No. 22-

In the

Supreme Court of the United States

NELSON DION,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state bail order/condition of release is a protection order under 18 U.S.C. § 2266(5) for purposes of violating 18 U.S.C. § 2262, which criminalizes interstate travel with the intent to violate a protection order?

2. Whether the plain text of §§ 2262 and 2266 provide sufficient notice that violating a bail order/condition would violate federal law under §§ 2262 and 2266?

3. Whether the absence of judicial notice that violating a bail-condition could have subjected the defendant to federal criminal charges deprived him of due process under the fifth and fourteenth amendments of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner in this Court is defendant-appellant, Nelson Dion. Respondent in this Court is the United States of America.

RELATED CASES

- United States of America v. Nelson Dion, No. 21-1411, U.S., United States Court Of Appeals For The First Circuit. Judgement entered Jun.16, 2022.

- United States of America v. Nelson Dion, No. 2:19-cr-00176-GZS, United States District Court, District of Maine. Judgement entered Mar. 25, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nelson Dion respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals of the First Circuit.

OPINIONS BELOW

The decision of the First Circuit under review is reported at *United States v. Dion*, No. 21-1411 (1st Cir. Jun. 16, 2022) and included in Appendix **A** at 24-66.

The antecedent order of the district court is as follows: *United States v. Dion*, Docket no. 2:19-cr-00176-GZS (D. Me. Mar. 25, 2020) and included in Appendix **B** at 66-76.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided this case was on June 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1251.

PROVISIONS INVOLVED

18 U.S.C.A. § 2262(a)(1) provides:

> (a) Offenses.--
>
> (1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person or the pet, service animal, emotional support animal, or horse of that person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b). (emphasis added).

18 U.S.C. § 2266(5)(A) provides:

> (5) Protection order.--The term "protection order" includes--
>
> (A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection

The Due Process Clause of the fifth and fourteenth amendments to the United States Constitution provide:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *

STATEMENT OF THE CASE

I. Facts Relevant To The Questions Presented

On April 16, 2016, Kittery police arrested Dion for assaulting his then girlfriend, T.N. *United States v. Dion*, 37 F.4th 31, 35 (1st Cir. 2022). Three days after his arrest, Dion appeared in state superior court for a bail hearing. *Id.*

The Superior Court orally advised Dion that while out on bail, he was obligated to comply with various conditions of his release – including the prohibition on contact of any kind with T.N. – and that his failure to abide by the conditions could lead to his arrest. *Id*. At no point, however, during the proceedings was Dion advised by the court that a failure to abide by his bail conditions could lead him to be charged with a federal crime. *Id*. There is no process in which a bail officer or judge must notify a criminal defendant, who lives within a few miles of a bordering state, that he risks violating a federal criminal statute by crossing state lines in violation of a state bail order.

Following the bail hearing, a state-court judge issued a conditional release order. *Id*. This order was issued on a standardized form, which included a no-contact provision that identified T.N. but the box next to the no-contact provision was left unchecked. *Id*.

Three years later a subsequent federal investigation prompted the government to charge Dion with two counts of interstate violation of a protective order, 18 U.S.C. § 2262(a)(1). *Id*. at 3. Allegedly, between about April 19 and June 30, 2016, Dion traveled from Maine to New Hampshire (Count 1) and from New Hampshire to Maine (Count 2) with the intent to have direct contact and communication with, and be in physical proximity to T.N., in violation of a protection order. *Id*.

II. Proceedings in the district court

Dion moved to dismiss the indictment. (**66**). He argued (1) that as a matter of law, the bail order he allegedly violated did not qualify as a protection order under §2266(5), and (2) that even if it did qualify as a protection order, he was not on fair notice of what § 2262

proscribes, in violation of the Due Process Clause to the federal constitution. (**69**).

By order dated March 25, 2020, the district court denied the motion on both grounds. On the issue of statutory construction, the court reasoned that "the plain language" of the definitional statute "encompasses the bail order that prohibited [Dion's] contact with T.N." **(70)**. Citing to *United States v. Cline*, 2019 WL 2465326, *4 (W.D. Tex. June 13, 2019), the court explained that "[t]he adjective 'any,' used repeatedly, indicates legislative intent to give the term 'protective order' broad and inclusive scope"; that the introductory phrase "includes" is "notably open-ended and expansive" and therefore a qualifying protection order may include an order that is not overtly described; and that "[t]he bail order at issue certainly qualifies as 'an order issued by a…criminal court for the purpose of preventing…contact or communication with or physical proximity to, another person." **(70-72)**.

On the issue of adequate notice, the district court concluded that the plain text of §§ 2262 and 2266 itself provides adequate notice, and it rejected Dion's argument that "he was

advised only that failure to abide by bail conditions could lead to his arrest, not that he would be subject to specific penalties," noting, "the Constitution does not require this level of notice." **(74)**.

On August 31, 2020, Dion entered a conditional plea of guilty, reserving the right to appeal the denial of his motion to dismiss. (*ECF No. 109, 110*). The court principally sentenced Dion to 31 months' prison, followed by three years of supervised release, and granted him bail pending the resolution of an appeal to the United States Court of Appeals For the First Circuit.

III. Proceedings First Circuit Court of Appeals

The First Circuit affirmed:

> "Defendant-appellant Nelson Jean Dion challenges his conviction for interstate violation of a protection order under 18 U.S.C. § 2262(a)(1) - an offense created by the *Violence Against Women Act of 1994 (VAWA),* Pub. L. 103-322, § 40001, 108 Stat. 1796, 1902 (1994). His appeal

> presents a question of first impression as to whether the no-contact and stay-away provisions in a conditional release order - requiring a defendant to refrain from contact with the victim of the alleged crime and to stay away from locations frequented by that victim - may constitute a "protection order" as defined by the VAWA. See 18 U.S.C. § 2266(5). We answer this question in the affirmative and uphold the district court's denial of the defendant's motion to dismiss. And as a result, we uphold the defendant's conviction.

United States v. Dion, 37 F.4th 31 (1st Cir. 2022). **(24).**

REASONS FOR GRANTING THE WRIT

I. The Meaning of "Protection Order" Merits This Court's Review

A. The 1st Circuit's expansive reading of 18 U.S.C.A. § 2266(5)(A), would make innocuous bail violations a federal offense

Granting this petition is important because the 1st Circuits interpretation of the statute is so broad that it will be applied arbitrarily without this Court's interpretation and as the 1st Circuit noted, this is an issue of first impression. *United States v. Dion*, 37 F.4th 31, 32 (1st Cir. 2022).

Although 18 U.S.C. § 2266(5)(A) explicitly uses the terms "'injunction,' 'restraining order,' or any other order" it specifically omits the terms 'bail,' 'bail conditions,' and 'conditions of release.' If, as the Government suggest that such items go 'hand in hand' then the "sensible inference that the term left out must have been meant to be excluded… ." *Chevron U. S. A. Inc. v. Echazabal*, 536 U.S. 73, 153 L.Ed.2d 82 (2002)

citing E. Crawford, *Construction of Statutes*, 337 (1940).

