No. 08-1819

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARY KATHRYN BROWN ,
Plaintiff-Appellant,

v.

CITY OF PITTSBURGH, PITTSBURGH CITY COUNCIL, and LUKE RAVENSTAHL
Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Pennsylvania

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiff–Appellant
Urging Reversal

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 08-1819

Mary Kathryn Brown

v.

City of Pittsburgh *et al.*

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N/A

/s/ Steven W. Fitschen Dated: 7/9/08
(Signature of Counsel or Party)

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501(c)(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its interests in protecting and maintaining free and vibrant exchange of ideas and debate in the public square.

This Brief is filed pursuant to the consent of Plaintiff-Appellant and, since the Defendants-Appellees have denied consent—pursuant to the accompanying Motion For Leave to File a Brief *Amicus Curiae.*

SUMMARY OF THE ARGUMENT

This Brief makes an argument not made by the Plaintiff. *Amicus* argues that the District Court erred when it held that Ordinance § 623.03 (the "Ordinance") was not unconstitutionally vague as-applied to Ms. Brown.

The Brief demonstrates the error noted above concerning the District Court's void for vagueness analysis. The court below erroneously focused on two things in order to reject Ms. Brown's vagueness claim. First, it incorrectly construed Ms. Brown's understanding of the word "consent" in the Ordinance to mean that she understood *when and how* consent occurs. Her testimony made clear, however, that as applied to her in her sidewalk counseling, she did not know what constituted consent in her efforts to speak with potential clinic patients. In the

instant case, "consent" is unclear as applied to Ms. Brown's sidewalk counseling. Second, the court below inappropriately used the equivocation of the terms "consent" and "informed consent" to erroneously attribute knowledge of consent to Ms. Brown because of her medical training as a nurse. "Consent" as used in the Ordinance and "consent" as used in "informed consent" have different meanings and to conclude that apprehension of one is apprehension of the other is unsound reasoning.

ARGUMENT

I. BECAUSE MS. BROWN IS UNABLE TO DISCERN WHAT CONSTITUTES CONSENT UNDER THE ORDINANCE, THE COURT BELOW ERRED IN FINDING THE ORDINANCES WERE NOT VAGUE AS APPLIED TO MS. BROWN.

The court below erroneously rejected Ms. Brown's argument that the term "consent" was vague as applied to her sidewalk counseling outside abortion clinics. The court below compounded its error by equating "informed consent," a medical term of art with which Ms. Brown is familiar, with the common use of the term, and therefore inappropriately dismissed her contention that she did not know what constituted consent under the Ordinance.

A. The court below erred in holding that Ms. Brown's understanding of the requirements of the Ordinance equates to knowledge of when a violation of the Ordinance has occurred.

"[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws

"offend several important values," including preventing innocent members of society from accidental violations of the law, and guarding against "discriminatory application" by policemen, judges, or others, discouraging *ad hoc* and subjective enforcement. *Id.* at 108-09. Finally, and importantly, vague statutes that "'abut[] upon sensitive areas of basic First Amendment freedoms' . . . 'inhibit the exercise of those freedoms.'" *Id.* at 109 (citations omitted).

Similarly, the Federal District Court for the Eastern District of Kentucky, following the obscenity standards set out in *Roth v. United States*, 354 U.S. 476 (1957), found an ordinance in the city of Knoxville unconstitutionally vague because it banned the sale or display of publications which "prominently feature[d] crime [or] obscenity" and gave unbridled authority to a board to decide what was proper to ban. *Werner v. City of Knoxville*, 161 F. Supp. 9, 10, 14 (E.D. Tenn. 1958). The board was given no standard by which to discriminate what was criminal or obscene. *Id.* The court struck down the ordinance for vagueness noting its potential impact on many "wholesome" publications, which had descriptions that, in a different context, could be taken as criminal or obscene, or that could be banned by the ordinance because of the unencumbered, "broad powers of censorship . . . without guides or standards for the exercise of such powers." *Id.* at 13-14. The court correctly saw the danger

in an ordinance that did not clearly define that which it was specifically designed to address.

