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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss. JUVENILE COURT DIVISION
BRISTOL COUNTY
TAUNTON SESSION
DOCKET NO.: 15YO0001NE

COMMONWEALTH)
)
V.) **DEFENDANT'S MOTION FOR**
) **REQUIRED FINDING OF NOT GUILTY**
MICHELLE CARTER)
Defendant)

Now comes the Defendant and moves, pursuant to Mass.R.Crim.P. 25 and Commonwealth v. Latimore, 378 Mass. 671 (1979) that this Honorable Court enter a finding of not guilty on the charges of involuntary manslaughter and being a youthful offender under the above-entitled indictment.

As reasons therefore, the evidence as presented by the Commonwealth is insufficient, as a matter of both fact and law, on the charges against the defendant. In further support thereof, the defense submits the attached memorandum of law.

Therefore, based on the foregoing and the attached memorandum of law the defendant prays this motion is allowed.

Respectfully Submitted,

The Defendant
MICHELLE CARTER
By his Attorney,

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Dated: June 8, 2017

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.	JUVENILE COURT DIVISION BRISTOL COUNTY TAUNTON SESSION DOCKET NO.: 15YO0001NE
COMMONWEALTH V. MICHELLE CARTER Defendant	)) **MEMORANDUM IN SUPPORT OF**) **DEFENDANT'S MOTION FOR**) **REQUIRED FINDING OF NOT GUILTY**))

Now comes the defendant and hereby submits the following memorandum of law in support of her Motion for Required Finding of Not Guilty.

ARGUMENT

A. The Evidence Presented During the Commonwealth's Case in Chief Failed to Establish the Defendant Committed the Crime of Involuntary Manslaughter as a Matter of Law

Under *Commonwealth v. Latimore*, 378 Mass. 671, 677-678 (1979), the Supreme Judicial Court held that in order for the Commonwealth to withstand a motion for a required finding on the elements of a criminal charge, there must be "sufficient evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt." Here, the Commonwealth has failed to do so.

(i.) The Commonwealth Failed to Present Sufficient Evidence to the Trier of Fact that the Defendant Engaged in Wanton and Reckless Conduct by the Commission of an Act

Wanton or reckless conduct involving the commission of an intentional (or "affirmative") act is conduct "that is undertaken in disregard of the probable harm to others that may result." *Life Care Ctrs. Of Am., Inc.*, 456 Mass. at 832. See *Welansky*, 316 Mass. at

397("Usually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another.")

In the case at bar, where no evidence was presented to the trier of fact that the defendant was physically present at the time of the defendant's death and undertook no physical act to assist the decedent in his suicide, no view of the evidence could establish that the defendant committed an intentional "act" that was done in disregard of the probable harm to the decedent. The Commonwealth's case rests entirely on the words alone of the defendant.

Furthermore, the defense submits that this Court should apply an objective "reasonable juvenile" standard, requiring the Commonwealth to prove that the juvenile engaged in conduct that was undertaken with knowledge and facts that would case a reasonable juvenile of the same age to know that a danger of serious harm existed, as opposed to a general "reasonable person" standard. "[N]euroscience confirms that adolescents demonstrate cognitive processes that are distinct from adult cognitive processes." Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. Rev. 539, 593 (2016), citing Jay N. Giedd et al., Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 Nature Neuroscience 861, 861–62(1999); Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859, 860–61 (1999). And it is now firmly established that adolescent brain science research is relevant to the analysis of legal issues, including constitutional analysis. See *Miller v. Alabama*, 132 S.Ct. 2455 (2012). *Commonwealth v. Diatchenko*, 466 Mass. 655, 662, (2013); see also *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403 n.5 (2011) (acknowledging that juvenile brain research supports the conclusion that the *Miranda* custody analysis as applied to a juvenile must be performed from the perspective of a reasonable juvenile of the same age).

