No. 20-1950

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOE, by his Mother and Next Friend, JANE DOE;
B.B., by his Mother and Next Friend, JANE BLOGGS,

Plaintiffs-Appellants,

v.

HOPKINTON PUBLIC SCHOOLS,

Defendant-Appellee.

&

CAROL CAVANAUGH, in her individual capacity and official capacity as Superintendent of the Hopkinton Public Schools; EVAN BISHOP, in his individual capacity and official capacity as Principal of Hopkinton High School,

Defendants.

On appeal from the U.S. District Court for the District of Massachusetts

BRIEF OF AMICUS CURIAE PROFESSOR DANIEL B. RICE IN SUPPORT OF NEITHER PARTY

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INTRODUCTION & INTEREST OF AMICUS CURIAE

Although Plaintiffs raise several claims in this suit, this amicus brief focuses solely on their claim that Massachusetts' anti-bullying statute is void for vagueness. That claim raises an important question about the standard that courts should apply when confronted with vagueness challenges to laws, like anti-bullying provisions, that specifically target children's conduct. For the reasons set forth below, this Court should make clear that such challenges must be analyzed under a standard that ensures fair notice to "children of ordinary intelligence," rather than "persons of ordinary intelligence." That standard, which accounts for the well-known developmental differences between children and adults, would better serve the underlying purposes of vagueness doctrine and better reflect the Supreme Court's recent cases recognizing that "children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

Amicus curiae Daniel B. Rice is a visiting assistant professor at Duke University School of Law, where his research focuses on constitutional law and history, among other areas. His forthcoming scholarship extensively analyzes the concept of tailored vagueness review, including how best to account for children's diminished legal acumen. *See* Daniel B. Rice, *Reforming Variable Vagueness*, 23 U. Pa. J. Const'l L. ___ (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585247. Prior to joining the academy, Professor Rice litigated several cases involving void-for-vagueness issues. He therefore has a longstanding interest and

expertise in the questions raised by this appeal. While Professor Rice urges the Court to clarify the standard governing vagueness challenges to laws that target children, he takes no position on the ultimate outcome of this case.[1]

ARGUMENT

To determine whether a law is impermissibly vague, courts typically examine whether the law defines the conduct it prohibits with sufficient clarity "to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). When the challenged law targets children's conduct, however, that inquiry must be refined. Children, after all, are not "person[s] of ordinary intelligence," and reflexively treating them as such often raises serious doctrinal problems, as the Supreme Court has repeatedly warned.

To avoid those problems, this Court should focus its vagueness inquiry on whether Massachusetts' anti-bullying law provides fair notice of its proscriptions to a "*child* of ordinary intelligence," rather than a "person of ordinary intelligence." Clarifying that standard here would not only bring this Court's approach to children's vagueness claims into line with that of other circuits, but also provide much-needed guidance to lower courts within this Circuit.

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[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that (1) this brief was authored entirely by counsel for amicus curiae and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than amicus curiae contributed money to the preparation or submission of this brief. All parties consent to the filing of this brief.

A. The stringency of vagueness review depends on the nature of the enactment at issue.

"The prohibition of vagueness . . . 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.'" *Johnson v. United States*, 576 U.S. 591, 595 (2015) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)). One of the doctrine's core purposes is to ensure that the law gives people "fair notice of the conduct it punishes." *Johnson*, 576 U.S. at 595. To that end, courts ordinarily decide vagueness claims by examining whether the enactment at issue is "sufficiently precise for a man of average intelligence to 'reasonably understand that his contemplated conduct is proscribed.'" *United States v. Mazurie*, 419 U.S. 544, 553 (1975) (citation omitted); *see also, e.g.*, *United States v. Colon-Ortiz*, 866 F.2d 6, 9 (1st Cir. 1989) ("The person of ordinary intelligence . . . should not have to guess at the meaning of penalty provisions.").

That traditional test, however, cannot be "mechanically applied" in every case. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Rather, as the Supreme Court has explained, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.* For instance, if a law "threatens to inhibit the exercise of constitutionally protected rights," then "a more stringent vagueness test should apply." *Id.* at 499. Similarly, laws that impose severe penalties are also subject to more stringent review. *Id.* at 498–99; *see, e.g.*,

Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (plurality op.) ("[T]he most exacting vagueness standard should apply in removal cases."). In contrast, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Hoffman Estates*, 455 U.S. at 499.[2]

Consistent with this tiered-review approach, if the enactment at issue targets the conduct of a distinct class of people, courts must tailor their vagueness analyses accordingly. Thus, laws regulating a specific profession need only define their terms with sufficient clarity to apprise members of that profession of their obligations. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("The Act provides *doctors of ordinary intelligence* a reasonable opportunity to know what is prohibited." (emphasis added; quotation marks and citation omitted)).[3] As this Court has put it: the "appropriate

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[2] Although amicus curiae has criticized the specific formulation of tiered vagueness review announced in *Hoffman Estates*, he fully endorses the underlying concept.

