ruled that Mt. Lebanon's registration requirement for canvassers (people who do not ask for money) did not violate the First Amendment. JA 003-20. The judge declined to rule on SEIU's challenge to the permitting requirement for solicitors (people who ask for money), holding that SEIU did not have standing to challenge the provisions. JA 019-20.

SEIU filed a timely appeal on December 14, 2004. JA 001-02.

## STATEMENT OF FACTS

Plaintiffs are a local labor organization, Service Employees International Union, Local #3 (“SEIU”) and two volunteers, Rachel Canning and Velvet Hazard (hereafter referred to collectively as “SEIU”) who were engaged in a get-out-the-vote campaign immediately preceding the November 2, 2004, presidential election. JA 028-030 (¶¶1,5,6 and 9). Working together with other organizations and groups, they recruited over 1000 volunteers to go door-to-door in Allegheny County communities, including Mt. Lebanon, to emphasize the presidential election’s importance, encourage people to vote and help them locate assigned polling places. JA 028-30 (¶1,9, 10, 11).

SEIU’s door-to-door activities are often referred to as “charitable” or “political solicitation.” JA 030 (¶12). The act of going to people’s homes to discuss political and religious matters is known as “canvassing” or “door-to-door solicitation.” Canvassing is an inexpensive and highly effective form of communication, for which there is no comparable and affordable alternative. JA 031 (¶13).

The municipalities sued by SEIU in this case, Mt. Lebanon and Monroeville, are two of many Allegheny County governments with ordinances that restrict or burden canvassing. JA 031 (¶14). SEIU did not have the time and resources to

comply with the various registration restrictions and conditions imposed on canvassers by these municipalities. JA 035 (¶¶39). The delay and expense, both financial and human resource, to comply with the ordinances would have prevented SEIU from communicating with many local residents prior to Election Day. JA 035 (¶¶40, 41).

In this case, when Ms. Canning contacted the Mt. Lebanon Police Department on Wednesday, October 27, 2004, to inquire about the Municipality's requirements for door-to-door canvassing, she was told that every person must register personally at the police department, provide a name, address, and photo identification, and then list the date, time and location of the canvassing activity. JA 034-35 (¶¶38). When she contacted the Monroeville Police Department that same day to inquire about the Municipality's requirements for door-to-door canvassing, she was told that every individual canvasser must obtain a permit. JA 033 (¶¶30). To do so, each person must personally come to the police station, bring two forms of identification and two pictures (one for the municipality to keep), and pay \$10. Id. The fee was for a criminal background check. Id. Additionally, the organization must pay \$50 per week, regardless how many canvassers it deploys. Id. Monroeville advised Ms. Canning that it takes at least two days to get a permit. Id.

On October 28, 2004, SEIU filed this action against Mt. Lebanon and Monroeville alleging that the municipalities' respective ordinances violate the First Amendment, both facially and as applied. JA 035 (¶42). SEIU simultaneously filed a Motion for Temporary Restraining Order and/or Preliminary Injunction to enjoin both municipalities "from enforcing their respective solicitation and peddling ordinances . . . and specifically to enjoin Defendants from requiring Plaintiffs or anyone else engaged in non-commercial door-to-door solicitation or canvassing to register, secure a permit or pay a fee." JA 044 (¶I). Since SEIU settled the claims against Monroeville and they are no longer party to this appeal, no further discussion is presented regarding that municipality's ordinance. JA 134-35.

Mt. Lebanon's Municipal Code regulates door-to-door canvassing and solicitation. Municipal Code of the Municipality of Mt. Lebanon, Chapter VIII, Part 3, §301 (hereafter referred to only by section number). The Code is appended at JA 128-32. Mt. Lebanon amended the Solicitation Code, to its present form, after the Supreme Court's decision in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton ("Watchtower").<sup>2</sup> Prior to the amendments, adopted in October 2002, Mt. Lebanon had in place not only a *registration* requirement, but a

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<sup>2</sup> 536 U. S. 150 (2002).

*permit* requirement for *everyone* going door to door.<sup>3</sup> Under this previous licensing system, which applied to more canvassers and subjected them to more intense scrutiny by the police, in the “four years” preceding the 2002 amendments the municipality “had ten burglaries committed by solicitors without permits....”<sup>4</sup>

The 2002 amendments to the Solicitation Ordinance created a two-tier structure, classifying people who want to go door to door as *canvassers* or *solicitors*. Although these terms are defined in greater detail below, the primary distinction between the two is that *canvassers* go door-to-door, but do not ask for money. *Solicitors* go door to door but either ask for a financial contribution or try to sell services or products. It is illegal to do either without first registering with, or getting a permit from, the police department. JA 128 (§302). The ordinance makes no exception for non-commercial activists from charitable, religious or political organizations. JA 128 (§301).

A *canvasser* under the ordinance is anyone who goes “door-to-door in the Municipality” and either distributes “pamphlets or other written material to an occupant of a residence” or who “discuss[es] with such occupant issues of public

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<sup>3</sup> 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”).

<sup>4</sup> JA 085-86 (Transcript).

or religions interest,” but does not ask for money. JA 128 (§303). Canvassers are subject to a *registration* requirement. JA 132 (§316). The registration process requires each canvasser to appear personally at the police station, present photo identification, and specify when and where he or she intends to canvass. Id. Failure to register before canvassing is illegal, JA 128 (§302), and is punishable by a \$300 fine. JA 131 (§310).

A *solicitor* under the ordinance is anyone who goes door to door and asks for *money*, regardless whether it is for commercial or non-commercial purposes. JA 128 (§303).<sup>5</sup> Unlike canvassers, who must only register, a solicitor must obtain a *permit*. JA 129-32 (§§304-314). Each solicitor must complete a sworn application to the police department that includes, *inter alia*, background and contact information for the sponsoring organization and its “officers directors, trustees, and principal salaried executive officers,” the name and address of each individual solicitor, the purpose for the solicitation, a description of the goods or subscriptions being offered, and the period and times of solicitation. JA 129 (§§304.1-304.8). Solicitors also must submit the “original of the Soliciting Organization’s State

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<sup>5</sup> §303 defines “solicit” as, “to go from door to door in the Municipality (I) soliciting contributions or pledges for contributions, or (ii) selling or attempting to sell subscriptions, products or services, or taking orders or attempting to take orders for subscriptions, products or services from or to an occupant of a residence.” A solicitor is a person who solicits. Id.