Until a juvenile reaches full psychosocial maturity, which typically occurs in early adulthood, she has diminished capacity in relation to adults in the areas of "impulse control, risk aversion, resistance to peer pressure, sensitivity to costs as well as rewards, and future orientation." Kathryn Monahan et. al, Juvenile Justice Policy and Practice: A Developmental Perspective 44 Crime & Just. 577, 590 (2015) (internal citations omitted); accord Carroll, supra at 583 (and sources cited). Juveniles also demonstrate diminished cognitive control when exposed to negative emotional situations and stress. See Alexandra O. Cohen et. al, When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts 11 (2016);[1] Laurence Steinberg & Robert G. Schwartz, Development Psychology Goes to Court in Youth on Trial: A Developmental Perspective on Juvenile Justice 26 (Thomas Grisso and Robert Schwartz eds., 2000). Of particular import, even when adolescents approach the cognitive capacities of adults, "they are less skilled than their adult counterparts in using these capacities to make real-life decisions." Carroll, supra at 583, citing Beatriz Luna et al., The Teenage Brain: Cognitive Control and Motivation, 22 Current Directions Psychol. Sci. 94, 96–99 (2013).

The "structural and functional changes [experienced by adolescents] do not all take place along one uniform timetable[.]" Laurence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy? Issues in Science and Technology 70 (Spring 2012), *available at* http://issues.org/28-3/steinberg/ (visited March 11, 2015) [hereinafter Steinberg]:

> Brain systems implicated in basic cognitive processes reach adult levels of maturity by mid-adolescence, whereas those that are active in self-regulation do not fully mature until late adolescence or even early adulthood. In other words, adolescents mature intellectually before they mature socially or emotionally, a fact that helps explain why teenagers who are so smart in some respects do surprisingly dumb things.

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[1] Article available at http://ac.els-cdn.com/S1878929315001292/1-s2.0-S1878929315001292-main.pdf?_tid=e7b11960-e188-11e5-998c-00000aacb361&acdnat=1457041562_077c4d6f8c70c01b74a060266d7b0fa0 (visited March 7, 2016).

See also "The Problem with Inference for Juvenile Defendants", Florida State University Law Review, Vol. 45, No 1, Forthcoming, Jenny E. Carrol, April 21, 2017:

> "Recent developments in neuroscience suggest that in the context of juvenile defendants, this moment of interpretation is fraught with particular risks. The emergence of fMRI technology has provided significant insights into adolescent brain development and its effect on adolescent thought processes. As a result, scientists (and courts) recognize that adolescent actors are more likely to engage in risky behavior, fail to properly comprehend long term consequences and over value reward. In short, science has proven what most long suspected: kids think and react differently than do adults."

Since, as stipulated, the defendant was 17 years-old at the time of the alleged incident, the defense submits that this Court apply a "reasonable juvenile standard" for that of a 17 year-old in order to determine whether she should have known that a danger of serious harm existed at the time of her alleged intentional commission of an "act".

(ii.) The Commonwealth Failed to Present Sufficient Evidence to the Trier of Fact that the Defendant Engaged in Wanton and Reckless Conduct by the Omission or Failure to Act

The Commonwealth fares no better in the evidence to the trier of fact in attempting to show wanton and reckless conduct by omission. In order to give rise to wanton and reckless conduct by the omission or failure to act, the Commonwealth must present sufficient evidence that "a special relationship between the defendant and the victim that gave rise to a duty of care, or the defendant created a situation that posed a grave risk of death or serious injury to another." See "Supreme Judicial Court Model Jury Instructions on Homicide," Involuntary Manslaughter, p. 80-81.

In the Commonwealth's case in chief, no evidence has been presented that a "special relationship" existed between Carter and Roy giving rise to a duty of care. Such "special relationships" giving rise to the duty of care are drawn on existing "duties imposed by civil law." *Commonwealth v. Levesque*, 436 Mass 443, 449 (2002). "Furthermore, the law provides no

general duty to protect others from self-inflicted harm, i.e., suicide." *Webstad v. Stortini*, 83 Wn. App. 857, 866 (1996). As the Court stated in *Webstad*:

> "Suicide is 'a voluntary willful choice determined by a moderately intelligent mental power[,] which knows the purpose and the physical effect of the suicidal act'...Thus, in cases of suicide, the person committing suicide is in effect both the victim and the actor. In fact, no duty exists to avoid acts or omissions that lead another person to commit suicide unless those acts or omissions directly or indirectly deprive that person of the command of his or her faculties or the control of his or her conduct."
>
> *Webstad*, 83 Wn. App. at 866, quoting *In re Sponatski*, 220 Mass. 526 (1915).