The 1st Circuit's interpretation of the statue defining "protection order" is so all-encompassing that any portion of any document derivative from a criminal case could constitute a "protection order." This reading would criminalize all types of orders that are not actually for the purpose of "protection." In its expansive analysis, the first circuit provides:

> " . . . [A]ny other order issued by a civil or criminal court" — is obviously a catch-all. Its wording reflects Congress's intent to include within the statutory sweep a wide swath of court orders that are not specifically delineated. This broadly inclusive intent is apparent from the open-ended language indicating that "any other order issued by a civil or criminal court" may, under particular circumstances, constitute a "protection order." The word "any," in particular, "has an

> expansive[1] meaning," *Patel v. Garland*, —— U.S. ——, 142 S. Ct. 1614, 1622, –— L.Ed.2d —— (2022) quoting *Babb v. Wilkie*, —— U.S. ——, 140 S. Ct. 1168, 1173 n.2, 206 L.Ed.2d 432 (2020)), that is most naturally read to modify "other order issued by a civil or criminal court," denoting such a court order of whatever kind, see *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9-10, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011) (reasoning that statutory phrase including term "any" "suggests a broad interpretation"); *Salinas v. United States*, 522 U.S. 52, 56-58, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (explaining that the term "any" reflects "expansive" language). This commodious phrasing leaves no doubt that Congress did not intend to exclude particular kinds of orders simply because they were left unmentioned.

[1] The First Circuit later opined, "[h]ad Congress included a comma before the "so long as" clause, we doubt that there would be any question about the clause's proper construction. *Dion*, 37 F.4th at 37.

> See *Echazabal*, 536 U.S. 73); see also *United States v. Contreras-Hernandez*, 628 F.3d 1169, 1172 (9th Cir. 2011) (rejecting inference that unmentioned item is excluded and explaining that "catchall language" "suggests a broader reach"). Consequently, the bare fact that the statutory definition does not specifically mention conditional release orders or no-contact orders is not dispositive."
>
> *U.S. v. Dion*, 37 F.4th 31, 35 (1st Cir. 2022).

In the year 2020, 7.63 million arrests were effectuated. https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/

New York alone sets bail for approximately 58,514 arrestees per year.[2] That means New York issues about 160 bail orders per day.

[2] New York collects data regarding the number of people who are released on bail conditions. The "de-identified csv extract"

Under the 1st Circuits expansive reading of the term 'protective order,' the number of people exposed to federal prosecution for violating release conditions is far more than intended by Congress. The greater concern is that federal charges become permissible in matters inapposite to domestic violence matters. For example, under the 1st Circuits expansive reading of 18 U.S.C.A. § 2262(a)(1) and 2266(5), a person could be subjected to federal prosecution if it is determined that harassed the service animal of a named witness in a criminal case who was part of a no-contact provision of conditions of release related to that criminal case. See 18 U.S.C.A. § 2262(a)(1). This is precisely the conundrum with an expansive reading of the statute as the 1st Circuit espouses.

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contains statewide criminal arraignments from January 1st, 2020 to December 31, 2021. https://ww2.nycourts.gov/pretrial-release-data-33136.

B. There are procedural differences between protective order and bail conditions.

There are significant differences between a protective order and bail conditions, perhaps the most pressing being the procedural requirements that are associated with each. One significant difference between a "protection order" and a "bail order" in Maine is that a protective order has a set trial date. See 19-A M.R.S.A §4006(1) ("within 21 days of the filing of the complaint, a hearing must be held … .") A bail order does not have an automatic court date and once there is a de novo review, which often occurs without assigned counsel when the defendant has an initial appearance, no further relief is available. See 15-A M.R.S.A. §1028(3).

II. The Notice Provisions of 18 U.S.C. § 2262 and 2266(5) Are Inadequate

Due process entitles a criminal defendant to fair notice and requires that courts maintain a balance between the separation of powers. *United States v. Davis*, 139 S. Ct. 2319, 2321 (2019). As discussed *supra*, the provisions of § 2262 and 2266 have been significantly judicially expanded yet even the Department of Justice acknowledges that "[18 U.S.C. 2266(5)] is unclear about the extent of notice the defendant must have had for the protection order to be considered valid." https://www.justice.gov/archives/jm/criminal-resource-manual-1120-prosecutions-under-18-usc-2262#:~:text=%C2%A7%202262%3A%20%2D%20Interstate%20Violation%20of,order%20must%20then%20have%20occurred

Due Process requires that, as a condition of enforcement, Dion reasonably understood that the violation of bail conditions could lead to a federal charge and penalties. *United States v. Nat'1 Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963). This means all elements of the offense, including that violating the bail

conditions would be akin to violating a "protection order" as defined under 18 U.S.C. §§ 2266(5) are both defined with "sufficient definiteness" in general and in this particular case so that Dion could "understand what conduct is prohibited" and the possible penalties attached. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The Due Process Clause "requires that statutes or regulations be sufficiently specific to provide fair notice of what they proscribe." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 50 (1st Cir. 2003). To determine whether a statute or regulation meets that requirement, this Court should look first to the language of the statute or regulation. *United States v. Duran*, 596 F.3d. 1283 (11th Cir. 2010). There is not only a general lack of notice that a violation of a bail condition is a violation of 18 U.S.C. §§2262(a)(1), but there was a failure of notice in this particular case.

"The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair

notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 591, 135 S. Ct. 2551, 2553 (2015)

"Employing the [constitutional avoidance[3]] canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. 2319, 2333 (2019).

As to arbitrary enforcement, take for example, a state that issues two separate bail orders that demand two parties stay away from each other. Assume the parties are

[3] Constitutional Avoidance is the principal that, if possible, the Supreme Court should avoid ruling on constitutional issues, and resolve the cases before them on other (usually statutory) grounds. In practice, what this often means is that if the Supreme Court is faced with two possible interpretations of a statute, one of which is plainly constitutional, and the other of which is of questionable constitutionality, the court will interpret the statute as having the plainly constitutional meaning, to avoid the hard constitutional questions that would come with the other interpretation.
https://www.law.cornell.edu/wex/constitutional_avoidance

mother and son. The mother resides in State X, which is 10 miles away from State Y, where the son resides. The son goes to State X, into his mother's house to drop off his father's medication or necessities once per week. The Son is arrested for violating the bail conditions and, if a prosecutor thinks he is deserving, of violating a federal law under VAWA because he violated a protection order.

Some states allow mutual protection orders or restraining orders. Abusers often file retaliatory protection orders to punish victims that file against the abuser. Assume the victim and abuser live 10 miles apart but in different states. If the victim crosses state lines to visit the abuser in the abuser's resident state, the victim, if a prosecutor believes the victim deserving, may be charged with violating a protection order under Federal Law.

These hypotheticals can only be derivative of a statute "so standardless that it invites arbitrary enforcement" under *Johnson*.

Under procedural due process, the constitution demands that when the federal government acts in such a way that denies a citizen of a life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker.

By imposing a vague federal criminal statute onto a state bail condition, the government has denied the defendant his liberty interest. The portion of procedure that was violated in this case was notice. Here, there was not notice to the defendant—there was not actual notice because there was not written notice about any federal entity on the bail form, and because the judge never told the defendant that he would be subjected to federal charges if he violated his state bail conditions.

In fact, in setting bail conditions, most state-court judges likely do not know that a defendant could commit a federal crime while at the same time only violating a state-issued bail condition. This is because the text of

§2266(5) is not specific enough to alert (through its plain meaning) that a defendant be charged with violating a "protective order" under the federal law if the defendant violates his *state* conditions of release. The Violence Against Women Act was passed so that all States could give full faith and credit to protection orders from all other states, not to surprise criminal defendants that fall into the broad wording of the statute.

Further, there was not constructive notice because the plain text of the statute is overbroad—in that "it fails to give ordinary people fair notice of the conduct it punishes" under *Johnson*. This notion is supported by the textual arguments above and consistently different judicial interpretations of VAWA.

Assume a judge knows that a bail condition is a protective order under a federal statute. At the crossroads between the constitutional deficiencies of actual and constructive notice normally owed to a United States citizen, some courts would undoubtedly interpret the statute to *not* cover a particular

condition as violating § 2266(5), because for example, the victim never sought an order of protection and never asked another person to do it for them, and the victim was thus not a "person seeking protection."

