No. _____

IN THE
Supreme Court of the United States

CAITLYN WILLIAMS,
Petitioner,
v.

STATE OF MISSOURI,
Respondent.

TAMARAE LARUE,
Petitioner,
v.

STATE OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the language "on a regular basis" in the compulsory school attendance law is impermissibly vague in violation of due process guarantees.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Caitlyn Williams and Tamarae LaRue, respectfully petition for a writ of certiorari to review the judgment of the Missouri Supreme Court.

OPINION BELOW

The opinion of the Missouri Supreme Court appears at Appendix A to this petition and is reported at ***State v. Williams and State v. LaRue,*** 673 S.W.3d 467 (Mo. banc 2023).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on August 15, 2023, and a timely petition for rehearing was denied on September 26, 2023. A copy of the order denying rehearing appears at Appendix B. Justice Kavanaugh granted an extension until January 24, 2024. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution in relevant part provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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."

STATEMENT OF THE CASE

Petitioners were charged under Mo. Rev. Stat. §167.031 (2009) with violations of the law requiring compulsory school attendance for a child. That statute provides, in pertinent part, that

> Any parent, guardian or other person who enrolls a child between the ages of five and seven years in a public-school program of academic instruction shall cause such child to attend the academic program on a regular basis, according to this section. Nonattendance by such child shall cause such parent, guardian, or other responsible person to be in violation of the provisions of §167.061, except as provided by this section.

Section 167.031.1(1) further provides that

> A child who, to the satisfaction of the superintendent of public schools of the district in which he resides, or if there is no superintendent then the chief school officer, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof[.]

Section 167.061 makes this crime a class C misdemeanor.

The children of both petitioners were between the ages of five and seven and attended Lebanon Public Schools. The Lebanon Public Schools Handbook says that "The state mandates that students maintain 90% or higher attendance each year in school and that continued and valuable learning cannot take place without regular attendance." The handbook goes on to say "Parents will ... [n]otify school with every absence, tardy, or early withdrawal. ... Absences caused by personal illness or injury, illness within the family which necessitates that a student be absent, and perhaps other extenuating circumstances, need to be communicated to the student's school."

Petitioners received letters from the school district when their children's absences totaled six days of school, nine days of school, and fifteen days of school. These letters did not distinguish between excused and unexcused absences. After the children had missed fifteen days of school, both Petitioners were prosecuted. Williams' daughter had nine absences with no explanation to the school during the charged time period. LaRue's son had seven such absences. Both petitioners were convicted under this statute. Williams was sentenced to seven days in jail, and LaRue to fifteen days in jail.

In deciding Williams' case after bench trial, the trial court told the parties that it "is not really sure how our legislature passes a statute that uses a term that is as vague as regular ..." "To be honest, there is nothing that would make this court more pleased ... than if you appeal it and that statute is stricken or rewritten substantially. It is absolutely a horrible statute."

Both Petitioners appealed to the Missouri Supreme Court on the basis that the word "regular" in the statute was unconstitutionally vague, in that it failed to give parents fair notice that their conduct violated the statute, and further allowed for discriminatory enforcement. The Missouri Supreme Court considered the Petitioners' argument that "regular," as defined by the school district handbook, was set at ninety percent attendance. However, the Court instead defined "to attend ... on a regular basis" to mean "to attend school on those days the school is in session." The Court failed to address whether the absences for which

Petitioners contacted the school constituted exceptions under the statute, instead defining "regular" as every day.

The Court held:

> In concluding that "to attend the academic program on a regular basis" means to attend school on those days the school is in session, this Court is aware of the implication of such meaning if taken to an extreme. Nevertheless, this Court is bound by its duty "to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning." ***Turner v. Sch. Dist. of Clayton***, 318 S.W.3d 660, 665 (Mo. banc 2010). In addition to the statute providing authority for school officials to excuse attendance when a child is mentally or physically unable to attend, §167.031.1(1), the potential of enforcement of the law in marginal cases of noncompliance is ameliorated both by the discretion of school officials to choose not to report minor noncompliance and of prosecutors to choose not to prosecute in those cases.

State v. Williams, 673 S.W.3d 467, 475 (Mo. banc 2023).

REASONS FOR GRANTING THE WRIT

A statute is unconstitutionally vague if it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." ***United States v. Harriss***, 347 U.S. 612, 617 (1954). A vague law contravenes the "first essential of due process of law" – that of knowledge of what the law demands. ***Connally v. General Constr. Co.***, 269 U.S. 385, 391 (1926). Furthermore, a statute may be impermissibly vague where it "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." ***Kolander v. Lawson***, 461 U.S. 352, 358 (1983).