Like the city of Knoxville in *Werner*, here the city of Pittsburgh has given no definitional clarity to what constitutes consent for the purposes of the Ordinance, apparently giving the police unfettered discretion to decide. Yet this is what stands between Ms. Brown and potential conviction. In analyzing the Ordinance for vagueness, the court below conflated the implications of Ms. Brown's testimony that she understood the *need* for consent before approaching a clinic patient with her contention that she was not sure *when* consent had been granted. *See Brown v. City of Pittsburgh*, 543 F. Supp. 2d 448, 481 (W.D. Pa. 2008). Further, Ms. Brown's testimony demonstrated real-world application and not simply far-flung hypotheticals–she had put the Ordinance to the test on the sidewalk and did not know when she appropriately gained consent of the clinic patient.

Similarly, in *Kolender v. Lawson*, 461 U.S. 352 (1983), a defendant was detained or arrested approximately fifteen times for alleged violations of a California loitering law that, among other things, required those persons who loitered and wandered the streets to be able to both account for their presence and to produce to a peace officer identification that was "credible and reliable." *Id.* at 353-54. The Supreme Court held that the enactment was unconstitutional,

particularly because the requirement to provide a "credible and reliable" identification "contain[ed] no standard for what a suspect ha[d] to do in order to satisfy the requirement." *Id.* at 358. The Court was concerned with arbitrary administration of the enactment and noted that the "void-for-vagueness" doctrine applied to make sure that a statute of that nature defined the criminal offense with such specificity that a person of ordinary understanding could comprehend "what conduct [was] prohibited" and that it would be applied in a way that would not encourage discriminatory or arbitrary application. *Id.* at 357-58.

Just as the term "credible and reliable" in *Kolender* was determined to be ambiguous and standardless, albeit words most people understand in common usage, so the term "consent" in Pittsburgh's ordinance is an undefined condition that lacks the clarity in this as-applied-challenge required for Ms. Brown—a person, who as a nurse, possesses at least ordinary intelligence—to know what she must do to attain this "consent" from a patient going to the clinic. Ms. Brown in her testimony has identified that she has serious questions such as what qualifies as valid consent. *Brown*, 543 F. Supp. 2d at 457. If there are several people in a group, must she gain consent from all of them or just the person she is seeking to speak to? As noted in *Kolender*, any language in a statute that is not given definition or boundaries leads to opportunities for those

enforcing it to apply the language to situations in discriminatory and arbitrary manners. 461 U.S. at 360. In the current situation, the police have no standard upon which to draw to know how to apply the consent requirement, and Ms. Brown is justified in her apprehension that the full weight of whether she has complied with the requirement hangs on the interpretation of whoever happens to be enforcing the ordinance that day–which means that the standard could change from day-to-day.

Although the United States Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 733 (2000), rejected facial vagueness of a Colorado statute similar (although by no means identical) to Pittsburgh's Ordinance, it explicitly stated that it was not engaging in "speculation about possible vagueness in hypothetical situations not before" it on a facial challenge. But in the instant case, the hypotheticals have disappeared and reality has set in. Receiving consent to do what is ordinarily a protected activity under the First Amendment needs greater definitional clarity than to simply assert, as the court below did, that the word is readily understood by a person of average intelligence. *See Brown*, 543 F. Supp. 2d at 480-82. Ms. Brown testified that she did not know what "conduct or words constitute 'consent,' [or] from whom she must obtain 'consent'" before approaching. *Id.* at 457 (citations omitted). Ms. Brown's testimony points clearly to the as-applied vagueness of the Ordinance.

One may argue that criminal statutes regularly make consent a defense to an alleged crime, therefore rendering consent just another element to be determined under the statute by the fact-finder. *See, e.g.* 18 Pa. Cons. Stat. § 3124.1 (sexual assault). The clear distinction, however, is that one has never been able to assume, under First Amendment jurisprudence at least, that he may engage in sexual intercourse whenever and with whomever he wishes. In evaluating whether a sexual assault has occurred, consent is critical to the context. On the other hand, with regard to speech, the presumption under the First Amendment is one of acceptability. For instance, one pedestrian approaching another to ask a question is a typical and expected part of walking on a public sidewalk. If the state is going to require consent for what is otherwise a carefully protected activity under the First Amendment, it is appropriate that it define its terms to appropriately put someone such as Ms. Brown on notice of what is expected of her under the law. *See, e.g. Grayned*, 408 U.S. at 108.

