

ORIGINAL

IN THE SUPREME COURT OF OHIO  
2013

STATE OF OHIO,

Case Nos. 12-1958  
12-2042

Plaintiff-Appellant,

-vs-

On Certified-Conflict and  
Discretionary Appeal  
from the Franklin County  
Court of Appeals,  
Tenth Appellate District

JASON ROMAGE,

Court of Appeals  
Case No. 11AP-822

Defendant-Appellee.

**REPLY BRIEF OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS  
ASSOCIATION AND FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN  
SUPPORT OF APPELLANT STATE OF OHIO**

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## ARGUMENT

Proposition of Law. The “solicit” form of the criminal-child-enticement offense in R.C. 2905.05(A) is not unconstitutional as substantially overbroad. The statute serves the compelling interest of protecting children and the compelling interest of supporting the prerogatives of parents and legal guardians and custodians in guiding the behavior of the children in their care, in knowing the location of such children, and in determining who the children accompany.

Certified-Conflict Question. Is R.C. 2905.05(A) unconstitutionally overbroad?

Even grandparents seeking to associate with their grandchildren have been found to lack a constitutional right to associate with those grandchildren over the objection of the parents of such children. But defendant and his amicus assert an even broader right to associate with such children, even over parental objection. They ground this “right” in the First Amendment’s freedoms of speech and association. In effect, they contend that the First Amendment compels an invasion of the constitutional rights of parents to direct the upbringing of their children. They are mistaken.

A.

The statute prohibits very little speech. The statute does not prevent a person generally from speaking with a child wherever that third party might find the child. The third party can talk to the child at length about any number of topics. The third party can be present at the same location as the child. Of course, the child need not listen to the third party and can completely ignore the third party and go somewhere else. Or the child can listen. But, in any event, third parties are not generally barred from speaking with or being present with another’s child at a location where the child is already present.

The statute only reaches a very narrow category of speech by prohibiting the

solicitation of the child to accompany the third party without parental or guardian permission and without an existing emergency or privilege. Under the dictionary definition of “accompany,” the word “accompany” means “to go with or attend as an associate or companion.” *State v. Johnson*, 2nd Dist. No. 23508, 2011-Ohio-1133, ¶ 86. But the word “accompany” is used here in combination with active words like “solicit, coax, entice, or lure \* \* \*.” The statute also speaks in active terms in relation to “undertaking the activity.” In combination, these words connote active movement and/or active changing of the child’s circumstances in a material way from what the child was already doing. Given that understanding, only the first connotation of the definition of “accompany” would apply here, “to go with.” “Accompany” here does not connote a person merely being in the child’s presence at a public location. It does not connote merely conversing with the child at that location. Although “accompany” has not been authoritatively construed by this Court, it should be construed to apply to appreciable changes in the child’s location or setting, such as from one public area to a private area away from public view, including entering a vehicle. “[E]ntering into any vehicle or onto any vessel” is included in the statute’s concept of “accompany.” R.C. 2905.05(A).

Also, the word “accompany” connotes that the child will be joining the speaker as a companion in the trip from the present location/setting or in entering the vehicle.

The limit on speech is quite narrow. The “solicit” form of the offense in R.C. 2905.05(A) only reaches solicitations that propose an unauthorized change in the child’s location or setting, including an unauthorized entering of a vehicle.

No speech at all is involved in the proposed act of accompaniment itself. The act

of accompaniment is conduct, not speech. The solicitation itself would often consist of speech, but “[i]f that activity is deemed ‘speech,’ then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.” *Hoffman Estates v. Flipside*, 455 U.S. 489, 496, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

The freedom of association protects the ability of persons to enter into and to maintain certain intimate human relationships and to join together for the purpose of engaging in expressive activity protected by the First Amendment. *State v. Burnett*, 93 Ohio St.3d 419, 424-25, 755 N.E.2d 857 (2001). But, again, not even grandparents have such a freedom of association with another’s child without parental consent. Third parties like defendant would have no greater constitutional right.

