No. 19-62

In the Supreme Court of the United States

MICHELLE CARTER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment permits petitioner's conviction for involuntary manslaughter, based on wanton or reckless conduct that caused the victim's suicide, because the speech at issue was integral to criminal conduct.

2. Whether petitioner's conviction for involuntary manslaughter comports with the requirement of the Due Process Clause of the Fifth Amendment that the law not be so vague as to encourage arbitrary and discriminatory enforcement, where petitioner no longer contests that Massachusetts' common law of involuntary manslaughter gave sufficient notice that her conduct was prohibited.

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INTRODUCTION

This petition should be denied because neither of the two questions presented satisfies the Court's criteria under Rule 10. First, with respect to this Court's longstanding recognition that speech integral to crime is not protected by the First Amendment, petitioner claims a square split with only one other state court, and the alleged conflict is illusory. The Massachusetts and Minnesota courts both recognized and applied the same doctrine, and they appropriately distinguished between the circumstances here—prosecution of a common-law offense that is defined by reference to a defendant's conduct, not speech—and the very different circumstances presented by a statute specifically targeting and criminalizing speech concerning suicide. Second, petitioner does not even attempt to claim a split of authority on the fact-bound question whether Massachusetts' common law of involuntary manslaughter was unconstitutionally vague as applied to her; she no longer contests that she herself had sufficient notice that her conduct was prohibited; and the decision below does not conflict with this Court's precedent regarding the necessity of adequate guidance for law enforcement.

STATEMENT

1. Petitioner was found guilty in Massachusetts Juvenile Court for the involuntary manslaughter of Conrad Roy, III. Pet. App. 41a. Having spent weeks exhorting Roy to kill himself, petitioner was on the phone with Roy for more than 80 minutes during the evening of his death by suicide; heard his labored

breathing as he asphyxiated himself with carbon monoxide in his truck; and ordered Roy to get back into the fume-filled truck when he stepped out. Pet. App. 6a-10a.

The record includes "voluminous" text messages between petitioner and Roy. Pet. App. 3a n.2. As the Supreme Judicial Court (SJC) below described, petitioner carried out a "systematic campaign of coercion" that "targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own" in the last weeks of his life. Pet. App. 62a. Petitioner exchanged many messages with Roy discussing the method he chose to kill himself, namely, carbon monoxide poisoning in his enclosed truck. *See, e.g.*, Pet. App. 4a n.3, 49a-50a n.6. She knew Roy had previously attempted suicide but had abandoned or foiled his own attempts, and she taunted him that he would purposely fail in killing himself again. Pet. App. 6a; *see*, *e.g.*, Pet. App. 7a n.5. And she repeatedly urged him that he "just [had] to do it" and that "the time [was] right," and berated him "for his indecision and delay." Pet. App. 4a-5a n.4, 6a; *see, e.g.*, Pet. App. 4a-5a n.4, 6a-7a n.5, 45a-50a nn.3-6 (collecting text messages).

Ultimately, Roy obtained a gasoline-powered water pump to generate carbon monoxide. Pet. App. 8a. On the evening of July 12, 2014, he "drove his truck to a local store's parking lot and started the pump." Pet. App. 9a. "While the pump was operating, filling the truck with carbon monoxide," petitioner and Roy were in contact by phone. *Id.* Cell phone records show that they were on the phone for two calls, each spanning more than 40 minutes: one from Roy to petitioner at 6:28 P.M., and the other from petitioner to Roy at 7:12

P.M. Pet. App. 9a, 50a n.7. The same evening, petitioner told two friends by text that she thought Roy had killed himself, and she described being on the phone with Roy. Pet. App. 9a. At 8:02 P.M., she wrote to a friend: "he just called me and there was a loud noise like a motor and I heard moaning like someone was in pain, and he wouldn't answer when I said his name. I stayed on the phone for like 20 minutes and that's all I heard." *Id.*

On the afternoon of the next day, July 13, 2014, a police officer found Roy's body in his truck parked in the store parking lot. Pet. App. 44a. "He had committed suicide by inhaling carbon monoxide that was produced by a gasoline powered water pump located in the truck." Pet. App. 3a.

