NO. 19-____

In the Supreme Court of the United States

MICHELLE CARTER,

Petitioner,

–v–

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michelle Carter's conviction for involuntary manslaughter in connection with Conrad Roy III's suicide is unprecedented. Massachusetts is the only state to have affirmed the conviction of a physically absent defendant who encouraged another person to commit suicide with words alone. Before this case, no state had interpreted its common law or enacted an assisted-suicide statute to criminalize such "pure speech," and no other defendant had been convicted for encouraging another person to take his own life where the defendant neither provided the actual means of death nor physically participated in the suicide.

This petition presents the questions whether Carter's conviction for involuntary manslaughter violated the U.S. Constitution in two distinct ways:

1. Whether Carter's conviction for involuntary manslaughter, based on words alone, violated the Free Speech Clause of the First Amendment, because her communications, which were found to have caused Roy's suicide, did not constitute speech that was "an integral part of conduct in violation of a valid criminal statute," *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)?

2. Whether Carter's conviction violated the Due Process Clause of the Fifth Amendment, because in assisted or encouraged suicide cases, the common law of involuntary manslaughter fails to provide reasonably clear guidelines to prevent "arbitrary and discriminatory enforcement," *McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016) (internal quotations omitted)?

LIST OF ALL PROCEEDINGS

Commonwealth v. Michelle Carter
Bristol Juvenile Court
New Bedford Division
Case No. 15YO00001NE
Decision Date: September 22, 2015

Commonwealth v. Michelle Carter
Supreme Judicial Court of Massachusetts
Case No. SJC-12043
Decision Date: July 1, 2016 (App.43a)

Commonwealth v. Michelle Carter
Bristol Juvenile Court
Taunton Session
Case No. 15YO00001NE
Decision Date: June 16, 2017 (App.30a)

Commonwealth v. Michelle Carter
Supreme Judicial Court of Massachusetts
Case No. SJC-12502
Decision Date: February 6, 2019 (App.1a)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michelle Carter respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts ("SJC").

OPINIONS BELOW

The SJC's opinion affirming Carter's conviction for involuntarily manslaughter is reported at 481 Mass. 352 (2019) ("*Carter II*"). App.1a. The trial judge's verdict is unpublished, but he explained his decision on the record, and the transcript is available in the appendices at App.30a.

The SJC's prior opinion, affirming the denial of Carter's pre-trial motion to dismiss the indictment, is reported at 474 Mass. 624 (2016) ("*Carter I*"). App.43a.

JURISDICTION

This Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a), to review the final judgment of the SJC.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

- U.S. Const. amend. I

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- U.S. Const. amend. V

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- Massachusetts General Laws, Chapter 265, § 13

  Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two-and-one-half years. Whoever

> commits manslaughter while violating the provisions of sections 102 to 102C, inclusive, of chapter 266 shall be imprisoned in the state prison for life or for any term of years.

STATEMENT OF THE CASE

On the night of July 12-13, 2014, 18-year-old Conrad Roy, III, parked his truck near Kmart in Fairhaven, Massachusetts, started a portable water pump that he had placed in the truck, filled the cabin with carbon monoxide, and died. App.2a-3a, 8a-11a. Roy acted alone, as he had during prior suicide attempts. App.3a.

At the time Roy took his own life, 17-year-old Michelle Carter was at home, nearly 50 miles away, in Plainville, Massachusetts. App.3a, 56a n.13.

The friendship between Roy and Carter began in February 2012, when they both visited relatives in Florida. After returning to Massachusetts, the teenagers shared a long-distance relationship, primarily through texts and calls. Living in different towns, they rarely spent time together in person. App.3a, 45a.

Throughout their relationship, Roy "struggl[ed] with his issues." App.32a; *see* App.45a (noting Roy received "treatment for mental health issues since 2011" before he met Carter). Roy "continually" talked about suicide, and he conducted "extensive" research about how to kill himself. App.32a; *see also* App.3a.

Indeed, without Carter's involvement, Roy attempted suicide on multiple occasions. After his

parents divorced, in October 2012, Roy twice tried to overdose on over-the-counter medications and also attempted to drown himself in a bathtub. In June 2014, Roy tried to induce water poisoning, and in early July 2014, less than one week before his death, Roy took Benadryl, placed a plastic bag over his head, and secured it with duct tape. As the undisputed expert evidence at trial established, the strongest predictor of suicide are such prior attempts.[1]

In response, Carter persistently, but unsuccessfully, "urged [Roy] to seek professional help for his mental illness." App.3a. About one month before Roy took his own life, Carter sought inpatient treatment for an eating disorder. She urged Roy to join her in the hospital, but he refused. App.3a.

After Carter returned home, her attitude changed, and according to the SJC, she began "a systematic campaign of coercion" to convince Roy to go through with his suicide plan. App.23a (quoting App.62a). With her words alone, Carter "helped [Roy] plan" his suicide, "downplayed his fears" about his family, and "chastised him for his indecision and delay." App.4a-6a; *see also* App.50a (noting Carter repeatedly texted, "You just [have] to do it").

The teenagers exchanged their last text message shortly before Roy left his mother's house around 6

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[1] As reflected in nearly 2,000 pages of medical records and other trial evidence, Roy took his own life after years of personal struggles that were unrelated to Carter, including his parents' divorce, violent abuse by his father (which, at times, required emergency medical attention), severe anxiety, hospitalizations for depression and suicidal ideation, chronic difficulties at school, his sudden decision not to pursue college, and recreational drug use.

p.m. on July 12, 2014. Phone records indicate that, later in the evening, Roy called Carter, and then, Carter called Roy. Both calls lasted about 45 minutes. App.9a.

No contemporaneous evidence reveals what was said during these calls. App.9a. Although Carter later claimed, in texts to her friends, that she was on the phone with Roy when he died, no evidence corroborated her statements, and the medical examiner could not determine the precise time of death.

More than two months later, in a rambling text to a friend, Carter claimed that Roy had gotten out of his truck and that she had told him to "get back in." App.9a-10a, 33a. This text message was not contemporaneous evidence but an uncorroborated account by Carter, whom the prosecution cast as an attention-seeking liar. The full text of that message does not appear in the SJC's decision, but it is reproduced in the appendices at App.68a-69a.