Thus, even assuming a neutral decision maker knew that a defendant *could* be subject to federal charges, the textual vagueness of the statute may nevertheless lead a court to *not* notify a defendant that his case could trigger §§ 2261(a) or 2266(5), because it is so unclear.

Thus, it becomes a due process issue because if a defendant violates conditions of release, he may be doing something that is ordinarily legal, albeit in violation of his bail conditions—which means he is on notice that he is violating *State law*. Similarly, under these facts, the defendant was not on notice that he was violating a Federal Law, since his bail order only shows "State of Maine."

But because violating this condition fell within § 2266(5), an "all encompassing" federal criminal statute, the defendant's state-

law bail violation put the defendant in federal prison for years.

In sum, while all statutes include some obscurity, §2266(5) is *unconstitutionally* vague and broad. Not only does this statute violate the constitution's notice mandate under the 5th and 14th amendments (which these facts trigger because of the defendant's liberty interest), but it also violates the nondelegation doctrine. Congress cannot just delegate its law-making authority to article three courts or article one "courts." Here, multiple article three judges, the FBI, *and* the Justice Department had to make up their own law in this case because of the broad and vague wording of this statute. Without a concrete standard from congress, criminal defendants are going to be prosecuted and put into jail under § 2266(1)(a) based on the facts of each case, instead of an accurate application of the facts to the law.

APPENDIX

APPENDIX A: OPINION, First Circuit Court of Appeals (dated Jun. 16, 2022)

37 F.4th 31

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

UNITED STATES of America, Appellee,

v.

Nelson Jean DION, Defendant, Appellant.

No. 21-1411

Opinion

SELYA, Circuit Judge.

Defendant-appellant Nelson Jean Dion challenges his conviction for interstate violation of a protection order under 18 U.S.C. § 2262(a)(1) — an offense created by the *Violence Against Women Act of 1994 (VAWA)*, Pub. L. 103-322, § 40001, 108 Stat. 1796, 1902 (1994). His appeal presents a question of first impression as to whether the no-contact and

stay-away provisions in a conditional release order — *33 requiring a defendant to refrain from contact with the victim of the alleged crime and to stay away from locations frequented by that victim — may constitute a "protection order" as defined by the VAWA. See 18 U.S.C. § 2266(5). We answer this question in the affirmative and uphold the district court's denial of the defendant's motion to dismiss. And as a result, we uphold the defendant's conviction.

I

We briefly rehearse the relevant facts and travel of the case. In April of 2016, local authorities arrested the defendant and charged him with felony aggravated assault under Maine law. See Me. Rev. Stat. Ann. tit. 17-A, § 208(1)(A). The offense involved the defendant's long-term girlfriend, T.N. (who had reported to the police that she had been physically assaulted). Following a bail hearing, a state-court judge issued a conditional release order. This order was issued on a standardized form, which included

a no-contact provision that identified T.N. and contained marks indicating that the defendant was ordered to stay away from certain locations (such as T.N.'s residence). Although the box next to the no-contact provision was left unchecked, the executed version of the defendant's bail-bond agreement reflects that he agreed to cease communication with T.N. and stay away from the locations identified in the conditional release order throughout the period of his conditional release.

The assault charge was eventually dismissed due to T.N.'s untimely death. Three years later, though, a federal grand jury sitting in the District of Maine returned an indictment that charged the defendant — in two counts — with interstate violation of a protection order. See 18 U.S.C. § 2262(a)(1). The indictment alleged that between April and June of 2016, the defendant traveled back and forth between Maine and New Hampshire, intending to have direct contact and communication with, and be in physical

proximity to, T.N., in violation of a protection order.

The defendant moved to dismiss the indictment on two grounds. See Fed. R. Crim. P. 12(b). First, he claimed that the conditional release order was not a "protection order" as defined in 18 U.S.C. § 2266(5). Second, he claimed that the charges against him abridged the Due Process Clause. See U.S. Const. amend. V.

The district court rejected both claims. See *United States v. Dion*, No. 19-176, 2020 WL 1450441, at *3 (D. Me. Mar. 25, 2020). Interpreting the statutory definition of "protection order" as "clearly encompass[ing] the bail order" based on the "plain language" of the statute, the district court jettisoned the defendant's first claim. Id. at *1-2. The court then found the defendant's constitutional claim wanting. See *id.* at *2-3.

The defendant subsequently entered a conditional guilty plea, see Fed. R. Crim. P. 11(a)(2), reserving the right to appeal from the denial of his motion to dismiss. The district

court sentenced him to concurrent thirty-one-month terms of immurement on the charged counts. This timely appeal followed.

II

In this court, the defendant does not break new ground but, rather, reprises arguments that he made below. To set the stage for our consideration of those arguments, we note that Federal Rule of Criminal Procedure 12(b)(1) allows for pretrial consideration of motions that are based on "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Typically, when such a motion seeks to dismiss an indictment, its resolution will turn on pure questions of law regarding the sufficiency of the indictment's allegations. See *United States v. Brissette*, 919 F.3d 670, 675 (1st Cir. 2019). Sometimes, however, resolving such a motion

may require addressing facts that are not alleged in the indictment. In that event, a court still may resolve a "pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts." *United States v. Musso*, 914 F.3d 26, 29-30 (1st Cir. 2019) (quoting *United States v. Weaver*, 659 F.3d 353, 355 n* (4th Cir. 2011)).

With this preface in place, we turn to the defendant's asseverational array. Our standard of review is straightforward. As the facts necessary to resolve this appeal are undisputed, we address only questions of law, which engender de novo review. See *id.* at 30; *United States v. Therrien*, 847 F.3d 9, 14 (1st Cir. 2017).

A

Before we grapple with the defendant's main contentions, we pause to address a subsidiary issue. The indictment charged the

defendant with violating 18 U.S.C. § 2262(a)(1), which criminalizes, in relevant part, "travel[ ] in interstate or foreign commerce ... with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person ... and subsequent[ ] engage[ment] in such conduct." Here, the defendant is alleged to have violated the no-contact and stay-away provisions (collectively, the No-Contact Order) in the conditional release order.

Maine law authorizes courts to "order the pretrial release" of a defendant "on a condition or combination of conditions." Me. Rev. Stat. Ann. tit. 15, § 1026(3). Although denominated "conditions of release," such provisions are full-fledged orders of the court: Maine law makes it a crime to "violate[ ] a condition of release." *Id.* § 1092(1). The defendant does not dispute that such conditions of release are generally binding. He

does, however, suggest that the No-Contact Order imposed in his case was not in force. This suggestion is based upon what appears to be a scrivener's error: an unchecked box next to the printed no-contact provision.

We conclude that the defendant's suggestion is specious. The conditional release order indicates that it was intended to be "attached" to the bail bond, which itself contains the defendant's signed agreement to refrain from contact with T.N. Moreover, the defendant concedes in his brief that he was advised of the no-contact requirement during his bail hearing. It is, therefore, abundantly clear that the defendant was aware of the requirement and by no means prejudiced by any missing checkmark in the conditional release order. Cf. *United States v. Merced-García,* 24 F.4th 76, 80 (1st Cir. 2022) (finding on plain error review that defendant was not prejudiced by unsigned section of plea agreement in part because agreement itself was signed*); United States v. Meléndez-Santana*, 353 F.3d 93, 100 (1st Cir. 2003) (concluding that conditions stated orally at

sentencing control even though conditions of release in written sentencing order differ materially), overruled in part on other grounds by *United States v. Padilla*, 415 F.3d 211, 215 (1st Cir. 2005) (en banc). Consequently, we continue our analysis secure in the knowledge that the No-Contact Order prohibited the defendant from communicating with T.N.