Permit” or a “sworn, written statement of the applicant indicating that such applicant is (i) exempt from the registration requirements of the Charitable Solicitation Act, or (ii) not subject to the Charitable Solicitation Act.” JA 129 (§304.9).<sup>6</sup> The permit-application form can be found at JA 167-68. The Police chief must issue permits if the information is complete and the requisite fees are paid, JA 129-30 (§305.1), but he has five days to do so, JA 130 (§305.2). The fee is \$50 for each permit, and covers the cost of a “criminal records check.” JA 130 (§306). The fee is waived for persons soliciting only one time within any calendar year. *Id.* Anyone failing to obtain a permit and to have it available at the request of any resident or police officer is subject to a \$300 fine. JA 131 (§310). The permits are a public record. JA 129-30 (§305.1).

On October 29, 2004, the district court convened a hearing on SEIU’s preliminary injunction motion. The immediate disputes against both municipalities settled, as explained below, without the court taking evidence or testimony. JA 218-46.

SEIU settled claims against Monroeville after the municipality agreed that the canvassers did not need to register, obtain a permit or pay a fee. SEIU dismissed Monroeville from the litigation by consent order. JA 134-35.

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<sup>6</sup> The Charitable Solicitation Act is codified at 10 Pa.C.S. §§162.1, *et seq.*

SEIU also resolved the preliminary-injunction motion with Mt. Lebanon through a consent order that delineated the terms under which canvassers could canvass in the municipality until Election Day. JA 136-39. The agreement required SEIU supervisors to list canvassers' names, addresses and drivers' license numbers and then to deliver that list by fax or personally to the Mt. Lebanon Police Department. JA 137 (¶¶4A-E). The parties also agreed to "resolve the case in chief with regard to the constitutionality of Chapter VIII, Part 3 of the Mt. Lebanon Code through summary judgment motions, without the need for any additional discovery, on a schedule set by the Court." JA 138 (¶6).

By order dated December 9, 2004 (and entered on December 10), the district court granted Mt. Lebanon's summary judgment motion. JA 022. The court ruled the canvassing-registration requirements facially constitutional. JA 003-020. The court refused to rule on SEIU's challenge to the solicitation-permitting requirements, holding that SEIU did not have standing to raise those claims. JA 019-020. The district court did not, and without a record could not, resolve Plaintiffs' *as-applied* claims under the First Amendment.

SEIU filed this appeal on December 14, 2004. JA 001.

**STATEMENT OF RELATED CASES AND PROCEEDINGS**

SEIU is unaware of any related cases or proceedings.

## **STANDARD OF REVIEW**

The standard of review for all issues in this First-Amendment case is plenary. "[I]n cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (citations omitted). Accord, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567-68 (1995); United States v. Various Articles of Merchandise, Schedule No. 287, 230 F.3d 649, 652-53 (3d Cir. 2000).

## SUMMARY OF ARGUMENT

Speaking with friends, neighbors and others, especially about important political and religious issues, without first notifying the government is a cherished First Amendment right and part of our national heritage. Three years ago the U. S. Supreme Court, in Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002), confirmed this right for charitable solicitors engaged in door-to-door canvassing. The district court's decision upholding the facial constitutionality of Mt. Lebanon's ordinance requiring charitable, religious and political organizations engaged in canvassing to register with the police before going door to door is irreconcilable with Watchtower.

The registration requirement for charitable and non-commercial canvassers is overbroad and facially unconstitutional under Watchtower. The constitutionally "offensive" features of the Ohio ordinance identified by the Watchtower Court apply equally to permit and registration systems, namely, they require people to notify the police before speaking with others, thereby preventing spontaneous and anonymous communication. Even if the ordinance were not unconstitutional as a matter of law under Watchtower, Mt. Lebanon has failed to meet its burden under intermediate scrutiny, much less the strict scrutiny that applies here, to demonstrate that permitting or registration in fact materially reduce crime.

Second, the district court's holding that SEIU did not have standing to challenge the *permit* requirements for charitable solicitors who include financial appeals ignored well-established law relaxing standing requirements in facial and overbreadth claims under the First Amendment. The imperative to protect speech interests, including those of people not before the court, and the goal to promote judicial economy by not forcing SEIU and others to re-file this lawsuit, dictates that this Court should decide the challenge to Mt. Lebanon's permit requirement.

Third, the permit requirement for charitable solicitors cannot be sustained under Watchtower simply because the solicitation includes a financial appeal. The Supreme Court has held that charitable solicitors' financial appeal is inextricably intertwined with the political or religious message and that the two components can neither be separated nor treated differently under the law. Moreover, for the same reasons that Mt. Lebanon did not meet its burden to justify registration, under either intermediate scrutiny or strict scrutiny (which should apply to this content-based regulation), it cannot do so for the permit requirements either.

This Court should reverse the district court's entry of summary judgment for Mt. Lebanon and enter judgment for SEIU, holding that both the registration and permitting requirements in Mt. Lebanon's solicitation ordinance are overbroad and facially unconstitutional.

## ARGUMENT

### **I. MT. LEBANON’S ADVANCE-REGISTRATION REQUIREMENT FOR CHARITABLE SOLICITORS WHO GO DOOR-TO-DOOR TO DISCUSS MATTERS OF PUBLIC OR RELIGIOUS INTEREST IS A FACIALLY-UNCONSTITUTIONAL SPEECH RESTRICTION UNDER WATCHTOWER.**

Requiring a person to give advance notice to the police before discussing important issues of the day with friends and neighbors is “offensive--not only to the values protected by the First Amendment, but to the very notion of a free society...” and is incompatible with our “national heritage and constitutional tradition.”<sup>7</sup> So held the U.S. Supreme Court, with just one dissent, a mere three years ago in Watchtower. The district court’s decision in this case upholding Mt. Lebanon’s registration requirement for door-to-door canvassers is irreconcilable with Watchtower. Moreover, even if Watchtower were not controlling, Mt. Lebanon’s registration requirement would still fail under the First Amendment because Mt. Lebanon has not proved, and cannot prove, that the licensing system actually advances the municipality’s crime-reduction interest, as required under the intermediate-scrutiny test. And Mt. Lebanon does not even contend that the ordinance can survive the strict scrutiny that should have been applied, given the ordinance’s content-based regulation of speech on “issues of public or religious

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<sup>7</sup> Watchtower, 536 U.S. at 165-66.

interest,” as well as the greater burdens the ordinance places on those who solicit financial support. The district court erred with respect to all of these issues. Any requirement that people give advance notice to the government before communicating with each other, especially on weighty matters of “public or religious interest,” is a significant burden on free speech.