Based on Carter's belated "confession" by text, the trial judge found that, while on the phone, Roy "got out of the truck, seeking fresh air," that Carter "instructed him to get back in," and that Roy complied. App.10a. The judge further found that, after Roy got back in the truck, Carter failed to call 911, contact his family, or tell him to get out. App.10a. Based on those findings, the judge ruled Carter had engaged in wanton and reckless conduct that caused Roy's death and convicted her of involuntary manslaughter. App. 11a, 35a.

The trial judge's verdict and the SJC's affirmance leave no doubt that Carter was convicted for her words alone—what she said and failed to say to Roy. Carter

neither provided Roy with the means of his death nor physically participated in his suicide. App.32a (finding Roy secured the pump, placed it in his truck, drove alone to the parking lot, and filled the truck with carbon monoxide).

Before trial, the SJC allowed an interlocutory appeal and affirmed the denial of Carter's motion to dismiss the indictment. App.43a. In footnotes, the SJC rejected Carter's First Amendment and due process challenges. App.55a-56a, 62a nn.11 & 17. Then, on direct appeal, the SJC affirmed the judge's verdict finding Carter guilty of involuntary manslaughter. App.1a. It again rejected Carter's constitutional arguments. App.18a-25a.

REASONS FOR GRANTING THE WRIT

In affirming Carter's conviction, the SJC decided an important question about free speech, holding the First Amendment does not protect words assisting or encouraging a person to commit suicide. Relying on *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the SJC concluded Carter's words, which were found to have caused Roy's suicide, were not protected because they constituted "speech integral to unlawful conduct." The SJC's holding conflicted with the decisions of several other state supreme courts that have refused to apply the same exception in similar circumstances. More broadly, given the confusion among the federal circuit courts and the consternation among First Amendment scholars, this Court should clarify

scope of the narrow exception that it established in *Giboney*.

The SJC also decided an important federal question concerning due process, holding Carter had fair notice that her so-called "verbal conduct" could constitute involuntary manslaughter. By focusing exclusively on notice, however, that holding overlooked the other half of the constitutional analysis. It directly conflicted with this Court's decisions that require "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement," *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (internal quotation omitted); *see also McDonnell v. United States*, 136 S.Ct. 2355, 2373 (2016). Although the SJC acknowledged that not every person who verbally encourages, or even physically assists, in a suicide should face prosecution, it provided no guidance to distinguish sympathetic cases of assisted suicide from culpable cases of unlawful killing, leaving those critical decisions to the ad hoc, subjective judgments of prosecutors and judges.

This case, which garnered extensive public attention and media coverage around the globe, is an appropriate vehicle to address these important federal constitutional questions. Thus, this Court should grant this petition and vacate Carter's conviction.

I. CARTER'S CONVICTION, BASED ON WORDS ALONE, VIOLATED THE FIRST AMENDMENT, AND IN RELYING ON *GIBONEY*, THE SJC NOT ONLY CREATED A SPLIT AMONG STATE SUPREME COURTS INTERPRETING THE "SPEECH INTEGRAL TO CRIMINAL CONDUCT" EXCEPTION, BUT IT ALSO DEMONSTRATED THE URGENT NEED FOR THIS COURT TO CLARIFY THAT NARROW CATEGORY OF UNPROTECTED SPEECH

In holding that Carter's words fell outside the First Amendment's protection, the SJC created a direct conflict with the Minnesota Supreme Court (which recently vacated assisted-suicide convictions) and a broader conflict with the Illinois Supreme Court and the North Carolina Court of Appeals (which both vacated stalking convictions). Moreover, in misconstruing—and significantly expanding—the "speech integral to criminal conduct" exception, the SJC ignored criticism of *Giboney* by judges and scholars alike. This high-profile criminal case, which squarely presents the free speech issue, not only provides an ideal vehicle to resolve the split among state courts but also to provide much needed guidance about the *Giboney* exception.

A. The SJC Misconstrued *Giboney* and Its Narrow Exception for "Speech Integral to Criminal Conduct"

In rejecting Carter's First Amendment defense, the SJC relied on *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), and held Carter's verbal encouragement of Roy's suicide—the "only speech" at issue in the case—was "speech integral to criminal conduct." App.22a-23a (quoting *Giboney*, 336 U.S. at 498, and citing *United States v. Stevens*, 559 U.S.

460, 468-469 (2010)). But the SJC mischaracterized *Giboney* as a criminal case "upholding [a] a conviction for speech," App.21a, when in fact, it was a civil labor case, affirming an injunction against picketing. Moreover, the SJC misconstrued—and significantly expanded—its narrow exception to the First Amendment.[2]

In *Giboney*, a union of retail ice peddlers sought to force local distributors to stop selling to non-union firms. When one distributor, Empire Storage & Ice Co., refused to go along, the union picketed. Empire sued, seeking an injunction. The union countered that the First Amendment protected the rights of picketers to publicize truthful information about their labor dispute.

If the strikers had engaged in speech alone, their labor protest would have been constitutionally protected. But this Court recognized that, on the record presented, "this publicizing" could not be considered "in isolation" from the closely related picketing "activities." *Id.* at 498.

> All of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning

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[2] In passing and without explanation, the SJC also cited a "true threats" case. App.22a (citing *Commonwealth v. Chou*, 433 Mass. 229, 236 (2001)). That exception is not based on *Giboney*, and it applies to an entirely different category of speech. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam). But Carter never threatened Roy: the only "threat" was that, if Roy did not voluntarily seek professional help, Carter would force him to get mental health treatment. App.49a-50a n.6 ("You just need to do it Conrad or I'm gonna get you help.") (emphasis added).

> union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law.

Id. (emphasis added). Understood in context, *Giboney* stands for the modest principle that, when speech is "used as an integral part of conduct in violation of a valid criminal statute," the constitutional protection for that speech cannot immunize the entire course of conduct from regulation or prosecution. *Id.*

In the absence of any acts, however, the *Giboney* exception is inapplicable. In other words, "[i]f a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply." *United States v. Osinger*, 753 F.3d 939, 950-954 (9th Cir. 2014) (Watford, J., concurring). That was the case, here. Carter's conviction was based on her speech alone.

The SJC did not hold, and no evidence established, that Carter's words were integral to a broader course of criminal actions by which she caused Roy to commit suicide. Rather, citing *Giboney*, the SJC deemed Carter's speech itself to be the conduct ("verbal conduct") that resulted in Roy's death. That is not what *Giboney* stands for, and it directly conflicts with other state supreme courts' readings of this Court's precedents.