B

The defendant's principal challenge to the indictment rests on the premise that, as a matter of law, neither the conditional release order nor any part of it is a "protection order" within the meaning of 18 U.S.C. § 2262(a)(1). This premise is flawed and, thus, the defendant's challenge fails.

The term "protection order," as used in 18 U.S.C. § 2262(a)(1), takes the meaning provided in 18 U.S.C. § 2266 (the relevant "Definitions" provision of the VAWA). The

defendant's challenge requires us to train the lens of our inquiry on whether the No-Contact Order satisfies the definition supplied in section 2266. See *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 n.10, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (explaining that, where "Congress explicitly defined the operative term," a court must focus on the statutory definition). To the extent that any aspect of the statutory definition is unclear, a court may consider the ordinary meaning of the defined term. See *United States v. Stevens,* 559 U.S. 460, 474, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); see also *Bond v. United States*, 572 U.S. 844, 861, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition.").

Section 2266(5)'s definition of "protection order" encompasses two subsections. See 18 U.S.C. § 2266(5). The relevant subsection

broadly defines a "protection order" as including

> any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection[.]

Id. § 2266(5)(A). The opening clause of this subsection identifies three types of orders that may constitute "protection order[s]." Neither party suggests that the No-Contact Order fits within the description of either of the first two types. That leaves the third type.

The third type — "any other order issued by a civil or criminal court" — is obviously a catch-all. Its wording reflects Congress's intent to include within the statutory sweep a wide swath of court orders that are not specifically delineated. This broadly inclusive intent is apparent from the open-ended language indicating that "any other order issued by a civil or criminal court" may, under particular circumstances, constitute a "protection order." The word "any," in particular, "has an expansive meaning," *Patel v. Garland*, —— U.S. ——, 142 S. Ct. 1614, 1622, —— L.Ed.2d —— (2022) (quoting *Babb v. Wilkie*, —— U.S. ——, 140 S. Ct. 1168, 1173 n.2, 206 L.Ed.2d 432 (2020)), that is most naturally read to modify "other order issued by a civil or criminal court," denoting such a court order of whatever kind, see *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 9-10, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011) (reasoning that statutory phrase including term "any" "suggests a broad interpretation"); *Salinas v. United States*, 522 U.S. 52, 56-58, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997)

(explaining that the term "any" reflects "expansive" language). This commodious phrasing leaves no doubt that Congress did not intend to exclude particular kinds of orders simply because they were left unmentioned. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002); see also *United States v. Contreras-Hernandez*, 628 F.3d 1169, 1172 (9th Cir. 2011) (rejecting inference that unmentioned item is excluded and explaining that "catchall language" "suggests a broader reach"). Consequently, the bare fact that the statutory definition does not specifically mention conditional release orders or no-contact orders is not dispositive.

None of this is to say that the catch-all category is unbounded. Most naturally read, the statutory definition circumscribes the catch-all category by two limitations.[4] First, a

[4] The defendant does not contend that the catch-all category should be constrained in any relevant way by the application of the interpretive maxim ejusdem generis. That maxim teaches that when a general term follows specific terms, the general term covers only examples of the same type as the preceding specific terms. See *Christopher v. SmithKline Beecham Corp.*,

"protection order" must have been issued for one of the purposes described in the definition. See 18 U.S.C. § 2266(5)(A). Second, "any other order issued by a civil or criminal court" may be a "protection order" only "so long as" it is "issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." Id.

The defendant does not dispute that the No-Contact Order in this case was issued for the purpose of preventing "contact or communication with or physical proximity to" T.N. Id. Nor could he: the No-Contact Order was designed to prevent the defendant both from contacting T.N. and from being in physical proximity to places frequented by her. The defendant does contend, however,

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567 U.S. 142, 163 n.19, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012). Although "firmly established," the maxim "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Garcia v. United States*, 469 U.S. 70, 74-75, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980)). This interpretive canon has no bearing here, inasmuch as express textual limitations provide sufficient guidance as to what Congress intended to include in the catch-all category.

that the second limitation (the "so long as" clause) has not been satisfied — a deficiency that, in his view, prohibits the inclusion of the No-Contact Order in the catch-all category.

The government demurs. It maintains that the second limitation does not narrow the catch-all category because those parts of the definition are separated by a different clause that begins with the word "including." Relying on the decision in *United States v. Cline*, 986 F.3d 873, 876 (5th Cir. 2021), the government submits that the "so long as" clause is best understood as modifying the orders described in the "including" clause but not the orders encompassed by the earlier clauses, like the catchall category.

In *Cline*, the Fifth Circuit rejected a defendant's argument that a mandatory protection order was not a "protection order" as defined in section 2266(5). See *id.* at 875-76. The *Cline* defendant argued that because the order was issued sua sponte pursuant to a statute, it did not satisfy the conditions described in the "so long as" clause. See id. at

875. The Fifth Circuit gave this argument short shrift. It declared that the orders described after the word "including" were merely illustrative and did not limit the sweeping definition provided in the opening clause. See id. at 876. Applying the nearest-reasonable-referent canon (an interpretative canon teaching that an adverbial phrase ordinarily should apply to its nearest reasonable referent), the court noted that the nearest reasonable referents for the conditions stated in the "so long as" clause were those orders described in the "including" clause. Id.

Our reading of the definition differs somewhat from that of the *Cline* court. We conclude that the "so long as" clause applies four-square to the catch-all category of "any other order."[5] "So long as" is familiar language and bears the same meaning as "provided that." That phrase introduces a condition. The

[5] The *Cline* court acknowledged that this reading may well be warranted, and ultimately determined that the mandatory protection order was a "restraining order." See 986 F.3d at 876 ("At most, the limitation would apply to the clause preceding the illustrative category, which defines a protection order as including 'any other order' that meets certain characteristics.").

Fifth Circuit's reading would render that condition without bite, as it would apply only to some examples of "other order[s]." Although the government argues that this result is permissible based on the expansive nature of the definition, we decline its invitation to adopt a construction that renders a condition nugatory. We think that the more sensible reading — to give the conditional language effect — is to read that condition as applicable to the category of orders preceding those described in the "including" clause. See *Brown v. United Airlines, Inc.*, 720 F.3d 60, 68 (1st Cir. 2013) ("[I]t is settled law that courts should strive to breathe life into every word and phrase in a statute."). The appropriateness of that reading is confirmed by the language of the "so long as" clause, which refers to "any civil or criminal order," and mirrors the subject matter of the catchall category.

Had Congress included a comma before the "so long as" clause, we doubt that there would be any question about the clause's proper construction. We acknowledge that the absence of that punctuation renders the

sentence somewhat awkward — but its meaning remains apparent. And where, as here, meaning is apparent, we will not accord decretory significance to omissions in punctuation. See *Barrett v. Van Pelt*, 268 U.S. 85, 91, 45 S.Ct. 437, 69 L.Ed. 857 (1925) ("Punctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." (quoting *Chi., Milwaukee & St. Paul Ry. Co. v. Voelker*, 129 F. 522, 527 (8th Cir. 1904))); *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54, 9 L.Ed. 624 (1837) ("Punctuation is a most fallible standard by which to interpret a writing ...."). Because the clause is most naturally read as limiting the catch-all category, that is how we read it.

C

The question remains whether the "so long as" clause extends to the No-Contact Order. There is more to that question than meets the eye.