Nor does the evidence before the trier of fact sufficiently show that the defendant "created" a situation that posed a grave risk of harm to another. "It is true that, in general, one does not have a duty to take affirmative action, however, a duty to prevent harm to others arises when one creates a dangerous situation, whether that situation was created intentionally or negligently." *Levesque*, 436 Mass. at 449. The evidence instead thus so far demonstrates the decedent's strong desire to take his own life, his previous multiple attempts at suicide and that he had been hospitalized and received mental health treatment on many different occasions during an approximate two (2) year time period leading to his death. Further, the evidence presented reveals that the decedent alone provided himself with the means to kill himself and placed himself in a life-threatening situation. Ultimately, his long-term thoughts, planning and acts towards the commission of his suicide were all of his own volition and creation.

(iii.) <u>The Defendant did not Cause the Death of the Decedent</u>

Even if the Court were to find that the defendant committed an act or omission constituting wanton and reckless conduct, the Commonwealth is still required to present sufficient evidence, under either theory, that the defendant's act or omission was the "proximate cause" of the decedent's death. "Proximate cause" 'is a cause, which in the natural and continuous sequence, produces the death, and without which the death would not have occurred.'" *Pugh*, 462 Mass. at

500, quoting *Commonwealth v. Rhoades*, 379 Mass. 810, 825 (1980). See also "Supreme Judicial Court Model Jury Instructions on Homicide," Involuntary Manslaughter, p. 76 "[T]he defendant's conduct must be the efficient cause, the cause that necessarily sets in operation the factors which caused the death." *Rhoades*, 379 Mass. at 825.

The evidence before the trier of fact, taken in the most favorable light to the Commonwealth, shows that the cause of the decedent's death was by the hands of the decedent himself. It was the decedent who alone drove to the parking lot, brought the water pump, which he obtained himself, and then ran it while inside his vehicle that ultimately lead to his death by inhalation of carbon monoxide. Furthermore, the defendant was not present and did not participate with the decedent in his acts. She was miles away and on a phone. No evidence was presented that she provided the means for the decedent to kill himself or that she committed an act that set into operation the sequence of events leading to the decedent's suicide. Ultimately, the sequence of events started and ended with the decedent's own actions.

B. The Evidence Before the Trier of Fact is Insufficient as a Matter of Law that She Was a "Youthful Offender" Under M.G.L. c. 119, § 54

The Commonwealth is proceeding on a youthful offender indictment under a theory that there is evidence of an "infliction or threat of serious bodily harm" on the decedent.[2] "[W]hen a

[2] However, it is important to note in the Commonwealth's appellate brief to the Supreme Judicial Court in the defendant's appeal of her denial of her motion to dismiss conceded: "[W]hile the motion judge rejected Carter's First Amendment claim on the ground that her 'conduct threatened serious bodily harm' to Conrad...the Commonwealth did not and does not argue that this case involved 'true threats'." See Commonwealth's Brief, SJC 12043, p. 45, footnote 4. The SJC in the *Carter* decision was silent on whether there was a "threat" of "serious bodily harm" and upheld the Y.O. indictment solely on the "infliction" portion of G.L. c. 119, § 54. However, the defense maintains that a "true threat" and a "threat" of "serious bodily harm" are one in the same and that there is no evidence presented to the trier of fact of a "threat" of "serious bodily harm." "The word 'threat' has a well established meaning in both common usage and in the law. It is the 'expression of an intention to inflict evil, injury, or damage on another.'" *Commonwealth v. Ditsch*, 19 Mass. App. Ct. at 1005 (1985), quoting Webster's New International Dictionary, n. 1 (1966 ed. unabridged). Further, "[i]n law 'threat' has universally been interpreted to require more than the mere expression of intention. It has, in fact, been interpreted to require both intention and ability in circumstances which would justify apprehension on the part of the recipient of the threat.'" *Id.*, quoting *Commonwealth v. Robicheau*, 421 Mass. 176, 183 (1995). *See Virginia v. Black*, 538 U.S. 343,

prosecutor seeks a youthful offender indictment relying on 'the infliction or threat of serious bodily harm' component of the statute, the conduct constituting the offense must involve the infliction or threat of serious bodily harm." *Quincy Q.*, 434 Mass. at 863. That means there must be evidence presented that the defendant threatened serious bodily harm "or that serious bodily injuries were actually inflicted." *Quincy Q.*, 434 Mass. at 863.

