

No. _____

In the
Supreme Court of the United States

Michael Burciaga,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for a Writ of Certiorari

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Question Presented for Review

This Court recognized in *Allen v. United States*, 164 U.S. 492, 497 (1896), the common-law tenet that “mere words” do not mitigate murder to manslaughter based on a heat of passion defense. The prevailing view across the country, however, is that words may support a heat of passion defense when those words impart highly provocative information. This informational words exception also existed at common law, though this Court did not have occasion to address it in *Allen* or subsequently. The question presented is:

Whether informational words may constitute adequate provocation for a heat of passion defense.

List of Parties

Michael Burciaga is the Petitioner. The United States of America is the Respondent. No party is a corporate entity.

Related Proceedings (Rule 14.1(b)(iii) Statement)

This case arises from the following proceedings in the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit:

United States v. Burciaga,
3:20-cr-60-MMD-CLB-1 (D. Nev.); and

United States v. Burciaga,
No. 23-2663, 2025 WL 3187361 (9th Cir. Nov. 14, 2025).

No other proceedings directly relate to this case.

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Petition for Writ of Certiorari

Petitioner Michael Burciaga respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's unreported panel opinion (App. 1a–4a) is available at 2025 WL 3187361. The Ninth Circuit's summary order denying rehearing is unreported (App. 5a). The district court's jury instructions on murder and manslaughter (App. 6a–17a) and its verdict form are unreported (App. 18a–24a).

Jurisdiction

The Ninth Circuit entered judgment on Nov. 14, 2025, and denied a timely rehearing petition on March 3, 2026. App. 1a–6a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

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 offence 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.

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1111(a):

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 1112(a):

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

Introduction

“The Fifth and Sixth Amendments placed the jury at the heart of our criminal justice system.” *Erlinger v. United States*, 602 U.S. 821, 831 (2024). The Fifth Amendment compels that “criminal prosecutions must comport with prevailing notions of fundamental fairness.” *California v. Trombetta*, 467 U.S. 479, 485 (1984). This Court has “long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.” *Id.* A necessary corollary to that meaningful opportunity is the

right “to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988). The Sixth Amendment guarantees that no conviction may be sustained unless and until the prosecution proves all the charged offense elements beyond a reasonable doubt. U.S. Const. amend. VI.

The rulings in this case significantly undermine these fundamental constitutional protections. Mr. Burciaga’s jury was not properly instructed on his heat of passion defense at his murder trial, even though the trial court found he presented sufficient provocation evidence to negate the element of malice. This ruling eliminated the prosecution’s burden to prove the absence of heat of passion for the murder charge. On appeal, the appellate court bypassed both the instructional and burden of proof errors. Instead, because some of the provocation evidence included words, the appellate court summarily applied the common-law “words alone” doctrine to find there was no instructional error in the first instance.

The appellate court’s ruling is not only contrary to the prevailing view on provocation evidence, but it also ignores the common-law exception that informational words can engender heat of passion. This Court’s review is necessary to preserve the integrity of the Fifth and Sixth Amendment protections guaranteed to all criminal defendants by clarifying the common-law “words alone” doctrine and its informational words exception.

Statement of the Case

A. Factual Background¹

Petitioner Michael Burciaga lived on the Pyramid Lake Indian Reservation in Nevada at the home of his girlfriend Amanda Davis and her three minor children.² The couple's relationship, however, was a volatile one, and they often engaged in tumultuous arguments with and domestic violence against each other.³

In early 2020, Ms. Davis became pregnant with Mr. Burciaga's child. But doctors gave the couple devastating news: the fetus had Trisomy-18, a lethal chromosomal defect that meant the fetus would likely die in utero.⁴ The likelihood of an in utero death ranged between over 50% to 80%⁵ and could occur at any moment.⁶ In the statistically unlikely event the fetus survived birth, it would likely die within days.⁷

The couple faced a heart-wrenching decision. Doctors advised they could: (1) abort the pregnancy; (2) let the pregnancy take its course and, if the fetus survived, provide palliative care as it died; (3) plan for post-birth surgery with specialists in another city in an effort to delay death for a short time; or (4) do nothing and

¹ "App. Dkt. __" citations reference the electronic docket for the Ninth Circuit Court of appeals in *United States v. Burciaga*, Case No. 23-2663 (9th Cir.). "Dist. Ct. Dkt. __" citations reference the electronic docket for the District Court in the District of Nevada in *United States v. Burciaga*, Case No. 3:20-cr-00060-MMD-CLB-1 (D. Nev.).

² App. Dkt. 20, 5-ER-1181.

³ *Id.* at 5-ER-1186, 1204–1208.

⁴ *Id.* at 5-ER-1055–1056; 6-ER-1386–1387; 6-ER-1409–1429.

⁵ *Id.* at 6-ER-1391, 1414–1415; 8-ER-2008.

⁶ *Id.* at 8-ER-2010.

⁷ *Id.* at 6-ER-1391.

determine the best course after delivery.⁸ The couple could not agree on how to proceed. Mr. Burciaga favored undertaking surgical and life support measures to prolong the fetus's life; Ms. Davis favored palliative care as the fetus died.⁹

The terminal Trisomy-18 diagnosis deeply affected Mr. Burciaga.¹⁰ He suffered anxiety over the grim prognosis for which he received psychiatric care and medication.¹¹

Mr. Burciaga participated in Ms. Davis's early prenatal appointments, but Ms. Davis excluded him from those appointments in her third trimester.¹² At a December 9, 2020 prenatal appointment without Mr. Burciaga, a doctor confirmed the fetus was still alive.¹³ This appointment was particularly important—any plan for post-delivery, out-of-town surgery required advance scheduling of specialists and time was running out to do so.¹⁴ Mr. Burciaga called Ms. Davis repeatedly during that appointment, but Ms. Davis would not speak to him.¹⁵

Five days later, on December 14, 2020, Mr. Burciaga left the couple's home, drank alcohol excessively, and passed out.¹⁶ When he returned home that evening,

⁸ *Id.* at 6-ER-1427–1428.

⁹ *Id.* at 6-ER-1388–1389.

