UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Final Exit Network, Inc., Fran Schindler, and Janet Grossman,

Plaintiffs,

vs.

Lori Swanson, in her official capacity as Attorney General of Minnesota; James C. Backstrom, in his official capacity as the Dakota County Attorney; and John L. Fossum, in his official capacity as the Rice County Attorney,

Defendants.

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

DEFENDANT ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

This memorandum is filed on behalf of Attorney General Lori Swanson, in her official capacity.

The organization Final Exit Network, Inc. ("Final Exit" or "FEN"), along with two of its individual members, challenge the constitutionality of Minnesota's prohibition on assisting suicide, Minn. Stat. § 609.215, subd. 1. Am. Compl. ¶ 1. They sue the Dakota County Attorney, who successfully prosecuted Final Exit for violating § 609.215, the Rice County Attorney, who has prosecuted other violations of the statute, and the Minnesota Attorney General, who played no role in the county attorneys' prosecutions under § 609.215 and who has no independent authority to initiate prosecutions for violations of the statute.

The Attorney General moves to dismiss this action because: (1) she is not a proper party under the Eleventh Amendment, (2) Plaintiffs lack standing, (3) this lawsuit is barred by collateral estoppel, and (4) the lawsuit fails on the merits.

STATEMENT OF FACTS

On its face, the challenged statute, § 609.215, subd. 1, states that it is a crime to "intentionally advise[], encourage[], or assist[] another in taking the other's own life." Minn. Stat. § 609.215, subd. 1.

Final Exit is a right-to-die organization that provides guidance to people contemplating suicide. Am. Compl. ¶ 10. Final Exit provides its guidance through individual members known as "exit guides." *Id.* at ¶¶ 11–14. Plaintiffs Fran Schindler and Janet Grossman are exit guides. *Id.* at ¶¶ 17–19. Neither one lives in Minnesota. *Id.* The Amended Complaint alleges that Final Exit "will probably contact Grossman about whether to accept an Exit Guide assignment in Minnesota," at which point she may decide to travel to Minnesota and violate the statute. *Id.* at ¶ 17. As for Schindler, the Amended Complaint alleges she has an "ongoing relationship with an Exit Guide client in Minnesota" and "is considering whether to arrange for this person to travel to her home in North Carolina in order to provide counseling without running the risk of prosecution under the Minnesota Statute." *Id.* at ¶ 19.

In 2011, the Rice County Attorney successfully prosecuted a violation of § 609.215, subd. 1. *State v. Melchert-Dinkel*, No. 66-CR-10-1193, 2011 WL 893506 (Minn. Rice County Dist Ct. March 15, 2011). The conviction was appealed to the Minnesota Supreme Court. *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014). The

state high court held that the "advises" and "encourages" clauses were unconstitutional and severed them from § 609.215, subd. 1. *Id.* at 24. The 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." *Id.* 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, 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.*

In 2015, the Dakota County Attorney successfully prosecuted Final Exit for violating § 609.215, subd. 1. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296 (Minn. App. 2016). On appeal, Final Exit argued that the statute was facially unconstitutional under the First Amendment. *Id.* The Minnesota Court of Appeals held that the "statute's 'assists' provision survives strict scrutiny and Final Exit's facial challenge to the statute." *Id.* at 303. The Minnesota Supreme Court denied discretionary review, and the U.S. Supreme Court denied Final Exit's petition for writ of certiorari. 138 S. Ct. 145 (Oct. 2, 2017).

In this lawsuit, Final Exit, Schindler, and Grossman seek a declaration that § 609.215, subd. 1, is facially unconstitutional to the extent it criminalizes speech that enables a suicide.

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.

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). Plaintiffs do not allege that a county attorney or the governor has requested the Attorney General to bring a criminal prosecution for any violations of § 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 claim against her must be dismissed.

II. PLAINTIFFS LACK STANDING.

To establish standing, Plaintiffs must demonstrate (1) a "concrete and particularized," "actual or imminent" injury that is (2) fairly traceable to the challenged statutory provisions, and that (3) it is "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (citation omitted). Thus, the "threatened injury must be *certainly impending* to constitute injury in fact"—"[a]llegations of *possible* future injury" are not sufficient. *Id.*

[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.