Missouri Revised Statutes, §167.031, and the interpretation of that law by the Missouri Supreme Court, implicates both the notice and arbitrary enforcement standards, rendering the statute impermissibly vague.

I. The statute fails to give a person of ordinary intelligence fair notice

Section 167.031 fails to give a person of ordinary intelligence fair notice that her contemplated conduct is forbidden insofar as it fails to clearly define the phrase "a regular basis." Lebanon School District defines "regularly" as ninety percent attendance. And yet the Missouri Supreme Court has defined it as "every day school is in session." If that is the law, then the State of Missouri has unfettered discretion to charge a parent with a violation of §167.031 if their child misses one day – one hour – one minute of a scheduled school day where they have not "to the satisfaction of the superintendent [been] determined to be

mentally or physically incapacitated." *See* §167.031.1(1). Parents are told by the school district that ninety percent attendance is regular. No one of ordinary intelligence would understand that anything less than one hundred percent attendance is criminal behavior.

II. The statute allows for arbitrary enforcement

The Missouri Supreme Court ignores the Lebanon School Handbook, as it must. It is the statute which defines criminal behavior. But the Court recognizes the inherent contradiction in noting

> the potential of enforcement of the law in marginal cases of noncompliance is ameliorated both by the discretion of school officials to choose not to report minor noncompliance and of prosecutors to choose not to prosecute in those cases.

State v. Williams, 673 S.W.3d 467, 475 (Mo. banc 2023). "But the Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" ***City of Chicago v. Morales***, 527 U.S. 41, 60 (1999), *citing,* ***United States v. Reese***, 92 U.S. 214, 221 (1876).

As Justice Gorsuch recognized in his concurrence in ***Percoco v. United States***, 598 U.S. 319, 333 (Gorsuch, J., concurring), "'Vague laws' impermissibly 'hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know

what consequences will attach to their conduct.'" (*citing,* ***United State v. Davis***, 588 U.S. ___, ___, 139 S.Ct. 2319, 2323 (2019)).

III. Other states provide a definition of the term "regularly" in compulsory school attendance laws

Oregon: "Regular" school attendance is required under Ore. Rev. Stat., §339.010, but Oregon's statute defines "regular." "Eight unexcused one-half day absences in any four-week period during which the school is in session shall be considered irregular attendance." Ore. Rev. Stat., §339.065.

Florida: Students are "required to attend school regularly during the entire school term, Fla. Stat. Ann., §1003.21, but Florida defines regular attendance further. "If a student has had at least five unexcused absences, or absences for which the reasons are unknown, within a calendar month or 10 unexcused absences, or absences for which the reasons are unknown, within a 90-calendar-day period, the student's primary teacher shall report to the school principal or his or her designee that the student may be exhibiting a pattern of nonattendance." Fla. Stat. Ann., §1003.26(1)(b).

Wisconsin: Wisconsin's compulsory school attendance statutes, Wis. Stat. Ann. §118.15-118.16, state that the "school board shall establish a written attendance policy specifying the reason for which pupils may be permitted to be absent from a public school." In ***State v. White***, 509 N.W.2d 434 (Wis. App. 1993), this statute was upheld against a challenge that it was unconstitutionally

vague. The Wisconsin Court noted that the relevant Wisconsin statute defined when attendance was required. ***Id.*** at 439. The Wisconsin statute provided "attendance is required 'during the full period and hours, religious holidays excepted, that the public or private school . . . is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of 18.'" ***Id.*** The Wisconsin Court held that "[b]y this language, a person of ordinary intelligence . . . know that attendance is compulsory during any time school is in session until the child is eighteen, except religious holidays." ***Id.*** Additionally, the statute in question cross-referenced the truancy statutes, which defined in the statute not only how many days of school could be missed but also the evidence a school attendance officer must provide before a parent can be prosecuted for a violation of Wisconsin's compulsory school attendance law. Wisc. Stat. Ann. §118.16.

District of Columbia: §38-203(f) of the District of Columbia Code defines nonattendance as follows. "Each unlawful absence of a minor for 2 full-day sessions or for 4 half-day sessions during a school month shall constitute a separate offense." D.C. Stat. §38-203.