¹⁰ *Id.* at 5-ER-1062–1063.

¹¹ *Id.* at 7-ER-1816–1822.

¹² *Id.* at 5-ER-1216–1217.

¹³ *Id.* at 6-ER-1390.

¹⁴ *Id.* at 5-ER-1070.

¹⁵ *Id.* at 5-ER-1033.

¹⁶ App. Dkt. 25, GX-41a-3 (08:57:20-09:02:43).

he asked Ms. Davis if he could fall asleep and hold her.¹⁷ Ms. Davis rebuffed him¹⁸ and the couple began arguing.¹⁹ The argument increased in intensity and apexed when Ms. Davis cursed at Mr. Burciaga and said she did not want his baby.²⁰ Hearing this, Mr. Burciaga grabbed a nearby knife and stabbed Ms. Davis.²¹ When the knife broke, he ran to the kitchen for another.²² Ms. Davis summoned her children into the bedroom and barricaded the door.²³ She armed her oldest daughter D.D. with a wooden rod, and D.D. grabbed a knife.²⁴ When Mr. Burciaga broke into the bedroom,²⁵ the chaos continued: Ms. Davis hit Mr. Burciaga in the head with a metal bat,²⁶ D.D. hit Mr. Burciaga with a metal lamp, a wooden rod, and a metal bat,²⁷ and Mr. Burciaga stabbed Ms. Davis chaotically²⁸ with a knife.²⁹ Mr. Burciaga sustained a head wound and defensive knife wounds to his right hand during the couples' fight.³⁰

¹⁷ *Id.* at GX-41a-3 (09:02:43-09:03:57; 09:08:43-09:09:22).

¹⁸ *Id.* at GX-41a-3 (09:03:57-09:04:04).

¹⁹ App. Dkt. 20, 5-ER-1185–1186.

²⁰ App. Dkt. 25, GX-41a-3 (09:04:43-09:09:05).

²¹ *Id.* at GX-41a-3 (09:06:08-09:07:01).

²² *Id.* at GX-41a-3 (09:07:01-09:07:57).

²³ *Id.* at GX-41a-3 (09:08:08-09:08:17); App. Dkt. 20, 5-ER-1221–1273.

²⁴ App. Dkt. 20, 5-ER-1223–1227.

²⁵ App. Dkt. 25, GX-41a-3 (09:07:57-09:07:58).

²⁶ *Id.* at GX-41a-3 (09:08:17-09:08:30).

²⁷ *Id.* at GX-41a-3 (09:10:09-09:10:15); 5-ER-1239–1242.

²⁸ App. Dkt. 20, 8-ER-1993.

²⁹ App. Dkt. 25, GX-41a-3 (09:08:30-09:08:38).

³⁰ App. Dkt. 20, 7-ER-1622–1624; 12-ER-3155–3160, 3162–3163.

After the fight, Mr. Burciaga's right hand was cut deeply and gushing blood.³¹ He walked out of the home³² and laid down in a nearby ditch believing the police would come soon.³³ He then realized the seriousness of what had happened,³⁴ returned immediately, and surrendered to police³⁵ without incident.³⁶ He yelled to Ms. Davis to "[t]ake care of our son,"³⁷ but soon lost consciousness.³⁸

Paramedics attended to the couple onsite.³⁹ They transported Mr. Burciaga, to the hospital for his significant hand laceration and head wound.⁴⁰ Mr. Burciaga repeatedly asked how Ms. Davis was doing, but no one would tell him.⁴¹ Though Mr. Burciaga did not yet know it, Ms. Davis died in her home.⁴²

Hospital tests revealed Mr. Burciaga had a high blood alcohol content and methamphetamine and other substances in his system.⁴³ After Mr. Burciaga underwent emergency surgery to repair his hand, an agent with the Federal Bureau of Investigation agent told him that Ms. Davis died.⁴⁴ Mr. Burciaga then confessed

³¹ App. Dkt. 25, GX-41a-3 (09:10:57-09:11:15).

³² *Id.* at GX-41a-3 (09:10:17-09:10:56; 09:11:17-09:11:35).

³³ *Id.* at GX-41a-3 (09:11:15-09:11:18).

³⁴ *Id.* at GX-41a-3 (09:11:35-09:12:24).

³⁵ *Id.* at GX-41a-3 (09:12:25-09:12:37).

³⁶ *Id.* at GX-41a-3 (09:12:37-09:13:15); GX-5a-3 (00:37:17-0039:16).

³⁷ App. Dkt. 20, 6-ER-1465; App. Dkt. 25, DX-531-A.

³⁸ App. Dkt. 25, GX-5c.

³⁹ *Id.* at GX-22d, 22e.

⁴⁰ *Id.* at GX-23a-b; App. Dkt. 20, 10-ER-2623–2661; 12-ER-3153–3163.

⁴¹ App. Dkt. 25, GX-5e; GX-5g; GX-8a.

⁴² App. Dkt. 20, 6-ER-1590.

⁴³ *Id.* at 1-ER-93.

⁴⁴ *Id.* at 6-ER-1493–1494.

to the agent that he stabbed Ms. Davis when she told him she did not want his baby, but he never planned or intended to kill Ms. Davis when he went home that night.⁴⁵

B. Procedural History

1. District Court Proceedings

Mr. Burciaga was federally indicted on three counts: first-degree murder under 18 U.S.C. §§ 1111, 1151, 1152 (Count One); protection of unborn children under 18 U.S.C. §§ 1841(a)(1), 1111, 1151, 1152 (Count Two); and domestic assault by a habitual offender (Count Three).⁴⁶

At his jury trial, Mr. Burciaga presented a heat of passion and sudden quarrel defense and proffered a corresponding jury instruction to the first-degree murder charge.⁴⁷ In support, he presented largely un rebutted evidence that he acted in the heat of passion or sudden quarrel. This evidence included: Mr. Burciaga's anxiety following the Trisomy-18 diagnosis for which he received psychiatric care; the couple's escalating disagreement over whether to proactively plan for surgery in an attempt to ameliorate the effects of Trisomy-18 (his strong preference) or do nothing (Ms. Davis's strong preference); the disagreement's apex immediately before the stabbing when Ms. Davis cursed at Mr. Burciaga and said she did not want his baby; the disordered pattern of wounds on Ms. Davis; Mr. Burciaga's high intoxication levels at the time of the stabbing, intensifying his

⁴⁵ App. Dkt. 25, GX-41a, a-1, a-2, a-3, b.