Later, on September 15, 2014, petitioner wrote to a friend that, while she was on the phone with Roy on the evening of his suicide, he stepped out of the truck because he became frightened as the pump was filling the cabin with carbon monoxide, and petitioner ordered him back into the truck. Pet. App. 10a (he "got out of the car because it was working and he got scared and I fucking told him to get back in"). Petitioner also wrote to the friend that petitioner "was talking to him on the phone when he did it" and "could have easily stopped him or called the police but [she] didn't." Pet. App. 51a.

2. A Bristol County grand jury indicted petitioner as a youthful offender on a charge of involuntary manslaughter, under Mass. Gen. Laws ch. 119, § 54, on February 6, 2015. Pet. App. 43a (noting that petitioner was 17 years old at the time of Roy's death at age 18); *see also N.M. v. Commonwealth*, 478 Mass. 89,

91 n.5 (2017) (explaining youthful-offender status under Massachusetts law). After the Juvenile Court denied petitioner's motion to dismiss the indictment, petitioner sought and obtained interlocutory review at the SJC. Pet. App. 52a. The SJC found that the Commonwealth had presented sufficient evidence to the grand jury "to support a finding of probable cause that the defendant's conduct (1) was intentional; (2) was wanton or reckless; and (3) caused the victim's death." Pet. App. 56a (footnote omitted). The SJC also rejected due process and First Amendment challenges to the indictment that petitioner had advanced. Pet. App. 55a n.11, 62a n.17. Ultimately, the SJC "conclude[d] that there was probable cause to show that the coercive quality of the defendant's verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death." Pet. App. 61a.

3. Petitioner was convicted of involuntary manslaughter after a jury-waived trial. Pet. App. 2a. The trial court, sitting as factfinder, believed "some explanation of [the] verdict" was "warranted" and gave an oral statement that the court cautioned "should not be construed as a complete explanation" of its findings of fact and conclusions of law. Pet. App. 31a; *see also id.* (noting written findings not required in the absence of a request); Mass. Gen. Laws ch. 119, § 55A; Mass. R. Crim. P. 26; Mass. Super. Ct. R. 70. The court found that the Commonwealth had proven beyond a reasonable doubt that petitioner's communications to Roy between June 30 and July 12 "constituted wanton and reckless conduct by her." Pet. App. 31a-32a. The court

further found that the Commonwealth had proven beyond a reasonable doubt that petitioner caused Roy's death, based specifically on the evidence that petitioner instructed Roy to get back in the truck after he got out seeking air (an action by Roy consistent with his past averted suicide attempts), as well as her failure to take any of the readily available measures to prevent his death after she instructed him to get back into the truck. Pet. App. 34a-36a.

The trial court sentenced petitioner to two and a half years in jail, with 15 months to be served and the balance suspended, and five years of probation. *See Commonwealth v. Carter*, SJC-12502, Doc. No. 21 (Mass. Feb. 11, 2019) (denying motion for stay of sentence pending this petition).

4. The SJC affirmed petitioner's conviction on appeal. Pet. App. 2a. The court began by rejecting petitioner's sufficiency challenge. *Id.* Noting that there was "no question in this case that the Commonwealth proved beyond a reasonable doubt that the defendant engaged in wanton or reckless conduct," Pet. App. 15a n.9, the court upheld the trial court's conclusion with respect to causation: petitioner's instruction to Roy to get back into the truck "overpowered the victim's will and thus caused his death," and "she did absolutely nothing to help him" after he followed her instruction. Pet. App. 16a-17a.