The "so long as" clause has four distinct elements. It requires that "any civil or criminal order" be (1) "issued in response" (2) "to a complaint, petition, or motion" that is (3) "filed" (4) "by or on behalf of a person seeking protection." 18 U.S.C. § 2266(5)(A). The defendant barely develops any argument particular to this clause and (from what we can tell) he only contests the fourth element.[6] We thus accept the government's unchallenged representation that the other elements are satisfied because the No-Contact Order was issued in material part in response to a prosecutor's oral motion for no-contact and stay-away conditions. The question, then, is whether that motion was submitted "by or on behalf of a person seeking protection."

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[6] The defendant categorically contends that the "so long as" clause means "either the person being protected must seek the protection order or be seeking protection, or someone on behalf of that person has to request the Maine judiciary to order protection." He asserts, without elaboration, that a "bail order does not fit this definition," and that even if it did, "there is no evidence on this record that T.N. herself sought a no-contact provision" in the conditional release order. Fairly read, we deem the defendant's textual argument as one premised exclusively on the fourth element.

It cannot be gainsaid that T.N. was a "person seeking protection" from abuse of the kind with which the VAWA is concerned.[7] She was a victim who sought protection by complaining of abuse to the authorities. She made an allegation of physical abuse at the hands of her long-term boyfriend (the defendant), thus initiating a criminal charge of aggravated assault. That fact is self-evident and, in all events, the defendant does not challenge the government's representation.

This leaves the issue of whether the prosecutor's motion for the no-contact and stay-away conditions was made "on behalf of" T.N. The parties have divergent views on how to understand "on behalf of" as used in the "so long as" clause. The defendant suggests that a prosecutor cannot be said to have acted "on behalf of" the victim because the victim is not

[7] The circumstances of this case do not require that we address the extent (if any) to which a "person seeking protection" encompasses protection against abuse other than abuse of the kind that the VAWA was intended to proscribe (such as, intimidation of a witness who is not a victim).

the prosecutor's client but, rather, the prosecutor acts for the state. The government rejoins that the prosecutor sought the No-Contact Order "on behalf of" T.N. because the no-contact and stay-away provisions were in the interest of and for the benefit of T.N.

Were we to consider the phrase "on behalf of" in isolation, it would be difficult to discern what was meant by Congress. Some sources indicate that the "traditional" usage of "on behalf of" was to signify "as the agent or representative of" and was distinct from the phrase "in behalf of," which signified "in the interest of" or "for the benefit of." See *Bryan A. Garner, Garner's Modern American Usage*, 103 (4th ed. 2016). But Congress's use of the preposition "on" rather than "in" provides no helpful clue: "[i]n current usage, the distinction is seldom followed." *Id.*; see 2 *Oxford English Dictionary* 73 (2d ed. 1989) (explaining that "on behalf" is used "in the sense of" "in behalf" in "recent use," referring to texts from the eighteenth and nineteenth centuries). And it is likely that such a distinction "never had a sound basis in actual

usage." *Behalf, Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/behalf (explaining that in American English, "the distinction is frequently not observed").

Rather, at the time of the statute's enactment, as now, the prepositional phrase "on behalf of" had more than one meaning. *See Webster's Third New International Dictionary of the English Language Unabridged* 198 (1981) (defining both "on behalf of" and "in behalf of" as "in the interest of," "as the representative of," or "for the benefit of"). The phrase may be narrowly understood as describing an agency principle, as in, a party acting as a "representative of" a client. See id. But the phrase also may be more broadly understood as describing the purpose of some act: for example, "on behalf of" can mean either "in the interest of" or "for the benefit of." See *id.*; see also *Madden v. Cowen & Co.*, 576 F.3d 957, 973 (9th Cir. 2009) (holding that "on behalf of" as used in federal securities law means "in the interest of, as a representative of, or for the benefit of"); *United States v.*

Frazier, 53 F.3d 1105, 1112 (10th Cir. 1995) (interpreting guidelines sentencing enhancement using phrase "on behalf of," and beginning with premise that "literal" meaning could be "as a representative of" or "in the interest or aid of").

The multiple meanings of "on behalf of" suggest that the statutory text may be ambiguous, leading us to question whether the rule of lenity may be in play. That rule is a principle of statutory construction that requires narrow constructions of ambiguous criminal statutes. See *Kasten, 563 U.S.* at 16, 131 S.Ct. 1325. But it applies when a criminal statute contains a "grievous ambiguity or uncertainty," and "only if, 'after seizing everything from which aid can be derived,' " a court "can make no more than a guess as to what Congress intended." *Muscarello v. United States,* 524 U.S. 125, 138–39, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 629 n.17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), and

United States v. Wells, 519 U.S. 482, 499, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997)) (internal quotation marks omitted); see *Ocasio v. United States*, 578 U.S. 282, 136 S. Ct. 1423, 1434 n.8, 194 L.Ed.2d 520 (2016*); United States v. Báez-Martínez*, 950 F.3d 119, 129 (1st Cir. 2020). In other words, a "grievous ambiguity" requires more than the "simple existence of some statutory ambiguity." *Muscarello*, 524 U.S. at 138-39, 118 S.Ct. 1911; see *Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 787, 206 L.Ed.2d 81 (2020). Because any ambiguity latent in the phrase "on behalf of" is resolved by reference to the statute's text and context, we conclude that the rule of lenity has no application here.

At any rate, the defendant — on appeal — has not developed any argument that such a grievous ambiguity exists. The only rule-of-lenity argument that the defendant makes in this court relates to supposed ambiguity arising from the No-Contact Order's unchecked box (an entirely different issue). See supra Part II(A). As to the meaning of the "on behalf of" language, any rule-of-lenity

argument is therefore waived. See *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (referring to "the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); see also *United States v. De la Cruz*, 998 F.3d 508, 519 n.12 (1st Cir. 2021) (deeming lenity argument waived); *United States v. Voisine*, 778 F.3d 176, 185 n.4 (1st Cir. 2015) (same).

In all events, the rule of lenity has no application here. To verify this conclusion, we first repair to the language of the statute itself, mindful that we must consider the statutory "text, structure, history, and purpose" before the rule of lenity comes into play. *Barber v. Thomas*, 560 U.S. 474, 488, 130 S.Ct. 2499, 177 L.Ed.2d 1 (2010); see *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (explaining that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context

of the statute as a whole"). The statute's text and context make clear that the meaning of "on behalf of" encompasses more than an agency principle.

To start, a broader understanding of the phrase "on behalf of" is necessary to give those words significance when read in the context of the "so long as" clause. The *40 phrase — complete with its neighboring words — is "by or on behalf of." The conjunction "or" suggests that "on behalf of" is an alternate prepositional phrase to "by." "By" is sufficiently broad to account for acts performed by legal representatives of a party. Dictionary definitions of "by" include both actions done "through the direct agency" of a party and those done "through the medium of (an indirect or subordinate agent)." See *Webster's Third International*, *supra* at 307. These meanings accord with our commonsense understanding of the term as used in connection with court filings. A motion filed "by" a party, for instance, is ordinarily

understood as capturing motions filed at the direction of a party (say, by a party's lawyer). Accordingly, to give meaning and effect to the phrase "on behalf of," the phrase must mean something more than the simple memorialization of an agency principle that is already captured in the word "by." See *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (quoting Inhabitants of *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883))).

