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No. 96313-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

FRANK WALLMULLER,

Respondent,

**BRIEF OF WACDL AS AMICUS CURIAE OBO RESPONDENT,
FRANK WALLMULLER**

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WACDL Amicus Committee

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Frank A. Wallmuller. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

II. ISSUE OF CONCERN TO AMICUS

Respondent was ordered as part of his community custody, “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” Is this community custody condition unconstitutionally vague because it fails to provide ordinary people fair warning of the conduct proscribed, or does not provide definite standards to protect against arbitrary enforcement?

III. ARGUMENT IN SUPPORT OF RESPONDENT

This Court has granted review to the issue whether a community custody condition prohibiting sex offenders from loitering or frequenting

where children congregate is unconstitutionally vague. The plethora of published and unpublished decisions in the Court of Appeals on this issue illustrates the need for guidance in this area from this Court.

A community custody condition is unconstitutionally vague if it:

(1) fails to provide ordinary people fair warning of the conduct proscribed, or (2) does not provide definite standards to protect against arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

The challenged clause at issue in this case reads: “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” But a review of the published and unpublished cases in this area reveals that despite all of the provisions being written by the Department of Corrections, there is a surprising lack of uniformity in the specific language used. The exact phrasing used includes the following. “Do not enter any parks/playgrounds/schools where any places minors congregate.” *State v. Norris*, 1 Wn.App.2d 87404 P.3d 83 (2017). Defendant shall not “frequent areas where children are known to congregate, as defined by the supervising CCO.” *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015). Defendant shall “avoid places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, day care centers, skating rinks, and video arcades.” *State v. Johnson*, 4

Wn.App.2d 352, 421 P.3d 969 (2018). Defendant shall not “go to or frequent places where children congregate (i.e. fast food restaurants, libraries, theaters, shopping malls, playgrounds and parks, etc.) unless otherwise approved by the Court.” *State v. Dossantos* (unpublished, Sept. 26, 2017). Defendant shall not “enter or frequent business establishments or areas that cater to minor children . . . [such as] video game parlors, parks, pools, skating rinks, school grounds or any areas routinely used by minors as areas of play/recreation or any other areas designated by DOC.” *State v. Starr*, (unpublished, Oct.17, 2017). Defendant “shall not frequent places where minors congregate including parks, playgrounds, schools, campgrounds, arcades, malls, daycare establishments and/or fast food restaurants.” *State v. Chapa*, (unpublished, Nov. 14, 2018), petition for review pending, 96641-9.

Because of the importance of this issue and the lack of uniformity employed by the Department of Corrections, WACDL has chosen to analyze this issue comprehensively and not limited itself to the specific issues in Mr. Wallmuller’s appeal. A review of the cases, both published and unpublished, reveals four areas of disagreement that potentially result in vague and ambiguous terms. First, courts around the state disagree on the initial verb used in the clause. Verbs include “enter,” frequent,” “loiter” and “avoid.” Second, there is the phrase “where children

congregate.” Third, there is often a non-exhaustive list of prohibited locations. Fourth, there is the term “child” itself. All four of these areas lend themselves to a vagueness challenge and will be discussed accordingly.

The variety of verbs used by courts to describe the prohibited conduct is fraught with vagueness. *Merriam-Webster’s Dictionary* defines “enter” as “to go or come in.” The word implies a building or enclosed area. So, if a person sits on an unenclosed swing set, have they “entered” a playground?

To “frequent” is defined as “to associate with, be in, or resort to often or habitually.” Does a one-time visit to a video arcade constitute frequenting? How many times must a person associate with a place in order for it to be considered “often or habitually?”

To “loiter” means to “remain in an area for no obvious reason.” But what if the person has a legitimate reason to be at the place? For instance, a parent may have need to enter a school for a parent-teacher conference. Or a person may wish to enter a McDonald’s for the brief time necessary to purchase food.

To “avoid” means to “keep away from; shun,” according to *Merriam-Webster*. But the connotation of the word “avoid” is ambiguous.

A person with a history of heart disease may “avoid” salt, but that does not mean he has eliminated it entirely from his diet.

Each of the four initial verbs used by the courts in the case law are open to multiple interpretations. As such, they do not provide fair warning to ordinary people and do not provide definite standard to prevent arbitrary enforcement.