The California Court of Appeals provided this helpful discussion in concluding that a teenage boyfriend had no “freedom of association” with his teenage girlfriend:

We categorically reject the absurd suggestion that defendant’s freedom of association trumps a parent’s right to direct and control the activities of a minor child, including with whom the child may associate. (*Troxel v. Granville* (2000) 530 U.S. 57, 65-66, 72, 120 S.Ct. 2054, 2059-60, 2063-64, 147 L.Ed.2d 49, 56-57, 60 \* \* \*) “The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court].” (*Troxel v. Granville*, supra, 530 U.S. at p. 65, 120 S.Ct. at p. 2059-60, 147 L.Ed.2d at p. 56.) Whether a child likes it or not, parents have broad authority over their minor children. (*Id.* at p. 66, 120 S.Ct. at p. 2060, 147 L.Ed.2d at p. 57.) The “fundamental right of parents to make child rearing decisions” includes deciding who may spend time with a minor child. (*Id.* at pp. 72-73, 120 S.Ct. at 2063-64, 147 L.Ed.2d at p. 61.)

Not only do parents have a constitutional right to exercise lawful control over the activities of their minor

children, the law requires parents to do so. \* \* \*

*Brekke v. Wills*, 125 Cal.App.4th 1400, 1410, 23 Cal.Rptr.3d 609 (2005) (some citations omitted). Third parties have no constitutional right to associate with the child by soliciting the child to enter a vehicle or to take a trip with them away from the place where the child is found when there is no parental or guardian permission. There being no constitutional right to “associate” with someone else’s child by soliciting the child to come away with the speaker, the General Assembly could prohibit such unauthorized acts of accompaniment and could prohibit the solicitation too.

If anything, the reliance on the “freedom of association” highlights the constitutionality of this statute. The notion that third party intermeddlers could lure or solicit young children into “intimate” associations without the parent’s or guardian’s approval is chilling. The idea that such intermeddlers could divert another’s child into indoctrination trips for expressive, political, or religious activity without the parent’s or guardian’s approval strikes at the core of why the parent’s or guardian’s permission should be required. The parent/guardian ultimately has the final say of what “intimate” familial-like associations are made with the child, and they similarly control when, how, and where the child will join in expressive conduct with others.

B.

Defendant and his amicus give no weight to the constitutionally-recognized prerogatives of parents. Parents have an undoubted constitutionally-protected “fundamental liberty interest” in the care, custody, and management of their child. *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990). “Parents have a

constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their children is paramount to any custodial interest in the children asserted by nonparents." *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302, ¶ 11. Thus, parents have a constitutionally-protected interest in deciding where their child goes and who the child accompanies. A third party has no such right.

C.

Defendant and his amicus assert several examples of situations in which they believe that the statute would be unconstitutional. It is helpful to address these examples.

1.

Amicus OPD asserts the example of a youth sports coach who offers to give a ride home to a youth to retrieve a forgotten piece of sports equipment. But given the necessity to retrieve the equipment, and given the parent's decision to allow the equipment to be stored at the parent's home, it is readily understood that the parent's permission allowing the child to participate in the sports activity would carry with it the implied permission for the coach to assist the child in retrieving the necessary equipment. The parent would want the sports practice or game to proceed.

2.

Amicus OPD asserts the example of a parent offering a ride home to another's child from a community facility so that the child does not need to walk home. But this bare-bones example does not provide enough information to assess the issue.

Some parents would have express or implied permission. The parent offering the

ride may have car-pooled the children before with the consent of the other parent.

Frequent car-pooling often would be seen as implied permission. The offering parent also might be a close family friend, in which case there could be implied permission.

But the circumstances significantly change under different facts. For aught that appears in the tendered example, the offeror of the ride could be a convicted sex offender, or a convicted OVI offender, or a habitual speeder, or a complete stranger. Despite the utter lack of information about the suitability of the “parent” who would be offering the ride, defendant and his amicus would blindly confer on this unknown quantity of a “parent” a constitutional right to be giving someone else’s child a ride home.

Under the example, the child is within walking distance of home. The child can walk. The child’s parent or guardian *expects* him to walk. There is no necessity, and no known constitutional right, for a convicted sex offender, or OVI offender, or habitual speeder, or stranger to solicit automobile trips with someone else’s child without the parent or guardian’s express or implied permission for the trip.

One wonders where this naïve sense of entitlement comes from in relation to such third-party intermeddlers. The vast majority of responsible parents and guardians would naturally check with the child’s parent or guardian before undertaking any trip with the child that so significantly changes the plans for the child. They would understand that the child’s mere presence at a community facility does not give third parties *carte blanche* to give rides to the child. If a third party wishes to change the child’s itinerary and thereby deviate from the parent’s or guardian’s plans, the third party can check with the parent or guardian. There is no constitutional right for third parties to assume pseudo-parental

prerogatives to make these decisions for someone else's child.