Next, the "so long as" clause's reference to "criminal order[s]" makes pellucid that the phrase "on behalf of" means "in the interest of" or "for the benefit of." Unlike civil protection orders — which are sought by a petitioner either by bringing an independent civil action or by motion in an ongoing civil case — "[c]riminal protection orders" are often issued "as bail conditions or as conditions of release to protect the victim during the pendency of a criminal case." *Off. on Violence Against Women, U.S. Dep't of Just., 2018 Biennial*

Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act 148 (2018), https://www.vawamei.org/wpcontent/uploads/2020/07/rtc_entire_final_oct2019.pdf. At the time of the VAWA's enactment — as now — states used no-contact and stay-away orders in criminal cases as a means of addressing the problem of domestic abuse.[8] See *Model Code on Domestic and Family Violence*, § 208 (Nat'l Council of Juv. & Fam. Ct. Judges 1994) ("Before releasing a person arrested for or charged with a crime involving domestic or family violence ..., the court or agency having authority to make a decision concerning pretrial release ... may impose conditions of release or bail on the person to protect the alleged victim," including no-contact and stay-away orders); see also *Developments in the*

[8] Maine furnishes an example. That state has instituted a civil petition process for those seeking orders of protection. See Me. Rev. Stat. Ann. tit. 19-A, § 4005. It has, however, also statutorily authorized courts to issue sua sponte protection orders as a condition of pretrial release in criminal cases involving crimes between family members. See id. tit. 15, § 321.

Law — Legal Responses to Domestic Violence, II. Traditional Mechanisms of Response to Domestic Violence, 106 Harv. L. Rev. 1505, 1514 & n.54 (1993) (explaining that jurisdictions may use no-contact orders as a condition of bail or pretrial release); *Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 1167 & n.2259 (1993) (observing that states are "increasingly placing conditions on bail and pretrial release for domestic violence perpetrators" and collecting relevant state laws). Congress must have been aware of this praxis when it legislated the VAWA as the federal response to the issue of domestic violence and must have intended that the "protection order" definition encompass no-contact and stay-away orders *41 imposed as conditions of release or bail. See *Voisine v. United States*, 579 U.S. 686, 699, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (inferring from state-law background against which Congress enacted federal ban on firearm ownership that Congress intended

crime to encompass individuals with prior misdemeanor convictions for reckless use of force against a domestic relation).

Viewed against this backdrop, the reference to "criminal order[s]" in the "so long as" clause supplies strong evidence that "on behalf of" is not narrowly circumscribed by agency principles. Those orders are typically issued either at a prosecutor's behest or sua sponte by the court (and not at the request of a victim). See *Jeannie Suk, Criminal Law Comes Home*, 116 Yale L.J. 2, 16-17 (2006) ("In most jurisdictions today, criminal courts issue protection orders at the prosecutor's request as a condition of pretrial release after a [domestic violence] arrest."); *Christine O'Connor, Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. Rev. 937, 946-47 (1999) (explaining that criminal protection orders are criminal no-contact orders that courts may issue "as part of another criminal proceeding, such as [a] bail determination, with the state acting as a party"). A narrow construction of the phrase "on behalf of" would — all things considered —

be unreasonable as it would nullify Congress's apparent intent to include "criminal order[s]" in the definition's sweep. "Everything depends on context, and when read in context," *Brown*, 720 F.3d at 68, the phrase "on behalf of" in the "so long as" clause must mean "in the interest of" or "for the benefit of."

If more were needed — and we do not think that it is — our reading of the phrase "on behalf of" is consistent with the apparent purposes of the "so long as" clause and the "protection order" definition generally. The legislative history suggests that the "so long as" clause may well have been intended to exclude orders issued sua sponte by courts without any indication that a particular person was seeking protection. Congress, when enacting the VAWA, was skeptical of so-called "mutual protection orders," which are protection orders running against those who sought protection orders in the first place. See *Catherine F. Klein, Full Faith and Credit: Interstate Enforcement of Protection Orders*

Under the Violence Against Women Act of 1994, 29 Fam. L. Q. 253, 266 (1995). When it enacted a full faith and credit provision to require that jurisdictions enforce protection orders of other jurisdictions, Congress purposefully denied full faith and credit status to protection orders that were "issued by a court against a person who ... filed a written pleading for protection ... if the order was issued sua sponte by the court or if it was not based on specific findings that each party was entitled to an order." *H.R. Rep. 103-395*, at 35-36 (1993); see 18 U.S.C. § 2265(c) (excluding "protection order issued ... against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse" if "no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order"). Our reading of the "so long as" clause similarly removes from the catch-all category's domain any order that does not respond to the interests of "a person seeking protection."

We add, moreover, that a broad reading of "on behalf of" is consistent with Congress's

intent to afford the "protection order" definition expansive scope. The definition's scope sets the boundaries for the reach of the VAWA's criminal provisions addressing interstate abuse using the term "protection order." A broad definition furthers the original purpose of those provisions, which were enacted to address domestic abusers who had theretofore escaped both the reach of state law enforcement and the jurisdiction of state court orders. See *S. Rep. No. 103-138*, at 61-62 (1993) (explaining domestic violence as an interstate issue that justified "requir[ing] one State to enforce the 'stay-away' order of another" and warranted imposition of federal penalties to address "abusers who cross State lines to continue abuse"); *S. Rep. No. 101-545*, at 39-40 (1990) (describing interstate crimes as intended to "clos[e] loopholes created by the division of criminal law responsibilities among the States"). To this end, Congress's changes to the "protection order" definition since the VAWA's enactment served only to expand its breadth. See *Violence Against Women and Department of Justice Reauthorization Act of*

2005, Pub. L. 109-162, § 106, 119 Stat. 2960, 2982 (2006) (adding, among other things, term "restraining order" and word "any" before "other order"); *151 Cong. Rec. S13*,749, S13,763 (2005) (explaining in section-by-section analysis that changes were made to "clarify that courts should enforce the protection orders issued by civil and criminal courts in other jurisdictions").

It would be nothing short of quixotic to read "on behalf of" narrowly and leave unpunished (under the VAWA) violators of criminal orders sought by prosecutors to protect victims of abuse of the kind intended by Congress to come under the carapace of the VAWA, simply because the victim or her legal representative may not specifically have requested such orders. To be sure, some orders issued sua sponte or at the request of prosecutors might be considered "restraining order[s]" and, thus, included within the "protection order" definition. See *Cline*, 986 F.3d at 876. But a related penalty provision for the crime of stalking under the VAWA indicates that Congress considered the terms

"restraining order" and "no-contact order" to refer to distinct types of orders. See 18 U.S.C. § 2261(b)(6) (punishing whoever "commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266"). It would be implausible (indeed, senseless) for Congress to have excluded from the "protection order" definition no-contact orders issued in criminal proceedings that would not otherwise be considered "restraining order[s]," solely because they had not been requested by a victim or her attorney. We can discern no plausible reason as to why Congress would disparately apply such a limitation to exclude, for example, sua sponte no-contact orders but not sua sponte restraining orders. The interpretation of a criminal statute cannot be hung on so wobbly a hook. Cf. *Caron v. United States*, 524 U.S. 308, 316, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998) ("The rule of lenity is not invoked by a grammatical possibility. It does not apply if the ambiguous reading relied on is

an implausible reading of the congressional purpose.").

In this instance, all roads lead to Rome. Consistent with the various interpretive modalities explored above, we conclude that the phrase "on behalf of" in the "so long as" clause must mean "in the interest of" or "for the benefit of" a person seeking protection. With this meaning in place, the prosecutor's request for no-contact and stay-away provisions easily satisfies the requirement that such a request be made "on behalf of" a victim. We hold, therefore, that the No-Contact Order constitutes a "protection order" as defined in section 2266(5).

D

The defendant's contrary arguments are unconvincing. Only one warrants discussion.

