No. _____

In the Supreme Court of the United States

MAREK KOZUBAL,
Petitioner,
v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

Petition for Writ of Certiorari

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QUESTION PRESENTED

This case involves an extremely specific statute defining the term "mandated reporter," which was altered by excision and thus broadened by Massachusetts courts into an unconstitutionally vague, criminal drift-net.

Massachusetts, like many states, imposes aggravated penalties for certain sexual offenses if the defendant fits the statutory definition of a "mandated reporter." That definition identifies forty-one specific job descriptions, including

> a public or private school teacher, . . . child care worker, *person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D* that provides child care or residential services to children.

M.G.L. c. 119, § 21 (emphasis added). Here, Massachusetts courts approved a jury instruction that truncated this definition to only a "person paid to care for or work with a child in any public or private facility." This construction absurdly broadened the reach of the statute while the unaltered statute clearly targets specified professions. Massachusetts rejected arguments that this construction failed to provide fair notice and violated the rule of lenity, rendering the statute vague.

Petitioner was employed part time at a private school, with no specific job title. He focused on maintaining a research-grade telescope. The incidents occurred at a club event open to the public, including adults. The complainant was not a student there. Under the broadened statute, the petitioner's sentence was aggravated to a ten year mandatory minimum. M.G.L. c. 265, § 13B ½.

Would a person of ordinary intelligence have had fair notice that he was subject to the aggravated penalties for mandated reporters?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marek Kozubal respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINION BELOW

The decision of the Massachusetts Supreme Judicial Court (SJC) is reported as *Commonwealth v. Kozubal*, 488 Mass. 575, 174 N.E.3d 1169 (2021) and is attached at App.1a–12a.

PRIOR PROCEEDINGS

In September, 2016, petitioner Kozubal was indicted on eight counts of indecent assault and battery on a child under fourteen by a mandated reporter. App.1a–2a. After a jury trial, he was convicted on all counts, but verdicts on three counts were reduced to lesser offenses after trial. App.12a. He was sentenced to the mandatory minimum of ten years in state prison, with three years of probation upon his release. *Id.* He timely appealed. The SJC issued its opinion on October 15, 2021. *Kozubal*, 174 N.E.3d at 1169. Justice Breyer granted an extension of time to file a petition for a writ of certiorari until March 14, 2022.

STATEMENT OF JURISDICTION

The decision of the SJC issued on October 15, 2021. App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the judgment of the SJC affirming Petitioner's convictions was "rendered by the highest court of a State in which a decision could be had." The SJC reviewed and rejected petitioner's argument that due process required a stricter construction of the statute. *Kozubal*, 174 N.E.3d at

1189-1190. Justice Breyer granted an extension of time to file a petition for a writ of certiorari until March 14, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law."

2. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. M.G.L. c. 119, § 21, in pertinent part, defines "mandated reporter" as

> a person who is: … (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licensor of the department of early education and care or school attendance officer.

4. M.G.L. c. 265, § 13B ½ (b), in pertinent part, provides:

> Whoever commits an indecent assault and battery on a child under the age of 14 and . . . at the time of commission of said indecent assault and battery, the defendant was a mandated reporter as is defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years.

STATEMENT OF THE CASE

The facts relevant to the question presented — whether the SJC's construction of "mandated reporter" rendered the criminal statute unconstitutionally vague — are contained in the opinion below and the trial record.

The evidence at trial

The SJC summarized the trial evidence in its opinion. *Commonwealth v. Kozubal*, 488 Mass. 575, 174 N.E.3d 1169 (2021). Petitioner recounts the relevant portions of that evidence below, with additions from the trial record.

> The thirty-nine year old defendant was convicted of indecently touching the thirteen year old victim on three separate occasions in 2016: June 24, June 25, and July 6.[1] The touching consisted of kissing, touching the victim's breasts over and under her clothing . . . . Tens of thousands of text messages were recovered forensically between the defendant and the victim, many of which had been deleted.
>
> In 2003, the defendant was hired as a faculty member and assistant to the director of a research-grade astronomical observatory at a private school for grades pre-kindergarten through twelve.