⁴⁶ App. Dkt. 20, 3-ER-636-638.

⁴⁷ See App. Dkt. 19, Opening Br., 25-29; App. Dkt. 46, Reply Br., 13-21.

response to perceived provocation; and Mr. Burciaga's head and defensive hand injuries from the fight with Ms. Davis, the latter of which required surgery.⁴⁸

Mr. Burciaga's proposed a first-degree murder instruction that identified the offense elements but advised jurors:

It is not first degree murder if Mr. Burciaga acted upon a sudden quarrel or heat of passion, or otherwise acted without malice aforethought. Heat of passion may be provoked by fear, rage, anger or terror. Provocation, in order to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone. In order to show that Mr. Burciaga acted with malice aforethought, the government must prove the absence of a sudden quarrel or heat of passion, and any other condition that might negate malice forethought, beyond a reasonable doubt.⁴⁹

He proposed an identical instruction for the lesser-included second-degree murder offense⁵⁰ and requested jurors be instructed on the lesser-included offenses of voluntary and involuntary manslaughter.⁵¹

The district court found sufficient evidence to instruct jurors on all lesser-included offenses to first-degree murder and provide the heat of passion/sudden quarrel defense instruction for the murder charge.⁵² The district court explained,

Count One appropriately includes the additional element that the government has to . . . negate heat of passion, and I think there's been evidence offered that the killing occurred in the context of the two individuals' argument, as heard by D.D. in her testimony that she woke up because she heard argument; and in the broader context of the two individuals disagreement about the – their child's Trisomy 18 and how to address the genetic condition.⁵³

⁴⁸ *See supra* 4–8.

⁴⁹ App. Dkt. 20, 2-ER-344–345.

⁵⁰ *Id.* at 2-ER-346–347.

⁵¹ *Id.* at 2-ER-342–343.

⁵² *Id.* at 8-ER-2056; 8-ER-2076–2077; 8-2082–2093.

⁵³ *Id.* at 8-ER-2056.

But the district court changed course after the government claimed it would confuse jurors to incorporate the heat of passion defense into both the murder and voluntary manslaughter instructions.⁵⁴ The district court thus removed the heat of passion and sudden quarrel defense instructional language from the murder instruction, including it only in the voluntary manslaughter instruction. App. 6a–10a.⁵⁵ The verdict form further instructed jurors to consider voluntary manslaughter only if they first acquitted on the murder charges or could not unanimously agree on the murder charges. App. 18a–23a.

Together, the jury instructions and verdict form directed jurors not to consider the heat of passion/sudden quarrel defense unless and until they first acquitted or could not agree on the murder charges. App. 6a–10a, 18a–23a. The jury convicted Mr. Burciaga of first-degree murder. App. 18a–23a.⁵⁶

2. Appellate Court Proceedings

Mr. Burciaga timely appealed.⁵⁷ Mr. Burciaga argued that the district court’s error in failing to properly instruct jurors on his a heat of passion or sudden quarrel defense alleviated the government’s burden of proof to secure a murder conviction.⁵⁸

⁵⁴ *Id.* at 8-ER-2077–2080. The government claimed it might confuse jurors to instruct them on the heat of passion/sudden quarrel defense in conjunction with the murder charge because the government had to prove the *absence* of the defense to obtain a murder verdict and prove the *existence* of the defense to obtain a voluntary manslaughter verdict. *See id.*; 18 U.S.C. §§ 1111 (murder), 1112(a) (voluntary manslaughter).

⁵⁵ *See also* App. Dkt. 20, 2-ER-377; 2-ER-379; 8-ER-2077–2080.

⁵⁶ The jury also convicted on Counts Two and Three. App. 24a.

⁵⁷ App. Dkt. 3-ER-639.

⁵⁸ App. Dkt. 19, Opening Br., 25–29; App. Dkt. 46, Reply Br., 13–21.

He requested his convictions be reversed and he be granted a new trial because these errors were not harmless, and the government could not demonstrate otherwise.⁵⁹

The three-judge appellate panel circumvented the jury instruction errors. The panel instead stated that Mr. “Burciaga presented only three statements by Davis that he alleges constitute sufficient evidence of provocation to warrant a provocation jury instruction. Words alone, however, generally do not make for adequate provocation.” App. 2a. As support, the panel cited this Court’s decision in *Allen v. United States*, 164 U.S. 492, 497 (1896), and the Ninth Circuit’s decisions in *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993), and *United States v. Wagner*, 834 F.2d 1474, 1487 (9th Cir. 1987). App. 2a. Then, without identifying the three statements, their nature, or the circumstances surrounding them, the panel decided for itself that those unidentified statements were “insufficient evidence of provocation to warrant a defense theory instruction on heat of passion.” App. 2a. The Ninth Circuit subsequently summarily denied Mr. Burciaga’s timely petition for panel and en banc rehearing. App. 5a.

⁵⁹ App. Dkt. 46, Reply Br., 17–21.

Reasons for Granting the Petition

The prevailing view is that informational words can serve as adequate provocation to mitigate murder to manslaughter by negating the element of malice. Five federal circuit courts and thirteen state high courts recognize this dominant opinion, yet the Ninth Circuit Court of Appeals did not consider it here. Because criminal defendants like Mr. Burciaga have a due process right to meaningfully present a complete defense and have jurors properly instructed to consider that defense, the Ninth Circuit's erroneous failure to apply the prevailing view has nationwide implication. This case presents an ideal vehicle to resolve this important issue.