**A. Watchtower Prohibits Not Just *Permit* Systems, but also Registration Requirements Because Both Licensing Forms Contain Advance-Notice Requirements That Foreclose Spontaneous and Anonymous Communications.**

The district court’s first error was in failing to apply the holding of Watchtower to strike down Mt. Lebanon’s registration scheme. The Stratton, Ohio, ordinance reviewed in Watchtower prohibited any “canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors...” from “going in and upon private property”<sup>8</sup> ... “without first registering in the office of the Mayor and obtaining a Solicitation Permit.”<sup>9</sup> The Stratton ordinance, thus, required canvassers both to “register[] in the office of the Mayor and obtain[] a Solicitation Permit.”<sup>10</sup> But that does not mean, as the court below stated, that the holding of Watchtower

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<sup>8</sup> 536 U.S. at 154 n.1.

<sup>9</sup> Id. at 155 n.2.

<sup>10</sup> 536 U.S. at 155 n.2; Id., 156 n.3 (emphasis added).

applies only to that combination of restrictions.

In ruling on the Jehovah's Witnesses' facial and overbreadth challenge to the Stratton ordinance,<sup>11</sup> the Supreme Court first reaffirmed its long-standing commitment to giving the highest First-Amendment protection to door-to-door canvassing.<sup>12</sup> Going to people's homes is "perhaps the most effective way of bringing [pamphlets and information] to the notice of individuals."<sup>13</sup> Indeed, "door to door distribution of circulars is essential to the poorly financed causes of little people."<sup>14</sup>

In determining whether the Stratton ordinance was sufficiently tailored to the promotion of the claimed government interest, the Watchtower Court placed great value on peoples' right to speak to one another without first having to inform the government, *even assuming that* governmental approval is routinely and quickly given:

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<sup>11</sup> The Jehovah's Witnesses did not challenge procedures allowing homeowners to display signs blocking various potential canvassers from coming to the door. 526 U.S. at 156. SEIU does not challenge similar provisions in this ordinance. See, §§307 and 315. JA 129-31.

<sup>12</sup> See, Watchtower, 536 U.S. at 161-64, and cases discussed therein.

<sup>13</sup> Watchtower, 536 U.S. at 162, quoting Schneider v. State, 308 U.S. 147, 164 (1939).

<sup>14</sup> Watchtower, 536 U.S. at 163, quoting Martin v. Struthers, 319 U.S. 141, 144-46 (1943).

It is offensive--not only to the values protected by the First Amendment, but to the very notion of a free society-- that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.<sup>15</sup>

The Court then considered Stratton's proffered justifications for the ordinance, namely, fraud prevention, crime prevention and protecting residential privacy, and determined that the licensing scheme was not sufficiently tailored, even under intermediate scrutiny, to justify its burden on speech.<sup>16</sup>

The Watchtower Court, therefore, clearly condemned both the permit system and the registration requirement. The constitutional harm – indeed the harm to a “free society” and to our “national heritage” – does not flow only from the need for governmental approval associated with a permit system, but is inflicted by the very advance-notification requirement inherent in registration. Nothing in the record indicates that Stratton's Jehovah's Witnesses distinguished registration from permitting, and nothing in the opinion suggests that the Court did so either. By

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<sup>15</sup> Id. at 165-66.

<sup>16</sup> Id. at 166-69. These interests are addressed below in greater detail. The Court evaluated the dispute under *intermediate*, not *strict*, scrutiny because the ordinance was so overbroad that it failed even the less searching standard. Id. at 164.

assuming, as the Court did, that Stratton granted permits without “cost [and] delay,”<sup>17</sup> the only conceivable concern remaining was the advance-notice requirement, which accompanies both registration and permitting.

Moreover, the three “pernicious effect[s]”<sup>18</sup> identified by the Court in Watchtower dispel any argument that only Mt. Lebanon’s permitting requirement, and not registration, is constitutionally offensive. Registration entails the same three “effects” as permitting. First, the historically-honored and important right to speak about political and religious matters *anonymously* is breached by both registration and permitting because Mt. Lebanon requires a canvasser, on pain of a \$300 fine,<sup>19</sup> to register her name, address and when and where she intends to canvass before going door to door to speak with people.<sup>20</sup> Second, the “objective burden” of applying for a license by those who believe in a “right to engage in uninhibited debate in the context of door-to-door advocacy” is the same with both the permitting required for the solicitation of money and the registration required

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<sup>17</sup> Id. at 166.

<sup>18</sup> Id.

<sup>19</sup> §§302 and 310. JA 128, 131.

<sup>20</sup> Watchtower, 536 U.S. at 166-67. For more discussion generally about the right to *anonymous* speech, see McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341-42 (1995).

simply to speak.<sup>21</sup> Third, both registration and permitting “effectively ban” spontaneous speech. As the Court noted in Watchtower, “a person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she [registered].”<sup>22</sup> Accordingly, the three “pernicious effects” associated with permitting equally attend registration.

Three earlier Supreme Court cases reinforce the argument that the advance-notification requirement by itself violates the First Amendment. Thomas v. Collins,<sup>23</sup> a case cited in Watchtower, involved only a *registration* requirement. In Thomas, a Texas statute required all labor-union organizers to obtain a card before soliciting memberships to the organization.<sup>24</sup> The issue was whether “the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment....”<sup>25</sup> Ruling solely on the registration requirement,<sup>26</sup> the

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<sup>21</sup> Watchtower, 536 U.S. at 167.

<sup>22</sup> Watchtower, 536 U.S. at 167-68.

<sup>23</sup> 323 U.S. 516 (1945).

<sup>24</sup> Id. at 519 n.1.

<sup>25</sup> Id. at 538. The Court subsequently reasserted that the holding applied just to a registration requirement requiring only advance notice: “As we think the requirement of registration, in the present circumstances, was in itself an invalid

(continued...)

Court held that it was “incompatible with an exercise of the rights of free speech and free assembly”<sup>27</sup> and “with the requirements of the First Amendment.”<sup>28</sup>

In Lamont v. Postmaster General of the United States,<sup>29</sup> the Court struck down another pre-identification requirement that required postal customers to specifically request delivery of their mail from foreign countries containing “communist political propaganda.” A federal statute required the postmaster to hold such mail and notify the addressee that the mail had been received and that it would be delivered only if the addressee returned a card requesting delivery. Ruling on the “narrow ground that the addressee[,] in order to receive his mail[,] must request in writing that it be delivered,” the Court held that this notification requirement violated the First Amendment.<sup>30</sup>

The third relevant Supreme Court precedent, also cited in Watchtower, is

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<sup>25</sup>(...continued)  
restriction, we have no occasion to consider whether the restraint as imposed goes beyond merely requiring previous identification or registration.” Id. at 541.

<sup>26</sup> The Court distinguished earlier licensing cases as involving “more than mere identification or previous registration....” Id.

<sup>27</sup> Id. at 539.