Id. at 1177. He was hired because of his unique skills to help run the observatory. Tr.8:135. Initially, supporting the operation of the observatory was his primary role: programming the associated computer, and maintaining the equipment, sensors, and the dome. Tr.8:136–37.

> The observatory housed telescopes and was used by afterschool, community, and club programs.[2] The defendant's duties as a faculty member in 2003 included supporting technology for the observatory programs. By 2016, the defendant was a part-time employee who

[1] Only the June 24 and 25 incidents are at issue here. Kozubal omits the facts relevant to July 6 because he was not convicted of being a mandated reporter for the July 6 incident.

[2] Local universities also rented time to use the telescope. Tr.8:135.

> worked in various afterschool programs, science programs, and outreach programs hosting visitors from other schools and scout troops. Occasionally, the defendant was a substitute teacher in middle school classes, and he worked on the school's lower-school extracurricular activities. The defendant also taught students during a summer camp at the school and instructed the amateur radio club, an afterschool program held at the school that was open to students, faculty, and members of the community. The assistant head of the school responsible for faculty and curriculum described the defendant as "a fellow teacher, a fellow faculty member at the school."

Kozubal, 174 N.E.3d at 1177–78. The school does not offer contracts; they use "renewal letters" and his latest renewal letter on file was March 11, 2011. Tr.9:23. In 2016, he was paid hourly, but the records do not say what he was paid for. Tr.9:24; Tr.8:139. There was no evidence that he had a job title. Tr.8:130. There was no evidence that he was paid for participating in afterschool programs. The school's director of human resources could not say that he was working for the afterschool programs. Tr.9:24–25. She could only say that he was working part-time. *Id.*

> The defendant met the victim [Ann Gray][3] and her father and stepmother in January 2016 at an adult education radio course held at the observatory.

Kozubal, 174 N.E.3d at 1178. The adult education course was run by the local town, not the school. Tr.8:140. Gray was not a student at the school. She was home schooled. Tr.7:108.

> They became friendly, and the victim's parents gave the defendant contact information for each of them. The defendant began exchanging text messages with all three of them and entered into a polyamorous sexual relationship with the victim's stepmother that ended in June 2016. The defendant also began exchanging text messages individually with the victim. Sometimes the defendant instructed the victim to delete text messages between them.

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[3] A pseudonym employed in state court as required by M.G.L. c. 265, § 24C.

> On June 24, 2016, the victim was dropped off at the school to meet the defendant and prepare for a radio event that was to be held on June 25 and 26.

Kozubal, 174 N.E.3d at 1178. The multi-day event at the observatory was part of a ham radio club event, attended by 20–40 children and adults from the community. Tr.5:69; Tr.6:11-12, 91–92; Tr.8:28-29. The event was not during the academic year. Tr.9:27. The purpose of the event was for ham radio operators from around the world to contact each other. Tr.6:11-12.

The event was organized by the ham radio club. Tr.5:69. Gray's mother testified that Kozubal told her that he was a "titled" member of the club, and that it was part of his job with the afterschool program. Tr.7:118; *see* Tr.8:125. Kozubal was paid to work with the radio club. Tr.8:126. The radio club was run by the faculty, students, and an outside organization. Tr.8:139. People from the community participated in the club, not just students. Tr.8:139–40.

During the event,

> [t]he defendant unlocked a classroom and kissed the victim. The defendant told the victim he was "not supposed to do that," he could "get in big trouble," and not to tell anyone. Later, in a stairway, the defendant kissed her again with his tongue and touched her breasts with his hands.
>
> During the course of the event held at the school on June 25 and 26, 2016, the defendant kissed the victim at least three times on her mouth, neck, and ears, and touched her breasts over and under her clothing. One of the incidents took place in a room of the observatory that contained a refrigerator. Again, the defendant told the victim that he could get in trouble for touching her. They later exchanged text messages about the incident, referring to the "room with a fridge" and the events that had transpired there.

