NO. 19-62

# 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

## REPLY BRIEF OF PETITIONER


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## INTRODUCTION

The Commonwealth urges this Court not to review the Supreme Judicial Court's decision to affirm Michelle Carter's unprecedented conviction for encouraging, with her words alone, Conrad Roy III's suicide. The Commonwealth opposes certiorari, even though the SJC's holding that Carter's speech was "integral to criminal conduct" and, thus, deserved no First Amendment protection directly conflicted with the recent decisions of several other state supreme courts and gave prosecutors no meaningful guidance for future suicide cases to distinguish involuntary manslaughter from intimate end-of-life discussions. Moreover, the Commonwealth refuses to acknowledge that this case is the focus of national attention, implicates the profound legal and moral debate about suicide, and raises important, novel issues of federal constitutional law that, in the absence of any conflict, would still warrant this Court's review.

Further, the issues presented are not merely hypothetical or constrained to Carter's unique factual circumstances. To the contrary, the toxic combination of mental illness, adolescent psychology, and social media will likely lead to more tragic suicides. In Massachusetts, the next headline-grabbing prosecution, which also involves allegedly coercive texts sent by a young woman to her boyfriend before his suicide, is already underway. *See* K. Taylor, *Thousands of Texts at Center of Case Against Woman Charged in Boyfriend's Suicide*, The New York Times (Nov. 22, 2019); R. Thebault and D. Paul, *Prosecutors Reveal a Woman's*

*Text They Say Drove Her Boyfriend to Suicide*, The Washington Post (Nov. 22, 2019). The District Attorney prosecuting that case has drawn explicit comparisons to Carter's case, commenting that according to the SJC, "the behavior exceeds First Amendment protections for free speech." J. Fox, *Suffolk District Attorney Defends Prosecution in BC Suicide in TV Interview*, The Boston Globe (Dec. 1, 2019).

In recently deciding to review *United States v. Sineneng-Smith*, No. 19-67 (cert. granted Oct. 4, 2019), this Court recognized the importance of clearly distinguishing protected speech from speech integral to criminal conduct, which may be broadly prohibited. The decision in that case may provide further guidance, but it will not answer the questions presented by this case. Thus, this Court should also grant Carter's petition for a writ of certiorari, reverse her conviction, clarify the controversial First Amendment exception that *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) established, and reaffirm that due process requires both fair notice to defendants and also adequate guidance to prosecutors, especially when they are confronted with inevitably complex cases of assisted or encouraged suicide.

## I. THE COMMONWEALTH NEITHER PLAUSIBLY DENIES NOR EFFECTIVELY MINIMIZES THE DIRECT CONFLICT CAUSED BY THE SJC'S NOVEL APPLICATION OF *GIBONEY* TO ENCOURAGED SUICIDE, AND THIS COURT SHOULD CLARIFY THE CONTROVERSIAL FIRST AMENDMENT EXCEPTION FOR "SPEECH INTEGRAL TO CRIMINAL CONDUCT."

The Commonwealth unsuccessfully attempts to deny the split among state supreme courts or, alter-

natively, to minimize it as "shallow." Opp.7-12. There is no dispute, however, that three other courts—in Minnesota, North Carolina, and Illinois—have rejected the very same interpretation of *Giboney* that the SJC adopted in this case. *See State v. Shackelford*, 825 S.E.2d 689, 698-99 (N.C. Ct. App. 2019) ("We therefore reject the State's argument that Defendant's posts fall within the 'speech integral to criminal conduct' exception."); *People v. Relerford*, 104 N.E.3d 341, 352 (Ill. 2017) ("The State maintains . . . that the phrase 'communicate to or about' [in the Illinois cyberstalking statute] does not implicate First Amendment rights because it relates to speech that is integral to criminal conduct. The State's contention is wrong."); *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014) ("[W]e reject the State's argument that the 'speech integral to criminal conduct exception to the First Amendment applies to [the defendant's convictions for assisted suicide]."). While the SJC affirmed Carter's conviction for involuntary manslaughter, these other courts all vacated the defendants' convictions for encouraging suicides and cyberstalking. If Carter had been prosecuted in any of these other states, her involuntary manslaughter conviction would have been vacated, because her words would not have been categorized as "speech integral to criminal conduct" and, thus, unprotected by the First Amendment under *Giboney*.