The defendant dwells at great length on how certain state procedures for obtaining civil protection orders afford significant

safeguards to alleged abusers. But he fails to persuade us that either the VAWA's text or any other reliable indicia of congressional intent suggest that court orders can only satisfy the statutory definition if they are accompanied by procedural trappings peculiar to civil cases. In fact, neither the elements of the crime nor the definition of "protection order" require a protection order that was issued following notice and an opportunity to be heard. *Cf. United States v. Hicks*, 389 F.3d 514, 535 (5th Cir. 2004) (rejecting challenge to conviction for possessing firearms while subject to restraining order premised on validity of order because criminal statute does not "indicate[ ] that it applies only to persons subject to a valid, as opposed to an invalid, protective order" (emphasis omitted)); 18 U.S.C. § 922(d)(8)(A) (requiring for firearm-related charge for persons subject to restraining order that such order be "issued after a hearing of which such person received actual notice").

That ends this aspect of the matter. We conclude that the no-contact and stay-away

provisions of a conditional release order may, under certain circumstances, constitute a "protection order" as defined in 18 U.S.C. § 2266(5). Those circumstances require that the order be "issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." See id. That compendium of circumstances, however, does not require that the person seeking protection herself seek protection directly in the form of a court order. Instead, such a person need only be found to be "seeking protection," and a court order may be sought by a prosecutor on her behalf when it aids her protection. That is plainly what transpired here. We thus conclude that the district court did not err in refusing to dismiss the indictment based on the defendant's definitional challenge.

III

We need not linger long over the defendant's argument that the indictment should have been dismissed because his due process rights were infringed. The defendant premises this argument on the assertion that

he did not receive constitutionally appropriate notice of the potential for federal prosecution if he violated the No-Contact Order. His assertion does not withstand scrutiny.

In his reply brief, the defendant clarifies that he does not rely on statutory vagueness as a ground for his failure-of-notice claim. This means that he has foregone any argument that sections 2262(a)(1) and 2266(5) failed to give him notice because they used "terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). He argues, instead, that he should have received actual notice of any federal penalties for violating the No-Contact Order when it was imposed.

Because — as the defendant implicitly concedes — the statute is not unconstitutionally vague, the statute itself gave constitutionally adequate notice to the

defendant that crossing state lines to engage in conduct prohibited by a protection order would subject him to federal prosecution. See *United States v. Jahagirdar*, 466 F.3d 149, 154 (1st Cir. 2006) ("Indulging the acceptable fiction that perpetrators closely read statutes before acting, this statute gave [the defendant] ample warning that he was courting violation."). *44 The No-Contact Order was such a "protection order" according to the plain language of section 2266(5). See supra Parts II(B)-(C). Such "plain language," which a person of ordinary intelligence would understand to include orders like the No-Contact Order, "constitutes a constitutionally sufficient warning." *United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994); see *Sabetti v. Dipaolo*, 16 F.3d 16, 18 (1st Cir. 1994) (explaining that even criminal provisions with "run-of-the-mill statutory ambiguities" typically do not create "fair notice" violations unless the provisions criminalize conduct generally considered innocent). Fair warning requires no more. See *Arcadipane*, 41 F.3d at 5 ("Fair warning ...

does not mean that the first bite is free, nor does the doctrine demand an explicit or personalized warning.").

IV

We need go no further. For the reasons elucidated above, we hold that the no-contact and stay-away provisions in a conditional release order may, under certain circumstances, satisfy the VAWA's definition of a "protection order" as set forth in section 2266(5). Because we find unfounded the defendant's claim that those circumstances are absent here, his challenge fails. We likewise conclude that his due process challenge fails. Hence, we affirm both the district court's denial of the defendant's motion to dismiss and the defendant's conviction.

Affirmed.

APPENDIX B: OPINION, United States District Court for the District of Maine (dated Mar. 25, 2022)

2020 WL 1450441

(Only the Westlaw citation is currently available).

UNITED STATES DISTRICT COURT, D. MAINE.

UNITED STATES of America

v.

Nelson DION, Defendant.

Docket no. 2:19-cr-00176-GZS

Signed: 03/25/2020

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ORDER ON MOTION TO DISMISS INDICTMENT

George Z. Singal, United States District Judge

Before the Court is the Motion to Dismiss Indictment by Defendant Nelson Dion (ECF No. 62). For reasons stated herein, the Court DENIES the Motion.

I. BACKGROUND

The Indictment at issue charges Defendant Dion with two counts of interstate violation of a protection order, a federal crime set forth in 18 U.S.C. § 2262(a)(1). Specifically, the Indictment alleges that between about April 19 and June 30, 2016, Defendant traveled from Maine to New Hampshire (Count I) and from New Hampshire to Maine (Count II) with the intent to have direct contact and communication with and be in physical proximity to an individual, T.N.,[9] in violation of a protection order.

The protection order Defendant is alleged to have violated was issued after

[9] The Court adopts the pseudonym used by the parties.

Defendant was arrested, on April 16, 2016, for aggravated assault in an incident involving T.N. Three days after the arrest, Defendant was released on bail following issuance of a bail bond by the Maine Superior Court. (See Def. Ex. B (ECF No. 66) at PageID # 168.) The bail bond explicitly prohibited Defendant from contact, direct or indirect, with T.N. During the hearing at which the bail order was issued, the court read aloud the conditions of bail, including the prohibition on contact of any kind with T.N., and advised Defendant that he could be arrested if he violated these conditions. A subsequent criminal investigation by the Federal Bureau of Investigation (FBI) led to the Indictment's allegations that Defendant violated the conditions of bail by crossing state lines to have contact with T.N. in New Hampshire.

II. DISCUSSION

Federal Rule of Criminal Procedure 12(b)(1) provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without

a trial on the merits." Thus, an indictment may be dismissed if a party can show that the indictment is facially defective in some way "or subject to a defense that may be decided solely on issues of law." *United States v. Mubayyid*, 476 F. Supp. 2d 46, 50 (1st Cir. 2007). Defendant seeks dismissal arguing that, as a matter of law, the bail order he allegedly violated does not qualify as a protection order under 18 U.S.C. § 2266(5). He additionally contends that, even if the bail order does qualify as a protection order under the statute, the application of 18 U.S.C. § 2262(a)(1) here violated the Due Process Clause of the Constitution because Defendant was not on fair notice of what the law proscribes. The Court addresses these arguments in turn.

A. The Bail Order Qualifies as a Protection Order Under 18 U.S.C. § 2266(5)(A).

For purposes of the crime Defendant is charged with violating, a protection order is defined, in relevant part, as:

any injunction, restraining order, or any other order issued by a civil or criminal court for the

purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

*2 18 U.S.C. § 2266(5)(A).