Kozubal, 174 N.E.3d at 1178.

At the close of the case, the jury was instructed over objection that a mandated reporter is "a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility." *Kozubal*, 174 N.E.3d at 1188; *see, e.g.*, Tr.4:53-55; Tr.5:12; Tr.9:175–76; Tr.10:9, 56, 69.

The appeal to the Massachusetts Supreme Judicial Court

On direct appeal, Kozubal argued that the trial judge erroneously expanded the reach of a criminal statute by truncating the statute defining mandated reporter to eliminate a clause modifying "public or private facility." The clause at issue defines one type of mandated reporter as a:

> person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs.

M.G.L. c. 119, § 21. Kozubal argued that "public or private facility" is modified by "funded by the commonwealth or licensed under chapter 15D."[4] *Kozubal*, 174 N.E.3d at 1188. The private school here was not funded by the Commonwealth or licensed under chapter 15D.

The SJC ruled that the Massachusetts "Legislature did not intend for 'any public of [sic] private facility' to be modified by 'funded by the commonwealth or licensed under [M.G.L. c.] 15D.' A plain reading of the statute suggests that the phrase 'funded by the commonwealth or licensed under [M.G.L. c.] 15D' modifies

[4] Chapter 15D establishes a "department of early education and care" which, in pertinent part, is responsible for licensing or approving child care centers and child care programs. M.G.L. c. 15D, § 2.

only 'home or program.'" *Kozubal*, 174 N.E.3d at 1188–89. Relying on the "last antecedent" rule and the Legislature's general intent to protect children, the SJC held that a mandated reporter is simply "any person paid to care for or work with a child in any public or private facility." *Id.*

Kozubal argued that any ambiguity in the definition of an element of a criminal statute must, consistent with due process, be strictly construed in his favor. *Kozubal*, 174 N.E.3d at 1190. The SJC rejected that argument, explicitly embracing a broad, rather than a narrow construction of the statute.

> To construe the statute the way the defendant argues would severely limit the class of adults overseeing children who are required to report signs of child abuse or neglect and thereby contravene the purpose of the statute: to protect children. The defendant's argument that the judge's construction of the statute would make employees of restaurants, video game stores, and amusement parks into mandated reporters is misguided. These employees are not directly responsible for the care of children, unlike the class of mandated reporters defined by G. L. c. 119, § 21.[5]

Kozubal, 174 N.E.3d at 1189.

[5] This is incorrect. The class of mandated reporters defined by § 21 are not all directly responsible for the care of children. The statute defines many occupations as mandated reporters even if they are not "directly responsible for the care of children," e.g., medical examiners, optometrists, "licensor" of the department of early education and care, probation officers, and clerk-magistrates.

REASONS FOR GRANTING THE PETITION

In instructing the jury, the trial judge broadened the statute defining "mandated reporter" by removing a clause limiting that definition to persons working at facilities licensed or funded by the state. In expanding the scope of liability under the statute, Massachusetts courts deprived Kozubal of fair notice and rendered the statute unconstitutionally vague.

The constitutional vagueness doctrine is a bulwark of democracy, advancing interests of fair notice and separation of powers. *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–70 (2010); Shon Hopwood, *Restoring the Historical Rule of Lenity As A Canon*, 95 N.Y.U. L. REV. 918, 932 (2020). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The doctrine also applies to statutes fixing criminal penalties. *Johnson v. United States*, 576 U.S. 591, 596 (2015). The statutes at issue here both define an offense and fix a mandatory minimum penalty (ten years in state prison).[6]

A. Massachusetts' construction turned an otherwise specific statute into one that is vague, ungrammatical, and nonsensical.