IV. Federal courts have held the words "regular" or "on a regular basis" to be unconstitutionally vague

In ***McClernon v. Wedding***, 590 F.Supp.3d 1172 (S.D. Ind. 2022), *vacated as moot by habeas petitioner's death,* 2022 WL 6156520 (S.D. Ind. 2022),

petitioner argued that Indiana's Sex Offender Registration Act was void for vagueness as applied to him following his conviction for knowingly or intentionally failing to register a vehicle he borrowed for five days. Indiana's Sex Offender Registration Act requires sex offenders to provide the "vehicle description, vehicle plate number, and vehicle identification number for vehicles the sex or violent offender owns or operates "on a regular basis." Ind. Code, §11-8-8-8(a)(1). The Court granted the petitioner's writ, finding that "the statute does not provide an objecting standard by which to determine whether one's use of a vehicle is 'regular.' It therefore fails to place a person of ordinary intelligence on notice of the conduct prescribed and opens the door for arbitrary enforcement." ***Id.*** at 1179.

In ***Doe v. Snyder***, 101 F.Supp.3d 672 (E.D. Mich. 2015), *rev'd on other grounds*, 834 F3d 696 (6th Cir. 2016), the Court found that the statute requiring sex offenders to register vehicle information for any vehicle they "regularly operate" was void for vagueness, stating "the commonly accepted meaning of the terms 'regularly' and 'routinely' do not provide sufficient guidance to law enforcement or registrants to survive a due process challenge both generally and as applied to Plaintiffs." ***Id.*** at 689.

In ***Whatley v. Zatecky***, 833 F.3d 762 (7th Cir. 2016), a habeas petitioner argued that an Indiana law prohibiting cocaine possession within 1000 feet of a "youth program center" was void for vagueness as applied to him following his conviction for cocaine possession near a church conducting a few weekly

children's events. The Indiana code defined a "youth program center" as any "building or structure that on a regular basis provides recreational, vocational, academic, social, or other programs or services for persons less than eighteen (18) years of age." Ind. Code 35-41-1-29(a). The Court of Appeals held that the petitioner's claim should be granted because "the use of the word 'regular' in the definition of 'youth program center' provides no objective standard, and thereby fails to place persons of ordinary intelligence on notice of the conduct proscribed and allows for arbitrary enforcement. ***Id*** at 784. Further, "as applied to [petitioner], the statute delegated to the police, the prosecutor and the jury the task of determining what conduct was proscribed." ***Id.***

In ***Does v. Cooper***, 842 F.3d 833 (4th Cir. 2016), the plaintiffs facially challenged a North Carolina statute prohibiting registered sex offenders from visiting certain areas where minors might be present. The statute provided that restricted locations included "any place where minors gather for regularly scheduled education, recreational, or social programs." N.C. Gen. Stat. Ann. 14-208.18(a)(3). The Court of Appeals affirmed the district court's judgment, finding that "neither an ordinary citizen nor a law enforcement officer could reasonably determine what activity was criminalized by subsection (a)(3)" as "the statute provides no principled standard at all for determining whether such programs are 'regularly scheduled.'" ***Id.*** at 843-844.

This case presents the right vehicle for a decision on this issue

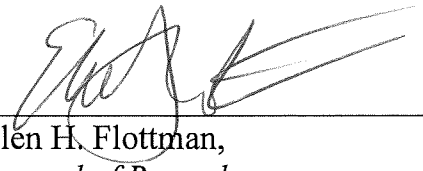
This case presents both sides of a vagueness challenge – §167.031 provides insufficient notice to those charged under the statute, but at the same time allows for discriminatory enforcement by the State of Missouri's own interpretation. According to the Missouri Supreme Court, the plain language of §167.031 defines "regular" attendance as attendance "every day," yet the statutory schema delegates "nonattendance" policies and excused attendance policies to the individual school boards, even though these polices are what trigger prosecution under §167.061, and even when these policies conflict with the definition of "regular" that the Missouri Supreme Court has promulgated. But, *if* the definition of "regular" means all Missouri parents must cause their children to attend school every day school is in session – and not a percentage as set forth in the Lebanon school handbook – and *if* the risk of criminal liability for Missouri parents attaches with any unexcused absence, then the Lebanon school handbook could not tell parents that absences cannot fall below 90%, insofar as the school board would have no authority in which to promulgate an alternative interpretation of the term "regular" as used in §167.031.

"We cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" ***Dubin v. United States*** 599 U.S. 110, 131 (2023) (citations omitted). The State of Missouri has adopted a criminal statute that can be used against the unsuspecting and against whomever it chooses, with unfettered discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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