B. In Misreading *Giboney*, the SJC Created a Direct Conflict with the Minnesota Supreme Court, Which Recently Held That Words Encouraging Another Person to Commit Suicide Do Not Constitute "Speech Integral to Criminal Conduct"

In relying on *Giboney* and rejecting Carter's First Amendment argument, the SJC's decision created a direct conflict with the Minnesota Supreme Court's decision in *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), which vacated assisted-suicide convictions and invalidated portions of Minnesota's assisted-suicide statute that infringed upon free speech.

Posing as a depressed young female nurse, the defendant William Melchert-Dinkel responded to posts on suicide websites by a 32-year-old man in England and a 19-year-old woman in Canada. *See id.* at 16-17. Shortly after their interactions with Melchert-Dinkel, the man hanged himself, and the woman drowned herself. *See id.* In both cases, Melchert-Dinkel "feigned caring and understanding to win the trust of his victims while encouraging each to [commit suicide]." *Id.* at 16.

Melchert-Dinkel was charged and convicted in Minnesota state court of aiding suicide in violation of Minnesota law, which at the time, prohibited "advis[ing], encourag[ing], or assist[ing] another in taking the other's own life." Minn. Stat. § 609.215, subd. 1. The trial court found Melchert-Dinkel "advised" and "encouraged" his victims, but he did not "assist" them. *See Melchert-Dinkel*, 844 N.W.2d at 17-18.

On appeal, the Minnesota Supreme Court held that, consistent with the First Amendment, the state could not constitutionally prosecute Melchert-Dinkel

for "encouraging or advising another to commit suicide." *Id.* Accordingly, it vacated his convictions and struck down those provisions of the assisted-suicide law that criminalized encouraging or advising (as opposed to assisting) another person to take his or her own life. *See id.*

In reaching that conclusion, the Minnesota Supreme Court expressly rejected the prosecution's argument, based on *Giboney*, that Melchert-Dinkel's words constituted "speech integral to criminal conduct." *Id.* at 19-20 (rejecting as "circular" the contention that a defendant's speech can combine with a decedent's conduct to produce speech integral to conduct). Unlike many other assisted-suicide laws that limit their reach to the physical assistance of suicide, *see infra* at n.3, the Minnesota law imposed criminal penalties on any person who, with words alone, advised or encouraged another to commit suicide. "In the absence of a physical assistance requirement"—that is, if words could themselves constitute criminal acts—"the speech prohibited by section 609.215 is an integral part of a violation of section 609.215." *Melchert-Dinkel*, 844 N.W.2d at 20. The court refused to expand the exception from *Giboney* in that novel way.

The Minnesota Supreme Court also emphasized that *Giboney* applies only to "speech integral to conduct 'in violation of a valid criminal statute.'" *Id.* at 19-20. The exception does not reach "speech that is integral to merely harmful conduct, as opposed to illegal conduct." *Id.* at 20. It was inapplicable in *Melchert-Dinkel*, because "no valid statute criminaliz[ed] suicide" in Minnesota. *Id.* Similarly, in this case, no valid criminal law in Massachusetts clearly prohibited suicide.

The dissent *in Melchert-Dinkel* would have gone even further. In remanding, the majority suggested Melchert-Dinkel could be prosecuted for "assisting" his victims. In dissent, Justice Page argued that, according to its plain meaning, "assistance" requires "physical assistance" and, thus, that "section 609.215 requires an action more concrete than speech instructing another on suicide methods." *Id.* at 26 (Page, J., dissenting). A new trial would only "waste judicial resources," because Melchert-Dinkel had not "engaged in any act other than pure speech." *Id.*

Like Melchert-Dinkel, Carter engaged in "pure speech." Carter neither provided Roy with the means of death (Roy devised the plan to use carbon monoxide, obtained the pump, and placed it in his truck) nor physically participated in his suicide (Roy drove alone to the parking lot and started the pump). Because Carter engaged in no acts, her speech was not integral to any conduct, much less criminal conduct, at least as *Giboney* defined that limited concept. If Carter had been prosecuted in Minnesota, rather than Massachusetts, her conviction would have been vacated on First Amendment grounds.

C. The SJC Also Created a Broader Conflict with State Supreme Courts That, in Recent Stalking Cases, Have Rejected the Argument That Harassing Words Are Categorically Unprotected Under *Giboney*

In relying on *Giboney* to affirm Carter's conviction, the SJC also created a broader conflict with state supreme courts that have addressed the "speech integral to criminal conduct" exception in the context of criminal stalking statutes. *See, e.g.*, *State v.*

Shackelford, 825 S.E.2d 689 (N.C. 2018); *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017). Both the North Carolina Court of Appeals and the Illinois Supreme Court recently vacated convictions based on purported "courses of conduct" that consisted only of harassing "communications." They also struck down the state stalking laws to the extent that they criminalized words alone.

In *People v. Relerford*, the Illinois Supreme Court vacated the defendant Walter Relerford's convictions for stalking and cyberstalking, because the Illinois criminal statutes, 720 ILCS 5/12-7.3(a)(1)-(2) (stalking) and 5/12-7.5(a)(1)-(2) (cyberstalking), were "overbroad" and "impermissibly infringe[d] on the right of free speech by criminalizing certain "communications to or about" another person. 104 N.E.3d at 358.

After Relerford interned at a radio station, he contacted the female manager, S.B., by email. Although his direct communications contained no threats, a colleague at the station discovered that Relerford had also posted several Facebook comments about S.B. Those posts were threatening, profane, and obscene: Relerford threatened to kill employees of the radio station and made graphic comments about sexual activity with S.B.

The Illinois law provided that a person commits "stalking" when he or she knowingly engages in a "course of conduct" that he or she knows, or should know, would cause a reasonable person to fear for his or her safety (or that of a third-party) or suffer emotional distress." 720 ILCS 5/12-7.3(a)(1)-(2). (The cyberstalking statute is essentially identical. 720 ILCS 5/12-7.5(a).) The law defined a "course of conduct"

to constitute, among other things, "2 or more acts" in which a person "communicates to or about a person" including "via electronic communications." *Id.* 5/12-7.3(c)(1). Relerford was convicted of stalking for engaging in conduct that consisted of posting his disturbing Facebook comments about S.B.