"Mandated reporter" is a legal construct that every state receiving federal funds must employ in some fashion. *See* 42 U.S.C. § 5106a(b)(2)(B)(i); Leonard G.

[6] Massachusetts is a "truth in sentencing" state. A defendant sentenced under the statute at issue will actually serve a minimum of ten years. M.G.L. c. 265, § 13B ½ (forbidding reduction of sentence); *see Commonwealth v. Rodriguez,* 482 Mass. 366, 372 (2019) (recounting history of truth in sentencing law). There is no mandatory minimum if the defendant is not a mandated reporter. M.G.L. c. 265, § 13B.

Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws*, 59 VILL. L. REV. TOLLE LEGE 37, 38 (2013). Like the majority of states, Massachusetts has not imposed a universal reporting obligation. *Id.* at 42 n.34; *see id.* at 57–58.

Prior to the SJC's decision in petitioner's case, Massachusetts' statutory scheme appeared to tie a mandatory reporting obligation to specific job descriptions. *Commonwealth v. Gomes*, 483 Mass. 123, 128 (2019) ("G. L. c. 119, § 21 [is] a provision that enumerates qualifying professions, for a definition of the term '[m]andated reporter'"). This is a common approach among the states and the federal government. Brown & Gallagher, 59 VILL. L. REV. at 57–58; 34 U.S.C. § 20341(b).[7].

Based on the mandated reporter statute as written at the time of his offense, Kozubal disputed that he fell within its ambit because he was not employed in one of the qualifying professions. He was not a "teacher" nor was he a "person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children." G.L. c. 119, § 21;[8] *Kozubal*, 174 N.E.3d at 1188.

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[7] Until recently, this section was codified as 42 U.S.C. § 13031.

[8] The full definition of "mandated reporter" in M.G.L. c. 119, § 21 reads: "'Mandated reporter', a person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social worker; *(ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person*

Instead, the SJC incorrectly applied canons of statutory construction to hold that "the Legislature did not intend for 'any public of [sic] private facility' to be modified by 'funded by the commonwealth or licensed under [G. L. c.] 15D.'" *Kozubal*, 174 N.E.3d. at 1188–89. The result of this construction is an unconstitutionally vague statute. *See, e.g., Rabe v. Washington*, 405 U.S. 313, 315–16 (1972) (state court broadened language of obscenity statute based on location, making "[t]he statute, so construed . . . impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown").

Employing canons of statutory construction — even employing them otherwise correctly — to broaden the sweep of a penal statute offends due process, deprives the citizenry of fair warning, and improperly wrests the power to define crimes and punishments away from the legislature and vests it in judges. *Davis*, 139 S. Ct. at 2333.

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paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licensor of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer or animal control officer; (iv) a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person's designated agent; or (vi) the child advocate." (emphasis added).

Here, the SJC relied on "plain reading," the placement of punctuation, the "last antecedent" rule, and legislative purpose to hold that "'funded by the commonwealth or licensed under [G. L. c.] 15D' modifies only 'home or program.'" *Kozubal*, 174 N.E.3d at 1189. They did it wrong. And because of that, they created an unconstitutionally vague statute.

In order to determine whether Kozubal had fair warning, it is important to understand how the SJC went wrong in construing the statute. Of course, courts always start by looking at the plain, ordinary meaning of the words in a statute. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). But plain meaning tends to be an *ipse dixit*. What is a plain meaning to one reader is not necessarily plain to another. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 187 (2001) (Breyer, J. dissenting) (disagreeing with majority's plain meaning interpretation of "state post-conviction or other collateral relief"). Indeed, in *Walker*, the majority looked at the plain meaning of the text but also looked for other clues to ensure that it arrived at the correct meaning. *Id*. at 174 (examining plain language construction for internal consistency, consistency with other statutes, avoiding interpretations that create surplusage); accord *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018) (interpreting "neutral" statutory language by looking to the statutory context). That is what should have happened here.