3.

Amicus OPD sets forth an example of a parent at a playground with his child who invites another child playing there to accompany them across the park to another set of play equipment. The statute does not reach this example because there is no appreciable change in the child's location or setting. The child is still located in the same park as before and is still playing on equipment located at the park. The parent's permission for the child to go to the park includes permission to play on various sets of equipment there.

4.

Amicus OPD mentions the well-worn example of a senior citizen offering a neighborhood child money to help do household chores. But, again, the example does not provide enough information.

Offering work projects to a child would not ordinarily violate the statute because such offers would often contemplate that the child will check with his parent or guardian first. If the senior citizen is proposing an act of accompaniment that will only occur with the parent's permission, then the offer does not violate the statute. The statute is violated only if the offeror "does not have the express or implied permission of the parent \* \* \* of the child in undertaking the activity." R.C. 2905.05(A)(1). Most senior citizens would not presume to hire a child for work without the child first obtaining parental permission.

In the absence of contemplated permission by the parent or guardian, the statute would prohibit offered acts of accompaniment for would-be character-building chores for money. Children are not minions to be employed at the whim of every third party in the

community. If the employment is a good idea, the parent or guardian would likely approve, and the third party should seek approval. But the parent or guardian may very well not approve for any number of reasons. The child may have a physical condition that makes it difficult or dangerous for him to perform the task. The child may have chores or homework he needs to do at home instead of undertaking a detour to a third party's home. The job simply may not pay enough to warrant the time.

In addition, the "senior citizen" in this example is an unknown quantity. For any number of reasons, the parent or guardian would be within their prerogatives to disapprove the activity. The "senior citizen" could be a convicted sex offender, an alcoholic, or frequent peruser of pornography so that the parent or guardian may not want the child accompanying the offeror anywhere. R.C. 2905.05 ensures that the parent or guardian should decide whether the third party offeror's motives are proper, not the third party. A parent has a right of constitutional dimension to make that decision for the child.

The example of a "senior citizen" or "elderly woman" making the offer is a common one made by those challenging this statute. But the fact that a senior citizen might violate the statute is irrelevant. Senior citizens are not exempt from criminal laws. Just as much as younger persons, they should adjust their behavior to take into account the prerogatives of the child's parent or guardian and to seek permission. There is no constitutional right to hire another's child as an employee.

5.

Amicus OPD raises an example of a senior citizen offering money to a child to escort the senior citizen across the street for "safety reasons." This example does not fit

within the statute, as the movement from one street corner to another does not involve the kind of appreciable change in location/setting that the word “accompany” would entail.

But, even if the statute would reach this example, there is no constitutional right to employ another’s child in any activity, particularly an activity in which the child would become a temporary caretaker for the senior citizen’s well-being.

6.

Amicus OPD raises an example of a 13-year-old asking his 13-year-old acquaintance to go on a bike ride. Again, not enough information is provided. Ordinarily, the parent’s permission for a child to go outside and play, and the parent’s purchasing of a bike for the child, would include at least the implied permission for the child to go bike riding with similarly-aged children. If the implied-permission component of the statute means anything, it would mean that outside play entails implied permission to engage in play with other children in the neighborhood. In many situations, the two 13-year-olds would have the express permission of their parents. Using this example of two children playing in the effort to invalidate this law is absurd.

Naturally, the implied permission dissipates under various circumstances. The implied permission to go for a bike ride would not include permission to travel to a brothel or adult book store. It would not include permission to run away by bike riding to a great distance away. These circumstances are extreme, but they also demonstrate that the statute is easily constitutional as applied in such scenarios. There is no constitutional right for a person of any age to engage another’s child to take a bike ride to far-distant or highly-questionable locations.

7.

Amicus OPD also posits a scenario in which one student asks a classmate to a dance. But this example falls outside the statute. As stated earlier, it is only when the proposed act of accompaniment would occur without parental or guardian permission that the offer would be prohibited. Nothing in this statute prevents one child from asking another to a dance. In the vast majority of situations, the offeror will contemplate that the other child will obtain parental or guardian consent to go to the dance.

8.