On appeal, the prosecution cited *Giboney* and argued that, although the laws criminalized certain "communicat[ion]s to or about a person," they did "not implicate First Amendment rights," because they concerned only "speech that is integral to criminal conduct," *i.e.*, stalking 104 N.E.3d at 351-353. The Illinois Supreme Court rejected that claim: "The State's contention is wrong." *Id.* at 352. "The rule cited by the State applies when the speech is 'an integral part of conduct in violation of a valid criminal statute.'" *Id.* (citing *Giboney*, 336 U.S. at 498). Under subsection (a) of the Illinois stalking and cyber-stalking laws, however, "the speech is the criminal act." *Id.* By arguing that Relerford's words constituted "speech integral to criminal conduct," the prosecution sought to expand *Giboney*'s narrow exception.

Similarly, in *State v. Shackelford*, the North Carolina Court of Appeals vacated the defendant Brady Shackelford's stalking convictions. Citing the "helpful" decision in *Relerford*, the North Carolina Court of Appeals noted "the pertinent statutory language at issue here is virtually identical to the statutory provision declared unconstitutional" by the Illinois Supreme Court. *Id.* at 698.

Shackelford met his victim, "Mary," at church. He sent letters and emails, but she spurned his advances. After a church official told Shackelford not

to contact Mary, he posted several comments on his Google+ account. Shackelford's incoherent musings referred to Mary as his "wife" and "soulmate." Despite an arrest for misdemeanor stalking, Shackelford continued to post on his Google+ account, making increasingly obsessive and bizarre references to Mary. Based on his harassing communications, Shackelford was convicted of felony stalking.

The North Carolina stalking law mirrored its Illinois counterpart, providing a person may be found guilty of "stalking" if he or she engages in a "course of conduct" to harass another person. N.C. Gen. Stat. § 14-277.3A (2017). Like Illinois, North Carolina defined a "course of conduct" to include repeated "communicat[ion]s to or about a person." *Id.*

On appeal, the prosecution argued Shackelford's posts "constitute[d] 'speech that is integral to criminal conduct'—a category of speech that falls outside of the protection provided by the First Amendment." *Id.* at 697. The North Carolina Court of Appeals disagreed, because under state law, "no additional conduct on Shackelford's part" other than his words alone "was needed to support his stalking convictions." *Id.* at 698. Instead, "his speech itself was the crime." *Id.* That, the North Carolina Supreme Court concluded, was inconsistent with the First Amendment. *See id.* at 698-699 ("We . . . reject the State's argument that Defendant's posts fall within the 'speech integral to criminal conduct' exception.").

If Carter had been prosecuted in Illinois or North Carolina, her conviction would have been vacated on First Amendment grounds. Those state supreme courts would not have applied the *Giboney* exception and

deemed Carter's words to be unprotected speech that was "integral to criminal conduct," because they have expressly rejected the constitutional analysis that the SJC erroneously applied in this case.

D. This Court Should Clarify the Limited Scope of the "Speech Integral to Criminal Conduct" Exception from *Giboney*, Which Federal Judges and Academic Scholars Have Criticized as Ambiguous and Incoherent

The free speech issue that this petition presents has important implications for federal constitutional law even beyond Carter's case, which has received widespread publicity, and apart from assisted suicide, which remains an issue of national importance. Two federal circuit courts have addressed *Giboney* in the context of state laws prohibiting counselors from engaging in "sexual orientation change efforts" ("SOCE"). *See King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014). In both cases—which reached opposite conclusions—the courts cautioned against relying on *Giboney* to strip "speech" of First Amendment protection by calling it "conduct."

In *King v. Governor of N.J.*, the Third Circuit held that a New Jersey law against counseling "to change a person's sexual orientation" infringed on free speech. Rejecting the prosecution's "counter-intuitive" argument that "the verbal communications that occur during SOCE counseling are 'conduct,'" the Third Circuit explained that *Giboney* does "not alter our conclusion," because the critical passage—on which the SJC expressly relied in *Carter*—"is now over 60 years old" and "has been the subject of much con-

fusion" about its "meaning and scope." 767 F.3d at 225 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)). In *Pickup v. Brown*, the Ninth Circuit reached the opposite conclusion about SOCE regulations, and its denial of a petition for rehearing *en banc* drew a strongly worded dissent from Judge O'Scannlain, who insisted the First Amendment's protections for speech cannot be "nullif[ied]" by "playing [a] labeling game." 740 F.3d at 1216 (O'Scannlain, J, dissenting). Rejecting the panel's characterization of SOCE as treatment and, thus, "conduct," Judge O'Scannlain wrote, "the government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate." *Id.*

Those views about *Giboney* echo pointed criticism by academic scholars that the "speech integral to conduct" exception is "unhelpful to First Amendment analysis," E. Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1323 (2005), because it "lacks content" and, as a result, "can be adapted and applied to justify a wide range of restrictions on disfavored or offensive speech," E. Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 986 (2016).

One legal scholar, Prof. Eugene Volokh, has described *Giboney* as a "poor basis for analyzing speech restrictions":

> The case itself provides no clear rule distinguishing speech that's constitutionally protected from speech that's stripped of constitutional protection. The cases applying

> *Giboney* don't help either. Some of those cases use *Giboney* to reach results that are inconsistent with modern First Amendment law. Other cases may reach results that fit within modern First Amendment doctrine, but the real foundation for the decision in those cases is something other than the *Giboney* principle. The citation of *Giboney* only obscures the true rationale.

Volokh (2005), *supra*, at 1326; *see id.* at 1323 ("[I]t's hard to figure out just what line *Giboney* purported to draw.").

Other commentators have raised similar concerns. *See, e.g.*, M. Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 Hofstra L. Rev. 681, 727 (2016) ("[N]umerous courts and scholars have attempted to use *Giboney* as the springboard for less-than-complete arguments for excluding certain speech from First Amendment coverage."); M. Buchhandler-Raphael, *Overcriminalizing Speech*, 36 Cardozo L. Rev. 1667, 1708-1709 (2015) ("*Giboney*'s exception . . . has not received any doctrinal articulation in more recent U.S. Supreme Court cases."); C. Hessick, *The Limits of Child Pornography*, 89 Ind. L.J. 1437, 1451 (2014) ("*Giboney* itself did not clearly define the reach of the exception, nor have subsequent cases applying *Giboney*."); C. Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 Seton Hall L. Rev. 395, 445 (2014) ("*Giboney*'s scope . . . is susceptible to several potential interpretations, and the Court's subsequent applications of this exception have not helped."); S. Morrison, *Conspiracy Law's Threat to Freedom of Speech*, 15 Pa. J. of Con. L. 865, 902-905

(2013) ("*Giboney* leaves us wanting a definition," and "the legal opinions and articles that apply integral speech are unhelpful in defining the category.").

