UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Final Exit Network, Inc.,

Plaintiff,

vs.

Loris Swanson, in her official capacity as Attorney General of Minnesota,

Defendant.

Case No. 18-cv-01025 (JNE/SER)

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This matter involves a constitutional challenge to Minnesota's prohibition on assisting suicide, Minn. Stat. § 609.215, subd. 1. The Dakota County Attorney successfully prosecuted Plaintiff Final Exit Network (FEN) for violating the statute, and the Minnesota Court of Appeals rejected FEN's argument that the conviction should be vacated because the statute violates the First Amendment. The Minnesota Supreme Court denied FEN's petition for review, and the U.S. Supreme Court denied FEN's certiorari petition.

FEN now seeks to relitigate its conviction and First Amendment challenge by suing the Minnesota Attorney General, who played no role in FEN's prosecution and has no independent authority to initiate prosecutions for violations of § 609.215. The Attorney General moves to dismiss this action because: (1) she is not a proper party under the Eleventh Amendment, (2) FEN's injuries are not traceable to the Attorney

General, (3) the lawsuit is barred by the *Rooker-Feldman* doctrine, and (4) it is barred by collateral estoppel. FEN's lawsuit also fails on the merits.

STATEMENT OF FACTS

In 2012, a Dakota County grand jury indicted FEN for violating § 609.215, subd. 1, which made it a crime to "intentionally advise[], encourage[], or assist[] another in taking the other's own life." Minn. Stat. § 609.215, subd. 1; Compl. ¶ 7. FEN moved to dismiss the indictment on First Amendment grounds. Compl. ¶ 8. In a pretrial order, the district court granted FEN's motions in part. *State v. Final Exit Network, Inc.*, No. A13-0563, 2013 WL 5418170 at *2 (Minn. App. Sept. 30, 2013). On appeal, the court of appeals held that both the "advises" and "encourages" clauses are unconstitutional, but it remanded for a trial on whether FEN "violated the undisputedly constitutional prohibition on assisting suicide." *Id.* at *8; Compl. ¶ 8.

In a separate case pending at the time, the Minnesota Supreme Court also held that the "advises" and "encourages" clauses were unconstitutional and severed them from § 609.215, subd. 1. *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014); Compl. ¶ 9. The Supreme Court, however, held that the prohibition on assisting suicide is constitutional because it "is narrowly drawn to serve the State's compelling interest in preserving human life." *Melchert-Dinkel*, 844 N.W.2d at 23; Compl. ¶ 10.

The jury found FEN guilty of assisting suicide in violation of § 609.215, subd. 1, and FEN was fined the statutory maximum $30,000. Compl. ¶¶ 11–12. FEN appealed the conviction, again raising the First Amendment issues as defenses. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 301–03 (Minn. Ct. App. 2016); Compl. ¶ 12. The Court

of Appeals affirmed the conviction. 889 N.W.2d at 307–08; Compl. ¶ 12. The Minnesota Supreme Court denied discretionary review, and the U.S. Supreme Court denied FEN's petition for writ of certiorari. 138 S. Ct. 145 (Oct. 2, 2017); Compl. ¶ 12. FEN filed this lawsuit on April 16, 2018. FEN seeks a declaratory judgment voiding its conviction and an injunction barring the Attorney General from initiating prosecution of FEN under § 609.215, subd. 1. Compl. at p. 5.

STANDARD OF REVIEW

When ruling on a motion to dismiss, a court must accept the facts alleged in the complaint as true and grant all reasonable inferences in the plaintiff's favor. *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009). However, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ARGUMENT

I. THE ATTORNEY GENERAL IS NOT A PROPER DEFENDANT UNDER THE ELEVENTH AMENDMENT.

The Eleventh Amendment prohibits suits in federal court against state officials, except for officials "who threaten and are about to commence proceedings" to enforce a

challenged statute. *Ex parte Young*, 209 U.S. 123, 156–57 (1908). This exception "does not apply when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional." *281 Care Committee v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014). "Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Id.* Here, the Attorney General is not a proper defendant under the Eleventh Amendment because she has not threatened or commenced prosecutions for violations of § 609.215, she lacks the independent authority to initiate such prosecutions, and she played no role in the prosecutions that were commenced by county prosecutors, including the prosecution against FEN.