<sup>28</sup> Id. at 541. Watchtower contained a lengthy quote from Collins that included both statements. 536 U.S. at 164.

<sup>29</sup> 381 U.S. 301 (1965).

<sup>30</sup> Id. at 307.

Hynes v. Mayor and Council of Oradell.<sup>31</sup> Hynes held unconstitutional an ordinance, much like Mt. Lebanon's registration provision, that required canvassers to "notify the Police Department in writing, for identification only."<sup>32</sup> While the Hynes Court struck the ordinance on vagueness grounds, the case is relevant because the law did not require a permit, only advance notification, which is akin to registration. Thomas, Lamont and Hynes, therefore, all support the argument that even just an advance-notification requirement can be, and in this case is, an unconstitutional restraint on free speech.

Finally, the only federal court to consider an ordinance, like Mt. Lebanon's, that attempted to distinguish Watchtower by requiring only registration, and not a permit, declared it unconstitutional. Ohio Citizen Action v. City of Mentor-on-the-Lake ("OCA")<sup>33</sup> involved a challenge to an ordinance, similar to Mt. Lebanon's, that created a registration requirement for charitable solicitors who did not ask for money, and a permitting requirement if the solicitor requested a contribution. The district court held that the identification requirements were

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<sup>31</sup> 525 U.S. 610 (1976). See, Watchtower, 536 U.S. at 161 n.11.

<sup>32</sup> Hynes, 525 U.S. at 610.

<sup>33</sup> 272 F.Supp.2d 671 (N.D. Ohio 2003).

“clearly invalid” under Watchtower.<sup>34</sup> Mirroring SEIU’s argument here, the court concluded that there is no legally-significant distinction between permitting and registration. It characterized both as a “prior restraint” because each requires “a speaker to obtain a license, register, or perform other duties as a condition precedent to their being allowed to exercise their First Amendment rights....”<sup>35</sup>

In sum, Watchtower and the earlier Supreme Court cases holding advance-notification laws unconstitutional mandate a reversal of the district court’s judgment upholding Mt. Lebanon’s canvassing-registration requirement. But even if that were not so, Mt. Lebanon’s registration requirement must fail because Mt. Lebanon has not offered sufficient evidence to justify the ordinance’s burden on speech, whether under intermediate or strict scrutiny.

**B. Mt. Lebanon Has Not Met It’s Burden, Even Under Intermediate Scrutiny, to Show That A License Requirement Will in Fact Alleviate Crime in a Direct and Material Way.**

Unlike most legal disputes, in First Amendment cases government *defendants* bear the burden of proof and persuasion.<sup>36</sup> Once plaintiffs have shown a restraint

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<sup>34</sup> Id. at 680.

<sup>35</sup> Id. at 681.

<sup>36</sup> United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816  
(continued...)

on free expression, the burden shifts to the government agency to justify the restraint under the relevant First-Amendment standard.<sup>37</sup> While SEIU believes – and argues in the next section – that Mt. Lebanon’s ordinance discriminates on the basis of content and, therefore, must satisfy strict scrutiny, the record demonstrates that Mt. Lebanon cannot justify its canvassing ordinance even under the burden imposed by an intermediate-scrutiny analysis.

Whenever government attempts to justify a speech restriction by claiming that it is necessary to “prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’ ...It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>38</sup> Even with restrictions on

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(...continued)

(2000) (“Playboy”) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions”) (citations omitted); Phillips v. Borough of Keyport, 107 F.3d 164, 172-73 (3<sup>rd</sup> Cir. 1997) (en banc), cert. denied, 522 U.S. 132 (1997) (accord).

<sup>37</sup> Phillips, 107 F.3d at 172-73 (“When a legislative body acts to regulate speech, it has the burden, when challenged ... of satisfying the relevant First Amendment standard”).

<sup>38</sup> United States v. National Treasury Employees Union, 513 U.S. 454, 475 (1995) (“NTEU”), quoting Turner Broadcasting System, Inc. v. Federal Communications Comm’n, 512 U.S. 622, 664 (1994) (“Turner Broadcasting”). See also, Bartnicki v. Vopper, 532 U.S. 514, 531-32 (2001) (justification to suppress expression “must be ‘far stronger than mere speculation about serious harms’”)

(continued...)

commercial speech, which enjoys less protection than the charitable solicitation at issue here, government must show that the speech restriction “will in fact alleviate [the intended harm] to a material degree.”<sup>39</sup> In any case, “the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”<sup>40</sup>

Mt. Lebanon merely “posit[s] the existence” of a crime problem, and fails to demonstrate that either the registration or the permit requirement “will in fact

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<sup>38</sup>(...continued)  
(citation omitted); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) (“[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden”); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969). (even in public school context, where officials are given significant latitude to protect children, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression”). The NTEU Court also quoted Justice Brandeis’s famous passage:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women.... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.

NTEU, 513 U.S. at 475, quoting, Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion).

<sup>39</sup> Lorillard Tobacco, Co. v. Reilly, 533 U.S. 525, 555 (2001) (citations omitted).

<sup>40</sup> Id.

alleviate these harms in a direct and material way.”<sup>41</sup> If anything, the evidence offered by Mt. Lebanon validates the Watchtower majority’s conclusion that a permit system is “unlikely” to stop or deter people intent on perpetrating crime and fraud.<sup>42</sup>

Mt. Lebanon’s evidence is presented through an affidavit from Municipal Manager Stephen M. Feller, to which are attached a transcript from the November 25, 2002, public hearing that preceded the ordinance’s amendment, and several newspaper and Internet articles purportedly about crimes committed by door-to-door solicitors. JA 067-133. Neither the transcript nor the articles support Mt. Lebanon’s contention that a nexus exists between licensing and crime reduction.

To begin with, the transcript reveals that even more onerous canvassing requirements did not prevent the type of crime Mt. Lebanon seeks to address through its ordinance. Mt. Lebanon Police Chief Tom Ogden testified at the public hearing that, “In the last four years we have had ten burglaries committed by solicitors without permits in our community.”<sup>43</sup> During those four years, Mt. Lebanon had in place not only a *registration* requirement, but a *permit* requirement

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<sup>41</sup> NTEU, 513 U.S. at 475.

<sup>42</sup> 536 U. S. 150, 169 (2002).