In *Carter*, the SJC used *Giboney* as "a tool for avoiding serious First Amendment analysis." Volokh (2016), *supra*, at 988. It affirmed Carter's conviction for causing Roy's suicide with her words alone "as supposedly fitting within an established exception, without a real explanation" of what speech concerning (or causing) suicide may be protected or why. *Id.* Ironically, the SJC has recognized it would be impossible to "define where on the spectrum between speech and physical acts involuntary manslaughter must fall," App.59a, but the court nevertheless relied on *Giboney*'s much-criticized exception, which assumes speech can be meaningfully distinguished from action, a "notoriously problematic" endeavor that "invites sophism and ad hocery." D. Kahan, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. 851, 855-856 (2012). In the end, a criminal conviction for involuntary manslaughter should not turn on a labeling game by which a court deems pure speech to be unlawful action that deserves no First Amendment protection.

E. The SJC Effectively Declared a Sweeping New Category of Speech About Suicide That Would Fall Outside the Protection of the First Amendment

In *Carter*, the SJC carved out a new "coerced suicide" exception to the First Amendment, a sharp contrast to the Minnesota Supreme Court's emphatic refusal to "declar[e] any new categories of speech that fall outside of the First Amendment's umbrella

protections." *Melchert-Dinkel,* 844 N.W.2d at 20 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791-792 (2011), and *United States v. Stevens*, 559 U.S. 460, 472 (2010)). To be sure, the SJC considered Carter's speech to be offensive, but "disgust is not a valid basis for restricting expression," *Entm't Merchs. Ass'n*, 564 U.S. at 798, under *Giboney* or otherwise. Regardless of whether Carter "pressured," "convinced," "chastised," or "coerced" Roy to take his own life, the SJC affirmed her conviction based solely on what she said to Roy, not anything she did with or to him.

"In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Stevens*, 559 U.S. at 470). "Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few '"historic and traditional categories [of expression] long familiar to the bar."' *Alvarez*, 567 U.S. at 717 (citing *Stevens*, 559 U.S. at 468 (internal quotation omitted)).

This Court has "recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations," *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992), and it has "chastened [the] lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply." *Pickup*, 740 F.3d at 1221 (O'Scannlain, J., dissenting); *see Entm't Merchs. Ass'n*, 564 U.S. at 791 (holding "new

categories of unprotected speech may not be added to the list by [a court] that concludes certain speech is too harmful to be tolerated"). But that is what the SJC did, disregarding the "traditional limitations" on categories of unprotected speech, *R.A.V.*, 505 U.S. at 383, and exercising "'startling and dangerous'" authority, *Alvarez*, 567 U.S. at 717 (quoting *Stevens*, 559 U.S. at 470), to declare for the first time that the First Amendment does not protect "speech integral to suicide."

F. The Common Law of Involuntary Manslaughter Cannot Survive Strict Scrutiny in the Context of Assisted or Encouraged Suicide

In a single conclusory paragraph, the SJC alternatively suggested that the common law of involuntary manslaughter, as a content-based restriction on speech about suicide, is "narrowly circumscribed" and survives strict scrutiny. App.24a-25a. It does not. Worse, the SJC's view exacerbates the direct split among state supreme courts. For example, in *Melchert-Dinkel*, the Minnesota Supreme Court held the provisions of the state assisted-suicide law that criminalized "encouraging" or "advising" suicide, as opposed to "assisting" in it, were "not narrowly drawn to serve the State's compelling interest in preserving life" and did "not survive strict scrutiny." 844 N.W.2d at 23-24; *see also Shackelford*, 825 S.E.2d at 700-701 (holding the application of state stalking law to the defendant's offensive social media posts "amounts to a content-based restriction on his speech that fails to satisfy strict scrutiny"); *Relerford*, 104 N.E.3d at 350-351 (holding state stalking laws were "overbroad" because they did not "differentiate[] between distress-

ing communications that are subject to prosecution and those that are not" and failed to "prevent unwarranted prosecutions" on "a case-by-case [basis]").

Identifying the state's interest in preventing suicide begins, rather than ends, the constitutional analysis. Because "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989), a restriction criminalizing speech based on its message must be "justified by a compelling government interest" and, in addition, "narrowly drawn to serve that interest," *Entm't Merchs. Ass'n*, 564 U.S. at 794 (although there was "no doubt" that "a State possesses legitimate power to protect children from harm," holding a law regulating violent video games did not "survive strict scrutiny"). Here, for the same reasons that the common law of involuntary manslaughter is unconstitutionally vague, *see* Part II *infra*, it is not narrowly tailored. The law could be applied to speech providing instructions, rallying courage, downplaying fears, or otherwise causing another person to commit suicide. Nothing in *Carter* prevents prosecutors from charging involuntary manslaughter in those situations. Rather the decision "allow[s] the government to stamp out virtually any speech at will." *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1746 (2018) (Thomas, J., concurring). The bare assertion that Carter's words were "different in kind," App.25a, is not an adequate substitute for the narrow tailoring necessary to survive strict scrutiny when First Amendment rights are so plainly implicated.