[3] *See also, e.g.*, *Am. Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 28 (D.C. Cir. 2015) ("We are confident that *reasonable mine operators* and *reasonable safety inspectors* will prove able to implement the Secretary's standard in practice." (emphasis added)); *Hayes v. New York Attorney Grievance Comm.*, 672 F.3d 158, 170 (2d Cir. 2012) ("We find ourselves unable to conclude, however, that a *lawyer of average intelligence* could anticipate that [he would be subject to a particular disciplinary rule governing advertising]." (emphasis added)); *Perez v. Hoblock*, 368 F.3d 166, 175–76 (2d Cir. 2004) ("In evaluating Perez's vagueness claim, we must consider the context in which the regulation was enforced, i.e., we must evaluate Perez's underlying conduct by reference to the norms of the [thoroughbred] racing community."); *United States v.*

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measure for testing a statute directed at a class of persons possessed of specialized learning is whether the 'language sufficiently conveys a definite warning as to the proscribed conduct, when measured by common understanding and commercial practice'" among that particular class. *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907 (1st Cir. 1980) (quoting *Connally*, 269 U.S. at 391). Or, put more succinctly, vagueness review focuses on ensuring that the specific class of "*regulated parties* . . . know[s] what is required of them." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (emphasis added).

B. Laws targeting children must define the prohibited conduct with sufficient clarity to provide fair notice to a "child of ordinary intelligence."

Given the doctrine's emphasis on ensuring fair notice to regulated parties, courts must analyze laws regulating the conduct of children—like Massachusetts' anti-bullying law—under a stringent vagueness standard. In recent years, the Supreme Court has repeatedly endorsed the general presumption that doctrinal tests cannot reflexively be applied to children without accounting for their distinctive traits, perspectives, and life experiences. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (holding that youth is a key factor in *Miranda*'s custody analysis); *Roper v.*

Lee, 183 F.3d 1029, 1033 (9th Cir. 1999) ("[I]n this specialized field, an *exporter of ordinary intelligence* should be on notice that inquiry is required before shipping an item that might be subject to the regulation." (emphasis added)); *Jump v. Goldenhersh*, 619 F.2d 11, 15 (8th Cir. 1980) (remarking on what "[a] *lawyer of ordinary intelligence* exercising common sense would understand" (emphasis added)).

Simmons, 543 U.S. 551, 569 (2005) (holding that juvenile offenders cannot be executed). As the Court has noted, "it is the odd legal rule that does *not* have some form of exception for children." *Miller v. Alabama*, 567 U.S. 460, 481 (2012) (holding that juvenile offenders may not be sentenced to life without parole under a mandatory-sentencing scheme). These cases thus reaffirm a longstanding principle of American law: that "children cannot be viewed simply as miniature adults." *J.D.B.*, 564 U.S. at 274. And this principle endures "even where a 'reasonable person' standard otherwise applies." *Id.*

Several federal appellate courts have relied on this same principle in analyzing vagueness claims challenging enactments that target school children's conduct. Rather than examining those enactments under the traditional "person of ordinary intelligence" standard, these courts have focused on whether a "*student* of ordinary intelligence" could have known what behavior was prohibited. *See, e.g.*, *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 51 (10th Cir. 2013) (inquiring whether "a reasonable high school student of ordinary intelligence would understand" the forbidden conduct); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010) (same, for a "student of ordinary intelligence"); *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980) (same, for "a reasonably intelligent student" (citation omitted)).[4]

[4] Other courts have likewise recognized that legal enactments applicable to children must be fairly comprehensible to children. *See, e.g.*, *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 267 (3d Cir. 2002) (school policy was "specific enough

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These decisions rightly grasp that it would be "nonsensical" for vagueness doctrine to "evaluate the [relevant] circumstances . . . through the eyes of a reasonable person of average years." *J.D.B.*, 564 U.S. at 275.