<sup>43</sup> JA 085-86 (Nov. 25, 2002, public hearing transcript (“transcript”).

for *everyone* going door to door.<sup>44</sup> Despite this permit requirement, apparently at least ten people disregarded it and committed crimes. This fact validates Watchtower's observation that, "it seems unlikely" that a permit system would deter people bent on committing a crime, or scoping out a home, from doing so.<sup>45</sup>

The newspaper and Internet articles attached to Mr. Feller's affidavit do no more to support Mt. Lebanon's argument that its registration and permitting requirements will reduce crimes committed by people who knock on other people's doors. Several of those articles recount assaults or robbery attempts by door-to-door canvassers that were completely unrelated to canvassing.<sup>46</sup> While the articles do discuss crimes that followed a knock on the door of the crime victim, none of these articles reveals whether the municipality had an ordinance requiring a permit or registration. Moreover, none of these articles indicates whether the perpetrator

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<sup>44</sup> JA 084 (transcript testimony from solicitor Roberts: "Our current ordinance does require a solicitation permit from everybody basically who goes door-to-door").

<sup>45</sup> 560 U.S. at 169.

<sup>46</sup> These include: a December 2, 2002, e-mail from Feller to Ogden regarding a Prince Georges County, Maryland assault in which one canvasser shot another one, JA 100-01; an April 26, 2002, Journal Gazette (Ft. Wayne, Indiana) article about traveling magazine salespeople assaulting each other, JA109-11; a September 12, 2001, Spokane, Washington Sheriff's news release about the arrest of a door-to-door salesman for robbing a car parked in a garage, JA 116-17 ; and a February 24, 2001, Independent.Com (Grand Island, Nebraska) article about door-to-door magazine sellers who assaulted people parked in a car, JA 126-27.

had secured the permit, or, as in the case of 10 burglaries in Mt. Lebanon between 1998 and 2002, simply ignored the requirement.<sup>47</sup> The articles at best, therefore, demonstrate that sometimes canvassers commit crimes. They do not provide evidence that a permitting or registration system has any effect on the frequency of such crimes. Mt. Lebanon's experience with its pre-2003 ordinance demonstrates that there is no clear nexus between registration or permit systems and reducing crime.

Mt. Lebanon's failure to demonstrate the requisite nexus between a licensing system and crime reduction is not surprising. The Watchtower-majority opinion

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<sup>47</sup> These include a June 27, 2002, Pittsburgh Post-Gazette news article about a salesman accused of raping a 14 year-old girl, JA 102; a May 3, 2000, Fulton Daily (near Buffalo, NY) article about a door-to-door salesman being charged with murder, JA 104-05; a July 29, 2000, Parent Watch article listing eleven incidents purportedly involving "magazine salesmen," JA 106-08; a June 13, 2001, Courier-Journal (Louisville, Kentucky) story about a door-to-door seller wanted in a sexual assault, JA 118-19; a November 13, 2002, Lancaster Eagle-Gazette (Ohio) and a September 12, 2002, The Advocate article, both about the same incident involving a door-to-door salesman who entered a home and sexually assaulted a young girl JA 120-23; and an August 22, 2001, Daily Beacon (Knoxville, Tennessee) article about a door-to-door salesman who forcibly entered a home and murdered the resident, JA 124-25. Mt. Lebanon also submitted a May 24, 2002, Milwaukee, Wisconsin press release about a door-to-door-magazine seller wanted for burglary in another state that did not reveal whether the alleged crime had anything to do with canvassing, JA 112-13; and a July 11, 2002, Boulder, Colorado news release about a female canvasser who was lured into a home and assaulted, JA 114-15. This last situation had nothing to do with *residents'* safety, the interest identified by Mt. Lebanon.

noted 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.”<sup>48</sup> The concurrence stated it more forcefully: “It is also intuitively implausible to think that Stratton's ordinance serves any governmental interest in preventing such crimes.”<sup>49</sup>

Mt. Lebanon, like Stratton, does not prohibit all people from knocking on doors. People bent on committing a crime or scoping out a home could pretend to “ask for directions or permission to use the telephone, or pose as surveyors or census takers.”<sup>50</sup> Mt. Lebanon has no law prohibiting people from going up to someone else’s door, so long as they do not go “door to door,” distribute “pamphlets or other written material to an occupant of a residence,” or “discuss with such occupant issues of public or religious interest,” which are the only actions that trigger registration under the ordinance.<sup>51</sup> Otherwise, Mt. Lebanon requires neither a permit nor registration.

Furthermore, people intent on committing crimes will not be deterred by the

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<sup>48</sup> 536 U.S. at 169.

<sup>49</sup> 536 U.S. at 170 (Breyer, J., concurring).

<sup>50</sup> Id.

<sup>51</sup> Mt. Lebanon Municipal Code, Chapter VIII Part 3, §303.

prospect of a fine. If the possibly-lengthy-prison sentences that attend the more serious crimes identified in Mt. Lebanon’s newspaper and Internet articles do not deter the person, then a \$300 fine for violating the ordinance is unlikely to discourage them. The Pennsylvania Crimes Code already imposes stiff prison sentences for burglary and the other crimes identified as concerns by Mt. Lebanon.<sup>52</sup> Also, the Solicitation of Funds for Charitable Purposes Act makes it a first-degree misdemeanor to commit fraud in the context of charitable solicitation, punishable by \$10,000 and five years imprisonment.<sup>53</sup>

Consequently, even if this Court determines that Watchtower does not bar the Mt. Lebanon ordinance as a matter of law, Mt. Lebanon has failed to sustain its intermediate-scrutiny burden to demonstrate that registration or permitting “in fact” alleviate crime to a material degree.

**C. Strict Scrutiny Applies to this Case Because Mt. Lebanon’s Ordinance Is Content Based.**

If this Court has not already concluded that Mt. Lebanon’s ordinance is unconstitutional, then it should apply strict scrutiny. Mt. Lebanon’s ordinance is

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<sup>52</sup> For instance, burglary is a first-degree felony, 18 Pa.C.S. §3502, which for a first offense carries a maximum prison term of 20 years, Id., §1103.

<sup>53</sup> See, 10 Pa.C.S. §§162.13, 162.14 and 162.18.

content based, triggering the most searching review.

The Supreme Court has repeatedly held that, “Regulations which permit the government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment.”<sup>54</sup> Content-based regulations of expression are “*presumptively unconstitutional* and subject to strictest judicial scrutiny.”<sup>55</sup> Under strict scrutiny, “the usual presumption of constitutionality afforded [governmental] enactments is reversed,”<sup>56</sup> and the government must prove that the restrictions on expression are justified by “compelling” governmental interests and are the most “narrowly tailored” to effectuate those interests.<sup>57</sup>

A law is content-based if it confers benefits or imposes burdens on speech

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<sup>54</sup> Forsyth Co. v. Nationalist Movement, 505 U.S. 123, 135 (1992) (“Forsyth Co.”) (citations omitted). See also, Circle School v. Pappert, 381 F.3d 172, 180 (3d Cir. 2004) (“When the imposition of such government authority is based on the content of the speech, such ‘[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.’”) (citation omitted).

