

## Get-Out-the-Vote Canvassing

### *Service Employees International Union v. Municipality of Mt. Lebanon (Arthur J. Schwab, W.D. Pa. 2:04-cv-1651)*

A district court was asked to resolve the constitutionality of county requirements for persons who wanted to go door to door over the weekend before a general election to encourage voting. In the short term, the counties relaxed their restrictions; in the long term, they revised them.

*Subject:* Campaign activities. *Topics:* Door-to-door canvassing; recusal.

At approximately 1:00 p.m. on the Thursday before the 2004 general election, persons who wanted to go door to door over the weekend to encourage voting and inform residents of their polling places filed an action in the Western District of Pennsylvania's Pittsburgh Division claiming that canvassing ordinances in the Allegheny County municipalities of Monroeville and Mt. Lebanon unduly burdened First Amendment canvassing rights.<sup>1</sup> The plaintiffs sought a declaration that the ordinances were unconstitutional, a temporary restraining order, and both preliminary and permanent injunctive relief.<sup>2</sup>

Because the plaintiffs requested a temporary restraining order, the clerk's office contacted the assigned judge's chambers immediately.<sup>3</sup> Judge Terrence F. McVerry recused himself,<sup>4</sup> and the case was reassigned to Judge Arthur J. Schwab.<sup>5</sup>

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1. Complaint, *Service Employees Int'l Union v. Municipality of Monroeville*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004), D.E. 1, Ohio State University Moitz College of Law, Election Law @ Moritz [hereinafter ELM], [moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf](http://moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf), *archived at* [web.archive.org/web/20161217192154/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf](http://web.archive.org/web/20161217192154/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-complaint.pdf); *Service Employees Int'l Union v. Municipality of Mt. Lebanon*, 446 F.3d 419, 421 (3d Cir. 2006); Transcript at 2, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004, filed Jan. 11, 2005), D.E. 23 [hereinafter Oct. 28, 2004, Transcript]; *see* Torsten Ove, *ACLU Sues to Overturn Anti-Canvassing Laws*, Pittsburgh Post-Gazette, Oct. 29, 2004, at A10 [hereinafter *ACLU Sues*]; Torsten Ove, *Agreement Clears Way for Canvassers in Communities*, Pittsburgh Post-Gazette, Oct. 30, 2004, at A13 [hereinafter *Agreement Clears Way*].

2. Complaint, *supra* note 1; Motion, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004), D.E. 2, ELM, [moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf](http://moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf), *archived at* [web.archive.org/web/20161217192200/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf](http://web.archive.org/web/20161217192200/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TRO.pdf); Brief, *id.* (Oct. 28, 2004), D.E. 3, ELM, [moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROMemo.pdf](http://moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROMemo.pdf), *archived at* [web.archive.org/web/20161217192203/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROMemo.pdf](http://web.archive.org/web/20161217192203/moritzlaw.osu.edu/electionlaw/docs/penn/seiu-TROMemo.pdf).

3. Interview with Hon. Arthur J. Schwab, Jan. 31, 2012.

Tim Reagan interviewed Judge Schwab for this report by telephone.

4. Judge McVerry was Allegheny County's solicitor from 2000 to 2002. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges). Both he and his wife were active in Mt. Lebanon politics. Interview with Judge Arthur J. Schwab, Jan. 31, 2012. Judge McVerry died on March

Between 11:00 and 11:30 that morning, the plaintiffs faxed to the municipalities' lawyers a copy of the complaint.<sup>6</sup> The attorney for Mt. Lebanon became aware of the fax between 12:00 and 1:00 in the afternoon, about the time that the complaint was filed.<sup>7</sup> The attorney for Monroeville became aware of the complaint when Channel 11 News called to ask for a comment.<sup>8</sup> About half an hour after Judge Schwab received the case, he conducted a telephonic proceeding in open court with attorneys for all of the parties.<sup>9</sup> Judge Schwab obtained from the attorneys an agreement to meet in court at 10:00 on Friday morning with decision-makers for all parties.<sup>10</sup> He asked the defendants to come with memoranda in response to the plaintiffs' request for immediate relief.<sup>11</sup>

On Friday morning, Judge Schwab greeted the parties and received oral summaries of the defendants' responses.<sup>12</sup> His principal question for the plaintiffs was whether they wanted a lawsuit or they wanted to canvass.<sup>13</sup>

The complaint alleged that Monroeville required each person going door to door there to obtain a permit—which would take at least two days—and pay a \$10 fee, and the complaint alleged that the organization had to pay an additional fee of \$50 per week.<sup>14</sup> At the Friday morning proceeding, Monroeville represented that its ordinance did not apply to political canvassers not soliciting contributions.<sup>15</sup> That afternoon, the plaintiffs and Monroeville memorialized the plaintiffs' right to canvass without a permit in a consent decree that Judge Schwab immediately signed.<sup>16</sup> Monroeville was dismissed as a defendant that day.<sup>17</sup>

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8, 2021. FJC Biographical Directory, *supra*.