Although *Melchert-Dinkel*, *Relerford*, *Shackelford*, and this case involve different statutory offenses and common-law crimes, as the Commonwealth notes, Opp.7, 11-12, the federal constitutional principles remain the same. Indeed, *Melchert-Dinkel* arose in a strikingly similar situation involving a defendant who, through remote communications, pressured two other

people to take their own lives. *See* 844 N.W.2d at 16-18. The Minnesota Supreme Court held that the defendant's convictions for verbally "encouraging" the suicides (as opposed to practically "assisting" them) violated the First Amendment. *See id.* at 24-25 (reversing defendant's convictions for "intentionally advising and encouraging" his victims' suicides). It also held that *Giboney* cannot apply in the absence of a "valid criminal statute." *Id.* at 19-20. As in Minnesota, no criminal law in Massachusetts prohibits suicide, and the Commonwealth does not contend otherwise. A more clear-cut conflict between state supreme courts on an important issue of federal constitutional law is difficult to imagine.

Even without an obvious split, certiorari would nevertheless be appropriate, because this case involves "an important question of federal that law has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). In its Opposition, the Commonwealth disregards relevant guidance from this Court about the conduct-speech distinction, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding "[t]he Government is wrong that the only thing actually at issue in this litigation is conduct" rather than speech); the simmering disputes among federal circuit courts about what speech can fairly be considered "integral to criminal conduct," *compare, e.g., King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014), *with Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); and the extensive criticism by constitutional scholars, who have widely condemned *Giboney* as an incoherent decision and perplexing precedent, Pet. 18-20 (collecting academic commentary). Perhaps the Commonwealth says so little about *Giboney* because it, too, is unsure about what

exactly that case means and how far its reasoning can be stretched. How could Carter's words constitute "speech integral to criminal conduct," when—as the Commonwealth concedes—she did not engage in any conduct other than talking (or texting) and her conviction rested entirely on the content of the words that she spoke to Roy? In focusing on Carter's "verbal conduct," a concept with no precedent in Massachusetts law, the SJC's decision played a "labeling game," *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting) ("[T]he government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate."), and the Commonwealth's Opposition does the same, *see* Opp.8-9.

The Commonwealth's alternative argument—that the common-law of involuntary manslaughter in Massachusetts is "narrowly tailored" as applied to encouraged suicide cases—fares no better. Opp.17. As Carter has already explained, the SJC's holding was incorrect and conflicted directly with *Melchert-Dinkel*, which held that the Minnesota law against "encouraging" or "advising" suicide could not survive strict scrutiny, as well as *Shackelford* and *Relerford*, which rejected similar contentions about state cyberstalking laws. Indeed, the SJC's refusal in *Carter* to reckon with more sympathetic suicide situations, such as "end-of-life discussions" among loving relatives, App.24a-25a, 62a-63a, which could result in criminal prosecutions in the future, makes the law unconstitutionally vague, not narrowly tailored.

## II. THE COMMONWEALTH DISREGARDS THE DUE PROCESS PROBLEM CREATED BY THE SJC'S MISAPPLICATION OF THIS COURT'S PRECEDENTS AND FAILURE TO PROVIDE ADEQUATE GUIDANCE TO PROSECUTORS FOR FUTURE ENCOURAGED SUICIDE CASES.

The Commonwealth mistakenly contends that the due process problems with Carter's conviction are not cert-worthy, because there is no split about the application of common law involuntary manslaughter to encouraged suicide, Opp.12-13; the issue is purportedly "fact-bound," Opp.13; and the elements of involuntary manslaughter in Massachusetts have "long been established" and "settled for decades," Opp.18-19. Moreover, the Commonwealth misstates Carter's due process concern: Carter has never made any "tacit concession" that she had fair notice, and the fact that she has presented a due process question focused on the SJC's failure to provide adequate prosecutorial guidance—which this Court has called "the most meaningful aspect of the vagueness doctrine," *Smith v. Goguen*, 415 U.S. 566, 574 (1974)—does not constitute such a concession. Opp.20-21.

A conflict is not a prerequisite for this Court's review where, as in this case, a state supreme court has misapplied federal constitutional law. *See* Sup. Ct. R. 10(c). Further, the legal question presented is whether the common law of involuntary manslaughter, as expanded by *Carter*, provides adequate guidance to prevent arbitrary and discriminatory prosecutions of encouraged suicide cases in the future. The answer to that question turns on the SJC's novel legal extension of involuntary manslaughter to affirm Carter's unprec-

edented criminal conviction, not any particular fact about this case.