This Court should adhere to the same approach here. Massachusetts' anti-bullying statute specifically targets the conduct of school children; it should therefore be analyzed under the "*child* of ordinary intelligence" standard, rather than the usual "*person* of ordinary intelligence" standard. Although the district court identified that standard correctly here, *see* R.A. 92 ("a school child of common intelligence"), its application of that standard included language that could be interpreted to downplay the differences between how children and adults would likely understand the statutory prohibition at issue. *See generally Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

The court concluded, for instance, that the statute's prohibition on speech causing "emotional harm" was not vague because "children of school age are fully

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to give fair notice to the students"); *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) ("[M]inors subject to the ordinance are not given fair notice . . . ."); *S.N.B. v. Pearland Indep. Sch. Dist.*, 120 F. Supp. 3d 620, 627 (S.D. Tex. 2014) ("[O]rdinary middle school students would undoubtedly understand . . . ."); *Hardwick ex rel. Hardwick v. Heyward*, 674 F. Supp. 2d 725, 744–45 (D.S.C. 2009) (inquiring whether "a reasonable student of ordinary intelligence who read the policy could not understand what it prohibited"); *Dumez v. La. High Sch. Athletic Ass'n*, 334 So.2d 494, 502 (La. Ct. App. 1976) ("Inasmuch as it is applicable to high school students, the test to be applied is that it must be capable of comprehension by a student who is possessed of average intelligence.").

capable of understanding that their words can cause emotional harm in others." R.A. 93. But understanding that one's words *can* cause emotional harm does not address the actual differences between children and adults in their ability to appreciate *when* their words are likely to have that impact. This Court's decision in *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981), illustrates that point well. In that case, the Court struck down as vague a zoning ordinance that permitted city officials to deny permits to businesses whose activities "harm[ed] the legitimate protectible interests of . . . citizens." *Id.* at 1119. The Court's decision did not hinge on the businesses' inability to understand that their activities *could* harm such interests; rather, it turned on the businesses' inability to know exactly *which* activities might be deemed harmful in the eyes of city officials. *Id.* at 1123–24. Similar logic applies here. If anything, a child of common intelligence faces even greater difficulty in predicting the emotional impact of his or her words than the average business faces in predicting the civic impact of its actions. *See generally Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (noting that "minors often lack the experience, perspective, and judgment expected of adults" (citation and quotation marks omitted)). The district court's analysis fails to account for those important differences.

The district court's reasoning also gives too much weight to the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). The Court in *Fraser* stated: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational

process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* at 686. But that statement was never intended to give school officials carte blanche to discipline students for any conduct the officials might later deem troublesome or disruptive. To the contrary, the statement merely reaffirmed the principle that criminal prohibitions demand a higher level of clarity than non-criminal prohibitions (like school rules) because the "consequences of imprecision" are so much greater in the criminal context. *Hoffman Estates*, 455 U.S. at 499.

More to the point, there was never any uncertainty in *Fraser* about children's capacity to understand the prohibitions at issue in that case, which were directed at a student who delivered a "lewd and indecent" speech at a school assembly. 478 U.S. at 685. Indeed, the student in *Fraser* "admitted . . . that he *deliberately* used sexual innuendo in the speech" to get a rise out of his classmates. *Id.* at 678 (emphasis added). And his teachers had explicitly warned him beforehand that "his delivery of the speech might have 'severe consequences.'" *Id.* (quoting record). In other words, the student in *Fraser* not only understood the likely impact of his speech but, in fact, *intended* his speech to have that impact. Here, in contrast, Massachusetts' anti-bullying law prohibits all speech that causes "emotional harm." The district court's analysis of that provision did not adequately engage with whether the prohibition provides clear notice to a child of ordinary intelligence: in fact, the court suggested that the provision would prohibit speech even when a "student may not be able to tell in the moment"

that his or her speech is actually causing harm. R.A. 93. And the court similarly concluded that, because the "statute does not entirely *prevent* arbitrary enforcement," "concerns about a thin-skinned administrator targeting a disliked student are not entirely precluded." R.A. 94. Nothing in *Fraser* endorsed such an approach to vagueness—in the school context or anywhere else.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully asks this Court to clarify the proper standard for resolving vagueness claims challenging laws that target children's conduct. Specifically, this Court should make clear that such laws must be analyzed under a "child of ordinary intelligence" standard, rather than a "person of ordinary intelligence" standard.

Respectfully submitted,

/s/ Nicolas Y. Riley

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FEBRUARY 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 2,585 words and was prepared in 14-point Garamond font, a proportionally spaced font.

/s/ Nicolas Y. Riley
NICOLAS Y. RILEY
Counsel for amicus curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Nicolas Y. Riley
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