A. The prevailing view is that informational words can engender heat of passion and negate malice.

Federal law divides unlawful killings into four categories: first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. *See* 18 U.S.C. §§ 1111(a) (murder offenses), 1112(a) (manslaughter offenses). To maintain these distinct categories, this Court recognizes that “the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.” *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975). “A defendant who acts in the heat of passion is guilty of voluntary manslaughter rather than murder.” *United States v. Begay*, 33 F.4th 1081, 1088 (9th Cir. 2022); *see also* 18 U.S.C. § 1112(a) (defining voluntary manslaughter as an “unlawful killing” “[u]pon a sudden quarrel or heat of

passion”). This is because heat of passion “negates the malice” element necessary for a murder conviction. *Begay*, 33 F.4th at 1088 (cleaned up).

To properly present a heat of passion defense, the person who committed the killing need offer only “some provocation to produce a certain condition of mind.” *Allen v. United States*, 164 U.S. 492, 496 (1896) (*Allen III*) (emphasis added); see also *United States v. Spentz*, 653 F.3d 815, 818 (9th Cir. 2011) (defendants need present only “slight” evidence in support of defense theory instruction); *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (the legal threshold for a defense theory instruction is “generous” to “protect[] the defendant’s right to have questions of evidentiary weight and credibility resolved by the jury”); *United States v. Johnson*, 459 F.3d 990, 993 (9th Cir. 2006) (cleaned up) (standard is satisfied when there is more than “a ‘mere scintilla of evidence,’” “even if [the] evidence ‘is weak, insufficient, inconsistent, or of doubtful credibility’”).

The fundamental inquiry thus asks what suffices as “some provocation” to support a heat of passion defense. At common law, the general rule provided that “[n]o words or gestures, however provoking,” could “justify homicide from the crime of murder.” *Watts v. Brains*, 78 Eng. Rep. 1009.⁶⁰ This Court recognized this common-law doctrine in a series of cases: *Allen III*, 164 U.S. at 497; *Allen v. United States*, 157 U.S. 675, 679–78 (1895) (*Allen II*); and *Allen v. United States*, 150 U.S.

⁶⁰ *Watts* is undated but appears to have been “decided in or before 1600.” Richard Singer, *The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. Rev. 243, n.39 (1986) (citation omitted).

551, 552 (1893) (*Allen I*). But the analysis undertaken in the *Allen* series, predicated on highly specific facts, is incapable of resolving the question presented here.

The *Allen* trilogy arose from a murder charge against Allen, a Black teenager, for killing Henson, a White teenager. *Allen I*, 150 U.S. at 552. The trial evidence conflicted as to which teenager was the aggressor and the nature of the aggressive acts. *Allen II*, 157 U.S. at 675; *Allen I*, 150 U.S. at 552–53, 557. For his part, Allen presented evidence that Henson physically assaulted and, using a racial slur, threatened to “settle with” Allen the next time he saw him. *Allen I*, 150 U.S. at 552. Two days later, Henson again used a racial slur and physically assaulted Allen; Allen responded by killing Henson. *Allen II*, 157 U.S. at 675; *Allen I*, 150 U.S. at 552–53. Allen was charged with murder. *Allen I*, 50 U.S. at 551.

The trial court instructed jurors on manslaughter but directed them to separate their consideration of words Hansen may have used from conduct Hansen may have engaged in:

The party who is killed, at the time of the killing, must offer some provocation to produce certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must be doing some act—that is, the deceased, Philip Henson, in this case, the party killed—which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion, in a heat of passion, where he is incapable of deliberating.

Allen III, 496 U.S. at 496–97. This Court affirmed the instruction, stating “[i]t is well settled by the authorities that mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter.” *Id.* at 497 (citing *Commonwealth v. York*, 9 Metcalf (Mass.) 93, 103 [(1845)]; Whart. Hom., § 393; Whart. Cr. Law, § 455a (10th ed. [1896])).

But *Allen* is of limited use here, as it is predicated on very specific facts and did not address the common-law exception to the “words alone” tenet. Factually, *Allen* involved racial insults, a single threat to “settle” matters two days before the killing, and contested evidence concerning the events preceding the killing. *Allen I*, 150 U.S. at 552–53; *Allen II*, 157 U.S. at 675. Legally, *Allen* did not address the common-law exception to the words alone doctrine for information words. *Allen* also predicated its holding on common law, not modern federal statutes criminalizing murder and manslaughter—the latter of which provides that voluntary manslaughter is an unlawful killing predicated upon an act undertaken in the heat of passion. *Compare Allen III*, 164 U.S. at 496–97, *with* 18 U.S.C. § 1112(a).

The common-law informational words exception is exemplified in *John Royley’s Case*, 79 Eng. Rep. 254 (England 1666). There, after Royley’s son told him another boy gave him a bloody nose, Royley walked a mile to find the young assailant, struck him with a stick, and killed him. *Id.* Royley was indicted for murder. *Id.* The court pardoned the murder charge, stating, “if one *hear* that his brother, or cousin, or servant, is fighting upon a sudden occasion, and he go to the place where they are fighting (although a mile or more distant), and finding the

adversary, fight with him and kill him, it is not murder, but manslaughter.” *Id.* (emphasis added). Thus, at common law, hearing words that convey provocative information could mitigate murder to manslaughter.

Courts have continued to recognize the common-law informational words exception for centuries. Under the exception, “[t]he fact that words were used . . . is not dispositive.” *Sells v. State*, 653 P.2d 162, 164 (N.M. 1982). Rather, “informational words, as distinguished from mere insulting words, may constitute adequate provocation.” *Id.* (quoting 2 C. Wharton’s Criminal Law, Section 156 (14th ed. 1979)); see also *United States v. Velazquez*, 246 F.3d 204, 213 (2d Cir. 2001) (“the prevailing view” is that highly provocative informational words cause heat of passion) (citing 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.10(b)(6), at 260 (2d ed.1986) (“words can engender heat of passion” when they “impart information of a highly provocative nature”) [LaFave & Scott (1986)]).

To assess whether the words are informational or merely insulting, courts scrutinize the exact words used, the nature of those words, and the context and circumstances in which they were uttered. “[T]aken together,” “the substance of the informational words spoken, the meaning conveyed by those informational words, [and] the ensuing arguments and other actions of the parties . . . could amount to provocation.” *Sells*, 653 P.2d at 164. Under this analysis, suddenly disclosing provocative information to the defendant “may be the equivalent of the event presently occurring.” *Id.* (quoting 2 C. Wharton’s Criminal Law, Section 156 (14th ed. 1979)).