The SJC also rejected petitioner's renewed First Amendment and due process challenges. Pet. App. 18a-25a. The SJC reaffirmed its earlier conclusion that no First Amendment violation "results from convicting a defendant of involuntary manslaughter for reckless and wanton, pressuring text messages and phone calls, preying upon well-known weaknesses,

fears, anxieties, and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing him to commit suicide." Pet. App. 20a-21a. Petitioner's "systematic campaign of coercion" was "speech integral to [a course of] criminal conduct," long understood to be exempt from First Amendment protections. Pet. App. 23a (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))). The court further concluded, in the alternative, that even if the restriction on petitioner's conduct in this case were viewed as reaching protected speech and subject to strict scrutiny, the prohibition of "the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live" would survive such scrutiny, as the prohibition was narrowly tailored "to further the Commonwealth's compelling interest in preserving life." Pet. App. 25a.

The SJC also reaffirmed its conclusion from the grand-jury appeal that the law of involuntary manslaughter is not unconstitutionally vague as applied to petitioner's conduct. Pet. App. 18a. Rather, the court found, petitioner's actions constituted wanton or reckless conduct causing the victim's death, thus satisfying the elements of involuntary manslaughter as long defined by Massachusetts case law. *Id.* The court also noted that prior Massachusetts cases dating back centuries had made clear "that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing a victim to commit suicide." Pet. App. 19a-20a (collecting cases).

REASONS TO DENY THE WRIT

I. The Petition Does Not Present a Split of Authority Warranting the Court's Consideration.

The petition's alleged conflict on the First Amendment question is illusory, and petitioner does not even attempt to argue that the lower courts are divided on the fact-bound due process question. This Court's review is therefore unwarranted. *See* Sup. Ct. R. 10.

A. The Claimed Shallow Split Regarding Speech Integral to Criminal Conduct Is Illusory.

The petition presents no actual conflict regarding the "long-established" exception to the First Amendment's protections for "speech integral to criminal conduct." *Stevens*, 559 U.S. at 468, 471. In the sole case petitioner identifies to allege a "direct conflict," Pet. 8, the Supreme Court of Minnesota recognized this exception but found that it did not apply in the very different case presented to it, which concerned a statute that prohibited advising, encouraging, or assisting another's suicide. *See State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014). That statute has no analogue in Massachusetts, and the Minnesota court's reasoning is inapposite in the context of petitioner's common-law involuntary manslaughter conviction. The petition's further resort to cases regarding stalking statutes is likewise unavailing.

Melchert-Dinkel struck down in part a Minnesota statute that criminalized speech based on its content. The law at issue prohibited "intentionally [1] advis[ing], [2] encourag[ing], or [3] assist[ing] another in

taking the other's own life." 844 N.W.2d at 19 (quoting Minn. Stat. § 609.215). As part of its analysis, the court rejected the State's argument that speech reached by the statute fell within the First Amendment's exception for speech integral to criminal conduct: suicide was not illegal in Minnesota, and the exception has never been held to extend to "speech that is integral to merely harmful conduct, as opposed to illegal conduct." *Id.* at 20 (discussing *Giboney*, 336 U.S. at 498). The court then upheld under strict scrutiny the statute's prohibition on assisting suicide, because it was "narrowly drawn to serve the State's compelling interest in preserving human life," but struck down the advising and encouraging prongs as insufficiently narrowly tailored. *Id*. at 22-24.[1]

There is no doctrinal split between *Melchert-Dinkel* and the decision below upholding petitioner's involuntary manslaughter conviction. The Minnesota court recognized that the First Amendment does not protect speech integral to criminal conduct but declined to apply the exception there to insulate from any scrutiny under the First Amendment a statute that restricted speech based on its content. 844 N.W.2d at 18-20

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[1] Following a remand to the trial court and second appeal, Minnesota's intermediate appellate court ultimately upheld Melchert-Dinkel's conviction under the "assisting" suicide prong with respect to one death where Melchert-Dinkel had provided instructions to the decedent that the decedent had apparently followed in committing suicide. *State v. Melchert-Dinkel*, No. A15-0073, 2015 WL 9437531, at *5-*9 (Minn. Ct. App. Dec. 28, 2015) (unpublished decision). The court reversed a second conviction arising from a different death in which the court found Melchert-Dinkel had given the decedent mere encouragement and advice not rising to the level of assistance under the statute as construed by the Minnesota Supreme Court. *Id.* at *9-*11.

