STATE OF MINNESOTA
IN THE SUPREME COURT

FINAL EXIT NETWORK, INC., Petitioner, v. STATE OF MINNESOTA, Respondent.	**PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS** **Appellate Court Case No. A15-1826** **Date of Filing Court of Appeals Decision: December 19, 2016** District Court Case No.: 19HA-CR-12-1718

TO: The Supreme Court of Minnesota

The Petitioner, Final Exit Network, Inc. (the "Network"), petitions for review of the above-entitled decision of the Court of Appeals:

1. The Petitioner is represented by Paul Engh, U.S. Bank Plaza, Suite 420, 200 S. 6th St., Minneapolis, MN 55402, (612) 252-1100, and Robert Rivas, Sachs Sax Caplan, P.L., 660 E. Jefferson St. Suite 102, Tallahassee, FL 32301, (850) 412-0306; and the Respondent is represented by James C. Backstrom, County Attorney of Dakota County, and his chief deputy, Phillip D. Prokopowicz, 1560 Highway 55, Hastings, MN 55033, (651) 438-4438.

2. The Petitioner seeks review of a decision filed on December 19, 2016. The appeal was taken from a judgment of conviction and Sentencing Order filed on August 24, 2015. *See* Sentencing Order, dated Aug. 24, 2015, Doc ID #108; Sentencing Memorandum, dated Sept. 8, 2015, Doc ID #110. The Network appeals only its conviction on the charge of "assist[ing] another in taking the other's own life." *See Minn.*

Stat. 609.215, subd. 1 (the "Statute").

3. The legal issues presented for review and the decision on those issues in the lower courts are as follows:

Whether the Statute is unconstitutional on it face or as applied or was overbroad in violation of the speech clause of the First Amendment to the United States Constitution? The District Court and the Court of Appeals held it was not unconstitutional.

Whether the District Court and the Court of Appeals misconstrued this Court's holding in *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), so as to infringe impermissibly on the Petitioner's rights under the First Amendment? The Court of Appeals held that the District Court properly applied *Melchert-Dinkel*.

4. The procedural history of this case is as follows:

Under the Statute a felony is committed by anyone who "intentionally advises, encourages, or assists another in taking the other's own life." The Petitioner moved to dismiss the indictment in part on grounds that the "advises" and "encourages" clauses violated the First Amendment. The trial court, the Honorable Karen Asphaug, presiding, agreed in part and dismissed the indictment in part.

The State took an interlocutory appeal. The Court of Appeals concurred with the Network's view. *State v. Final Exit Network, Inc*., unpublished slip op., Case Nos. A13–0563, A13–0564, and A13–0565 (Minn. App. Sept. 30, 2013) (2013 WL 5418170), 41 Media L. Rptr. 2549 ("*Final Exit Network*"). The Court of Appeals declared the Statute's use of the terms "advises" and "encourages" unconstitutional and remanded the

case to proceed solely based on the "assists" clause of the Statute.

At that time, this Court was considering the case that later came to be published as *Melchert-Dinkel*. This Court granted further review of *Final Exit Network* but stayed the case pending the outcome of *Melchert-Dinkel*. In *Melchert-Dinkel*, this Court — just as the Court of Appeals did in *Final Exit Network* — held that the Statute violated the First Amendment by its prohibition on speech that "advises" or "encourages" a "suicide," and therefore severed those clauses from the Statute. This Court then denied further review of *Final Exit Network* and vacated its stay of those proceedings.

In the meantime, Judge Asphaug had recused herself and the case proceeded to trial before the Honorable Christian Wilton in May 2015. In accordance with *Final Exit Network* and *Melchert-Dinkel*, the charge was limited at trial to "assisting" in a "suicide." In accordance with *Melchert-Dinkel*, however, the jury was instructed to convict the Network solely for engaging in First Amendment-protected speech.

The jury convicted the Network, the trial court rendered judgment and sentence, and the Network appealed. The Court of Appeals affirmed the conviction.

5. The facts which give rise to this request for discretionary review are as follows:

Final Exit Network is a nonprofit volunteer group that advocates for the right to die. As set forth on its website, www.finalexitnetwork.org, and in other public communications, the Network provides its members with counseling services and information on end-of-life care, including methods to hasten death by "suicide."