II. AS APPLIED TO ASSISTING OR ENCOURAGING SUICIDE WITH WORDS ALONE, THE COMMON LAW OF INVOLUNTARY MANSLAUGHTER VIOLATES DUE PROCESS BECAUSE NEITHER *CARTER* NOR ANY PRIOR PRECEDENT HAS ESTABLISHED MEANINGFUL GUIDANCE TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT

"By combining indeterminacy about" when speech alone may be deemed conduct "with indeterminacy about" when electronic communications amount to virtual presence, especially among immature, troubled teenagers who are active users of social media, the SJC dangerously expanded the common law of involuntary manslaughter in a manner that "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson v. United States*, 135 S.Ct. 2551, 2558 (2015). In doing so, and despite this Court's clear mandate, the SJC failed to establish "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

A. Due Process Does Not Permit "Standardless" Criminal Laws on the Assumption That Prosecutors Will Reasonably Apply Them

This Court has never hesitated to vacate convictions for violations of vague criminal laws. *See McDonnell v. United States*, 136 S.Ct. 2355 (2016). For example, in *Ashton v. Kentucky*, 384 U.S. 195 (1966), this Court vacated convictions for criminal libel, an offense that was traditionally understood to include publications "calculated to cause disturbances

of the peace," because "no Kentucky case ha[d] redefined the crime in understandable terms," and as a result, the common law crime was "indefinite and uncertain." *Id.* at 197-198; *see also Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (vacating a conviction for "the common law offense of inciting a breach of the peace," which "embraces a great variety of conduct destroying or menacing public order and tranquility"). Vague common-law offenses, like expansive criminal statutes, "sweep in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and the judicial branches too wide a discretion in its application." *Id.* at 300.

Put simply, "a vague law is no law at all." *United States v. Davis*, ___ U.S. ___, 2019 U.S. LEXIS 4210, *6 (U.S. June 24, 2019). Rather it "invite[s] the exercise of arbitrary power," by "allowing prosecutors and courts to make it up." *Session v. Dimaya*, 138 S.Ct. 1204, 1223-1224 (2018) (Gorsuch, J., concurring). Absent "reasonably clear lines," the "standardless sweep" of the criminal law permits prosecutors "to pursue their own personal predilections." *Goguen*, 415 U.S. at 575 (vacating a flag contempt conviction) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-169 (1972) (vacating a loitering conviction)). When "no standards govern[ ] the exercise of discretion," the criminal law "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

For these reasons, due process requires that criminal laws define offenses with sufficient specificity to prevent "arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The "concern for minimal guidelines" dates back to *United States v. Reese*, 92 U.S. 214 (1876), which recognized the danger of "set[ting] a net large enough to catch all possible offenders" and "leav[ing] it to the courts to step inside and say who could rightfully be detained, and who should be set at large." *Id.* at 221. That is why this Court has consistently refused to construe vague criminal laws "on the assumption that the Government will 'use [them] responsibly.'" *McDonnell*, 136 S.Ct. at 2372-2373 (quoting *Stevens*, 559 U.S. at 480); *see also United States v. Sun-Diamond Growers*, 526 U.S. 398, 408 (1999) (declining to rely on "the Government's discretion" to protect against overzealous prosecutions).

Although this Court's recent vagueness decisions have focused on federal statutory offenses, *see, e.g.*, *McDonnell*, *supra* (18 U.S.C. §§ 201, 1343, 1349, and 1951), and *Skilling v. United States*, 561 U.S. 358 (2010) (18 U.S.C. §§ 371, 1343, and 1346), the same due process principles apply to common-law offenses. "While the common law necessarily is 'evolutionary in nature,' even in jurisdictions where common-law crimes are still part of the penal framework, an act does not become a crime without its foundations having been firmly established in precedent." *Hamden v. Rumsfeld*, 548 U.S. 557, 602 n.34 (2006); *cf. Rogers v. Tennessee*, 532 U.S. 451, 467-482 (2001) (Scalia, J., dissenting) (contrasting "normal, case-by-case common-law adjudication" with the expansion of common-law offenses "through disregard of the traditional limits on judicial power").

B. Clear Guidelines Are Especially Important in Suicide Cases, Because the Prosecution of Assisted or Encouraged Suicide Raises Difficult and Profound Problems

The need for clear guidelines is especially compelling in suicide cases, which inevitably prompt "perplexing question[s] with unusually strong moral and ethical overtones," *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 (1990). Although *Cruzan* split this Court, all the Justices agreed, "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," *id.* at 281, and laws regulating the end-of-life decisions pose "difficult and sensitive problems," *id.* at 292 (O'Connor, J., concurring); *see id.* at 292 (Scalia, J., concurring) (describing the questions presented as "difficult, indeed agonizing"); *id.* at 310 (Brennan, J., dissenting) (recognizing "[d]ying is personal" and "profound"); *id.* at 354 (Stevens, J., dissenting) (stating "[c]hoices about life and death are profound ones, not susceptible of resolution by recourse to medical or legal rules").

Moreover, in recent years, social norms concerning these controversial issues have evolved, and they will almost certainly continue to do so. *See Washington v. Glucksberg*, 521 U.S. 702, 716 (1997) (surveying the "many significant changes in state laws and in the attitudes that these laws reflect"). Given the difficulties with applying common law manslaughter to an area as fraught as assisted or encouraged suicide, almost all of the states—Massachusetts is a notable exception—have adopted a "modern statutory scheme" that "treats assisted suicide as a separate crime, with penalties less onerous than those for murder." *People v.*

Kevorkian, 527 N.W.2d 714, 736 (Mich. 1994); *see Glucksberg*, 521 U.S. at 715 & n.11 (reviewing the early development of state assisted-suicide laws).

These new statutes "mitigate the punishment for assisted suicide by removing it from the harsh consequence of homicide law and giving it a separate criminal classification more carefully tailored to the actual culpability of the aider and abettor." *In re Joseph G.*, 34 Cal. 3d 429, 434-435 (1983); *see also State v. Sexson*, 869 P.2d 301, 305 (N.M. 1994). They also guide law enforcement by limiting criminal liability to persons who provide "physical assistance" in suicides, not only verbal encouragement. For example, a 1996 Rhode Island law provides that a person commits a felony punishable by ten years of imprisonment if, "with the purpose of assisting another person to commit suicide," the person provides the physical means" or "participates in a physical act by which another person commits or attempts to commit suicide." R.I.G.L. § 11-60-3.[3] In the more than 40 states with assisted-suicide statutes, Carter would not have faced prosecution, and she could not have been convicted for telling Roy to take his own life.

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[3] *See also* Ariz. Rev. Stat. § 13-1103; Ga. Code § 16-5-5; Ill. Stat. c. 720 § 5/12-34.5(a)(2); Idaho Code § 18-4017(a)-(b); Ind. Code § 35-42-1-2.5(b); Kan. Stat. § 21-5407; Ky. Rev. Stat. § 216.302; Md. Code, Crim. L. § 3-102(2)-(3); Ohio Rev. Code § 3795.04; S.C. Code § 16-3-1090; Tenn. Code § 39-13-216. In other states, legislatures have enacted more broadly worded laws, and courts have narrowly construed them to required active involvement. *See, e.g.*, *In re Ryan N.*, 92 Cal. App. 4th 1365, 1374 (2001) (interpreting Cal. Penal Code § 401).