<sup>55</sup> Rosenberger v. Rector and Visitors of Univ. Of Virginia, 515 U.S. 819, 828-29 (1995); Forsyth Co., 505 U.S. at 130.

<sup>56</sup> Playboy, 529 U.S. at 817 (2000) (citation omitted).

<sup>57</sup> See, e.g., Turner Broadcasting, 512 U.S. at 641-42; American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 251 (3d Cir. 2003) (“strict scrutiny requires that a statute (1) serve a compelling government interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of achieving that interest”) (citation omitted).

based on the message, i.e., “the ideas or views expressed.”<sup>58</sup> In this Court’s words, “[t]he essence of the distinction [between content-based and content-neutral regulations] lies in the fact that, if the regulation were content-based, it would not be possible to determine whether a particular speech is prohibited without referring to the substantive import of that expression.”<sup>59</sup>

The registration requirement is content-based because it applies only to people who want to discuss “*issues of public or religious interest*,”<sup>60</sup> as opposed to personal, business, community or family issues. Therefore, in order to determine whether a person must register to canvass, it is necessary to review what the canvasser plans to say when going door to door.<sup>61</sup> As the Eleventh Circuit recently

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<sup>58</sup> Turner Broadcasting, 512 U.S. at 643 (citations omitted). Also, it makes no difference whether the law “burdens” rather than “bans” the speech: “The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” Playboy, 529 U.S. at 812. See also, Circle School, 381 F.3d at 181 (“The Supreme Court has repeatedly stated that ‘constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.’”) (citations omitted).

<sup>59</sup> Barnicki v. Vopper, 200 F.3d 109, 121 (3d Cir 1999), affirmed, 532 U.S. 514 (2001).

<sup>60</sup> JA 128 (See §303; definition of “canvass”).

<sup>61</sup> Additionally, the term “public or religious interest” is nowhere defined, which in and of itself raises a constitutional vagueness problem. Vague laws violate two fundamental principles of due process: (1) they leave the public

(continued...)

held, requiring people engaged in “political” protests to obtain a permit, but not requiring people occupying the same area for non-political reasons to do so, is a “content-based” regulation.<sup>62</sup>

Mt. Lebanon’s solicitation ordinance is also content-based because it burdens door-to-door activists differently depending on whether they ask for money. The registration requirement applies only to canvassers who do not “solicit contributions or pledges for contributions.....”<sup>63</sup> Conversely, the financial appeal triggers the solicitation and permit-requirement provisions.<sup>64</sup> Regardless whether the canvassers’ message is charitable or commercial, if it includes a financial appeal

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<sup>61</sup>(...continued)

guessing about what actions are proscribed; and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to law-enforcement officers. See, e.g. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The Supreme Court has been especially sensitive to vagueness problem in the free-speech context. See, NAACP v. Button, 371 U.S. 415, 438 (1963) (“Precision of regulation ... must be the touchstone” where free expression is concerned). See also Hynes, 425 U.S. at 620 (more exacting vagueness scrutiny required where First Amendment rights are implicated).

<sup>62</sup> Burk v. Augusta-Richmond County, 365 F.3d 1247, 1251-53 (11<sup>th</sup> Cir. 2004). See also, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 533 (1980) (holding content-based a regulation that barred utility-company-bill inserts expressing “opinions or viewpoints on controversial issues of public policy,” but did not bar “topics that are not controversial issues of public policy”).

<sup>63</sup> JA 128 (Compare, §303; definitions for “canvass” and “solicit”).

<sup>64</sup> Id.

the permit requirement applies.

For both registration and permitting, this need to focus on the canvasser's message to determine which rules apply is the essence of a content-based regulation.<sup>65</sup> Since content-based regulations are presumptively unconstitutional, and Watchtower ruled a registration requirement unconstitutional under intermediate scrutiny, Mt. Lebanon's ordinance plainly fails strict scrutiny.

As the district court correctly observed, Watchtower plainly does not "prohibit all regulation of door to door canvassers or solicitors...."<sup>66</sup> Reasonable content-neutral time, place and manner regulations are allowed. Empowering homeowners to post "no-solicitation" signs and setting 9:00 p.m. curfews are regulations that have been upheld repeatedly. Of course, punishing crime and fraud directly are allowable and likely the greatest deterrent. But Watchtower does raise a significant, and maybe even an insurmountable, obstacle to a licensing scheme for charitable solicitors. The door remains open to a municipality proving a correlation between licensing and crime reduction, and then showing that it is a narrowly-tailored means to achieve that goal. But Mt. Lebanon has not done so in

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<sup>65</sup> The district court incorrectly held that, despite these seemingly clear distinctions based on message, the canvassing requirement is "content neutral." JA 015-16. The court described the ordinance's applicability only to "issues of public or religious interest" as related to "character," not content. JA 016.

<sup>66</sup> JA 018.

this case.

## **II. THE *PERMIT*-REQUIREMENTS FOR CHARITABLE SOLICITORS WHO INCLUDE A FINANCIAL APPEAL ARE ALSO OVERBROAD AND FACIALLY UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.**

### **A. Principles of Relaxed Standing in First-Amendment-Overbreadth Cases and Judicial Economy Support this Court’s Review of SEIU’s Challenge to the *Permit* Requirement.**

The district court declined, on standing grounds, to rule on SEIU’s challenge to Mt. Lebanon’s solicitation-permit requirement for charitable solicitors who seek a financial donation.<sup>67</sup> The court erred by ignoring the relaxed-standing rules that apply in First Amendment overbreadth and facial challenges.

The Supreme Court’s solicitude for First Amendment freedoms has led to relaxed standing requirements for litigants bringing facial and overbreadth challenges to laws restricting expression.<sup>68</sup> The district court’s decision to “decline[] the invitation to go beyond review of the provisions which affect

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<sup>67</sup> JA 019-20.

<sup>68</sup> See, Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 954-59 (1984) (“Munson”); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). See also, Sabri v. United States, 541 U.S. 600, \_\_\_, 124 S.Ct. 1941, 1948 (2004) (reaffirming viability of facial attacks and overbreadth challenges in free-speech cases).

Plaintiffs, the canvassing registration provisions . . .”,<sup>69</sup> contradicts this long-settled precedent. The imperative to rectify unconstitutional restrictions on expression and to promote judicial economy support this Court addressing both the canvassing-registration and solicitation-permitting requirements in this appeal.