The individual Plaintiffs have not suffered an actual or imminent injury, and none of the Plaintiffs' purported injuries are fairly traceable to the Attorney General.

A. The Individual Plaintiffs Have Not Alleged An Actual Or Imminent Injury.

Neither individual Plaintiff has alleged an actual or certainly impending injury sufficient to confer Article III Standing. Unlike Final Exit, they have never been prosecuted for violations of the statute, and they do not plausibly allege that they face an imminent risk of prosecution.

For Grossman, the pleadings show that she is several speculative steps away from any concrete plans that could subject her to the risk of prosecution in Minnesota. The Amended Complaint does not allege that Grossman is currently providing exit guide services to individuals in Minnesota. Instead, it states: "FEN *will probably* contact Grossman about whether to accept an Exit Guide assignment in Minnesota." Am. Comp. ¶ 17 (emphasis added). There are no allegations that Grossman would certainly accept such an assignment, even if the offer were made. On these pleadings, Grossman cannot show a certainly impending injury. As the Supreme Court has explained: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

For Schindler, the pleadings also fail to show a certainly impending injury. The Amended Complaint states that she has an "ongoing relationship with an Exit Guide client in Minnesota," and "she does intend to give information in violation of the Statute

when the person is ready" to die. Am. Compl. ¶ 19. The Amended Complaint, though, does not assert that Schindler has concrete plans to assist with her client's suicide in Minnesota. Indeed, the Amended Complaint alleges that Schindler is "considering whether to arrange for this person to travel to [Schindler's] home in North Carolina," where Schindler would provide exit guide services without being subject to the Minnesota statute. Am. Compl. ¶ 19. Because Schindler has no concrete plans that would subject her to a risk of prosecution in Minnesota, she has not established a certainly impending injury. *See Lujan*, 504 U.S. at 564.

Schindler also alleges that she "plans to stage public seminars, in great detail, on how to painlessly and effectively induce one's own death." Am. Compl. ¶ 20. These allegations are also insufficient to establish an injury because they do not show that Schindler has concrete plans to give such seminars in Minnesota, or that such seminars would violate the challenged statute. Indeed, speech assisting suicide is only prohibited under the statute to the extent it is "targeted at a specific individual." *Melchert-Dinkel*, 844 N.W.2d at 23. The Minnesota Supreme Court held that the statute does not cover "public discussion on the topic of suicide" or "speech made in public discourse." *Id.* at 23 and n.5. Thus, Schindler cannot plausibly allege a viable threat of prosecution for a public seminar on suicide.

B. Plaintiffs' Alleged Injuries Are Not Traceable To The Attorney General.

The purported injury for all three Plaintiffs—*i.e.*, the risk of prosecution under the challenged statute—is not fairly traceable to the Attorney General.

The Attorney General did not initiate or play any role in the County Attorneys' prosecutions of the challenged statute. *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 Amended 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.").

III. PLAINTIFFS' FACIAL CHALLENGE IS 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). 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).

With respect to Final Exit, all four elements are satisfied. The issue here is whether the "assists" provision of § 609.215, subd. 1, facially violates the First Amendment. Am. Compl. ¶ 1. Final Exit raised this identical issue as a defense to the state prosecution. *Final Exit Network*, 889 N.W.2d at 301–03. In that criminal matter, the court of appeals specifically listed the first issue on appeal as: "Is Minn. Stat. § 609.215, subd. 1, facially unconstitutional under the First Amendment?" *Id.* at 302. Final judgment was entered in those proceedings before Final Exit filed this suit. Final

Exit, the estopped party here, was a party to the prior adjudication.[2] Finally, Final Exit had a full and fair opportunity to argue the issue in the state proceedings because the constitutional issue was considered by both the trial court and court of appeals.