The section at issue defines a mandated reporter as

> *a person* who is . . . a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under

> chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licensor of the department of early education and care or school attendance officer;

M.G.L. c. 119, § 21. A plain meaning reading of the statute, at a minimum, does not dictate that "home or program funded by the commonwealth or licensed under chapter 15D" does not modify "public or private facility." Instead, we look for other clues.

Here, the SJC's creation of "person paid to care for or work with a child in any public or private facility" as a standalone category not modified by the words that follow creates a grammatically nonsensical statute. Section 21 is a list of *actual humans* who are defined to be mandated reporters because they engage in "enumerate[d] qualifying professions." *Gomes*, 483 Mass. at 128.[9] But the SJC's construction results in definition of a mandated reporter as "a person who is . . . a home or program." A home or program is not a person.

Similarly, the SJC's construction makes a mandated reporter out of "a person who is a . . . voucher management agencies or family child care systems or child care food programs." These are also not "a person." They are not even singular nouns. Again, this construction makes no sense and is therefore wrong. *Sec. Indus.*

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[9] M.G.L. c. 119, § 21 contains several categories of professions. Subsection (i) of the statute covers people working in medical and counseling professions. Subsection (ii) covers people who work in education and child care. Subsection (iii) covers people who work in courts, social work, and first responders. Subsection (iv) covers people who are religious leaders or are employed by religious institutions. Subsection (v) covers people in charge of medical or educational institutions. Subsection (vi) covers "the child advocate" established by M.G.L. c. 18C, § 2.

Ass'n v. Bd. of Governors of Fed. Reserve Sys., 468 U.S. 137, 166 (1984) ("petitioners' reading . . . makes nonsense of the statutory language, and it therefore cannot be correct"); *Corley v. United States*, 556 U.S. 303, 314 (2009). These are internal clues that "funded by the commonwealth or licensed" is an integral modifier describing facilities at which a covered human works.

The SJC also relied on the "last antecedent" rule to hold that the funded-or-licensed clause modified only home or program. *Kozubal*, 174 N.E.3d at 1189. But this Court recently held that application of the non-constitutionally based "last antecedent" rule is context-dependent and should not be employed where it produces an ungrammatical result. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021). But here, application of the last antecedent rule to arrive at the SJC construction manifestly produces an unlikely, ungrammatical result. *Paroline v. United States*, 572 U.S. 434, 446–47 (2014) (rejecting last antecedent construction requiring Court to accept "unlikely premises"). On the other hand, construing the funded-or-licensed clause to modify to "public or facility" produces a sentence which reads naturally. "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 447 (quoting *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 348, 40 S. Ct. 516, 64 L.Ed. 944 (1920)).

Without elaborating, the SJC further relied on the placement of the comma between "public or private facility," and "or home or program funded by the

commonwealth or licensed under [M.G. L. c.] 15D," as evidence that that clause modified only "home or program." *Kozubal*, 174 N.E.3d at 1189 (cleaned up). But "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993); *see United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82–83 (1932) (punctuation may be disregarded if it distorts the statute's meaning).

Finally, the SJC relied on legislative purpose: "[t]o construe the statute the way the defendant argues would severely limit the class of adults overseeing children who are required to report signs of child abuse or neglect and thereby contravene the purpose of the statute: to protect children." *Kozubal*, 174 N.E.3d at 1189. That is hardly a sufficient justification for the problematic construction the SJC adopted. The fact that a legislature "was broadly concerned" about a problem "does not mean it adopted a broad" solution. *Facebook,* 141 S. Ct. at 1172.