Amicus OPD returns to the park scenario to raise the prospect of a parent at the park with his child offering another child at the park a slice of pizza. But this addition to the fact pattern *weakens* the amicus position. The mere offer of a slice of pizza, without proposing a significant change in the public location or setting for the child, would not constitute the soliciting of an act of accompaniment. As stated above, the word “accompany” connotes an appreciable change in the child’s location/setting, not merely the child going from a play set at the park to walk over to a picnic table in the same park.

The example nevertheless raises significant questions and would justify the General Assembly’s decision to require parental or guardian permission. Health-related and religious-related dietary restrictions make it extremely problematic for third parties to be feeding another’s child without the express or implied permission of the parent or guardian. Food allergies can be fatal. Religious-based dietary restrictions fundamentally implicate the religious freedoms and beliefs of the child and his family. Even if the “offer of pizza” example would trigger the statute, the statute would easily pass muster as

allowing parents and guardians to protect their children from third parties who would wittingly or unwittingly intrude on these health and religious dietary concerns.

Of course, there are variations of the “offer pizza” example to which the statute would apply. Offering pizza to entice the child into entering a vehicle in the park would constitute an appreciable change in setting. The statute expressly refers to “entering into any vehicle” as a prohibited act of accompaniment. The Tenth District conceded that the statute had been upheld when the statute had focused on such car-based scenarios.

9.

Amicus OPD returns to the community-center example to mention the prospect of a parent offering to buy the child some ice cream on the way home from the community center. But, again, this weakens the challenge to the statute. The child was expected to be walking home, but now the third party is giving the child a ride home *and* taking a substantial detour for ice cream that could very well delay his return home. The child’s parent or guardian will have no idea where the child is. Substantial efforts might be undertaken to locate the child because the third party has not bothered to notify the parent or guardian and obtain permission. And given the dietary concerns just discussed, taking the child to an ice cream stand could pose significant health risks for the child.

There is simply no constitutional right to take the child on this extended trip of the third party’s own making without parental or guardian permission.

10.

Defendant posits a scenario in which a parent picking up their own child from school would violate the statute merely by asking another child if the child needed a ride

home. But, again, several points come to mind.

If the offering parent asked the child to check with his parent first, the offering of the ride would not violate the statute, as the act of accompaniment would only occur with the permission of the other child's parent or guardian.

But the statute is constitutional in prohibiting the soliciting of children for rides when there is no parental or guardian permission and there is no emergency or privilege. The child would have a usual and expected mode of transport home, either by walking, by school bus, or by prior arrangement with another parent or adult. At a minimum, changing that plan on the spur of the moment without parental or guardian permission would create uncertainty about the child's current location and could cause untoward alarm about the child's safety while the child is missing.

It is also notable that the school itself would not be able to release the child to the offering parent without the express permission of the child's parent. So one wonders how defendant and his amicus can claim there is a constitutional right on the offering parent's behalf to be offering and giving rides to another's child without any hint of parental or guardian permission. It is constitutional for the General Assembly to require either express permission, implied permission, an emergency, or a privilege before a third party would undertake this activity.

It is easy to tweak the example to support the constitutionality of the law even more. Again, the offering parent in this example is an unknown quantity. He could be a convicted felon, a convicted OVI offender, a habitual speeder, a known alcoholic or drug abuser, a loudmouth prone to bad language, and/or a complete stranger. In such

scenarios, one can easily see why the General Assembly would empower parents and guardians to grant or deny permission. Parents and guardians should have the final say on what trips their children take and whom they take those trips with.

11.

Defendant posits another scenario in which someone asks a child to return a Frisbee that has inadvertently blown over a fence. But it is difficult to see how this would violate the statute. The request to return the Frisbee does not propose any act of accompaniment by the child with the speaker, but, rather, only the return of the item. The Frisbee that blew over the fence could be thrown right back over the same fence without any appreciable movement by the child anyway. The Frisbee example is a poor one.

12.

Defendant posits another scenario in which a 13-year-old boy asks a 13-year-old friend to come over to stuff envelopes for a school levy campaign his parents are organizing. (In another example, defendant mentions a similar judicial-campaign scenario) Defendant contends that “simply asking” the other boy to come over would violate the statute, but that is not true if the request contemplated that the other boy would obtain express or implied permission first. The statute does not prohibit every proposal of every trip, but, rather, only offers for proposed trips that would occur without express or implied parental or guardian permission for undertaking the proposed activity.

