No. _____

In the Supreme Court of the United States

Final Exit Network, Inc.,
Petitioner,

v.

State of Minnesota,
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Minnesota law, one who "assists" in a "suicide" commits a felony. The Minnesota Supreme Court has definitively interpreted the word "assists" to criminalize "speech" that "enables" a suicide. The Petitioner was convicted under this content- and viewpoint-based prohibition of speech — in the complete absence of any evidence of physical assistance — solely for giving the "victim" information that was readily available in bookstores, libraries, and on the Internet. The Minnesota Supreme Court acknowledges that the prohibited speech is First Amendment-protected but holds that the law, as so construed, survives strict scrutiny.

The questions presented are:

(1) Does Minnesota's criminal prohibition of "speech" that "enables" a suicide survive strict scrutiny under the First Amendment?

(2) Does Minnesota's criminal prohibition of "speech" that "enables" a suicide violate the First Amendment?

CORPORATE DISCLOSURE STATEMENT

Final Exit Network, Inc. has no parent companies or shares of stock.

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DECISIONS BELOW

The opinions below are *Minnesota v. Final Exit Network, Inc.*, 889 N.W.2d 296 (Minn. App. 2016) (App. A) ("*Final Exit Network II*"); *Minnesota v. Melchert- Dinkel*, 844 N.W.2d 13 (Minn. 2014) (App. E); and *Minnesota v. Final Exit Network, Inc.*, Slip Op. (unpublished), Case Nos. A13–0563, A13–0564, and A13–0565 (Minn. App. 2013) (2013 Westlaw 5418170) (App. D) ("*Final Exit Network I*").

BASIS FOR JURISDICTION

The Petitioner seeks review of *Final Exit Network II*, which was rendered on December 19, 2016. App. A. Petitioner sought discretionary review in the Minnesota Supreme Court, which denied review on March 14, 2017. App. B. The judgment of the Court of Appeals was entered on March 15, 2017. App. C. This petition is therefore timely. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

THE PERTINENT CONSTITUTIONAL PROVISIONS AND MINNESOTA STATUTE

The First Amendment to the Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

Minnesota Statutes section 609.215, subd. 1 provides, in its entirety: "**Aiding suicide**. Whoever intentionally advises, encourages, or assists another in taking the other's own life may be sentenced to

imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both."

In *Melchert-Dinkel*, the Minnesota Supreme Court severed the words "advises" and "encourages" from the statute, App. 63a, as did the Court of Appeals in *Final Exit Network I*, App. 40a. However, the Minnesota Supreme Court simultaneously interpreted the word "assists" to prohibit "speech" that "involves enabling the person to commit suicide" by "instructing another on suicide methods." App. 60a. Since "speech alone may . . . enable a person to commit suicide," one could violate the prohibition on "assisting" in a suicide by "speech alone." App. 60a. The Minnesota Supreme Court said "the statute, on its face, does not require a person to *physically* assist the suicide." App. 54a (emphasis in original). *Mechert-Dinkel* required the trial court in this case to give the jury an instruction that ensured the Petitioner's conviction for speech alone, leading to the affirmance of the conviction in *Final Exit Network II.*

STATEMENT OF THE CASE

This case involves a First Amendment challenge to Minnesota Statutes section 609.215, subd. 1. As interpreted by the Minnesota Supreme Court in *Melchert-Dinkel*, in addition to prohibiting "assisting" in a "suicide," the statute alternatively prohibits "speech" that "enables" a "suicide." The latter violation requires neither "causation" of the suicide nor any conduct, as opposed to pure speech. The Petitioner was convicted of violating this provision solely on the basis of First Amendment-protected speech, *i.e.*, in the absence of any proscribable conduct. The Court of Appeals of Minnesota confirmed that the trial record contained no evidence of physical assistance, yet affirmed the conviction, App. A, holding it was bound by *Melchert-Dinkel*, and the Minnesota Supreme Court then denied further review. App. B-C.