Ironically, in asserting that *Carter* followed precedent, the Commonwealth ignores the ways in which the SJC was forced to establish a new, judge-made crime to fit the facts. In *Persampieri v. Commonwealth*, 343 Mass. 19 (1961), and *Commonwealth v. Atencio*, 345 Mass. 627 (1963), on which the SJC principally relied, the defendants had physically provided the means of death (in both cases, guns) and actively participated in their victims' suicides. None of that was true, here. Before *Carter*, no absent defendant has ever been convicted of involuntary manslaughter, in Massachusetts or elsewhere, for encouraging with words alone another person to commit suicide. In its Opposition, the Commonwealth fails to identify a single comparable case.

The Commonwealth also ignores other salient features of this case, such as the supposed "virtual presence" of a juvenile defendant based on her extensive use of text messaging and social media. The SJC invented that broad and ill-defined concept of culpability to affirm Carter's conviction. Under this Court's vagueness doctrine, it is not sufficient for the elements of a common-law offense to be "well-established," if those elements are "indefinite and uncertain." *Ashton v. Kentucky*, 384 U.S. 195 (1966) (vacating conviction for criminal libel under vagueness doctrine). Rather the law must provide "reasonably clear guidelines for law enforcement officials . . . to prevent arbitrary and discriminatory enforcement." *Goguen*, 415 U.S. at 573. Despite that requirement, the SJC failed to establish sufficient criteria to cabin prosecutorial discretion in

future encouraged suicide cases. That is not merely a theoretical problem, as the most recent texting-and-suicide prosecution in Massachusetts demonstrates.

Yet more prosecutions are possible, even likely. As a result, *Carter* "cast[s] a pall of potential prosecution" over any person, however well-intentioned, who verbally encourages another person to commit suicide. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). Nothing in *Carter* prevents a prosecutor who believes that all suicide (and, by extension, all assisted suicide) is morally blameworthy from prosecuting all persons who successfully encourage terminally ill relatives to end terrible suffering by committing suicide. Indeed, the opinion in *Carter* suggests that such an individual should not face prosecution, even if he or she actively participates in a family member's suicide by physically providing a fatal overdose of medication. App.24a n.15, 62a. But the SJC's gut instinct for the "acceptable" cases of assisted suicide is no substitute for the clear, cogent guidance to prosecutors that due process requires.

## III. THIS COURT'S RECENT GRANT OF CERTIORARI IN *SINENENG-SMITH* RECOGNIZED THE NEED TO CLARIFY THE DISTINCTION BETWEEN PROTECTED SPEECH AND PROHIBITED CONDUCT, BUT THE DECISION IN THAT CASE WILL NOT RESOLVE WHETHER WORDS THAT ENCOURAGE SUICIDE CONSTITUTE "SPEECH INTEGRAL TO CRIMINAL CONDUCT" UNDER *GIBONEY*.

This Court recently granted certiorari in *United States v. Sineneng-Smith*, No. 19-67 (cert. granted Oct. 4, 2019), to determine whether 8 U.S.C. § 1324(a)(1)(A)(iv), which criminalizes "encourag[ing] or induc[ing]

an alien to come to, enter, or reside in the United States" without lawful status, is facially unconstitutional. *Sineneng-Smith* Pet.(I). The Ninth Circuit vacated the defendant's conviction, citing First Amendment concerns. *See United States v. Sineneng-Smith*, 910 F.3d 461, 479-81 (9th Cir. 2018) (holding that, "[u]nder no reasonable reading are the words 'encourage' and 'induce' limited to conduct,"; that "the statute is only susceptible to a construction that affects speech"; and that it "criminalizes speech beyond that which is integral to violations of the immigration laws"). In choosing to review that decision, this Court recognized the importance—and the difficulty—of drawing clear, sensible lines between speech, which the First Amendment generally protects, and conduct, which the criminal law may rightly proscribe.