Relaxed standing in the First-Amendment context is needed to address laws that *chill* free speech and has been justified as a benefit to society: “Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court.”<sup>70</sup> Even when a First-Amendment challenge to the law could be brought by a person more directly affected by the restriction, “there is the possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in protected activity. Society as a whole then would be the loser.”<sup>71</sup> Consequently, “an individual against whom no enforcement action has been taken can still challenge a

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<sup>69</sup> JA 019-20.

<sup>70</sup> Munson, 467 U.S. at 958. See also, Peachlum v. City of York, 333 F.3d 429, 438 (3d Cir. 2003) (“Standing is relaxed in First Amendment overbreadth and facial challenges “not just because [the plaintiffs’] own rights of free expression are violated, but because of a judicial prediction or assumption that the [ordinance’s] very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”), quoting Broadrick, 413 U.S. at 612.

<sup>71</sup> Munson, 467 U.S. at 956.

regulation ‘because [that regulation] also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.’”<sup>72</sup> Indeed, the Watchtower Court applied this very principle to consider the law’s impact on people not before the Court who had different interests.<sup>73</sup>

This Court has also accorded standing to challenge overbroad regulations to ligiants who have not been affected directly by those regulations. In Peachlum, this Court addressed the *ripeness* of a facial-First-Amendment challenge to lawn-sign restrictions. Ripeness is a subset of standing that more aptly characterizes Judge Schwab’s refusal to adjudicate the challenge to the solicitation-permit requirement.<sup>74</sup> This Court held that First Amendment facial or overbreadth

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<sup>72</sup> Peachlum, 333 F.3d at 438 (citations omitted) (ellipses in original).

<sup>73</sup> Watchtower, 536 U. S. at 166 n.14.

<sup>74</sup> The ripeness doctrine entails the following considerations: “are the parties in a sufficiently adversarial posture to be able to present their positions vigorously; are the facts of the case sufficiently developed to provide the court with enough information on which to decide the matter conclusively; and is a party genuinely aggrieved so as to avoid expenditure of judicial resources on matters which have caused harm to no one. Peachlum, 333 F.3d at 433-34 (citation omitted).

challenges are “subject to a relaxed ripeness standard”<sup>75</sup> similar to the relaxed standing doctrine articulated in Munson. Based on that standard, this Court reversed the lower court’s refusal to hear the facial challenge because administrative proceedings might negate the injury to Ms. Peachlum. This Court held that, even if “the ordinance [was] deemed inapplicable to” Ms. Peachlum, a concern about other “York residents [who] might be unsure of the status of various other forms of signage...” or “who are more diffident about risking penalties under the ordinance might have their free speech rights vindicated through Peachlum’s suit.”<sup>76</sup> This concern about speakers not before the court whose rights might be chilled applies equally in this case. Amici’s participation in this appeal<sup>77</sup> emphasizes the importance of this Court ruling on the facial challenge to the entire ordinance, including the solicitation-permit requirement.

The relaxed standing requirement also promotes judicial economy. “[T]here is no reason to limit challenges to case-by-case ‘as applied’ challenges when the statute on its face and therefore in all its applications falls short of constitutional

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<sup>75</sup> Id. at 434-35, 438.

<sup>76</sup> Id. at 438.

<sup>77</sup> Although not yet filed, SEIU expects that at least one group that engages in charitable-solicitation will petition this Court to file an amicus brief supporting SEIU.

demands.”<sup>78</sup> SEIU or other affected parties will simply re-file to challenge the permit requirement. Forcing the parties to re-litigate the matter would needlessly waste both the parties’ and the courts’ resources.

Therefore, this Court should address SEIU’s challenge to the entire ordinance, not just the canvassing-registration sections. The ordinance covers all door-to-door activities regardless whether money is solicited. Artificially divorcing the registration and the permit provisions makes no doctrinal sense, will waste the parties’ and the courts’ resources, and will prolong the First-Amendment injury to plaintiffs and others, an injury where irreparable harm is presumed.<sup>79</sup> Since this review is plenary, and the challenge is facial, SEIU urges this Court to rule on the First-Amendment challenge to both the registration and permit requirements.

### **B. The Solicitation-Permit Requirement Is Also Unconstitutional Under Watchtower**

The reasons set forth above that Mt. Lebanon’s canvassing-registration provisions are unconstitutional apply equally to the solicitation-registration sections. Watchtower held overbroad and facially unconstitutional a permit ordinance similar

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<sup>78</sup> Munson, 467 U.S. at 967.

<sup>79</sup> See, e.g. Elrod v. Burns, 427 U.S. 347, 373-374 (1976); Swartzwelder v. McNeilly, 297 F.3d 228, 241-42 (3d Cir. 2002).

to this one. Moreover, Mt. Lebanon’s failure to adduce evidence demonstrating a link between licensing and crime reduction is fatal to both the registration and permitting requirements. And the need to focus on whether the solicitor asks for money makes the ordinance content based, triggering strict scrutiny. There is simply no evidence to suggest that people who knock on doors for the purpose of making a financial appeal are more likely to commit crimes than those who knock on doors solely to share information.<sup>80</sup>

Mt. Lebanon argues that Watchtower does not apply because a request for money changes the calculus. Although Watchtower is ambiguous on this point, a fair reading of the case supports limiting that distinction to commercial speech, not charitable solicitation that includes a financial appeal.

The Stratton ordinance applied the registration and permit requirements expansively to include virtually all door-to-door activity, including both charitable and commercial solicitation.<sup>81</sup> While the Court acknowledged that prior cases have recognized that a town may have a greater interest in regulation “when the

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<sup>80</sup> In Village of Schaumburg v. Citizens for a Better Environment, the Court rejected the argument that charitable solicitors who spend a higher percentage of revenue on fundraising are more likely to commit crimes than charitable solicitors who spend less. 444 U.S. 620, 638 (1980).

<sup>81</sup> See, 536 U.S. at 154 n.1.

solicitation of money is involved,”<sup>82</sup> the Court appears to have been referring to commercial speech. The Court criticized Stratton for applying the ordinance to “noncommercial ‘canvassers’”<sup>83</sup> and held that the ordinance swept too broadly by “covering unpopular causes unrelated to commercial transactions....”<sup>84</sup> Moreover, doctrinally the ruling makes sense only if limited to commercial speech.

Segregating the charitable, religious and political solicitors’ fund-raising message from information-dissemination and then applying a different constitutional standard to each is prohibited by a trilogy of 1980’s Supreme Court cases. The first, Village of Schaumburg v. Citizens for a Better Environment, involved a challenge to an ordinance that restricted door-to-door solicitation by groups whose fund-raising and administrative expenses exceeded 25% of their budget.<sup>85</sup> The Court reviewed prior cases from the 1940’s through the 1970’s and concluded that a request for financial support by charitable organizations does not transform otherwise political speech into commercial speech, and that such

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<sup>82</sup> Id. at 162, citing Cantwell v. Connecticut, 310 U.S. 296 (1940).