The next issue is what the phrase “places where children congregate” means. This was the phrase the Court of Appeals found unconstitutional in *State v. Wallmuller*, 4 Wn.App.2d 698, 423 P.3d 282 (2018). WACDL agrees with the analysis of Judge Maxa in his majority opinion that “places where children congregate” is unconstitutionally vague and incorporates his argument by reference.

But even that definition creates uncertainty and gives rise to several questions: (1) Must the children join together in a formal group to “congregate,” or is it sufficient that children be at the same place even if they are unconnected? (2) Similarly, must the children intend to join together with other children to “congregate,” or can they end up at the same place by happenstance? (3) How many children are required to congregate to invoke the condition? Is two enough, or is some unstated larger number required? (4) How often must children congregate in a place to invoke the condition? Is once enough, or is some unstated frequency required? (5) Assuming that children must have actually rather than potentially congregated at a place to invoke the condition, how recently must they have congregated there? Is one prior instance of children congregating in a place sufficient regardless of when it

occurred? These questions suggest that the condition does not sufficiently define the proscribed conduct.

Wallmuller at 703.

The third issue, the non-exhaustive list of prohibited places, is one that has received less attention than it deserves in the Court of Appeals. The non-exhaustive list suffers from the same legal infirmity as the term “paraphernalia,” which this Court found unconstitutionally vague because “inventive probation officers” may have different interpretations of the word, resulting in arbitrary enforcement. *State v. Valencia*, 169 Wn.2d 782, 794, 239 P.3d 1059 (2010). This Court was concerned in part with the fact that, while paraphernalia frequently refers to drug paraphernalia, there is nothing about the term “paraphernalia” that limits its application to drugs.

The non-exhaustive list of prohibited places, culled from the published and unpublished cases cited above, has grown to include parks, libraries, campgrounds, playgrounds, schools, school yards, day care centers, pools, skating rinks, fast food restaurants, theaters, shopping malls, malls, video game parlors, and video arcades. While some of these terms may appear to have common definitions, an even cursory examination reveals that they are fraught with ambiguity.

Take the term “park.” *Merriam-Webster Dictionary* has five definitions for the term “park:”

- (1) a : an enclosed piece of ground stocked with game and held by royal prescription or grant;
b : a tract of land that often includes lawns, woodland, and pasture attached to a country house and is used as a game preserve and for recreation
- (2) a : a piece of ground in or near a city or town kept for ornament and recreation
b : an area maintained in its natural state as a public property
- (3) a : a space occupied by military vehicles, materials, or animals
b : parking lot
- (4) : an enclosed arena or stadium used especially for ball games
- (5) : an area designed for a specified type of use (such as industrial, commercial, or residential use)

It is unclear which of these five definitions constitutes a prohibited “park.”

Lest this Court think that some of these definitions are clearly inapplicable, undersigned counsel engaged in a half-day hearing several years ago in Kitsap Superior Court where an “inventive probation officer” attempted to violate a probationer for entering a “park” after he attended a baseball game at Safeco Field.”¹ Although the trial court ultimately dismissed the community custody violation, the fact that the community custody officer even brought the violation indicates the word “park” is subject to arbitrary enforcement. The Court in *Johnson* discussed this ambiguity, concluding without reasoning that “park” does not include “national park” because “[w]hile the exact confines of condition 14 are not

¹ Despite his best efforts, counsel was unable to locate the name of the defendant or cause number for this hearing.

amenable to description, the condition provides Mr. Johnson sufficient notice to allow for compliance.” *Johnson* at 361. But there is nothing in the provision to put either the defendant or his “inventive probation officer” on notice that “parks” excludes “national parks.”

Or the term “fast food restaurant.” In *Chapa*, the State conceded the phrase “fast food restaurant” is unconstitutionally vague, but the Court of Appeals refused to accept this concession. Does a person violate this provision by using the drive-thru? If a person enters a McDonald’s and promptly leaves after collecting their food, are they frequenting or loitering in a fast food restaurant? And what, really, is fast food? Is Panda Express fast food? What about Subway Sandwich? How about IHOP or Denny’s? A buffet?