(identifying the statute as "content-based" and calling the State's analysis "circular," because it would "effectively uphold[] the statute on the ground that the speech prohibited by section 609.215 is an integral part of a violation of section 609.215"). No such circularity exists here, where, by contrast, petitioner's speech was integral to her commission of a longstanding common-law crime—involuntary manslaughter—that "makes no reference to restricting or regulating speech, let alone speech of a particular content or viewpoint"; rather, "the crime is directed at a course of conduct," and "the conduct it proscribes is not necessarily associated with speech." Pet. App. 21a. In particular, petitioner was convicted for causing the death of another through wanton or reckless conduct, with "wanton or reckless" defined in Massachusetts not by the content of a defendant's speech, but rather the nature of her conduct: conduct "involv[ing] a high degree of likelihood that substantial harm will result to another." *Commonwealth v. Godin*, 374 Mass. 120, 129 (1977) (quotation omitted); *accord* Pet. App. 15a n.9. The decision below therefore represents a straightforward application of the exception, rather than requiring "an expansion," *Melchert-Dinkel*, 844 N.W.2d at 20.

Nor are the decisions inconsistent in their respective strict scrutiny analyses—an issue and alternative basis for affirmance below that is discussed in the petition but arguably not fairly included in the questions presented.[2] Most fundamentally, *Melchert-Dinkel* and

[2] The petition's first question asks "[w]hether Carter's conviction for involuntary manslaughter, based on words alone, violated the Free Speech Clause of the First Amendment, because

the SJC's decision are not at odds for the simple reason that they arise from distinct legal and factual contexts. As petitioner acknowledges, Pet. 27, Massachusetts is not among the dozens of states that have statutes criminalizing conduct that assists another's suicide. *See generally* Neil M. Gorsuch, The Future of Assisted Suicide and Euthanasia 43-44 & nn.186, 192 (2009) (surveying such statutes and acknowledging Massachusetts as among the "few" states without one). Accordingly, no Massachusetts court has addressed the narrow-tailoring questions presented by such statutes.

Moreover, insofar as one can nevertheless compare the Minnesota and Massachusetts courts' strict scrutiny analyses, they are not inconsistent. *Melchert-*

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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[.]'" Pet. i (quoting *Giboney*, 336 U.S. at 498). The question whether petitioner's speech lacked protection because it was integral to committing involuntary manslaughter is distinct from the additional questions whether the underlying common-law criminal prohibition survives or is even subject to strict scrutiny, *see* Pet. 22-23. These latter questions are thus arguably only "related to," but not included in, the question presented as framed by petitioner, and therefore not before the Court. *Yee v. Escondido*, 503 U.S. 519, 537 (1992); *see also Wood v. Allen*, 558 U.S. 290, 304-05 (2010) (whether counsel's strategic decision was reasonable was not fairly included in the question whether counsel had made a strategic decision). And if the strict-scrutiny issues are not before the Court, the SJC's alternative ruling below—that Massachusetts' common-law prohibition on involuntary manslaughter as applied in the circumstances of this case meets strict scrutiny, *see* Pet. App. 24a-25a—would preclude petitioner from obtaining meaningful relief even if she were to prevail in her contention that her speech was not unprotected under *Giboney*.

Dinkel upheld Minnesota's assisting suicide prohibition as narrowly tailored to serve "the State's compelling interest in preserving human life," but struck down the advising and encouraging prohibitions because they restricted speech merely "support[ing] or rall[ying] courage," without "a direct, causal connection to a suicide." 844 N.W.2d at 21-23. The court concluded that Minnesota could constitutionally proscribe "assist[ing]" suicide in the form of speech "targeted at a specific individual" that did have "a direct, causal connection to a suicide." *Id.* at 23. The SJC cited *Melchert-Dinkel* for this very point in the grand-jury appeal. Pet. App. 62a n.17. And, in the post-conviction appeal, in alternatively holding that the law of involuntary manslaughter as applied here would survive strict scrutiny because it was "necessary to further the Commonwealth's compelling interest in preserving life," the SJC similarly emphasized how the required causation element—that the defendant's wanton or reckless conduct actually caused the victim's death—narrowed the law's reach. Pet. App. 25a ("[o]nly the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live has been proscribed"). Thus, no meaningful division exists between the courts' analyses of the distinct circumstances presented in each case.