B. Five federal circuits and thirteen state high courts agree that informational words can engender heat of passion and negate malice.

The prevailing view concerning informational words judiciously recognizes the nuanced exception to the restrictive common-law “words alone” tenet and acknowledges the reality that certain words can be as provocative as physical contact. J. Ohlin, Wharton’s Criminal Law § 22:6 Provocation—Words and Gestures (16th ed. 2025). Under this view, “words that convey information of an actual fact or injury may be sufficient” “to provoke heat of passion” and “negate malice aforethought.” *United States v. Sockey*, 157 F.4th 1282, 1287 (10th Cir. 2025) (citing 3 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 15.2(b)(6) (3d ed. 2018) [LaFave & Scott (2018)], as “detailing extraordinary, but inapposite exceptions”). Federal and state courts thus routinely distinguish “insulting words” from “informational words” and treat them differently. J. Ohlin, Wharton’s Criminal Law § 22:6 Provocation—Words and Gestures (16th ed. 2025).

“The classic example” of informational words engendering heat of passion is where “one spouse inform[s] the other spouse of the former’s infidelity, which provokes the recipient of the information to kill the adulterer.” *Velazquez*, 246 F.3d at 213 (citing LaFave & Scott (1986), § 7.10(b)(6), at 260). But the breadth of informational words that may sufficiently provoke a defendant and negate malice requires scrutinizing the actual words spoken, the meaning conveyed, and the arguments and actions of those involved in the interaction. *See Sells*, 653 P.2d at 164.

The federal circuits to consider the issue in published opinions—the Second, Fourth, Fifth, Eighth, and Tenth—all require the factfinder to evaluate the nature and context of the words exchanged to determine the propriety of a heat of passion defense.⁶¹ By summarily and dispositively treating the fact that words precipitated the killing as insufficient for such a defense, the Ninth Circuit is an outlier among the federal circuits. *See App. 2a.*⁶²

The Second Circuit acknowledged the prevailing view and examined whether the words used and the surrounding circumstances could have been considered provocative by the factfinder. *Velazquez*, 246 F.3d at 213. In doing so, the Second Circuit concluded the victim “cursing at Velazquez imparted no information, and [the victim’s] isolated use of the same expletive Velazquez had directed at him will not suffice for a ‘heat of passion.’” *Id.* The Fifth Circuit likewise examined the record after a murder conviction but found “no evidence of any sudden quarrel and certainly none provoked by more than mere words” because the defendant “testified he and his [victim] wife were both laughing at the time” of her killing. *United States v. McRae*, 593 F.2d 700, 705 (5th Cir. 1979).

The Eighth Circuit, however, affirmed a voluntary manslaughter conviction because its examination of the record revealed the inebriated defendant engaged in

⁶¹ The remaining federal circuits do not appear to have published opinions adopting or even addressing the prevailing view concerning informational words.

⁶² *But see United States v. Burns*, No. 18-10083, 2023 WL 7876414, at *1 (9th Cir. Nov. 16, 2023) (noting *Allen III* in an unreported decision but also examining the evidence of provocation to conclude the victim only insulted the defendant by calling him “a mark”).

a sudden argument with his wife over the defendant's infidelity which resulted in a knife fight and the wife's death. *Wakaksan v. United States*, 367 F.2d 639, 641 (8th Cir. 1966). And the Fourth Circuit has noted the words alone tenet does have exceptions. *See United States v. Slager*, 912 F.3d 224, 236 (4th Cir. 2019) (citing LaFave & Scott (2018), *supra*, § 15.2(b)(6), as "detailing extraordinary, but inapposite exceptions").

The Tenth Circuit recently stated it "has never explicitly held that words alone cannot provoke heat of passion manslaughter under 18 U.S.C. § 1112(a) and such language is not included in the pattern jury instructions." *United States v. Sockey*, 157 F.4th 1282, 1286 (10th Cir. 2025). To the contrary, it specifically acknowledged "[t]here may be some situations in which words alone can be sufficient to negate malice aforethought — for example, 'a reasonable man may be provoked upon suddenly being told of his wife's infidelity.'" *Id.* at 1287 (citations omitted). But the court's examination of the record in *Sockey* revealed the words alleged to provoke the defendant were mere name-calling and teasing words, such as "chicken legs," "scrawny," and "crybaby. *Id.* The Tenth Circuit thus found no error in instructing jurors there that words alone do not cause heat of passion because that "instruction did not prohibit the jury from considering words in general." *Id.* at 1284–88.

The Tenth Circuit's approach in *Sockey* highlights important constitutional implications protected by the prevailing view. The trial court in *Sockey* instructed jurors that "[w]ords alone, no matter how aggravating or insulting, do not negate

malice aforethought and create heat of passion.” *Id.* at 1285. It was thus *the jurors* sitting as factfinders who decided whether the evidence presented involved merely aggravating or insulting words alone that would be insufficient to “cause[] an ordinary person to lose his normal self-control,” not the trial court. *Id.* This is critical. The Sixth Amendment guarantees those accused of a crime the right to have an impartial jury adjudicate guilt. *Alleyne v. United States*, 570 U.S. 99, 104 (2013).

Notably, the trial court in *Sockey* formulated its own heat of passion jury instruction as the defendant did not proffer one. *Sockey*, 157 F.4th at 1285. Ideally, a defense-proffered instruction would instruct jurors on the critical distinction between mere insulting words and informational words. For example:

‘Adequate provocation’ refers to any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant. Generally, actions which are calculated to provoke an emotional response and ordinarily cause serious violence are recognized as adequate provocation. Actions that do not ordinarily provoke serious violence do not constitute adequate provocation. In determining whether the deceased’s conduct was adequate provocation, the conduct is judged as a person or [sic] reasonable intelligence and disposition would respond to it. Mere words alone, or threats, menaces, or gestures alone, however offensive or insulting, do not constitute adequate provocation. *However, words, threats, menaces, or gestures, when considered in connection with provoking conduct of the deceased, may constitute adequate provocation.* Personal violence or aggression [sic] by the deceased of a nature sufficiently violent to cause or threaten to cause pain, bloodshed, or bodily harm to the defendant may be adequate provocation.