The court below erroneously used a one-size-fits-all approach when addressing the question of consent. Because of the lack of definitional clarity as to what exactly "consent" means in the Ordinance, Ms. Brown does not know if she must gain verbal, written, physical, or some other type of consent (or perhaps a combination of types) before approaching a clinic patient. Although

she knows she must obtain consent, it does not logically follow that she knows *how* to do so. Consequently, in an effort to circumvent Ms. Brown's testimony, the court below resorted to a logical fallacy (as will be demonstrated in the next Section of the Brief) to reject Ms. Brown's as-applied vagueness argument.

B. The court below erred by committing the logical fallacy of equivocation in analyzing whether Ms. Brown understood the meaning of consent.

As outlined above, to circumvent Ms. Brown's testimony that she did not know when she will have received consent from a potential clinic patient, the court below erred in relying on the logical fallacy of equivocation in rejecting Ms. Brown's as applied vagueness argument.

In *Allied Erecting & Dismantling Co. v. USX Corp.*, 249 F.3d 191 (3d Cir. 2001), this Court analyzed the logical fallacy of equivocation in its resolution of a breach of settlement agreement dispute. *Id.* at 193. At issue, among other things, was whether asbestos dust and sinter dust were the same thing under the settlement agreement, in that they were both classified as "residual waste under the Pennsylvania Solid Waste Management Act." *Id.* at 202. This Court held that to view them as the same was logically flawed and explicated the matter by way of the following example:

1. All women are humans
2. All men are humans
3. [Therefore] All women are men

Id. at 202, n.1.

Conflating two different uses of "consent" led the court below to draw an unsound conclusion about Ms. Brown. Medical informed consent is a term of art wherein a physician discloses to his patient all of the relevant information that would allow the patient to "'evaluate knowledgeably the options available and the risks attendant upon each' before subjecting the patient to a course of treatment." *Hinman v. Dello Russo*, No. 06-3814, 2008 U.S. App. LEXIS 474, at *1 (3d Cir. Jan. 10, 2008) (citations omitted). The court below held that because Ms. Brown is a registered nurse it could "reasonably infer that she understands what consent means." *Brown*, 543 F. Supp. at 481. Yet, in citing *Hinman*, this Court made it clear that it is the *physician* and not the nurse that has to acquire the informed consent from the patient. *Id.* at 481, n.28.

Additionally, even if Ms. Brown is familiar with the concept of informed medical consent, it does not mean the she would necessarily know what "consent" means as used in the city's ordinance. The definition of informed medical consent has been used for many years and has been refined by the courts into a working definition so that physicians are not left in the dark regarding what the courts expect them to do to gain informed medical consent. However, the terms used in the city's ordinance are vague and Ms. Brown, or any ordinary person, would be at a loss to describe what must be done to gain

the consent of another person before they could approach as mandated in the ordinance.

The fallacy is explicitly this–simply because Ms. Brown may know what consent is in one context (for instance, medical informed consent) and because the Ordinance requires consent to be given before a clinic patient is approached within the 100 feet zone, it does not follow that Ms. Brown understands what consent is under the Ordinance. Therefore, it was wrong for the court below to assume that the city's use of consent is identical to, or even remotely similar to, informed medical consent because the Ordinance neither defines what the term consent means, nor does it narrow the term so that Ms. Brown and other people of ordinary intelligence would be able to be sure of what would constitute consent.

The Ordinance should not fail simply because it *used* an equivocal term such as "consent." By that standard, almost no word could be used in any law. Rather, the Ordinance should fail because as Ms. Brown attempted to interact with potential clinic patients, a well guarded right under the First Amendment, she found the Ordinance's lack of definitional clarity left her with an inability to discern when consent had arisen. In upholding the Ordinance, the court compounded the Ordinance's vagueness by drawing a fallacious conclusion about Ms. Brown's knowledge of consent.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Plaintiff-Appellant's Brief, this Court should reverse the judgment of the United States District Court for the Western District of Pennsylvania.

Respectfully submitted this
9th day of July 2008.

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COMBINED CERTIFICATIONS

1. I hereby certify that I am admitted to practice law in the Third Circuit.

2. I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 2,364 words using Microsoft Word 2007 word count function.

3. I hereby certify that the electronic brief and the hard copies that have been filed are identical.

4. I hereby certify that the electronic brief has been scanned for viruses using PC Security Shield.

5. I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Brown v. City of Pittsburgh et al.*, No. 08-1819, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on July 9, 2008, addressed as listed below. The required number of paper copies were filed in the same manner and the electronic version of the brief was e-mailed on the same date.

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