Doreen Dunn had suffered horrendous, irremediable pain from 1996 until her death in May 2007. She obtained a membership in Final Exit Network and then applied for Exit Guide services in January 2007. In order to receive Exit Guide services, a member must demonstrate that he or she has an incurable condition that causes intolerable suffering and is mentally competent, physically strong enough to perform the required tasks, able to procure the necessary equipment, and in fact has done so.

The volunteers require the applicant to read the *New York Times* bestseller *Final Exit* or watch a video based on the book. A volunteer interviewed Mrs. Dunn in early February 2007 and provided her with information about *Final Exit* and "general information" about the Network's "preferred inhalation method." These materials, which instruct the reader or viewer on how to die by helium inhalation, are readily available to every Minnesotan. The book may be purchased in bookstores everywhere in the country or downloaded. After the member has read he book, Network volunteers may provide the member with the names and addresses of manufacturers who sell the hood used to "commit suicide" by way of helium asphyxiation.

After a member is approved for Exit Guide services, the Network assigns Exit Guides to prepare the member for his or her death. On February 6, 2007, the Network's medical director approved Mrs. Dunn for Exit Guide services.

The guides inform the member where to purchase the necessary equipment. The Network's protocols strictly prohibit the Exit Guides from assisting the member in

acquiring these implements, and the Exit Guides in this case followed those protocols. The Exit Guide visits the member and rehearses the procedure with the member before the planned day of the death. One week before she died in May, one of Mrs. Dunn's assigned Exit Guides visited Apple Valley to review Mrs. Dunn's preparation with her.

On the day of the "suicide," the Exit Guides found that the necessary equipment for helium asphyxiation was in her living room when they arrived, as required under the Network's protocols. Neither of the Exit Guides touched the equipment or otherwise physically assisted her. Well prepared in advance, Mrs. Dunn did not need any additional advice from the Exit Guides that day. When she was ready, she placed the hood on her head, opened the helium tank valves, and died at approximately 12:30 p.m.

Before they left, the Exit Guides removed the hood and took the equipment with them, as Mrs. Dunn had requested. For this, the Network was convicted of "interfering with a death scene," Minn. State s. 609.502, subd. 1. The Network did not appeal this conviction. Upon investigating, the medical examiner concluded that Mrs. Dunn had died of atherosclerotic coronary artery disease.

As part of an unrelated matter, the Georgia Bureau of Investigation (GBI) investigated the Network and seized materials related to Mrs. Dunn's death. The GBI provided these materials to the Minnesota Bureau of Criminal Apprehension, which began investigating early in 2010. The investigation resulted in the Network's indictment in May 2012.

6. The Supreme Court should exercise its discretion to review this case for the following reasons:

Minnesota occupies a unique position in American law. No other content- and viewpoint-based state or federal law criminalizes pure First Amendment-protected speech in a manner remotely similar to that of the Statute.

The Minnesota law against "assisting" in a "suicide" now makes it a crime for one to "assist" in a suicide without committing any physical act whatsoever, but solely by giving information to one who subsequently chooses to die. The law does not require that the "suicide" be "caused" by the defendant. The Statute criminalizes the giving of information that is lawfully obtained, otherwise perfectly legal to convey, and otherwise readily available to the recipient or anyone else at any time.

Indeed, the State argued to the jury that it was required to convict the Network not because its volunteers themselves directly gave information to Mrs. Dunn about how to induce her death, but because they gave her the Internet address of a website where she could download the book *Final Exit* or informed her she could purchase the book at any bookstore or from other sources online.

Explaining the well-established First Amendment analysis, the *Melchert-Dinkel* and *Final Exit Network* cases held that the speech prohibited by the Statute was not categorically exempt from First Amendment protection on any of the recognized grounds: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. These cases observed that a law prohibiting the giving of information about how to "commit

suicide" is content and viewpoint based, and that the giving of information about how to "commit suicide" is at the core of First Amendment-protected speech. Therefore, the "advises" and "assists" clauses were subjected to "strict" or "exacting" scrutiny, and they failed the test of being narrowly tailored to accomplish a compelling state interest.