Finally, petitioner's references to two cases striking down stalking convictions also do not limn a split regarding speech integral to criminal conduct. *See* Pet. 13-17 (discussing *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2019), and *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017)). In both cases, concerning "virtually identical" statutes, the courts declined to find the defendants' speech to be integral to criminal conduct and therefore wholly unprotected, because the

statutes suffered from the same circularity defect identified in *Melchert-Dinkel*: they defined stalking as a course of conduct consisting of two or more communications to or about a person, with no requirement that the communications be in furtherance of an unlawful purpose. *Shackelford*, 825 S.E.2d at 697-98; *Relerford*, 104 N.E.3d at 352. By contrast, as the Illinois Supreme Court recognized, "speech is 'fully outside'" the First Amendment's protection "when it is a mechanism or instrumentality in the commission of a separate unlawful act." 104 N.E.3d at 352 (quoting *Stevens*, 559 U.S. at 471, and rejecting the State's reliance on cases including *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (upholding federal stalking statute against facial challenge because statute required malicious intent and harm to the victim)). As discussed, involuntary manslaughter is indeed such an unlawful act, defined not by the content of a defendant's speech but instead by the high degree of risk involved in the intentional conduct that causes the victim's death. The stalking cases, too, are therefore not inconsistent with the decision below.

In sum, the petition does not identify a split of authority on the First Amendment question presented. To the extent the increasing availability of evidence of common-law crimes in the form of defendants' own electronic communications raises distinct First Amendment concerns, those questions warrant further percolation.

B. The Petition Does Not Identify a Split Regarding the Fact-Bound Due Process Question.

The petition does not attempt to allege a conflict among lower courts on the second question presented.

See Pet. 24-38. Instead, petitioner's contention appears to be that the SJC departed from this Court's due process jurisprudence because, in the SJC's discussion of the Massachusetts common-law precedent for petitioner's prosecution, the SJC "[f]ocus[ed] on" whether petitioner had adequate notice that her conduct was prohibited, but did not expressly state that Massachusetts law enforcement officers also had constitutionally adequate guidance under the same precedent. Pet. 29-30 (discussing Pet. App. 18a-20a). And petitioner does not ask this Court to review the SJC's conclusion that she herself did have adequate notice. Pet. i; *see also* Pet. 24, 29-30. This request for fact-bound review—of whether, with respect to the conduct proven here, Massachusetts' common law of involuntary manslaughter gave sufficient guidance to Massachusetts law enforcement, where petitioner does not contest that it did give sufficient notice to her—does not satisfy this Court's Rule 10(c). Moreover, for the reasons discussed below, no such departure from the Court's precedent occurred. *See* pp. 18-22, *infra*. The petition's second question presented therefore also does not warrant this Court's review.

II. The Decision Below Is Correct.

This Court's review is unwarranted not only because the petition does not meet Rule 10's standards, but also because the decision below correctly resolved the highly fact-specific issues pressed in the petition. First, the SJC correctly concluded that petitioner's speech was unprotected because it was integral to the commission of involuntary manslaughter, and, in the alternative, that even if the speech were protected, Massachusetts' prohibition of involuntary manslaughter as applied to the facts of this case satisfied strict

scrutiny. Second, the SJC correctly rejected petitioner's due process challenge, because Massachusetts' longstanding common law of involuntary manslaughter gave both adequate notice to petitioner and sufficient guidance to law enforcement.