5. Docket Sheet, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Oct. 28, 2004); Transcript at 2–3, *id.* (Oct. 29, 2004, filed Jan. 11, 2005), D.E. 24 [hereinafter Oct. 29, 2004, Transcript].

6. Oct. 28, 2004, Transcript, *supra* note 1, at 2.

7. *Id.* at 2–4.

8. *Id.* at 3.

9. *Id.* at 2, 10.

10. *Id.* at 4–11.

11. Oct. 28, 2004, Transcript, *supra* note 1, at 11; Opinion at 3, *Service Employees Int'l Union v. Municipality of Monroeville*, No. 2:04-cv-1651 (W.D. Pa. Dec. 9, 2004), D.E. 19 [hereinafter W.D. Pa. *Service Employees Int'l Union* Opinion]; Oct. 29, 2004, Transcript, *supra* note 5, at 3.

12. Oct. 29, 2004, Transcript, *supra* note 5, at 2–13; see Docket Sheet, *supra* note 5.

13. Interview with Hon. Arthur J. Schwab, Jan. 31, 2012; Oct. 28, 2004, Transcript, *supra* note 1, at 6 (“Everyone has legitimate interests and we can spend days and weeks litigating the respective positions, and if that’s what people want, then I’m happy to do that. I’m just saying that there may be a way that reasonable people can sit down and work through something that would satisfy everyone in this regard.”).

14. Complaint, *supra* note 1, at 4–7; see *Ove, ACLU Sues*, *supra* note 1.

15. Oct. 29, 2004, Transcript, *supra* note 5, at 9–12; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 3.

16. Oct. 29, 2004, Transcript, *supra* note 5, at 16–19; Docket Sheet, *supra* note 5; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 3–4.

17. W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 3; see *Ove, Agreement Clears Way*, *supra* note 1.

The plaintiffs and Mt. Lebanon spent all Friday working out a consent decree, which Judge Schwab signed that day, allowing the plaintiffs to canvass in Mt. Lebanon over the weekend and deferring the constitutionality of Mt. Lebanon's canvassing ordinance for resolution later.<sup>18</sup> As part of the compromise, instead of individual canvassers appearing at the police station for individual permits, the union would submit a list of canvassers and their driver-license numbers.<sup>19</sup> Judge Schwab made himself and his staff available over the weekend in case they were needed, and they were not.<sup>20</sup>

If Judge Schwab received a case like this again, he would refer it to the court's alternative-dispute-resolution program for immediate mediation by an expert in election law.<sup>21</sup>

On December 2, Judge Schwab determined that Mt. Lebanon's ordinance was constitutional,<sup>22</sup> but the court of appeals, on April 28, 2006, determined that it was not.<sup>23</sup> Mt. Lebanon decided not to seek reconsideration of the appellate opinion.<sup>24</sup> Judge Schwab ordered mediation on attorney-fee matters,<sup>25</sup> but by the time the parties worked out the logistics of mediation they apparently came to an agreement on their own.<sup>26</sup>

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18. Oct. 29, 2004, Transcript, *supra* note 5, at 21–28; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 4; Docket Sheet, *supra* note 5.

19. Oct. 29, 2004, Transcript, *supra* note 5, at 26–27; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 4; *see Ove, Agreement Clears Way*, *supra* note 1.

20. Oct. 29, 2004, Transcript, *supra* note 5, at 5; W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 4–5.

21. Interview with Hon. Arthur J. Schwab, Jan. 31, 2012.

22. W.D. Pa. *Service Employees Int'l Union* Opinion, *supra* note 11, at 17; *see Paula Reed Ward, Mt. Lebanon Can't Force Door-to-Door Canvassers to Register, Court Rules*, Pittsburgh Post-Gazette, Apr. 29, 2006, at B1.

23. *Service Employees Int'l Union v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3d Cir. 2006); *see Ward, supra* note 22.

24. Status Report, *Service Employees Int'l Union v. Municipality of Monroeville*, No. 2:04-cv-1651 (W.D. Pa. June 5, 2006), D.E. 28.

25. Order, *id.* (June 29, 2006), D.E. 31.

26. Docket Sheet, *supra* note 5; Motion, *Service Employees Int'l Union*, No. 2:04-cv-1651 (W.D. Pa. Aug. 21, 2006), D.E. 33.