While the Supreme Judicial Court upheld that there was sufficient evidence presented to the grand jury in this case to uphold the youthful offender indictment in this case under the "infliction" portion of the statute, the Court qualified that "involuntary manslaughter under these circumstances inherently involves the infliction of serious bodily harm." See *Commonwealth v. Carter*, 477 Mass. 624, 636, n. 19 (2016). (Emphasis added.) As such, the trier of fact still needs to make its own independent judgment based on the evidence thus far presented as to whether sufficient facts in evidence under the *Latimore* were presented for the defendant to be found a "youthful offender". See *Commonwealth v. Clint C.*, 430 Mass. 219, 225, n. 8 (1999)(A court reviewing a challenge to the sufficiency of the statutory requirements for a youthful offender indictment must "consider the underlying facts of the offense" and not "whether the offense itself involved" threat or infliction of serious bodily harm.) *Commonwealth v. Hoshi H.*, 72 Mass.App.Ct. 18, 21 (2008)("[W]e look only to the juvenile's own conduct in assessing the applicability of that provision.") See also *Felix F., a juvenile v. Commonwealth*, 471 Mass. 513, 517 (2015). Further, as the United States Supreme Court has held:

359-360 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"). *See also Commonwealth v. Milo M.*, 433 Mass. 149, 150 and 152 (2001) (the existence of a threat occurred when "it was reasonable to fear that the juvenile had the intention and ability to carry out the threat.").

> [A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to [the fact finder], and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth...that..."[I]t is unconstitutional for a legislature to remove from the [fact finder] the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.
>
> *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000).

The defense maintains that the evidence presented shows that the injuries (and ultimately the death) of the decedent were self-inflicted. None of the evidence as presented to the trier of fact at trial shows that the defendant committed an act of force or physical act upon the decedent. Therefore, the evidence presented by the Commonwealth is insufficient as a matter of law under the higher *Latimore* standard to show an "infliction" of "serious bodily injury" by the defendant.

C. The Defendant's Statements and Text Messages to the Defendant are Content-Based Speech Protected under the First Amendment to the United States Constitution

(i.) As Applied to the Defendant, the Manslaughter Statute/Common Law Manslaughter is Unconstitutional under the First Amendment

The First Amendment to the United States Constitution, applied to the states under the Fourteenth Amendment, provides that "Congress shall make no law...abridging the freedom of speech...." Similarly, Article 16 of the Massachusetts Declaration of Rights provides that "[t]he right of free speech shall not be abridged." "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality." *Ashcroft v. ACLU*, 542 U.S. 656, 698 (2004).

"As a general matter, the amendment establishes that 'above all else,' the government 'has no power to restrict expression because of its message, its ideas, its subject matter, or its

content." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (2014), quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Of course, the protections of the First Amendment are not absolute, but a law restricting the content of protected speech will only be valid if "it pass[es] strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, ____ U.S. ____, 131 S.Ct. 2729, 2738 (2011).

In a recent case that came subsequent to the *Carter* decision, the Supreme Judicial Court cited and quoted with authority a decision from the 1st Circuit Court of Appeals: "[E]xpression has special value only in the context of 'dialogue'....As speech strays further away from the values of persuasion, dialogue and free exchange of ideas the [F]irst [A]mendment was designed to protect, and moves towards threats made with specific intent to perform illegal acts, the [S]tate has greater latitude to enact statutes that effectively neutralize verbal expression." *Commonwealth v. Bigelow*, 475 Mass. 554, 567, n. 20, quoting *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991). (Emphasis added.) See also *Elonis v. United States*, 135 S.Ct. 2001 (2015)(Court declines to address at this time appellant's claim of whether prosecuting someone under a federal threat statute under a theory of a "mental state of recklessness" would be prohibited under the United States First Amendment.). As such, the defense submits that the First Amendment requires proof of intentionality for any crime allegedly committed with speech.

In this case, the Commonwealth's effort to charge Carter with involuntary manslaughter under, G.L. c. 265, § 13 fails to meet the heavy burden set forth above. Even in the light most favorable to the Commonwealth, the speech that the Commonwealth is using against the defendant consists entirely of "encouraging" the decedent to commit suicide. The Commonwealth can point to no compelling government interest in restricting such speech.

Especially where the Legislature has not chosen to criminalize words that encourage suicide, the Commonwealth's efforts to penalize such words by charging Carter with manslaughter cannot pass constitutional muster.

In *Melchert-Dinkel*, the Minnesota Supreme Court analyzed whether a Minnesota criminal statute, punishing individuals for "assisting", "advising" or "encouraging" another to commit suicide was a constitutional "content-based" restriction under the First Amendment. *Melchert-Dinkel*, supra. The government argued that there were three exceptions to the First Amendment that made this type of speech "unprotected". *Melchert-Dinkel*, 844 N.W.2d at 19.