1. Final Exit Network

Final Exit Network (the "Network") is one of the nation's leading organizations advocating for the right to death with dignity, sometimes called the right-to-die movement. *See* www.finalexitnetwork.org. The organization is incorporated as Final Exit Network, Inc., a not-for-profit, 501(c)(3) corporation organized under Florida law.[1] Its members and volunteers are mostly of retirement age.

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1. The record, *e.g.,* App. 3a, reflects that the corporation was incorporated in Georgia. However, in 2016, Final Exit Network, Inc. was redomesticated under Florida law.

Its signature initiative is its "Exit Guide" program, under which its volunteers provide information, education, and counseling to Network members who have decided to terminate irremediable suffering. App. 2a-4a. The Network screens those members who apply for Exit Guide services to ensure that they are competent adults who seek rational "self-deliverance" in that they have no potential means of obtaining a satisfactory quality of life. *Id*. The Exit Guides provide information to such qualified members on how to induce their own deaths in a painless and effective manner. App. 3a-4a.

In meeting with members who have chosen to hasten their deaths, the Exit Guides are trained to comply with strict protocols: They never provide any physical assistance in the member's death, and they never provide the means — they do not physically assist the member in obtaining any drugs or other tangible objects to be used in the member's "suicide." App. 4a. The Court of Appeals found, "In order to receive exit services, a member must demonstrate that the member has 'an incurable condition which causes intolerable suffering' and is mentally competent, physically strong enough to perform the required tasks, and able to procure the necessary equipment." App. 3a. "The guide does not physically assist the member in acquiring the equipment. . . . The guides do not physically assist the member in conducting the procedure." App. 4a.[2]

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[2]. In *Final Exit Network I*, an interlocutory appeal at a time when there had been no evidentiary hearing, the Court of Appeals opinion said two Exit Guides "are present for the death and may hold the member's hands, not only for support and comfort, but also to prevent involuntary jerking that could result in tearing the plastic hood." App. 27a. In fact, the Network

Indeed, while the volunteers' handbook is the Network's namesake, *New York Times* bestseller *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying* (eBook, 3d ed.), Exit Guides are prohibited from giving or lending the member a copy of the book. Exit Guides tell members they are required to obtain *Final Exit* at a bookstore or library or download it from the website of the book's author, Derek Humphry, in book or video format. App. 86a-98a.

2. *Final Exit Network I*

The Network and four of its volunteers were indicted in 2012 in Dakota County, Minnesota on 17 charges arising from the death of Doreen Dunn, who participated in the Exit Guide program in 2007. Only one charge against one defendant, the corporation, is pertinent to this appeal today: The Network was charged with violating Minn. Stat. § 609.215, subd. 1, which imposes up to 15 years of imprisonment and a fine of up to $30,000 upon one who "intentionally advises, encourages, or assists another in taking the other's own life."

The Network moved to dismiss the indictment, in part, on grounds that the "advises" and "encourages" clauses were facially unconstitutional content- and viewpoint-based prohibitions of speech.[3]

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denied this claim, and the State abandoned it at trial. At trial, the State offered no evidence of any Network practice of hand-holding, neither for "support and comfort" nor to "prevent involuntary jerking," and no evidence the decedent was touched by any Network volunteer for any reason before she died.

[3]. The Network and its volunteers have never argued a State could not criminalize "assisting" in a "suicide," as those words

App. 29a. The trial court granted in part the Network's motion, holding that the "advises" clause was unconstitutional under the First Amendment. *Id.* The trial court also held that the "encourages" clause could survive First Amendment strict scrutiny only by a judicial narrowing of its meaning, which the trial court provided. *Id.*

The State appealed the trial court's ruling on the "advises" clause. App. 30a. The Network cross-appealed the trial court's ruling that the "encourages" provision could be judicially narrowed to withstand strict scrutiny. *Id.*

The Court of Appeals found, as the state conceded, that the "advises" and "encourages" provisions were content-based. App. 31a. Next, the Court of Appeals rejected the State's argument that the court should create "a new category of unprotected speech," App. 32a, relying primarily on *United States v. Stevens*, 559 U.S. 460, 470 (2010) (declining to identify a new category of unprotected speech based on "an ad hoc balancing of relative social costs and benefits" of the speech) and *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791-92 (2011) ("new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated"). App. 33a-34a.