A. Petitioner's Conviction for Involuntary Manslaughter Does Not Violate the First Amendment.

This Court has identified "speech integral to criminal conduct" as among the "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem[.]'" *Stevens*, 559 U.S. at 468-69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Inasmuch as petitioner's wanton or reckless conduct causing Roy's death was carried out by speech, that speech was therefore unprotected because it was integral to the commission of involuntary manslaughter.

Petitioner was convicted of involuntary manslaughter under Massachusetts law: "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct." *Godin*, 374 Mass. at 126 (quotation omitted). While the offense does not require proving that the defendant intended to cause the death, the defendant's conduct that caused the death must be intentional and must be wanton or reckless. *See id.* at 129 ("The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." (quotation omitted)). As

the SJC below observed, "because wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific." Pet. App. 59a. Accordingly, the SJC focused on the "specific circumstances of this case" in upholding the prosecution and eventual conviction of petitioner for involuntary manslaughter. Pet. App. 60a; *see also* Pet. App. 12a-17a (rejecting petitioner's challenge to the sufficiency of the evidence).

The SJC likewise engaged in a fact-specific analysis in correctly concluding that "[t]he only speech made punishable" by its decision in petitioner's case was "'speech integral to [a course of] criminal conduct,'" and that petitioner's speech was therefore unprotected. Pet. App. 23a (quoting *Stevens*, 559 U.S. at 468). The course of conduct that formed the basis for petitioner's conviction was "a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own." *Id.* (quotation omitted). More specifically, as the court had described in rejecting petitioner's sufficiency challenge on causation, these facts included that "the vulnerable, confused, mentally ill, eighteen year old victim had managed to save himself once again in the midst of his latest suicide attempt, removing himself from the truck as it filled with carbon monoxide"; that he was "badgered back into the gas-infused truck by the defendant, . . . the person who had been constantly pressuring him to complete their often discussed plan, fulfill his promise to her, and finally commit suicide"; and that "after she convinced him to get back into the carbon monoxide filled truck, she did absolutely nothing to help him: she did not call

for help or tell him to get out of the truck as she listened to him choke and die." Pet. App. 17a. Hewing to these facts, the SJC emphasized that its decision reached "[o]nly the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live." Pet. App. 25a.

Because this case thus concerns a fact-specific application of a settled common-law prohibition of certain conduct, it is distinguishable from the cases cited by petitioner where this Court declined to apply the rule that speech integral to criminal conduct is unprotected. *See* Pet. 20-22. Each such case involved a statute drafted to single out and prohibit speech based on its content. *See Stevens*, 559 U.S. at 464-65 (depiction of animal cruelty); *United States v. Alvarez*, 567 U.S. 709, 715-22 (2012) (false claim to have received Congressional Medal of Honor); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790-99 (2011) (violent video games); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391 (1992) (fighting words "that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender'"); *see also Melchert-Dinkel*, 844 N.W.2d at 19-20 (encouraging or advising suicide). No such content-based speech regulation exists here, where the Massachusetts offense of involuntary manslaughter "is directed at a course of conduct, rather than speech, and the conduct it proscribes is not necessarily associated with speech." Pet. App. 21a (quotation omitted). As this Court recognized in *R.A.V.*, "words can in some circumstances violate laws directed not against speech but against conduct." 505 U.S. at 389 ("[A] law against treason, for example, is violated by telling the enemy the Nation's defense secrets[.]").