In Minnesota, the authority to initiate criminal prosecutions generally rests with county attorneys, not the Attorney General. Minn. Stat. § 388.051, subd. 1(3). The Attorney General may only participate in criminal prosecutions following an accepted request by the county attorney or a request by the governor. Minn. Stat. § 8.01. As the Minnesota Supreme Court explained: "The attorney general plays only a limited role in criminal prosecutions and then only at the request of the county attorney or the governor." *State v. Lemmer*, 736 N.W.2d 650, 662 (Minn. 2007). Here, the Attorney General played no role in FEN's prosecution in Dakota County, and there are no allegations suggesting that the Attorney General plans to commence or assist in future prosecutions to enforce § 609.215.

Where, as here, a plaintiff fails to allege that the Attorney General has threatened, commenced, or is about to commence proceedings under the challenged statute, courts in

this district have repeatedly dismissed the claims against her on Eleventh Amendment grounds. *See North Dakota v. Swanson*, Civ. No. 11–3232, 2012 WL 4479246, at *18–19 (D. Minn. Sept. 30, 2012) ("Attorney General Swanson is immune from this suit under the Eleventh Amendment. Plaintiffs do not allege that Attorney General Swanson has threatened a suit or is about to commence proceedings against them or anyone else under Minn. Stat. § 216B.03."); *Advanced Auto Transp., Inc. v. Pawlenty*, Civ. No. 10–159, 2010 WL 2265159, at *3 (June 2, 2010) (finding the Attorney General immune from suit because the plaintiff does not allege that "Attorney General Swanson threatened a suit or [is] about to commence proceedings"); *see also Greene v. Dayton*, 81 F.Supp.3d 747, 752 (D. Minn. 2015) (dismissing claims against the Governor and state commissioners "because the Plaintiffs have failed to allege that the State Defendants have threatened or are about to commence proceedings against Plaintiffs or anyone else under the state statute").[1]

Because the allegations do not plausibly suggest the Attorney General is a proper party under the Eleventh Amendment, the Complaint must be dismissed.

[1] Where a complaint plausibly suggested that the Attorney General was "a *potentially* proper party for injunctive relief," the Eighth Circuit waited until summary judgment to "find the attorney general immune from suit under the Eleventh Amendment," based on her affidavit attesting that her office had never prosecuted violations of the challenged statute and had no intention of doing so. *281 Care Committee v. Arneson*, 766 F.3d 774, 796–97 (8th Cir. 2014). Here, dismissal is appropriate at the pleadings stage because the Complaint does not plausibly suggest the Attorney General is a proper party.

II. FEN LACKS STANDING BECAUSE ANY INJURIES ARE NOT FAIRLY TRACEABLE TO THE ATTORNEY GENERAL'S CONDUCT.

To establish Article III standing, a plaintiff must show it has "suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by the relief" sought. *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017). FEN has not asserted an injury that is fairly traceable to the Attorney General.

FEN alleges that the "existence of the conviction on the Plaintiff's record causes direct, immediate, and ongoing prejudice," and that it "is in constant danger of being prosecuted again" under § 609.215, subd. 1. Compl. ¶¶ 15, 17. The Attorney General, however, did not initiate or play any role in the prosecution that led to FEN's conviction. *See Doe v. Pryor*, 344 F.3d 1282, 1285 (11th Cir. 2003) (holding that the plaintiff lacked standing because: "The only defendant in this case is the Alabama Attorney General, and the only injuries [the plaintiff] has alleged stem from a state court custody proceeding in which the Attorney General played no role."). Furthermore, as discussed above, the Attorney General may only prosecute violations of § 609.215 following an accepted request by the county attorney or request by the governor. Minn. Stat. § 8.01. The Complaint does not allege the Attorney General has received and acted on such a request.

In a similar context, the Eighth Circuit determined that a threat of prosecution was not traceable to the Missouri Attorney General because of the limits on his power to prosecute. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139 (8th Cir. 2005). In that case, Planned Parenthood sued to challenge enforcement of a Missouri informed-consent abortion statute. *Id.* at 1141.

Under Missouri law, local prosecutors had the power to initiate prosecutions, and the Attorney General could only aid in prosecutions as directed by the governor or a trial court. *Id.* at 1145. The Eighth Circuit held that, "as neither the Governor nor any state trial court has directed the Attorney General to take action to enforce § 188.039, Planned Parenthood has shown no threat of irreparable injury by the Attorney General." *Id.* at 1145. Similarly, here, as there are no allegations that the Attorney General has received and acted on a request from a county attorney or the governor to enforce § 609.215, there is no threat of injury by the Attorney General. *See also Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) ("The lack of threatened enforcement by the Attorney General also means that the 'case or controversy' requirement of Article III is not satisfied.").