<sup>83</sup> 536 U.S. at 162.

<sup>84</sup> Id. at 167.

<sup>85</sup> 444 U.S. at 622-24.

solicitation is essential to these organizations' continuing vitality.<sup>86</sup> Significantly, the Court rejected the Village's argument that the permit-requirement was constitutional because it applied only to groups soliciting money.<sup>87</sup> The second case is, Munson, *supra*, which involved a challenge to a restriction on charitable organizations using professional fundraisers, and reaffirmed Schaumburg's holding that seeking financial support did not diminish the constitutional protection for charitable solicitation.<sup>88</sup>

Finally, in 1988, the Court in Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., reiterated the Schaumburg and Munson holdings that the fundraising portion of the message delivered by charitable, political and religious groups was "inextricably intertwined" with informative speech.<sup>89</sup> This time, however, the Court added that it would be improper to apply different constitutional standards to the component messages:

[W]here, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply

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<sup>86</sup> Id. at 628-32.

<sup>87</sup> Id. at 628.

<sup>88</sup> Munson, 467 U.S. at 959-60.

<sup>89</sup> 487 U.S. 781, 796 (1988).

our test for fully protected expression.<sup>90</sup>

Accordingly, charitable solicitation enjoys maximal constitutional protection, regardless whether it includes a request for financial assistance. This analysis is reinforced by the fact that both federal courts that have considered arguments that Watchtower allows licensing systems for charitable solicitors who include a financial appeal have rejected them.

The first of these, the OCA court, relied on the trilogy of cases discussed above to hold that “financial appeals by a charitable organization are inextricably intertwined with fully protected speech that the organization espouses.”<sup>91</sup> “When a charitable or other non-profit organization incorporates a request for donations or other fund-raising activities with their otherwise fully protected speech, the courts may not parcel out the financial or ‘commercial’ aspect of the speech in order to justify the application of a lower level of scrutiny.”<sup>92</sup> In holding unconstitutional the permitting requirement as applied to solicitors who incorporate a request for money, the OCA court concluded that Watchtower “must apply equally to charitable organizations who incorporate the solicitation of funds for their cause

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<sup>90</sup> Id.

<sup>91</sup> 272 F.Supp.2d at 680.

<sup>92</sup> Id., quoting Riley, 487 U.S. at 796.

during such campaigns, and to those who do not.”<sup>93</sup>

The court in New Jersey Environmental Federation v. Wayne Township (hereafter “NJEF”) also concluded that charitable-donation requests are an inextricable part of the information-dissemination process, and that they are treated differently than “purely commercial speech.”<sup>94</sup> The NJEF court, applying intermediate scrutiny and following Watchtower, held the permit requirement unconstitutional.<sup>95</sup> The court rejected the argument reiterated here by Mt. Lebanon that crime and fraud prevention justify the permitting system. Just as the Watchtower Court rejected crime and fraud prevention as an insufficient justification, the NJEF court held that the permitting requirement was “unlikely” to stop or deter people intent on perpetrating crime and fraud.<sup>96</sup> Furthermore, the court noted that there was no indication that “organizations [that engage in fund-raising] are any more likely to employ solicitors who would be a threat to public safety than are other [canvassing] organizations” that do not ask for money.<sup>97</sup> The

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<sup>93</sup> 272 F.Supp.2d at 680.

<sup>94</sup> 310 F.Supp.2d 681, 690-91, 692-93 (D.N.J. 2004).

<sup>95</sup> Id. at 694 n.9.

<sup>96</sup> Id. at 697.

<sup>97</sup> Id., quoting Schaumburg, 444 U.S. at 638.

NJEF court also concluded that treating solicitors differently based on whether they asked for money is a “content-based” distinction that triggers strict scrutiny.<sup>98</sup> The New Jersey court’s analysis is sound and supports SEIU’s argument that Mt. Lebanon’s solicitation-permitting sections are unconstitutional.

Considering Watchtower together with the trilogy of solicitation cases demonstrates that the restriction on a licensing system applies to all charitable, or non-commercial, solicitors, regardless whether they include a financial appeal. The question left open by Watchtower is whether a licensing system can be applied to commercial solicitors. That is not, though, a question for this case. Since Mt. Lebanon has applied the permit requirement to charitable and non-commercial solicitors, the ordinance is overbroad under Watchtower.

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<sup>98</sup> Id. at 694.

## CONCLUSION

The right to communicate with other people without first having to inform the police is a hallmark of a free society. While the district court may have believed that Mt. Lebanon's registration requirement is relatively trivial, no registration requirement for free speech is minor. The Supreme Court in Thomas v. Collins, characterizing the Texas registration requirement, answered the district court's observation directly: "The restraint is not small when it is considered what is restrained. The right is a national right, federally guaranteed."<sup>99</sup> Especially after Watchtower, there should be little doubt that both the registration and permit requirements in Mt. Lebanon's solicitation ordinance are an unconstitutional restraint on free speech.

WHEREFORE, 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

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<sup>99</sup> 323 U.S. at 543.

that the Court remand the case to the district court for resolution of the First Amendment *as-applied* claims.

Respectfully submitted,

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February 28, 2005

## **CERTIFICATE OF COMPLIANCE**

I, Witold J. Walczak, HEREBY CERTIFY on this 27<sup>th</sup> day of February, 2005, that a word count conducted by Word Perfect software shows that the breif contains 9948 words and 977 lines.

/s/ Witold J . Walczak

Witold J. Walczak

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing **BRIEF FOR APPELLANTS AND JOINT APPENDIX (VOLUME 1)** were served, via First Class Mail to the persons listed below on February 28, 2005:

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I hereby certify that a copy of the Appellants' e-filing with the Court was served via email to the persons listed below on February 28, 2005:

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/s/ Michael J. Healey  
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**CERTIFICATE OF BAR MEMBERSHIP**

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

/s/ Witold J. Walczak  
Witold J. Walczak

/s/ Michael J. Healey  
Michael J. Healey

/s/ Douglas B. McKechnie  
Douglas B. McKechnie

**CERTIFICATE OF IDENTICALNESS**

I hereby certify that the electronic version of Appellants' Brief filed with the Court via email is identical to the hard-copy version of Appellants' 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 February 28, 2005. I performed the virus scan using Norton AntiVirus 2004, which was updated on February 25, 2005.

/s/ Michael J. Healey  
MICHAEL J. HEALEY

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 04-4646

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

Appellants,

v.

MUNICIPALITY OF MT. LEBANON,

Appellee.

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**JOINT APPENDIX (VOL. 1)**

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