13.

Defendant posits another scenario in which a 13-year-old sets up a lemonade stand and invites a 13-year-old neighbor to come over for some lemonade. Again, there

would usually be implied permission for the one neighbor girl to play with another. In addition, there is no proposal for the one girl to accompany another when there is no contemplation they will go anywhere together.

D.

The present case exemplifies why “[f]acial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks and citations omitted). Moreover, invalidation on facial-overbreadth grounds “has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

A court’s power to invalidate a statute “is a power to be exercised only with great caution and in the clearest of cases.” *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16. Laws have a “strong presumption of constitutionality,” and any party challenging the constitutionality of a law “bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.” *Id.*

The examples provided by defendant and his amicus are bare bones and require too much speculation to conclude that the statute, as applied in such situations, would be unconstitutional. Nothing is specified in these fact patterns about the “parent” or “senior citizen” who would offer rides or chores for money without the express or implied permission of the child’s parent or guardian. These kinds of examples should await the development of full factual records in as-applied challenges rather than attempting to determine constitutionality based as largely-speculative and conclusory “examples.” Individual instances of unconstitutional application (if any) can be resolved on a case-by-case basis as they arise based on concrete factual records. See *New York v. Ferber*, 458 U.S. 747, 773-74, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Factual development is also lacking regarding the frequency of these supposed examples. Defendant and his amicus set forth a dozen or so examples, some overlapping. Otherwise, they merely speculate that the number of unconstitutional applications would be “vast” or “countless.” But one suspects that parents and guardians of a child *are* being consulted in the vast majority of would-be rides home and would-be job hiring. It is speculative to conclude that there is an epidemic of unauthorized rides and chores being offered by persons wholly oblivious of the common courtesy of seeking the permission of the child’s parent or guardian. And, as discussed at pages 17-18 of the initial OPAA/O’Brien amicus brief, there are large numbers of situations in which the statute is constitutional. This Court lacks the basic information to conclude that there is *substantial* overbreadth in this law, particularly after this Court would authoritatively construe the statute. The dozen or so examples tendered by defendant and his amicus do not establish

such overbreadth so as to justify facial invalidation.

Defendant makes no as-applied challenge himself. The record was not developed for such a challenge, and the information in the record shows that he would not fit within any of the examples set forth by defendant and his amicus. Without an evidentiary hearing, this Court has no way of knowing what defendant's actual purpose was as a 41-year-old man attempting to lure two boys with money to come to his apartment. The defense claims the trip would have had an innocent purpose, but only defendant himself would be able to establish that fact through testimony, and the prosecution has not had the opportunity to cross-examine defendant about his purposes on this occasion and his prior efforts in offering rides to children. His counsel's statements at the non-evidentiary hearing need not be accepted as true without adversarial testing in an evidentiary hearing.

E.

The phrases "by any means" and "in any manner" do not render the statutory prohibition unconstitutional. The reach of the statute is already sufficiently limited by other language so as not to reach constitutionally protected speech or association. The "by any means" and "in any manner" language assures that, whatever means and manner are used, the third party cannot *knowingly* solicit another's child to accompany the third party when there is no parental/guardian permission and when there is no emergency or privilege. Given the knowingly mens rea, the offender will only violate the statute if he knows that he is soliciting an act of accompaniment.

F.

Both defendant and his amicus tout bills introduced in the current General

Assembly that would add “unlawful purpose” language to R.C. 2905.05. See S.B. 64; H.B. 122. But these bills do not reflect any concession that legislators think the current law is unconstitutional. Legislators are naturally concerned about this problem and are preparing to act depending on how this Court rules.

Substitute Senate Bill 64 has passed the Senate and is different than the version attached to amicus OPD’s brief. It *retains* the language in paragraph (A), and it adds a new paragraph (C) with an “unlawful purpose” component. The Senate version plainly seeks to retain the basic form of the offense in paragraph (A).

Imposing an “unlawful purpose” requirement in paragraph (A) would be a substantial step backwards. Requiring proof of “unlawful purpose” would give short shrift to the interests of parents and guardians in exercising control over their child and in making decisions about the safety and well-being of their child. Even if the actor has no “unlawful purpose,” the prerogatives of parents and guardians are still improperly invaded by a third party taking an unauthorized trip with the child. Moreover, if proving “unlawful purpose” were required under paragraph (A), *any* person of doubtful or unknown character could attempt again and again to solicit young children on car trips and other trips that the child’s parent and guardian would never authorize, and, so long as the person is adept enough to avoid reference to an unlawful purpose, the police often would be unable to act. And by the time evidence of “unlawful purpose” would come to light, the harm often will have already occurred to the child. Hopefully, this Court will uphold these prosecutions so that there will be no need for any legislative action.