Because FEN's alleged injuries are not fairly traceable to the Attorney General, FEN lacks standing to bring this action against the Attorney General.

III. FEN'S CLAIMS ARE BARRED BY THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine precludes lower federal courts from exercising jurisdiction over actions seeking review of, or relief from, state court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291–93 (2005). The doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. The Eighth Circuit "has specifically cautioned against state-court losers seeking victory over their adversaries in subsequent § 1983 actions in federal court." *Robins v. Ritchie*, 631 F.3d 919, 925 (8th Cir. 2011).

This action falls squarely in the category of cases precluded by *Rooker-Feldman*. It is brought by a state-court loser, FEN, who complains of injuries caused by a state-court judgment, and the state court proceedings were commenced and final before this suit was filed. FEN expressly claims it was injured by its state court conviction and asks this Court for a declaration "voiding FEN's conviction." Compl. p. 5. Because FEN's claims "are essentially appeals from state-court judgments masked as a § 1983 action, brought by state-court losers, and filed after the state court rendered its judgments," this Court lacks jurisdiction under *Rooker-Feldman*. *Robins*, 631 F.3d at 925.

IV. FEN'S SUIT IS ALSO BARRED BY PRECLUSION LAW.

"[C]ollateral estoppel can bar the relitigation of constitutional claims in a section 1983 action when they were fully and fairly litigated and decided in a prior state criminal proceeding." *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984) (citing *Allen v. McCurry*, 449 U.S. 90 (1980)). Federal courts are required to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). Because FEN was convicted in Minnesota, Minnesota's collateral estoppel standard applies. *Tyler*, 744 F.2d at 655. In Minnesota, collateral estoppel bars relitigation where: (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party had a full and fair opportunity to be heard on the adjudicated issue. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004).

All four elements are satisfied. The issue here is whether § 609.215, subd. 1,

violates the First Amendment. FEN raised this identical issue as a defense to the state prosecution. *Final Exit Network*, 889 N.W.2d at 301–03. Final judgment was entered in those proceedings before FEN filed this suit. FEN, the estopped party here, was a party to the prior adjudication.[2] Finally, FEN had a full and fair opportunity to argue the issue in the state proceedings and raised it before both the trial and appellate courts. Thus, the lawsuit is barred by collateral estoppel.

V. FEN'S CLAIMS FAIL ON THE MERITS.

In addition to the multiple procedural bars, this suit also fails on the merits, for the reasons provided by the Minnesota Supreme Court in *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014). FEN claims that the criminal prohibition on assisting suicide, § 609.215, subd. 1, violates the First Amendment. The Minnesota Supreme Court considered and rejected this exact issue. In *Melchert-Dinkel*, the Court held that the provision "is narrowly drawn to serve the State's compelling interest in preserving human life." 844 N.W.2d at 23. The Court reasoned that speech that assists suicide "signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support." *Id.* It involves "enabling the person to commit suicide." *Id.* The Court concluded: "Prohibiting only speech that assists suicide,

[2] The fact that the Attorney General was not a party to the earlier adjudication is irrelevant to whether collateral estoppel applies. While the doctrine of res judicata requires that "the earlier claim involved the same parties or their privies," the related but narrower doctrine of collateral estoppel requires only that "the estopped party was a party or was in privity with a party to the prior adjudication." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 and 840 (Minn. 2004). Here, because the Attorney General is invoking collateral estoppel and not res judicata, all that is necessary for this element is that FEN, as the estopped party, was a party to the prior adjudication.

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." *Id.* Because the challenged provision is narrowly tailored to serve a compelling state interest, as explained in *Melchert-Dinkel*, FEN's lawsuit fails on the merits.

CONCLUSION

The Attorney General respectfully requests that the Court grant her motion and dismiss this action with prejudice and in its entirety.

Dated: May 7, 2018

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ Jason Marisam
Jason Marisam
Assistant Attorney General
Atty. Reg. No. 0398187

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1275 (Voice)
(651) 282-5832 (Fax)
jason.marisam@ag.state.mn.us

ATTORNEY FOR DEFENDANT LORI SWANSON