C. The SJC Misconstrued This Court's Due Process Precedents by Focusing on Whether Carter Had Fair Notice but Ignoring Whether Prosecutors Have Meaningful Guidance

Under this Court's vagueness precedents, due process imposes two distinct requirements: the law must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Kolender*, 461 U.S. at 357, and it must also be written or interpreted "in a manner that does not encourage arbitrary and discriminatory enforcement," *id.* at 357-58; *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (holding, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"). The SJC addressed the first prong of this calculus but ignored the second.

In *Smith v. Goguen*, (vacating a conviction under the Massachusetts flag contempt statute, M.G.L. c.264, § 5), this Court identified the constitutional requirement of "minimal guidelines to govern law enforcement" as "the most meaningful aspect of the vagueness doctrine." 415 U.S. at 574 (emphasis added); *see Dimaya*, 138 S.Ct. at 1228 (Gorsuch, J., concurring). In light of "the widely varying attitudes" about the flag and "tastes for displaying" it, this Court presumed that Massachusetts had not intended "to make criminal every informal use of the flag." *Goguen*, 415 U.S. at 574. As drafted, however, the law criminalized all "contemptuous[ ]" treatment, and it "fail[ed] to draw reasonably clear lines between the kinds of non-ceremonial treatment that are criminal and those that are not." *Id.* at 569 n.3 (quoting M.G.L. c.264,

§ 5), 574. This Court held that the prospect for "selective enforcement" amounted to the "denial of due process." *Id.* at 576.

In rejecting Carter's due process challenge, the SJC misstated the relevant two-part principle. It held, "our common law provides sufficient notice that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing a victim to commit suicide." App.20a (emphasis added). That discussion, however, disregarded the "most important aspect" of the due process analysis: whether the common law, as interpreted by the SJC, provides sufficient guidance to prosecutors and judges to prevent arbitrary and discriminatory enforcement. In fact, it provides no guidance whatsoever. To the contrary, the law authorizes decisions "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109.

D. The SJC Recognized That Not All Assisted or Encouraged Suicide Cases Warrant Criminal Prosecution, but It Failed to Provide Any Criteria for Law Enforcement to Distinguish Acceptable Assisted Suicide from Unlawful Involuntary Manslaughter

Although the SJC affirmed Carter's conviction, it strongly suggested that not all assisted or encouraged suicides should be prosecuted as involuntary manslaughter. That is because future cases might, in the court's view, prove to be more sympathetic, understandable, and acceptable. In *Carter I*, the SJC stated:

> [T]his case . . . is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case . . . .

App.62a. In *Carter II*, the SJC "reemphasize[d]":

> [T]his case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with the certain physical and mental suffering brought upon by impending death. . . . Nothing in *Carter I*, our decision today, or our earlier involuntary manslaughter cases involving verbal conduct suggests that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important First Amendment concerns.

App.24a & n.15 (citing App.62a).

Even if these various situations may seem "easily distinguishable" to the SJC, its decision in *Carter* failed to tell police, prosecutors, or courts how to draw the critical distinctions. The SJC imagined a range of conduct from coerced suicide to dignified death, but it offered no clear, meaningful, and constitutional way to determine where a particular case may fall on that spectrum. The deciding factor is the

prosecutor's gut. A prosecutor who believes that all suicide is wrong could prosecute people in the very situations that the SJC characterized as "easily distinguishable." Nothing in *Carter* would prevent such aggressive prosecutions in all assisted or encouraged suicide cases. "The only thing standing between defendants," like Carter, who face prosecution for involuntary manslaughter and individuals who are considered to have helped their long-suffering loved ones die with dignity is "the mercy of a prosecutor." *Stevens*, 559 U.S. at 477. Putting such "great power in the hands of prosecutors" not only risks "nonuniform execution of that power across time and geographic location" but also threatens to "undermin[e] the necessary confidence in the criminal justice system," because "the public fears arbitrary prosecution." *Marinello v. United States*, 138 S.Ct. 1101, 1108-1109 (2018).

The SJC's hypothetical case of a would-be defendant who "offer[s] support, comfort, and even assistance to a mature adult who, confronted with [a painful, terminal illness], has decided to end his or her life" begs more questions than it answers. App.24a & n.15 (citing App.62a). What if the would-be defendant, like Carter, is an adolescent who, as a matter of well-established neuroscience, lacks maturity, cannot weigh risks and benefits, and makes short-term decisions heedless of long-term consequences? Does it matter whether the person who commits suicide is older and, if so, how old? Does it matter whether the person suffers from physical pain, or can mental anguish be sufficient? Must the person's malady be "terminal," and who makes that medical judgment? Is a pre-existing relationship required, and if so, could it be

short-term and long-distance? Finally, what if the person who takes his or her own life wants to prevent emotional pain or financial hardship to the would-be defendant? As this Court has recognized, "[c]lose family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading." *Cruzan*, 497 U.S. at 286. If such family members persuade an ailing relative to commit suicide, have those relatives committed involuntary manslaughter? Whatever the answers to these difficult questions, there is no doubt that Carter has "cast[ed] a pall of potential prosecution" over all these situations. *McDonnell*, 136 S.Ct. at 2372.

Even the supposedly easy hypothetical that the SJC describes would be a hard case. Consider a defendant who is the wife of a mature, older man who has been diagnosed with a terminal illness and suffers from agonizing pain. Too weak to take his own life, the husband asks his wife to pour a fatal dose of medicine and lift the cup to his lips. She does, and he dies, at peace and surrounded by loving family. *Carter* indicates the SJC would approve of a prosecutorial decision not to charge the wife for providing "assistance" in her husband's suicide. App.24a & n.15 (citing App.62a). Depending on the predilection of an individual prosecutor, merely telling a person to commit suicide may constitute involuntary manslaughter, while actually helping that person to commit suicide may not. Due process forbids that unprincipled, ad hoc approach to enforcing criminal law.