Finally, to the extent the question is properly before the court, *but see* p. 9 n.2, *supra*, the SJC did not err in concluding in the alternative that, even if strict scrutiny applied, the law here was "narrowly circumscribed to serve" Massachusetts' "compelling interest in preserving life." Pet. App. 24a-25a. Indeed, petitioner does not contest that a criminal prohibition on wantonly or recklessly coercing a person into suicide, and thereby causing that person's death, serves the Commonwealth's unquestioned interest in preserving life. *See* Pet. 22-23. And the SJC emphasized that it did *not* purport to address "the prosecution of end-of-life discussions" more generally or "discussions about euthanasia or suicide targeting the ideas themselves," and that prosecutions in "these very different contexts" would "rais[e] important First Amendment concerns." Pet. App. 24a-25a. Although petitioner complains that "nothing in [the decision below] prevents prosecutors from charging involuntary manslaughter in those situations," Pet. 23, those situations were not before the court in this case. The SJC is not a legislature and cannot enact a statute regulating assisting suicide across a wide array of factual circumstances. *See Rogers v. Tennessee*, 532 U.S. 451, 460-61 (2001) (recognizing that state courts, "acting in their common law capacity," "can only act in construing existing law in actual litigation" (quotation omitted)). Moreover, not having raised an overbreadth claim, petitioner cannot obtain reversal of her conviction through speculation about different prosecutions that might occur in the future under different facts, notwithstanding the SJC's express caution that such prosecutions

would pose distinct First Amendment questions, Pet. App. 25a.[3]

B. Massachusetts' Common Law of Involuntary Manslaughter Is Not Unconstitutionally Vague as Applied to Petitioner.

The SJC also properly rejected petitioner's claim that "the law of involuntary manslaughter is unconstitutionally vague as applied to her conduct." Pet. App. 18a. While "an act does not become a crime without its foundations having been firmly established in precedent," Pet. 26 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 n.34 (2006) (opinion of Stevens, J.)), this is not a case where the foundations were lacking.

"It has long been established in [Massachusetts'] common law that wanton or reckless conduct that

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[3] In evoking the possibility of prosecutions in circumstances different from her own, petitioner now in essence appears to be attempting to raise a limited overbreadth challenge to Massachusetts' common law of manslaughter as applied in the context of "[a]ssisted or [e]ncouraged [s]uicide" generally. Pet. 22-23. But, as discussed, the SJC expressly disclaimed that its opinion should be read so broadly and repeatedly emphasized that its decision reached only the "systematic campaign of coercion" at issue here. Pet. App. 23a, 24a n.15 (quoting Pet. App. 62). And at no point in either her grand-jury or post-conviction appeals has petitioner raised an overbreadth challenge as such (whether limited or otherwise). *See, e.g.*, Brief of Defendant-Appellant, *Commonwealth v. Carter*, SJC-12502, Doc. No. 7, at 45-49 (Mass. June 29, 2018). This Court should therefore decline to consider any such challenge at this late stage. *See Stevens*, 559 U.S. at 473 n.3 (declining to consider limited as-applied overbreadth challenge because defendant had failed to "adequately develop[] a separate attack on a defined subset of the statute's applications" in the courts below).

causes a person's death constitutes involuntary manslaughter." Pet. App. 18a (citing *Commonwealth v. Campbell*, 352 Mass. 387, 397 (1967), and cases collected therein); *see also, e.g.*, *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944). The definition of "wanton or reckless" conduct—intentional conduct that involves "a high degree of likelihood that substantial harm will result to another"—too has been settled for decades in Massachusetts. *Welansky*, 316 Mass. at 399. And Massachusetts law is clear that "the intervening conduct of a third party"—including the victim's own conduct—"will relieve a defendant of culpability only if such an intervening response was not reasonably foreseeable." *Commonwealth v. Askew*, 404 Mass. 532, 534-35 (1989); *see also, e.g.*, *Commonwealth v. Carlson*, 447 Mass. 79, 84 (2006) (reasonably foreseeable that victim would forego life support).

Moreover, there is common-law precedent in Massachusetts for involuntary manslaughter liability where a defendant's wanton or reckless conduct involved a high degree of likelihood that substantial harm would result specifically in the form of a victim's own suicide. Pet. App. 19a. In one case, for example, a defendant taunted his wife, who had previously attempted suicide and who had just threatened to commit suicide in response to his stated intent to divorce her, that she was "chicken—and wouldn't do it"; instructed her to get a rifle and loaded it for her; and then gave her advice on how to reach the trigger by taking off her shoes. *Persampieri v. Commonwealth*, 343 Mass. 19, 22-23 (1961). *See also, e.g.*, *Commonwealth v. Atencio*, 345 Mass. 627, 627-29 (1963) (affirming involuntary manslaughter convictions arising from the defendants' participation in a "game" of "Russian roulette" and noting "[t]here is no controversy as

to definition" of the elements of involuntary manslaughter); *Commonwealth v. Bowen*, 13 Mass. 356, 359 (1816) (recounting jury instruction that defendant could be guilty of murder where he urged a fellow prisoner to commit suicide, so long as the defendant "was instrumental in the death").