In the Court's view, the plain language of this definition clearly encompasses the bail order that prohibited Defendant's contact with T.N. The adjective "any," used repeatedly, indicates legislative intent to give the term "protection order" broad and inclusive scope. See *United States v. Cline*, No. EP-19-CR-1018-DB, 2019 WL 2465326, *4 (W.D. Tex. June 13, 2019) ("The Court ... agrees with the Government's assessment that Congress intended the definition of a protection order to be broad and

inclusive as the plain language of the statute shows."). Even if broadly drawn, Defendant argues, the definition cannot extend to the bail order because it was not sought on behalf of "a person seeking protection." 18 U.S.C. § 2266(5)(A). However, as another court dealing with similar challenges to an indictment brought under 18 U.S.C. § 2262 has noted, because "the introductory phrase: '[t]he term 'protection order' includes' is notably open-ended and expansive, rather than exclusive and limited[,].... a qualifying protection order may include an order that is not overtly described.' " *Cline*, 2019 WL 2465326, at *4 (emphasis in original) (internal citation omitted). The bail order at issue certainly qualifies as an "order issued by a ... criminal court for the purpose of preventing ... contact or communication with or physical proximity to, another person." 18 U.S.C. § 2266(5)(A). It is thus defined as a protection order even if it does not precisely fall within the example of such an order provided in the remainder of the statutory definition. The Court concludes that

the bail order meets the definition of protection order in 18 U.S.C. § 2266(5)(A).[10]

B. The Notice Defendant Received Comported with Due Process.

A penal statute violates the Due Process Clause of the Constitution if it fails to define a criminal offense with sufficient definiteness to provide fair notice of what it proscribes. *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 50 (1st Cir. 2003); see also *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963) ("[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."). Defendant contends that 18

[10] Because the Court concludes the statute is unambiguous, it need not address Defendant's argument regarding the rule of lenity. It also disregards Defendant's argument that the bail order is not a protection order because the Maine Legislature did not intend it to be so for purposes of 18 U.S.C. § 2262(a)(1). The legislative intent relevant to 18 U.S.C. § 2262(a)(1)'s scope is that of the federal legislators who drafted this criminal statute. The intent of the Maine Legislature in providing for bail orders is simply irrelevant.

U.S.C. § 2262(a)(1) is deficient in this manner because (a) the statute does not make clear that violation of a bail condition can qualify as a violation of a statutorily defined protection order and (b) the actual notice provided to him was deficient. Both contentions are misguided.

First, as the Court's earlier discussion indicates, 18 U.S.C. §§ 2262(a)(1) & 2266(5) together make clear to any reasonable person that interstate travel with the intent to violate a bail order of the kind issued to Defendant is proscribed by federal law. Second, although Defendant urges that the notice provided him was deficient because he was advised only that failure to abide by bail conditions could lead to his arrest, not that he would be subject to specific penalties, the Constitution does not require this level of notice. See, e.g., *United States v. Gonzalez,* 949 F.3d 30, 38 (1st Cir. 2020) ("A federal law violates the Due Process Clause only if it is 'so vague that it fails to give ordinary people fair notice of the conduct it punishes.' " (emphasis added) (quoting *Johnson v. United States,* 135 S. Ct. 2551, 2556 (2015))). Defendant cites no case law to

support his position. Instead, he points to notice requirements in Maine and federal statutes. These are not helpful, however, for the question here is whether notice was sufficient to satisfy Due Process, not state or federal statutory requirements. Since Defendant had the opportunity to raise statutory challenges to the bail order in other fora, he cannot collaterally attack it now.[11] See *Cline*, 2019 WL 2465326, at *5 ("Thus, facially, the federal statute that criminalizes the interstate violation of a protection order does not need to include a mechanism for collateral attack of a protection order to pass constitutional muster."). In sum, the notice

[11] Defendant additionally argues that the written bail order signed by the presiding judge did not have the "no contact" provision box checked, contributing to the alleged deficiency of notice. Even if it were proper for the Court to consider this collateral attack on the bail order, the argument would be unlikely to prevail. Having reviewed the judge-signed bail order as well as the copy signed by a bail officer, which did have the box checked (see ECF No. 66, PageID #s 168 & 171), the Court concludes that the scrivener's error of which Defendant complains could not cause reasonable confusion as to the no-contact provision such that Defendant's due process rights were violated.

provided Defendant was constitutionally sufficient.

III. CONCLUSION

Therefore, the Court hereby DENIES the pending Motion to Dismiss Indictment (ECF No. 62).

SO ORDERED.

APPENDIX C: Bail Order

EXHIBIT B

☐ COMMITMENT ORDER with CONDITIONS OF RELEASE
☐ CONDITIONS OF RELEASE

☑ UNIFIED CRIMINAL ☐ DISTRICT ☐ SUPERIOR COURT located at Six Ave Alf Docket No. CR-16-00330

STATE OF MAINE v. Nathan Dinsmore [redacted] Defendant

OFFENSE(S) 16-003205 Aggravated Assault

ATN/CIN

Defendant shall be held at the ☐ County Jail ☐ Department of Corrections

☐ without bail ☐ as indicated on attached Bail Bond form ☐ until bail is posted as follows

☐ PERSONAL RECOGNIZANCE. ☐ UNSECURED. Defendant is not required to post any security to be released, but if defendant fails to appear as the Bail Bond requires defendant shall owe the State of Maine $

☒ SECURED. Defendant shall be released from custody only after the following security is posted.

☒ Cash in the amount of $ 2000.00 or ☐ No Third Party Bail Allowed

☐ Real estate (or) with a net value (total value less encumbrances) of $

☐ Bail Bond. ☐ Within 1 working day after today ☐ Before defendant may be released, a lien on the real estate described must be recorded in the Registry of Deeds in the county where the real estate is located, and proof of such recording must be filed with the court listed above. (Note: The Registry of Deeds and the clerk's office are different offices and may be in different counties.)

☐ SUPERVISED RELEASE: Check One Box Only ☐ AND ☐ OR In the alternative, defendant is released to the custody of a supervised bail contract pursuant to terms and conditions provided in the contract.

☐ CONCURRENT. This bail is concurrent to the bail previously set/posted in (*list court and docket number*):

The following special condition(s) also apply to the defendant: The defendant shall

☒ not use any alcoholic beverages or illegal drugs ☒ not possess any alcoholic beverages or illegal drugs

☒ not possess any dangerous weapons, including, but not limited to, firearms.

☒ In order to determine if s/he has violated any prohibitions of this bond regarding alcoholic beverages, illegal drugs or dangerous weapons, s/he will submit to searches of her/his person, vehicle and residence and, if applicable, to chemical tests

☒ at any time without articulable suspicion or probable cause ☐ upon articulable suspicion

☐ participate in an electronic monitoring program.

☐ have no direct or indirect contact with (*name and dob*) [redacted] except as is necessary

☐ for counseling; ☐ to pay child support; ☐ for child contact; ☐ by telephone; ☐

☒ and not enter any ☐ residence ☒ place of employment ☐ place of education of any such person(s)

☐ except for a single time, while accompanied by a police officer, for the purpose of retrieving defendant's personal effects.

☐ maintain or actively seek employment; ☐ maintain or commence an education program;

☐ participate in regular substance abuse counseling and provide proof of such counseling upon request.

☐ undergo ☐ medical ☐ mental health ☐ evaluation ☐ counseling/treatment & provide proof of such counseling/treatment upon request.

☐ complete certified Batterer's Intervention Program ☐ undergo other counseling/treatment and provide proof of such counseling/treatment upon request.

☐ abide by the following restrictions on personal associations, place of abode, or travel:

☐ report ☐ daily ☐ ☐ in person ☐ by phone, to ☐ probation officer ☐

☐ report ☐ weekly ☐ ☐ in person ☐ by phone, to ☐ probation officer ☐

☐ comply with the following curfew:

☐ participate in ☐ outpatient ☐ voluntary inpatient treatment; at or with

☐ take medications as prescribed.

☐ not operate any motor vehicle under any circumstances ☐ unless lawfully licensed to do so.

☐

If the defendant makes bail, the defendant is required to appear: 8-10-16 8:30am

At the Unified Criminal Court on and on any other date and time and at the court the Justice, Judge or clerk tells me to appear.

(This Condition of Release is to be attached to defendant's Bail Bond.)

Date: 4/19/16

Justice / Judge / Clerk / Bail Commissioner

Printed Name of Bail Commissioner

CR-002, Rev. 07/15 COURT

CONCLUSION

This Court should grant the writ of certiorari.

Respectfully submitted,

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