E. Carter Demonstrates the Unconstitutional Vagueness of Involuntary Manslaughter as Applied to a Troubled Teenager Who, with Words Alone, Causes Another Young Person to Commit Suicide

In at least three respects, the SJC interpreted involuntary manslaughter too broadly, compounding the unconstitutional vagueness of the common law and impermissibly inviting prosecutors to enforce the law in an arbitrary and discriminatory manner. First, the SJC affirmed Carter's conviction by using the label "verbal conduct," a newly minted concept that neither *Carter* nor any prior case has defined, to describe communications that were undeniably "pure speech." It also analogized this case to prior suicide cases that featured physically present defendants by holding that Carter's text messages and phone calls rendered her "virtually present," an unprecedented fiction that was never explained. Finally, the SJC emphasized Roy's age, describing him as Carter's "young victim," but it ignored the complex issues of adolescent neuroscience that often arise in suicide cases, like this one, involving troubled teenagers and their electronic communications.

Without citation to any precedent from Massachusetts or elsewhere, the SJC held Carter committed involuntary manslaughter because her so-called "verbal conduct" caused Roy to commit suicide. App.1a-2a, 11a, 20a, 25a. The SJC did not, however, define "verbal conduct," a phrase that no prior involuntary manslaughter case had ever used, or explain how to distinguish words from action. After *Carter*, can a single statement be sufficiently "coercive"

to constitute "wanton and reckless conduct" under Massachusetts law? Can a series of subtle hints suffice for criminal liability? When do words cross the line from permissible, encouragement, advice, or persuasion to prohibited coercion? App.18a n.10 (insisting Carter "did not merely encourage" Roy, "but coerced him to get back into the truck, causing his death"). Does such a line even exist?

Before the trial, the SJC offered no guidance: "We need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case approach." App.59a. Later, in affirming the guilty verdict, the SJC maintained its standardless approach. Thus, *Carter* establishes a "bad precedent that promotes convictions based on the subjective heinousness" of a defendant's words "as opposed to established legal standards." N. LaPalme, *Michelle Carter and the Curious Case of Causation: How to Respond to a Newly Emerging Class of Suicide-Related Proceedings*, 98 B.U.L. Rev. 1444, 1446 (2018); *see id.* at 1453 (arguing the affirmance of Carter's conviction "could lead to unpredictable results based entirely on whether the individual judge finds the defendant's words to be vicious enough"). Applying "so "shapeless" a criminal law to "condemn someone to prison . . . does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S.Ct. at 2560.

Similarly, the SJC invented the novel concept of "virtual presence" to affirm Carter's conviction, *see* App.60a; see also App.56a n.13 ("Although not physically present when [Roy] committed suicide, the con-

stant communications with him by text message and by telephone leading up to and during the suicide made [Carter's] presence at least virtual."). All three Massachusetts cases on which the SJC relied as prior precedent involved physically present defendants. *See Commonwealth v. Atencio*, 345 Mass. 627 (1963) (defendants played Russian roulette with the victim and handed him the loaded firearm); *Persampieri v. Commonwealth*, 343 Mass. 19 (1961) (defendant handed his wife a rifle, told her how to pull the trigger, and stood in front of her when she committed suicide); *Commonwealth v. Bowen*, 13 Mass. 356 (1816) (defendant, who was not convicted, occupied a neighboring jail cell from where he persuaded the victim to take his own life, shortly before his scheduled public hanging). There is no suicide case, from Massachusetts or elsewhere, affirming the involuntary manslaughter conviction of a physically absent defendant. Nor is there any case that adopts "virtual presence," through "constant" communication, as a basis for criminal liability.

Carter fails to explain when a defendant may be deemed "virtually present." How many messages, over how long a period of time, constitute "constant" communication? Is the key variable the volume, the frequency, or a combination of both? Can a teenager who is simultaneously active with several peers on social media be present in multiple places at one time? By leaving these questions unanswered, Carter's conviction creates "a vagueness issue in the context of online relationships based on electronic communications," because "virtual presence" is a legal rationale with "no common understanding" and, as a result, "may make many unsuspecting citizens into criminals."

C. Adside, III, *The Innocent Villain: Involuntary Manslaughter by Text*, 52 U. Mich. J.L. Reform 732, 734-735 (2019); *see id.* at 745-746 ("The [SJC] acknowledged that there will be some subjective line drawing from one virtual-presence case to another."). Given the data that teenagers send and receive about 200 text messages per day, *see* Pew Research Center, *Teens, Smartphones & Texting* (2012) at 12, due process demands clear criteria for determining when a defendant may be considered "virtually present" and, thus, held liable for involuntary manslaughter in a suicide case.

Finally, the SJC made much of Roy's age, repeatedly characterizing him as Carter's "young victim." But Roy was older than Carter, who was only 17 at the time. *Carter* offered no guidance to police, prosecutors, and courts about how to consider the respective ages of teenagers in the culpability analysis. The common law of involuntary manslaughter incurporates a "reasonable person" standard. *See Commonwealth v. Sires*, 413 Mass. 292, 302 (1997) ("reasonable person"); *Commonwealth v. Levesque*, 436 Mass. 443, 450 (2002) ("reasonable care"). But in that legal context, a reasonable person means a typical adult, and reasonable care means the care that an adult would ordinarily demonstrate in the same situation. As this Court as recognized, however, "children cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

"Youth matters," because among the "hallmark features" of adolescence are "immaturity, impetusosity, and failure to appreciate risks and consequences." *Miller v. Alabama*, 567 U.S. 460, 473, 477 (2012); *see*

Johnson v. Texas, 509 U.S. 350, 368 (1993). "[F]ailing to consider these constitutionally significant differences . . . 'poses too great a risk of disproportionate punishment'" for young offenders, like Carter. *Tatum v. Arizona*, 137 S.Ct. 11, 12 (2016) (Sotomayor, J., concurring) (quoting *Miller*, 567 U.S. at 479). Conduct that would be plainly reckless for adults may seem completely reasonable to teenagers, particularly when that "conduct" consists of online communications or social media posts. *Carter* authorizes prosecutors to charge a juvenile with involuntary manslaughter for sending harsh, berating, or coercive texts to a peer who then commits suicide. As a result, the decision delegates to prosecutors the difficult task of distinguishing misguided advice or unfortunate bullying from unlawful killing.

CONCLUSION

For the foregoing reasons, Petitioner Michelle Carter respectfully requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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