This Court and the Court of Appeals voided the language of the Statute that the Legislature had enacted in an effort to criminalize speech that enabled a "suicide." With its other hand, however, this Court criminalized speech the same speech, rewriting the Statute to redefine "assists" to criminalize speech that "involves enabling the person to commit suicide" by "instructing another on suicide methods," even in the absence of assistance.

Melchert-Dinkel held the Statute, as so revised, passed strict scrutiny. The Court erred in this conclusion. In a facial or as applied analysis, or an overbreadth analysis, the Court's rule that the communicating of "words" that "enable" a suicide — provided only that they be directly communicated to a "targeted" recipient — fails strict scrutiny for the same reasons as the "advises" and "encourages" clauses failed strict scrutiny.

Melchert-Dinkel held that: "Prohibiting only speech that assists suicide, combined with the statutory limitation that such enablement must be targeted at a specific individual, *narrows the reach to only the most direct, causal links* between speech and the suicide." 844 N.W.2d at 23 (emphasis added). Whatever the Court meant by its use of the word "causal" in this sentence, *Melchert-Dinkel* did not require proof that a defendant

"caused" the "suicide," the jury instructions in this case did not require a finding of causation, and there was no evidence of causation. The First Amendment analysis would be significantly different if the jury had been required to find that the Network volunteers "caused" Mrs. Dunn's "suicide."

Neither is the Court's "enablement" concept narrowly tailored because the speech is "targeted at specific individual." If a "targeting" requirement were sufficient to narrowly tailor the Statute's prohibition of speech, the "advises" and "encourages" clauses might have survived strict scrutiny. *Final Exit Network* found the "advises" and "encourages" clauses to be unconstitutional *even if they were narrowed by a "targeting" requirement*. *Melchert-Dinkel* found the "advises" and "encourages" clauses to be unconstitutional even though it found that a targeting requirement was inherent on the face of the Statute, which necessarily means this Court applied the targeting requirement to the "advises" or "encourages" clauses.

If the "advises" and "encourages" clauses are not narrowly tailored by a "targeting" requirement, the "enables" clause cannot be either. The fact is, the conveying of useful factual information is one of the definitions of "advises," "encourages," and "enables." The "enables" provision is no more narrow than the "advises" or "encourages" clauses. The record in this case shows that there is no principled distinction between these three words as they are used (or as "enables" is not used) in the Statute.

Melchert-Dinkel's definition of "assists" criminalizes speech that takes place every

day in the loving homes and doctor's offices of Minnesotans who are trying to cope with the impending death of a loved one. The Statute is not narrowly tailored because its prohibition of targeted speech reaches all these intimate communications.

Melchert-Dinkel allows the use of criminal sanctions to enforce the State's viewpoint that nobody in Minnesota, under any circumstances, should consider inducing death before it would have occurred naturally. "Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

Moreover, the "enables" clause is egregiously underinclusive in that it accomplishes little or nothing to further the State's putative "compelling interest" in preventing suicide. Speech that "enables" a suicide is freely available from countless sources everywhere in the country without regulation. Like the California law against violent video games in *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011), this Court's "enables" clause is "wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular idea."

The Court should exercise discretionary review because the Court of Appeals

"decision presents an important question on which the Supreme Court should rule," Minn. R. Crim. P. 29.04, subd. 4(1); the "Court of Appeals has ruled on the constitutionality of a statute," subd. 4(2); the "Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court," subd. 4(3), in that the "enables" rule is in conflict with the holdings of *Final Exit Network* and *Melchert-Dinkel* that the "advises" and "encourages" clauses were unconstitutional; and, finally, the Supreme Court decision "will help develop, clarify, or harmonize the law," the "resolution of the question presented has possible statewide impact," and the "question will likely recur unless resolved by the Supreme Court," Subd. 4(5).

7. An appendix, in compliance with Minn. R. Crim. P. 29.04, subd. 3(7), is filed simultaneously with this Petition.

Dated this 17th day of January, 2017.

Respectfully submitted,

/s/Paul Engh

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