The Court of Appeals then applied strict scrutiny to the "advises" and "encourages" clauses.

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are normally understood (to refer to conduct and not pure speech), for such an argument would be contrary to this Court's holdings in *Washington v. Glucksberg*, 521 U.S. 702, 728-29 (1997), and *Vacco v. Quill*, 521 U.S. 793, 796-97 (1997).

App. 35a-40a. Finding they both failed the test, the Court of Appeals affirmed the trial court's ruling that the "advises" clause was unconstitutional and reversed its ruling that the "encourages" clause could be saved, declaring both the "advises" and "encourages" clauses to be facially unconstitutional in violation of the First Amendment. App. 36a-40a. The State sought review in the Minnesota Supreme Court, which was granted. App. 6a-7a.

3. *Melchert-Dinkel*

At the time the Minnesota Supreme Court granted review of *Final Exit Network I*, it had already been fully briefed in the case that was later reported as *Melchert-Dinkel*, 844 N.W.2d at 13 (App. E, 44a-71a). On granting review of *Final Exit Network I*, the Minnesota Supreme Court stayed the proceedings in *Final Exit Network I* pending a decision in *Melchert-Dinkel*. App. 7a.

The defendant in *Melchert-Dinkel* was convicted of "advising" and "encouraging" the suicides, via Internet chat room conversations, of young people in Canada and England. App. 46a-49a. The trial court and the Court of Appeals both held that Mr. Melchert-Dinkel's Internet speech was categorically unprotected by the First Amendment. App. 50a-51a. Defending the conviction in the Minnesota Supreme Court, the State argued that his speech was unprotected by the First Amendment as "speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and fraud, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612

(2003)." App. 52a. The Minnesota Supreme Court rejected each of these arguments. App. 52a-57a.

Finding the speech prohibited by the statute to be First Amendment-protected, the Minnesota Supreme Court found that the "advises" and "encourages" clauses facially unconstitutional. App. 61a-62a. Because these clauses were "not narrowly drawn to serve the State's compelling interest in preserving human life, we conclude that they do not survive strict scrutiny," applying the same analysis as the Court of Appeals did in *Final Exit Network I*. *Id*. The court severed and excised the words "advises" and "encourages" from the statute. App. 62a-63a.

But the Minnesota Supreme Court redefined the word "assists" in a manner that was not briefed by any of the parties to *Melchert-Dinkel* or *Final Exit Network I*. The parties' briefs could not have anticipated the Minnesota Supreme Court's redefinition of "assists," which emerged *sua sponte*. "Consistent with the plain language of the statute," the court held, the "assists" clause:

> proscribes speech or conduct that provides another person with what is needed for the person to commit suicide. This signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support. Rather, "assist," by its plain meaning, involves enabling the person to commit suicide. While enablement perhaps most obviously occurs in the context of physical assistance, speech alone may also enable

> a person to commit suicide. Here, we need only note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide.
>
> 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.

App. 60a-61a.

The court held "that the State may prosecute [Mr.] Melchert-Dinkel for assisting another in committing suicide, but not for encouraging or advising another to commit suicide." App. 46a. The court remanded the case for reconsideration because "the district court did not make a specific finding on whether [Mr.] Melchert-Dinkel assisted the victims' suicides" under the new formulation that "speech" that "enables" a suicide was criminalized by the "assists" clause of the statute. *Id.*

After rendering *Melchert-Dinkel*, the Minnesota Supreme Court dissolved its stay of

proceedings in *Final Exit Network I* and denied review. App. 7a.