Accordingly, before this Court, petitioner no longer contests that Massachusetts law defines involuntary manslaughter "with sufficient definiteness that ordinary people can understand what conduct is prohibited," Pet. 29 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), and, in particular, no longer contests that she herself had sufficient notice that her own conduct was unlawful. *See, e.g.*, Pet. i, 29-30. Rather, petitioner's sole contention is that, notwithstanding the SJC's unchallenged conclusion that Massachusetts law gave her sufficient notice of the unlawfulness of wantonly or recklessly coercing a vulnerable person into committing suicide, Massachusetts law nevertheless defies the core due process principle that criminal laws must be "written or interpreted 'in a manner that does not encourage arbitrary and discriminatory enforcement[.]'" Pet. 29 (quoting *Kolender*, 461 U.S. at 357).

But the cases on which petitioner relies, where this Court struck down criminal laws for failing to "establish minimal guidelines to govern law enforcement," *Smith v. Goguen*, 415 U.S. 566, 574 (1974), are inapposite here. *See* Pet. 29-32. This is not a case involving a vague statutory provision in the absence of any "judicial construction," *Goguen*, 415 U.S. at 578; nor does the Commonwealth seek "to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal" prohibition, *Marinello v. United*

States, 138 S. Ct. 1101, 1108 (2018). To the contrary, petitioner's conviction is consistent with decades of common-law precedent establishing straightforward elements, against which fact-specific circumstances may be assessed. This is also not a case where a broadly applicable statute "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," like the statute in *Kolender* authorizing police to stop any person on the street to demand "credible and reliable" identification. 461 U.S. at 360 (quotation omitted). Rather, as the SJC repeatedly emphasized, its decision upholding petitioner's conviction applies only in the limited circumstances where a person has died as the result of wanton or reckless conduct. Pet. App. 20a, 25a. And, for similar reasons, this case does not entail "'more unpredictability and arbitrariness than the Due Process Clause tolerates.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015)) ("crime of violence" residual clause required court to "picture the kind of conduct that the crime involves in 'the ordinary case'" and then assess whether it presents "some not-well-specified-yet-sufficiently-large degree of risk"). Indeed, petitioner's tacit concession in this Court that she herself did not lack constitutionally sufficient notice undermines any such claim of unpredictability.

Petitioner's assertion that the decision below "'cast[s] a pall of potential prosecution'" over numerous disparate factual situations, Pet. 33 (quoting *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016)), is thus unfounded. Again, the SJC expressly limited its holding under Massachusetts' longstanding common law of involuntary manslaughter to the facts

here: "the wanton or reckless pressuring of a person to commit suicide" that thereby caused the person's death. Pet. App. 24a-25a. Thus, any "pall" has been cast only over such cases—and not, for example, "end-of-life discussions" more generally, Pet. App. 24a. Common-law crimes are not unconstitutional simply because, conceivably, on different facts, an "aggressive" prosecutor could pursue a potentially unconstitutional conviction, Pet. 32. *See Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973) (noting that, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), "[t]he Court did not hold that the offense 'known as breach of the peace' must fall *in toto* because it was capable of some unconstitutional applications" like Cantwell's prosecution for playing a religious record on a public street to willing listeners; "in fact, the Court seemingly envisioned [the offense's] continued use against 'a great variety of conduct destroying or menacing public order and tranquility'" (quoting *Cantwell*, 310 U.S. at 308)). The SJC was therefore correct to reject petitioner's due process claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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