Of course, a state's construction of its own statute is binding on this Court; this Court cannot narrow a state statute on its own authority. *Chicago v. Morales*, 527 U.S. 41, 61 (1999) (plurality opinion of Stevens, J.). The SJC could have construed the statute narrowly, obeyed the rule of lenity, and avoided a constitutional vagueness problem. *Davis*, 139 S. Ct. at 2333; *see, e.g., Dowling v. United States*, 473 U.S. 207, 228–29 (1985) (rule of lenity applied to hold that statute prohibiting transportation of stolen property did not apply to bootleg recordings). But the SJC chose to instead expand the definition. *Bouie v. City of*

Columbia, 378 U.S. 347, 356–57 (1964) (state court's decision to construe criminal statute broadly deprived petitioners of fair notice). As a result, Kozubal was convicted under a vague statute. *Rabe*, 405 U.S. at 315–16. It falls to this Court to act.

B. As construed by Massachusetts, the "mandated reporter" statute is unconstitutionally vague.

1. The mandated reporter definition at the time of the offenses.

At the time of the offenses, Kozubal was faced with a statute that would puzzle even attorneys experienced in statutory construction. On these facts, he did not have fair warning that his status made him a mandated reporter subject to a mandatory ten years in state prison.

What Kozubal had warning of was a statute that punished "any person paid to work with children in any public or private facility, or home or program funded by the Commonwealth or licensed under chapter 15D." And that statute at the same time identified a litany of other specified professionals.

State regulations interpreting "mandated reporter" also provided notice of a statute with only limited reach. The Massachusetts Department of Children and Families (DCF) issued a regulation interpreting the text of the statute. 110 C.M.R. 2.00. For clarity, the agency inserted semi-colons between specified professions, rather than using the commas found in the statute. The resulting regulation made clear that "person paid to care for or work with a child in any public or private facility" is not a standalone, broad category of mandated reporter. The regulation defines mandated reporter as a

> public or private school teacher; educational administrator; guidance or family counselor; day care worker or any person paid to care for or work with a child in any public or private facility, **or home or program funded by the Commonwealth or licensed** pursuant to the provisions of M.G.L. c. [15D],[10] which provides day care or residential services to children or which provides the services of child care resource and referral agencies, voucher management agencies, family day care systems and child care food programs; probation officer; clerk/magistrate of the district courts . . .

110 C.M.R. 2.00. Under this regulation, the phrase "any person paid to care for or work with a child in any public or private facility…" is clearly modified, and its expansive scope thus limited, by the phrase that follows it. The whole clause defines one type of mandated reporter and is set off by semi-colons.

2. The standard that the jury were instructed to employ and affirmed by the SJC as a correct construction of the statute is unconstitutionally vague.

The "doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers." *Davis*, 139 S. Ct. at 2325. A statute violates due process when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (cleaned up); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws also violate due process where their indefinite terms allow police, judges, and juries to resolve the reach of a statute "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09. The vagueness doctrine also protects the separation of powers (and here, federalism) by prohibiting

[10] The regulation cites M.G.L. c. 28A which has since been repealed and replaced by chapter 15D, § 1 *et seq* containing essentially identical language.

federal judges from "judicial construction [of state statutes] that writes in specific criteria that its text does not contain" where that is emphatically the role of the state legislature. *Skilling v. United States*, 561 U.S. 358, 415–16 (2010) (Scalia, J., concurring) (citation omitted). As construed, the Massachusetts mandated reporter statute violates this doctrine.

a. Lack of fair notice due to vague terms.

Kozubal argued at trial and on appeal that imposing aggravated criminal penalties on any "person paid to care for or work with a child in any public or private facility" would make a huge swath of the public into mandated reporters. Tr.9:176. Under the jury instruction given which truncated the statute, it is indisputably true as a matter of the English language that any employee of a business geared towards children becomes a mandated reporter subject to ten years in state prison while a trusted neighbor would not. *Contrast United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 408 (1999) (construing gratuity statute to avoid absurdities). Sales clerks at Stride Rite (a children's shoe store) become mandated reporters under this construction because they "work with" children at a "private facility." As does a hairstylist at Snip-its (a children's barber shop), a ticket-taker at Legoland, or a server at Chuck E. Cheese.