The Minnesota Supreme Court's decision to deny Final Exit's petition to review the court of appeals' opinion does not deprive the opinion of its preclusive effect. There is an exception to preclusion that applies when the party "could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement (Second) of Judgments § 28(1). However, this exception involves the ability to appeal from the district court. "It does not apply in cases where review is available but is not sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied." *Id.* § 28 cmt. a; *see also Soverain Software LLC v. Victoria's Secret Direct Brand Management, LLC*, 778 F.3d 1311, 1317 n. 5 (Fed. Cir. 2015). Here, Final Exit's facial challenge was heard by the district court and court of appeals. The final appellate opinion has preclusive effect, even though the state high court exercised its discretion to decline further review of Final Exit's facial challenge.

Collateral estoppel also bars Schindler's and Grossman's claims because, as members of Final Exit, they are in privity with the organization. Under preclusion law,

[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.

an estopped party must have been "a party or in privity with a party to the prior adjudication." *Hauschildt*, 686 N.W.2d at 837. For preclusion purposes, members of an organization are in privity with their organization where there is no conflict between the members and the organization, and the organization adequately represented its members' interests in the prior litigation. *See Tahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) ("if there is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization"); *Gospel Missions of America v. Los Angeles*, 328 F.3d 548, 556–57 (9th Cir. 2003) (holding that an organization and its members were in privity for preclusion purposes in part because the complaint "alleged that all the individual plaintiffs are members of the organization, thus admitting these twenty individual plaintiffs are in privity").

Here, there is no conflict between Final Exit and the individual exit guide Plaintiffs. The organization and the individuals are represented by the same attorney, who is Final Exit's general counsel. *See State v. Final Exit Network, Inc.*, No. A13–0563, 2013 WL 5418170 (Minn. App. Sept. 30, 2013) (identifying Robert Rivas as "general counsel" for Final Exit). Moreover, Final Exit represented the interests of its exit guides in the criminal matter. Indeed, Final Exit was found criminally liable based on the acts of one of its exit guides. *Final Exit*, 889 N.W.2d at 300–02. Final Exit's defense included the theory that the speech of its exit guides, in assisting suicide, is constitutionally protected. *Id.* at 302–07.

The individual Plaintiffs, as exit guides for and members of Final Exit, are in privity with the organization. Thus, their claims are also barred by collateral estoppel.

IV. PLAINTIFFS' FACIAL CHALLENGE FAILS ON THE MERITS.

Plaintiffs challenge the Minnesota Supreme Court's interpretation that the "assists" provision in § 609.215, subd. 1, covers speech that "enable[s] a person to commit suicide," where the speech is "targeted at a specific individual" and there is a "direct, causal link[] between [the] speech and the suicide." *Melchert-Dinkel*, 844 N.W.2d at 23–24; Am. Compl. ¶ 2. To succeed on their facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the [challenged interpretation] would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Here, Plaintiffs cannot meet their burden. Indeed, the statutory interpretation they challenge is supported by historical background and legal principles.

As the Minnesota Supreme Court explained in *Melchert-Dinkel*, the law has "historically rejected, rather than protected, attempts to permit assisted suicide." 844 N.W.2d at 22. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the U.S. Supreme Court rejected a due process challenge to a statute prohibiting a person from knowingly causing or aiding another person to attempt suicide, because of the state's interest in preserving human life, protecting vulnerable groups, protecting the integrity of the medical profession, and avoiding the path toward voluntary or involuntary euthanasia. 521 U.S. at 728–34. Based on this historical background and precedent, the *Melchert-Dinkel* court held:

> 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. We thus conclude that the proscription against 'assist[ing]' another in taking the other's own life is narrowly drawn to serve the State's compelling interest in preserving human life.

Melchert-Dinkel, 844 N.W.2d at 23. Plaintiffs cannot show that, in all respects, this interpretation of the "assists" provision is facially unconstitutional. Accordingly, their constitutional challenge fails.

CONCLUSION

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

Dated: September 11, 2018

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
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LR 7.1(f) CERTIFICATE OF COMPLIANCE REGARDING DEFENDANT ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

I, Jason Marisam, certify that:

Defendant Attorney General's Memorandum in Support of Motion to Dismiss Amended Complaint complies with Local Rule 7.1(f). I further certify that, in preparation of this document, I used Microsoft Word Version 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above document contains 3,636 words.

Dated: September 11, 2018

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