Or the term “shopping mall.” In many areas, it is impossible to shop for basic necessities without going into shopping malls. If a person enters Macy’s through a side entrance without going into the hallways of the shopping mall, has a person violated the provision? And what exactly constitutes a shopping mall? Does it include strip malls? Does going into Safeway or T.J. Maxx, which frequently act as an anchor stores for strip malls, violate this provision? Does the phrase “shopping mall,” as used in *Wallmuller*, differ from the phrase “mall,” as used in *Chapa*? See *Valencia* at 794 (concluding “paraphernalia” differs from “drug paraphernalia.”) If a

person attends a rally at the National Mall in front of the Lincoln Memorial to see a recreation of Martin Luther King's "I Have a Dream Speech," have they frequented a mall?

Or the word "theater." If a person attends a showing of "Spring Awakening" or "Dear Evan Hanson"² at the Paramount Theater in Seattle, have they frequented a "theater?" What about attending a rated-R movie, where all attendees would presumably be over 17? Does a person violate this provision by attending an over-21 concert at The Showbox in Seattle?

Or the word "library." Are we now going to say that being convicted of a sex offense means a person may not check out a book from their local library just because children may also want to check out books? What if the person agrees to stay away from the children's section? What about non-profit or local community groups that rent out the local library for their monthly meetings? What about visiting the Book Mobile? Does prohibiting people from conducting historical, literary, political, or social research at the local library impair their First Amendment rights to free speech.

Even the word "school" is subject to interpretation. Does a university constitute a school? What about a local community college?

² "Spring Awakening" and "Dear Evan Hanson," the 2007 and 2017 Tony Award winners for Best Musical respectively, have both showed at the Paramount Theater in recent years. Both musicals feature frequent profanity and have mature themes that include suicide, abortion, and rape.

Does it matter that the community college has a Running Start Program? And while the primary purpose of schools is to educate children, they also serve as community centers and meeting places. Does a person violate this provision by entering a school on the weekend to attend a political party caucus or PTA meeting? On at least one occasion, this Court has found the term “school” to be unconstitutionally vague as applied because there was no readily available means a person of ordinary intelligence could have known that a particular building housed a school. *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997) (finding 7-2 that the YEP was not sufficiently marked as a school). If the nine members of this Court cannot agree on whether a particular building qualifies as a “school,” imagine how much mischief an “inventive probation officer” can create.

Another problem with the non-exhaustive list is that it is non-exhaustive. Every non-exhaustive list referenced above is both overinclusive (also referred to in the case law as overbroad) and underinclusive. A statute or regulation that is both overinclusive and underinclusive is more likely to run afoul of the Constitution. *Brown v. Entertainment Merchants*, 564 U.S. 786, 131 S.Ct. 2729, 2742, 180 L.Ed.2d 708 (2011). An overbroad regulation is unconstitutional if it “reaches a substantial amount of constitutionally protected conduct.”

Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. *Brown* at 2740.

Limiting our inquiry to the non-exhaustive list in Mr. Wallmuller's case, Mr. Wallmuller is on notice he may not loiter or frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls. This list is overinclusive because it contains areas that most people do not consider be areas where children congregate, like campgrounds. This list is also underinclusive because it omits areas that almost everyone can agree are areas where children are likely to be, such as day care centers. Because the non-exhaustive list is both overinclusive and underinclusive, it is subject to interpretation. And any list that is subject to interpretation neither provides fair warning of the conduct proscribed nor protects against arbitrary enforcement.

The final issue is the term "children" itself. The *Johnson* Court held that the term should be limited to children under the age of 16 and WACDL agrees.

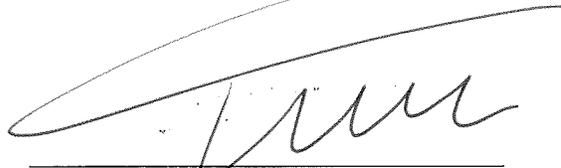
WACDL is mindful of the need to protect children from people who have sexually offended against children. But the solution is not to create ambiguous, vague prohibitions that are nearly impossible to

understand and follow. Almost all probationers who have prohibitions on going to places where children congregate also have prohibitions on having direct or indirect contact with children. This unambiguous prohibition is sufficient to protect children without creating impossible barriers to living.

IV. CONCLUSION

This Court should find that the community custody prohibition on frequenting, loitering, entering, or avoiding places where children congregate, in all its various versions and permutations, is unconstitutionally vague.

Respectfully submitted this 27th day of February, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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THE LAW OFFICE OF THOMAS E. WEAVER

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