But at the time of the offenses, the text of the statute appeared to list only specific professions as mandated reporters and the state regulations implementing the statute agreed with petitioner's interpretation that he was not such a professional. *Bouie*, 378 U.S. at 361 ("that petitioners had no fair warning of the

criminal prohibition . . . is confirmed by the opinion held in South Carolina itself as to the scope of the statute"); *see Grayned*, 408 U.S. at 110 ("interpretation of the statute given by those charged with enforcing it" relevant to fair notice);[11] *Shreveport Grain & Elevator Co.*, 287 U.S. at 84 (statutory construction supported by prior interpretation by agency). Indeed, the Commonwealth has *still* not amended the regulations in light of the decision in petitioner's case. 110 C.M.R. 2.00.

This did not provide "fair warning" to petitioner "in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Aguilar*, 515 U.S. 593, 600 (1995).[12] As noted, petitioner was employed part time at a private school, with no specific job title. He focused on maintaining a research-grade telescope. The incidents occurred at a club event that was open to the public — including adults — and that was not held during the school year. The complainant was not a student at the school. There was no evidence that the school was funded by the Commonwealth or licensed under M.G.L. c. 15D.

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[11] *Grayned*'s statement on the topic is grudging because it was not intended to allow the government to avoid the vagueness doctrine by simply promising to exercise discretion in a predictable way. *Grayned*, 408 U.S. at 110 & n.13; *see Marinello*, 138 S.Ct. at 1108–09 (same).

[12] The language in *Aguilar* is a quote from *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *McBoyle* is instructive here. In that case, this Court employed the fair notice doctrine to construe a criminal statute defining "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, *or any other self-propelled vehicle not designed for running on rails*" to not include aircraft. *McBoyle*, 283 U.S. at 26 (emphasis added).

The language "person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D" cannot have provided fair notice in this context. When seeking to enforce a penal statute, legislatures must speak with more clarity. *Marinello*, 138 S. Ct. at 1108.

b. Lack of fair notice due to unforeseeable retroactive expansion of statutory language.

"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. As in *Bouie*, no prior Massachusetts decision construed the statute in this expansive manner. *Compare id.* at 358–60 (insufficient fair notice where two prior civil cases arguably construed trespass statute similarly). The statutory language defining "mandated reporter" is precise and narrow. But by its strained reading, the SJC expanded the scope of a criminal statute to large swaths of the public for the first time. *Contrast Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (*Bouie* principle applies with less force to common law rules).

In recent years, this Court has only had occasion to apply *Bouie* to fair notice arguments in the context of the "unreasonable application" clause of 28 U.S.C. § 2254(d). *Metrish v. Lancaster*, 569 U.S. 351, 367–68 (2013); *Parker v. Matthews*, 567 U.S. 37, 42 (2012). Thus, the Court could not "say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). It should do so now.

c. The construction by the SJC cured nothing.

On appeal, the SJC rejected Kozubal's argument that the broad construction was vague, violated the rule of lenity, and swept up large swaths of private sector employees. It ruled that the argument "is misguided. These employees are not directly responsible for the care of children, unlike the class of mandated reporters defined by G. L. c. 119, § 21." *Kozubal*, 174 N.E.3d at 1189. It is not clear whether the SJC intended "directly responsible for the care of children" as a limiting construction. The SJC certainly did not require that future juries be so instructed. But even that does not matter to petitioner's case. Petitioner's jury was not asked to decide whether he was "directly responsible for the care of children" at the time of the offense. The extent of Kozubal's responsibilities, his status as an employee, and what he was paid for were all directly at issue at trial. The SJC's statement cures nothing.

CONCLUSION

This Court should grant certiorari and hold that the Massachusetts mandated reporter statute as applied to Kozubal failed to provide fair notice and, as a result, is unconstitutionally vague.

Respectfully submitted,

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