Black v. Workman, 682 F.3d 880, 900 (10th Cir. 2012) (alteration in original) (emphasis added).

Fundamental fairness, as guaranteed by the Due Process Clause, requires those accused of crimes “be afforded a meaningful opportunity to present a complete defense,” *California v. Trombetta*, 467 U.S. 479, 485 (1984), and “to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor,” *Mathews v. United States*, 485 U.S. 58, 63 (1988). Thus, when the accused puts forth some provocation evidence involving words, the Constitution rightfully demands that *the jury* determine whether, “taken together,” the nature of the words, the meaning conveyed by them, the resulting arguments and actions of the other parties involved amounted to provocation. *Sells*, 653 P.2d at 164; *see also Alleyne*, 570 U.S. at 104. A defendant’s burden on this front is “slight.” *Kayser*, 488 F.3d at 1076; *see also Johnson*, 459 F.3d at 990 (cleaned up) (standard is satisfied when there is more than “a ‘mere scintilla of evidence,’ “even if [the] evidence ‘is weak, insufficient, inconsistent, or of doubtful credibility’”). It is the *jurors* who then must decide whether the precipitating words would cause an ordinary person to lose normal self-control. A jury instruction like the one in *Black*, 682 F.3d at 900, works to protect the accused’s constitutional rights by requiring jurors to consider whether the precipitative words were merely “words alone” or provocative, informational words.

Thirteen state high courts likewise hold the informational words exception to the common-law “words alone” doctrine can constitute adequate provocation:

California,⁶³ Georgia,⁶⁴ Kansas,⁶⁵ Iowa,⁶⁶ New Mexico,⁶⁷ New Jersey,⁶⁸

Massachusetts,⁶⁹ Michigan,⁷⁰ Mississippi,⁷¹ Oklahoma,⁷² Pennsylvania,⁷³

Tennessee,⁷⁴ and Wyoming.⁷⁵

⁶³ See *People v. Berry*, 556 P.2d 777, 780–81 (Cal. 1976) (defendant entitled to voluntary manslaughter instruction where he “chronicle[d] a two-week period of provocatory conduct by the defendant’s wife . . . that could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly”); *People v. Valentine*, 169 P.2d 1, 15 (1946) (whether verbal provocation is sufficient to find a heat of passion is jury question).

⁶⁴ See *Raines v. State*, 277 S.E.2d 47, 49 (Ga. 1981) (“serious provocation” existed to authorize voluntary manslaughter instruction where defendant discovered wife carrying letter to her boyfriend where wife admitted and taunted defendant with her adultery).

⁶⁵ *State v. Thille*, 570 P.3d 18, 25 (Kan. 2025): (holding defendant pointed “to no evidence that [the victim] said anything to provoke defendant.”)

⁶⁶ See *State v. Thompson*, 836 N.W.2d 470, 478 (Iowa 2013) (noting informational words exception but finding exception not met where victim’s words were “merely insulting or abusive”).

⁶⁷ See *Sells*, 653 P.2d at 164.

⁶⁸ See *State v. Erazo*, 594 A.2d 232, 238 (N.J. 1991) (ongoing tension in relationship demonstrated causal connection between victim’s death and her threatening to have defendant’s parole revoked).

⁶⁹ See *Commonwealth v. Ronchi*, 202 N.E.3d 499, 512 (Mass. 2023) (while no longer recognizing oral disclosure of infidelity as sufficient provocation to kill a spouse because women are no longer viewed as property, not “foreclose[ing] possibility of sufficient provocation caused by learning of other types of information of a ‘nature to cause a reasonable person to lose his self-control’”); *Commonwealth v. Bermudez*, 348 N.E.2d 802 (Mass. 1976) (“The existence of sufficient provocation is not foreclosed absolutely because a defendant learns of a fact from oral statements rather than from personal observation.”) (citation omitted); see also Voluntary manslaughter—Mitigating circumstances; reasonable provocation, 14A Mass. Prac., Summary of Basic Law § 7:153 (5th ed.) (footnotes omitted):

Under the prevailing view, Mr. Burciaga's heat of passion defense would more than likely have succeeded. Immediately before the killing, Ms. Davis told Mr.

Mere words, no matter how insulting or abusive, do not ordinarily by themselves constitute reasonable provocation. [But there may be reasonable provocation where the defendant learns suddenly of information that would cause a reasonable person to lose his self-control and learning of the matter disclosed did actually cause the defendant to do so.].

⁷⁰*People v. Pouncey*, 471 N.W.2d 346, 351 (Mich. 1991) (noting "words of an informative nature, rather than mere insults, have been considered adequate provocation," declining "to issue a rule that insulting words per se are never adequate provocation," and reiterating "that what constitutes adequate provocation is a factual question") (cleaned up).

⁷¹ See *Nolan v. State*, 61 So. 3d 887, 894 (Miss. 2011) ("a reasonable fact-finder could have found that [the victim] made certain statements that had provoked [the defendant's] actions" because, in the days before the shooting, defendant "was in a constant state of agitation, predicated upon his father's comments regarding his sexuality"); *Haley v. State*, 85 So. 129, 130–33 (Miss. 1920) (upholding manslaughter conviction where defendant's wife's suddenly confessed adultery).

⁷² *Washington v. State*, 989 P.2d 960, 969 n.4 (Okla. 1999) ("Mere words alone, or threats, menaces, or gestures alone, however offensive or insulting, do not constitute adequate provocation. However, words, threats, menaces, or gestures, when considered in connection with provoking conduct of the deceased, may constitute adequate provocation.").

⁷³ See *Commonwealth v. Berry*, 336 A.2d 262, 263–65 (Pa. 1975) (holding jury could find defendant was provoked when, arriving on the scene shortly after the attack, his mother told him she had been assaulted by man that defendant killed).

⁷⁴ See *Toler v. State*, 260 S.W. 134, 136–37 (Tenn. 1924) (father who killed his neighbor within an hour of learning the neighbor had sexually assaulted the father's minor daughter acted in the heat of passion and did not commit murder).