The government first argued that the statute was valid under the "speech integral to criminal conduct" exception to the First Amendment. *Melchert-Dinkel*, 844 N.W.2d at 19. This exception applies to "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). However, as the *Melchert-Dinkel* Court held, "*Giboney* specifically stated that the exception was for speech integral to conduct 'in violation of a valid criminal statute,' and there is no valid statute criminalizing suicide here." *Melchert-Dinkel*, 844 N.W.2d at 19-20 (Emphasis added.) Accordingly, the Minnesota Supreme Court held that this exception did not apply. *Melchert-Dinkel*, 844 N.W.2d at 20.

The Court also similarly rejected the government's second argument for an exception where the First Amendment "allows states to forbid advocating for someone else to break the law when such advocacy is both 'directed to inciting or producing imminent lawless action' and it is 'likely to incite or produce such action.'" *Melchert-Dinkel*, 844 N.W.2d at 20, quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). As the Court held, "the State's argument fails because suicide is not unlawful and cannot be considered 'lawless action'." *Melchert-Dinkel*,

844 N.W.2d at 21. The Minnesota Supreme Court unanimously held that the part of the statute that penalized "advising" or "encouraging" one to commit suicide was only "tangential" to the State's compelling interest in preserving life and not narrowly tailored, such that it would allow the State to seek broad prosecutions on "general discussions of suicide with specific individuals or groups." *Melchert-Dinkel*, 844 N.W.2d at 24. As the Court stated:

> "Speech in support of suicide, however distasteful, is an expression of a viewpoint on a matter of public concern, and given current U.S. Supreme Court First Amendment jurisprudence, is therefore entitled to special protection as the 'highest rung of hierarchy of First Amendment values.'"
>
> *Melchert-Dinkel*, 844 N.W.2d at 24, quoting *Snyder v. Phillips*, 131 S.Ct. 1207, 1215 (2011).

In this case, the Commonwealth's charge of involuntary manslaughter under G.L. c. 265, § 13 fails to meet the heavy burden set forth above. Even in the light most favorable to the Commonwealth, the speech that the Commonwealth intends to use against the defendant consists entirely of "encouraging" the decedent to commit suicide. As in *Melchert-Dinkel* case, the Commonwealth can point to no compelling government interest in restricting such speech. Especially where the Legislature has not chosen to criminalize words that encourage suicide, the Commonwealth's efforts to penalize such words by charging Carter with manslaughter cannot pass constitutional muster.

(ii.) <u>As Applied to the Defendant, the Youthful Offender Statute is Unconstitutional under the First Amendment</u>

Under the same legal requirements as stated above, the youthful offender statute, G.L. 119, § 54, as applied to the defendant, fails to pass constitutional muster under the First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights. In fact, the statutory subsection the Commonwealth is proceeding on specifically carves out a provision of "threat" to commit "serious bodily harm" that would cover "words alone" <u>if</u>

they constituted a "true threat". However, as the Commonwealth has conceded, the defendant's words did not constitute a "true threat".

As with the manslaughter statute, the "infliction" provision of this subsection is by no means "narrowly drawn" to further a compelling governmental interest, as the term "infliction" is not specified to cover any content-based speech. Further, there are no valid exceptions to the protections of the First Amendment that would allow the defendant to be prosecuted for her content-based speech. Therefore, as a matter of law, the youthful offender indictment must be dismissed.

D. The Charge of Involuntary Manslaughter is Unconstitutionally Vague as Applied to the Defendant

"It is fundamental tenet of due process that '[no] one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "A criminal statute is therefore invalid if it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.'" *Id.* at 123, quoting *United States v. Harris*, 347 U.S. 612, 617 (1954). "A 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Commonwealth v. Bohmer*, 374 Mass. 368, 371-372 (1978), citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The statute must be "sufficiently explicit to give clear warning as to proscribed activities." *Commonwealth v. Orlando*, 371 Mass. 732, 734 (1977).