G.

Defendant contends that the concept of “implied permission” is unconstitutionally vague. But this claim of impermissible vagueness ignores the fact that the inclusion of “implied permission” is a benefit for those persons who might be able to claim “implied permission.” The General Assembly could have limited the statute to allowing only express permission to serve as a basis for the third party to avoid liability. The inclusion of “implied permission” allows third parties having no express permission to claim that other circumstances created an implied permission for their action.

The concept of “implied permission” is not new. It is included in other situations, such as negligent entrustment actions and insurance contracts regarding whether the driver was using the vehicle with the permission of the owner. *Erie Ins. Co. v. Paradise*, 5th Dist. No. 2008CA00084, 2009-Ohio-4005, ¶ 14 (“Implied permission may be demonstrated by previous use or consent, place of keeping the keys in a car and the like, the relationship of the parties, a course of conduct and circumstantial evidence.”; quoting another case); *Keeley v. Hough*, 11th Dist. No. 2004-T-0038, 2005-Ohio-3771, ¶ 22 (“Implied permission has been defined as “a sufferance of use or a passive permission deduced from a failure to object to a known past, present or intended future use where the use should be anticipated.”; quoting another case); see, also, R.C. 4509.51(B) (“express or implied permission”); R.C. 4511.01(DD) (same). The concept of “implied permission” can also play a role in determining whether a potential trespasser was in fact privileged to enter a premises. See *State v. Grey*, 11th Dist. No. 92-P-0041 (1994).

The concept of “implied permission” is sufficiently clear. It allows law

enforcement and/or a fact-finder to consider whether the third party had implied permission based on the parent/guardian's course of conduct, the prior and present relationship of the parties, and other circumstantial evidence. There is already a body of law from which offenders, police, judges, and juries will be able to draw in determining whether there was "implied permission."

The void-for-vagueness doctrine "permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional." *Perez v. Cleveland*, 78 Ohio St.3d 376, 378-79, 678 N.E.2d 537 (1997). A court has a duty to give the statute a construction that will avoid a valid vagueness challenge. *State v. Dorso*, 4 Ohio St.3d 60, 61, 446 N.E.2d 449 (1983); *State v. Hoffman*, 57 Ohio St.2d 129, 387 N.E.2d 239 (1979), paragraph two of the syllabus.

A statute will be upheld against a void-for-vagueness challenge if it provides "a person of ordinary intelligence" with "fair notice" of what is contemplated by the statute. *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). Statutes pass muster when they convey a comprehensible standard that can be applied by judges and juries, even though that standard is somewhat imprecise. *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). Comprehensibility is assessed from the perspective of a person desiring to obey and understand the law. *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); *Colten v. Kentucky*, 407 U.S. 104, 106, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). A statute is not impermissibly vague merely because "there may be marginal cases in which it is difficult to determine the side of the

line on which a particular fact situation falls \* \* \*.” *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947). “Occasional doubt or confusion about the applicability of a statute does not render the statute vague on its face.” *State v. Anderson*, 57 Ohio St.3d 168, 173 n. 2, 566 N.E.2d 1224 (1991).

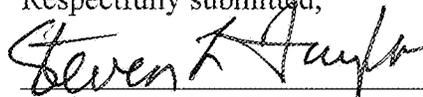
When a statutory provision clearly applies to a particular defendant, that defendant cannot challenge it on the ground that it might be impermissibly vague when applied to other defendants. *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Defendant cannot complain about “implied permission” being vague when the facts of his case do not indicate that the implied-permission concept of the statute was relevant.

Nevertheless, it should be noted that the previous version of the statute also included the “implied permission” concept and was upheld against vagueness challenge. *State v. Bertke*, 1st Dist. No. C-870524 (1988).

### CONCLUSION

Amici respectfully request that this Court uphold the constitutionality of these charges, reverse the Tenth District’s judgment, and remand the case to the municipal court for further prosecution on the charges.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail  
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