⁷⁵ See *State v. Flory*, 276 P. 458 (Wyo. 1929) (holding jury could find voluntary manslaughter where defendant's father-in-law raped defendant's wife; wife told defendant about assault, and defendant killed his father-in-law the next day).

Burciaga she did not want his baby⁷⁶—a baby Mr. Burciaga wanted to make every effort to save.⁷⁷ These words fell on the heels of Ms. Davis shutting Mr. Burciaga out of her third-semester prenatal appointments and decisions concerning fetal care and while Mr. Buricaga was experience anxiety over the lethal Trisomy-18 diagnosis.⁷⁸ Ms. Davis's words signaled to Mr. Burciaga that she did not want to secure medical specialists in an attempt to preserve even a small fraction of the fetus's life in the event it survived birth. Under these circumstances, Ms. Davis's words communicated to Mr. Buricaga that she planned to let the fetus die. These words were at least as provocative as confessing infidelity to one's spouse or learning that someone assaulted a family member, if not more so. Mr. Burciaga thus had a constitutional right to have the jury consider Ms. Davis's words and their circumstances in adjudicating the murder charges. *See Mathews*, 485 U.S. at 63; *Trombetta*, 467 U.S. at 485.

The failure to inform jurors the heat of passion defense, if accepted, could negate the element of malice required for murder caused a second error: misinforming jurors on the government's burden of proof. Federal murder requires the government to prove malice aforethought beyond a reasonable doubt. 18 U.S.C. § 1111(a). When the defendant puts forth some evidence of provocative informational words, the government must also prove the absence of heat of passion beyond a reasonable doubt, as heat of passion negates malice. *See Mullaney v.*

⁷⁶ App. Dkt. 25, GX-41a-3 (09:04:43-09:09:05).

⁷⁷ App. Dkt. 20, 6-ER-1388–1389.

⁷⁸ *See supra* 4–8.

Wilbur, 421 U.S. 684, 697–98 (1975) (prosecution required to “prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case”); *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985) (because “malice is an element of murder” under 18 U.S.C. § 1111, and “[t]he heat of passion defense is directly at odds with malice,” “[t]he rule of law articulated in *Mullaney* . . . controls”). Because Mr. Burciaga’s jury was not advised the government had to prove the *absence* of heat of passion, the government was not held to its required evidentiary burden. This violated Mr. Burciaga’s Sixth Amendment rights. U.S. Const. amend. VI.

There can be no valid argument that these errors were harmless. Mr. Burciaga’s heat of passion defense was the critical to his defense presentation at trial. Because his jury was not properly instructed on that defense or the government’s burden of proof, his trial was fundamentally unfair.

This Court’s decision in *United States v. Frady*, 456 U.S. 152 (1982), does not impact the harmlessness analysis here. Frady pursued habeas relief under 28 U.S.C. § 2255 and argued for the first time in collateral proceedings that the jury instructions at his trial “compelled the jury to presume malice and thereby wrongfully eliminated any possibility of a manslaughter verdict, since manslaughter was defined as culpable homicide without malice.” *Id.* at 158. This Court denied relief but

emphasize[d] that this would be a different case had Frady brought before the District Court affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent. But Frady, it must be remembered, did not assert at trial that he and

Richard Gordon beat Thomas Bennett to death without malice. Instead, Frady claimed he had nothing whatever to do with the crime. . . . Since that time, Frady has never presented colorable evidence, even from his own testimony, indicating such justification, mitigation, or excuse that would reduce his crime from murder to manslaughter. Mr. Burciaga, unlike Frady, assuredly introduced largely un rebutted

evidence that he acted in a heat of passion when he stabbed Ms. Davis.⁷⁹ Also unlike Frady, Mr. Burciaga confessed to stabbing Ms. Davis during their argument in response to Ms. Davis's abrupt avowal that she did not want his baby.⁸⁰ The instructional error was not harmless here.

C. This Court's intervention is needed.

Because the informational words exception has existed since common law, there is no basis to believe that the federal appellate courts that have not directly addressed the exception will do so in the foreseeable future. Moreover, by intervening now, this Court's review will provide nationwide consistency on the question presented and guide the courts who have not yet resolved the issue.

D. This case presents an exceptionally important issue and an ideal vehicle for resolution.

The question presented concerns two critical constitutional rights necessary to our criminal justice system—the Fifth Amendment due process right to present a complete defense and the Sixth Amendment right to require the government to prove all the elements of an offense beyond a reasonable doubt. *Mathews*, 485 U.S. at 63; *Trombetta*, 467 U.S. at 485. The Ninth Circuit's summary decision on the question presented substantially undermined both rights. App. 2a.

⁷⁹ See *supra* 4–8.

⁸⁰ App. Dkt. 25, GX-41a-3 (09:04:43-09:09:05).

This case presents an ideal vehicle to resolve whether federal courts should, in accord with the prevailing view, consider both the common-law “words alone” doctrine and the common-law informational words exception to a defendant’s heat of passion defense by examining the nature of those words and circumstances surrounding them. Here, Mr. Burciaga presented largely un rebutted evidence concerning the provocative nature and circumstances of Ms. Davis’s statement that she did not want his baby.⁸¹ He also proffered a heat of passion jury instruction and requested its inclusion in the murder instructions to explain the government’s burden to prove the absence of that defense to sustain a murder conviction.⁸² Initially, the district court correctly concluded the evidence presented warranted a heat of passion defense instruction.⁸³ But the district court legally erred by incorrectly instructing the jury as to the impact of the heat of passion defense on the murder charges. App. 7a–14a.⁸⁴

The Ninth Circuit also legally erred by failing to consider the informational words exception, summarily applying the “words alone” doctrine without regard to the facts and circumstances of the words precipitating the killing, and ignoring the informational words exception and prevailing view. App. 2a. These legal errors are fully preserved and ripe for this Court’s review.

⁸¹ *See supra* 4–8.

⁸² App. Dkt. 20, 2-ER-342–347.

⁸³ *Id.* at 8-ER-2056; 8-ER-2076–2077.

⁸⁴ *See also id.* at 8-ER-2077–2080.