In urging this Court to review *Sineneng-Smith*, the United States insisted that the provisions against encouraging or inducing violations of immigration laws are "primarily directed at conduct, not speech": "[t]o the extent they even reach speech, they do so only incidentally by prohibiting communications that foster unlawful activity by particular individuals," such as the defendant's "money-making scheme," which entailed entering retainer agreements with her undocumented clients and charging substantial fees to file futile applications for work permits and green cards for them. *Sineneng-Smith* Pet. at 4, 7-8; *see id.* at 10 (arguing "[t]he crime is . . . limited to <u>certain acts</u> of procuring or facilitating particular civil or criminal violations of immigration laws for profit") (emphasis added).

Citing *Giboney*, the United States argued, "§ 1324 (a)(1)(A)(iv)'s applications to conduct, rather than speech, present no First Amendment concerns." *Id.* at 13 (citing *Giboney*, 336 U.S. at 506); *see id.* at 23 (discussing the First Amendment exception for "speech integral to criminal conduct" and citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Sineneng-Smith countered that her case did "not fall under the 'integral to criminal conduct' exception because the statute broadly prohibits encouragement (not speech essential to a crime)." Opp.26 (emphasis in original). Both parties endorsed a reading of *Giboney* that is at odds with the SJC's holding in this case—that verbal encouragement of suicide, absent the physical presence or active participation of the defendant, is unprotected speech and may be punished as involuntary manslaughter, so long as the defendant acts wantonly or recklessly and another person commits suicide. In contrast to *Carter*, the parties in *Sineneng-Smith* agreed that the exception for "speech integral to criminal conduct" requires speech and conduct. If there are only words, as in Carter's case, the exception does not apply. *See United States v. Osinger*, 753 F.3d 939, 950-954 (9th Cir. 2014) (Watford, J., concurring) ("If 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.").

Notably, the United States and Sineneng-Smith both cited *United States v. Williams*, 553 U.S. 285 (2008), in which this Court distinguished protected speech from speech integral to criminal conduct in the context of an overbreadth challenge to 18 U.S.C. § 2252A(a)(3)(B), which prohibits "pandering child

pornography." Although pandering necessarily involves communication, this Court held the statute banned only "the collateral speech" by which illegal images and videos are introduced "into the child-pornography distribution network." *Id.* at 293. Drawing a line between prohibited conduct and pure speech (or "mere advocacy"), this Court interpreted "the statute's string of operative verbs," including "promotes," "presents," and "solicits," "to have a transactional connotation." *Id.* at 294. Congress's objective was to punish speech that "accompanies," or is otherwise inextricably linked with, the acquisition, transfer, or delivery of child pornography. Observing that "all the words in this list relate to transactions" involving child pornography, this Court stated that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Id.* at 297 (citing, *inter alia*, *Giboney*, 336 U.S. at 498). Although this Court did not elaborate on its citation to *Giboney*, the relevant transaction in that nearly 70-year-old labor case was presumably the illegal restraint of trade, "in violation of a valid criminal statute," in which the union picketers had engaged as part of their "single integrated course of conduct." *Giboney*, 336 U.S. at 498.

In *Williams*, this Court emphasized that, consistent with the First Amendment, the criminal law may not prohibit a person from verbally encouraging another person to obtain child pornography. *See* 553 U.S. at 300-301 (characterizing the statement "I encourage you to obtain child pornography" as protected advocacy). The same must be true, as a matter of federal constitutional law, for a person who verbally encourages—or pressures, induces, coerces, etc.—another person to commit suicide, by saying, "I encourage you to commit

suicide," "I want you to die," or "you really should kill yourself."

No doubt, suicide cases are inevitably disturbing situations that raise difficult questions. This Court's decision in *Sineneng-Smith* may provide further guidance about how to distinguish protected speech from speech integral to criminal conduct, speech that is "collateral" or "incidental" to such conduct, or speech that is fundamentally "transactional" rather than communicative. That decision will not, however, resolve the questions presented in this case, because *Sineneng-Smith* turns on the interpretation of a specific federal criminal statute, and it does not require this Court to resolve the broader constitutional dispute (and related confusion) concerning *Giboney*'s judge-made exception to the First Amendment, certainly not in the complex context of assisted or encouraged suicide, which this Court has previously recognized as a controversial issue of national importance. *See, e.g.*, *Gonzalez v. Oregon*, 546 U.S. 243, 267-68 (2006) (noting "'the earnest and profound debate' across the country") (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)). Thus, at a minimum, this Court should hold this case pending its decision in *Sineneng-Smith*.

## 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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