"[T]he vagueness doctrine also prohibits such imprecision as might give rise to arbitrary enforcement of law." *Commonwealth v. Abramms,* 66 Mass. App. Ct. 576, 580 (2006). "The concept of the vagueness in the due process context is based in part on the principle that a penal

statute should provide comprehensible standards that limit prosecutorial and judicial discretion." *Commonwealth v. Pagan*, 445 Mass. 161, 172-173 (2005). "An additional principle to be noted is that '[w]here a statute's literal scope...is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine *demands a greater degree of specificity than in other contexts.*'" *Abramms*, 66 Mass.App.Ct. at 581, quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)(emphasis added). As the U.S. Supreme Court also has stated:

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. We said in Cantwell v. Connecticut, supra, that such a law must be 'narrowly drawn to prevent the supposed evil,' 301 U.S. at 307, 60 S.Ct., at 905, and that a conviction for an utterance 'based on a common law concept of the most general and undefined nature,' id., at 308, 60 S.Ct. at 905 could not stand."
>
> *Ashton v. Kentucky*, 384 U.S. 195, 200-201 (1966). (Emphasis added.)

In this case, G.L. c. 265, § 13, as applied to Carter, is unconstitutionally vague under the due process provisions of the Fifth and Fourteenth Amendments, as well as Article 12 of the Massachusetts Declaration of Rights. The Commonwealth is alleging an unprecedented claim that by encouraging Roy to commit suicide she, a juvenile, committed the crime of involuntary manslaughter. As stated previously, the actual manslaughter statute is silent on this type of conduct. Given that the type of alleged conduct against Carter concerns content-based expression that is sheltered by the First Amendment, a greater degree of specificity is required when reviewing this statute under the vagueness doctrine. The manslaughter statute provides no such specificity.

At the present time, there is no criminal statute in Massachusetts specifically prohibiting suicide or even assisting or encouraging suicide. Despite the legislature's decision not to enact such a law, the Commonwealth decided to charge Carter with an even more serious crime: a

form of homicide. Given that the manslaughter statute, nor any proscribed law in the Commonwealth, do not provide a sufficiently explicit warning to someone of ordinary intelligence – let alone a juvenile – in the defendant's position that encouraging suicide is prosecutable under existing law, M.G.L. c. 265, § 13 is hopelessly confusing and vague as applied to Carter and has led to an arbitrary enforcement of this law by the Commonwealth.

Finally, should this Court conclude that the doctrine of lenity does not apply where involuntary manslaughter is a common law crime and is not specifically defined in the language of the statute, the principle behind the rule most certainly does apply. That is, a criminal offense may not be redefined retroactively in a manner that makes conduct criminal that was not so before. *See Commonwealth v. Quincy Q.*, 434 Mass. at 864–866; *Commonwealth v. Hampton*, 64 Mass. App. Ct. 27, 31-32 (2005). *See also Schriro v. Summerlin*, 542 U.S. 348, 352, 354 (2004). That is precisely what the Commonwealth seeks to do.

Where, as here, "text, structure, and history fail to establish that the Government's position is unambiguously correct" the ambiguity in the definition of the offense must be resolved in Carter's favor. *United States v. Granderson*, 511 U.S. at 54.

E. The Manslaughter Statute as Applied to the Defendant is an Unconstitutional Ex Post Facto Law

"An ex post facto law is, in this context, one that 'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" See *Commonwealth v. Cory*, 454 Mass. 559, 564 (2009). See also Article 1, § 9, cl. 3, Article 1, § 10, cl. 1 of the United States Constitution, and Article 24 of the Massachusetts Declaration of Rights. "To prevail on this sort of ex post facto claim, [the defendant] must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." *Cory*, 454 Mass at

564, quoting *Johnson v. United States*, 529 U.S. 694, 699 (2000). See *Weaver v. Graham*, 450 U.S. 24, 31 (1981) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.")

In the case at bar, the manslaughter statute, G.L. c. 265, § 13 as applied to the defendant would be an unconstitutional ex post facto law if allowed to proceed any further. While the SJC allowed the indictment to proceed against the defendant, the Court conceded that "[w]e also never have had occasion to consider such an indictment against a defendant on the basis of words alone." *Carter*, 474 Mass. at 633. Therefore, by continuing to prosecute this defendant for a common law crime for her words alone that have "never" been "consider[ed]", the law is operating against the defendant retroactively and is increasing the penalty of the law, as applied to her, before the decision by the SJC had even been rendered. It would be a violation of the defendant's due process rights under both the United States Constitution and Massachusetts Declaration of Rights to retroactively expand a common law crime's definition and scope.

As such, the indictment for involuntary manslaughter and being a youthful offender must be dismissed.

Respectfully Submitted,

The Defendant
MICHELLE CARTER
By his Attorney,

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