E. The Ninth Circuit’s decision is wrong.

The district court correctly found Mr. Buricaga met the requisite standard for presenting the heat of passion to the murder charge, concluding “there’s been evidence offered that the killing occurred in the context of the [couple’s] argument . . . and in the broader context of the [couple’s] disagreement about” how to address the Trisomy-18 diagnosis.”⁸⁵ This evidence included: (1) the couple’s torturous disagreement over whether to seek medical intervention for the Trisomy-18 diagnosis; (2) Mr. Burciaga was under psychiatric care for his anxiety over the diagnosis and, at the time of the killing, was highly intoxicated with alcohol, had recently ingested methamphetamine, and tested positive for benzodiazepines, and opioids, intensifying his response to perceived provocation; (3) the couple had a loud, heated argument immediately before Ms. Davis’s death; (4) the disagreement apexed when Ms. Davis said she did not want Mr. Burciaga’s baby; (5) Mr. Burciaga sustained head and defensive hand injuries from the fight with Ms. Davis, the latter of which required surgery; and (6) forensic pathologist Larry Simms concluded Ms. Davis’s wounds were “rushed,” “chaotic,” and “not well planned.”⁸⁶

The Ninth Circuit, however, stated only that “[w]ords alone . . . generally do not make for adequate provocation” without identifying Ms. Davis’s words to Mr. Burciaga or the circumstances surrounding them. App. 2a.

Both common law and the prevailing view demonstrate the Ninth Circuit was wrong. Common law gave rise to both the “words alone” doctrine *and* the

⁸⁵ *Id.* at 8-ER-2056

⁸⁶ *See supra* 4–10.

informational words exception to that doctrine. The prevailing view continues to recognize the informational words exception.⁸⁷ But the Ninth Circuit considered only the general rule, not its exception—even though Mr. Burciaga put forth evidence in support of the exception.⁸⁸ The Ninth Circuit erred by failing to consider both the rule and its exception in conjunction with the actual words used and their circumstances before adjudicating whether those words could engender heat of passion. App. 2a.

The Ninth Circuit’s erroneous legal analysis gave rise to a second error—failing to recognize criminal defendants have only a slight burden to put forth some provocation evidence to receive a heat of passion instruction in a homicide case. App. 21. Mr. Burciaga more than met that standard here. Indeed, a substantial portion of his provocation evidence remains unrebutted. By not recognizing Mr. Burciaga’s low evidentiary burden and the depth of the provocation evidence he provided, the Ninth Circuit’ placed a new, higher evidentiary burden on defendants seeking to advance an affirmative defense than the law allows. *Compare* App. 2a, with *supra* 13, 21.

Finally, the Ninth Circuit’s reliance on *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993), and *United States v. Wagner*, 834 F.2d 1474, 1487 (9th Cir. 1987), provide no support for its decision. App. 2a. The *Roston* defendant claimed entitlement to a heat of passion defense for killing his wife due largely to “(1) disagreements between him and his wife over her eating

⁸⁷ See *supra* 12–22.

⁸⁸ See *supra* 8–9.

sweets; [and] (2) tension between them because she did not know how to use the ‘complex’ silverware settings aboard ship.” 986 F.2d at 1291. The Ninth Circuit rejected this argument, but not because the couple had verbal disagreements or tension. The Ninth Circuit instead concluded “neither [issue] could possibly provoke a reasonable and ordinary person to kill.” *Id.* Conversely, Ms. Davis suddenly telling Mr. Burciaga she did not want his baby under the circumstances presented here could very likely provoke a reasonable person to kill. *Wagner* is inapposite as well: “there was no evidence that Wagner stabbed [a fellow inmate] in a ‘heat of passion,’” because “Wagner steadfastly claimed the stabbing was an accident.” *Id.* at 1487. Unlike here, there were no words for the *Wagner* court to consider.

The result in this case not only violated Mr. Burciaga’s Fifth and Sixth Amendment rights, but it also created the exact situation Justice Sotomayor expressed concern about with her statement in *Black v. Tennessee*, 606 U.S. ---, 145 S. Ct. 2622, 2623 (2025) (Mem). Justice Sotomayor found two jury instructions in Black’s murder trial raised serious constitutional questions. First, Tennessee’s second-degree murder instruction required the prosecution to prove “an unlawful and voluntary (knowing) killing” while its voluntary manslaughter instruction required proof of “those same two elements, plus a third: that the defendant acted ‘in a state of passion induced by adequate provocation.’” *Id.* Second, jurors were advised not to consider any lesser-included offense unless they unanimously acquitted on the immediately preceding greater offense or had a reasonable doubt of the defendant’s guilt on that offense. *Id.* at 2624. Thus, “no jury instructed on both

second-degree murder and manslaughter could ever reach a manslaughter verdict.”

Id. Justice Sotomayor found it “hard to imagine” that “instructions rendering it legally impossible for the jury to accept a legitimate defense could pass muster under the Due Process Clause.” *Id.* Though the lower court in *Black* “did not grapple with” these issues, Justice Sotomayor “encourage[d] the Tennessee Supreme Court to resolve them in the first instance.” *Id.* at 2623.

Mr. Burciaga’s jury instructions and verdict form raise the same due process concern Justice Sotomayor identified in *Black*, 145 S. Ct. at 2623–64. Only the manslaughter instruction mentioned his heat of passion provocation defense—not the murder instruction. App. 6a–17a. And the verdict form told jurors not to even consider lesser-included offenses unless they first either acquitted or could not reach a unanimous verdict on murder. App. 18a–24a. Thus, Mr. Burciaga’s jury could never consider his heat of passion defense if it convicted on murder. *Accord Black*, 145 S. Ct. at 2624. The inclusion of a heat of passion in the voluntary manslaughter instruction could not save the faulty murder instruction here.

The Ninth Circuit’s legal analysis unconstitutionally burdens defendants, jeopardizes the sanctity of the rights guaranteed by the Fifth and Sixth Amendments, and is contrary to the prevailing view on the common law exception concerning informational provocative words. This Court’s review is warranted.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated this 29th day of May, 2026.

Respectfully submitted,

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