4. The trial on remand

On remand from *Final Exit Network I*, the Network moved to determine the definition of "assists" in the jury instructions. App. 7a. The Network argued that the Minnesota Supreme Court's rule that "speech" that "enables" a "suicide" was just as unconstitutional as the "advises" and "encourages" clauses had been, and for the same reasons. App. F.-1 (72a-82a).

Three months before trial, the trial court entered an order on the definition of "assists" in the jury instructions, adhering to *Melchert-Dinkel*:

> To "assist" means that [Defendant] enabled [D.D.] through either physical conduct or words that were specifically directed at [D.D.] and that the conduct or words enabled [D.D.] to take her own life. One has not "assisted" where one has only expressed a moral viewpoint on suicide or provided mere comfort or support.

App. 8a. The Network moved for rehearing of this order to no avail. *Id*. The trial court steadfastly overruled the Network's persistent objection, reargued at every stage of the trial, that *Melchert-Dinkel*'s prohibition of "speech" that "enables" a suicide violated the First Amendment. App. F.-3 (106a-113a); App. F.-4.

The evidence at trial affirmatively proved that the Network volunteers in Ms. Dunn's case, an Exit Guide and the Network's medical director, followed the Network's policies, protocols, and practices by not providing her any assistance and by not providing the means. App. 3a-6a. For instance, the Court of Appeals found, "The necessary equipment for helium asphyxiation was in [Ms. Dunn's] living room when they arrived. Neither the medical director nor the guide touched the equipment." App. 5a.

The jury convicted the Network. App. 8a. Because there was no evidence of any physical assistance or of providing the means, the jury could only have convicted the Network solely for communicating "words" that "enabled" the Ms. Dunn to "take her own life." Because the Network makes no secret of its practices, there was abundant evidence that the Network provided Ms. Dunn with information about how to induce her own death. Under the *Melchert-Dinkel* holding, this evidence *required* the Network's conviction.

Indeed, the State argued that the jury should convict the Network for informing Ms. Dunn of where she could obtain a copy of *Final Exit* for herself in the same manner as anyone else could obtain a copy of *Final Exit* anywhere in the country — by instant download or at any bookstore or library. App. F.-3 (95a, 104a, 114a-115a). Merely because Network volunteers told Ms. Dunn where she could obtain a copy of the book, the State argued that a "blueprint" of "how to take her own life" was provided to her through "the conduit . . . of Final Exit Network, Incorporated. . . . Now, she may have purchased it on her own. But the bottom line is Final Exit Network

gave her the information which led her to further knowledge and discovery about how to do it." App. 114a-115a.

5. *Final Exit Network II*

The Network appealed its conviction to the Court of Appeals and argued that the Minnesota Supreme Court's "enablement" holding in *Melchert-Dinkel* violated the First Amendment. App. A. The Court of Appeals noted the Network sought "to challenge the Minnesota Supreme Court's holding in *Melchert-Dinkel*." App. 14a.

The Court of Appeals held the First Amendment issues were fully adjudicated by the Minnesota Supreme Court in *Melchert-Dinkel*. "We are bound by Minnesota Supreme Court precedent." App. 11a. "The district court's jury instructions in this case follow the language of the *Melchert-Dinkel* decision." App. 13a. The trial court's jury instructions "comport with the Minnesota Supreme Court's decision in *Melchert-Dinkel* and do not expand the statute's reach beyond its plainly legitimate sweep." App. 13a.

> If the jury instructions in this case are overbroad, so too is the Minnesota Supreme Court's interpretation of the statute in *Melchert-Dinkel*. We will not question Minnesota Supreme Court precedent.

App. 14a.

> We are bound by the Minnesota Supreme Court's decision in *Melchert-Dinkel*. . . . We therefore reject Final Exit [Network]'s overbreadth challenge to the district court's jury instructions because the jury instructions use the same language as *Melchert-Dinkel*, 844 N.W.2d at 23.

App. 15a.

Having previously granted, then denied, review in *Final Exit Network I*, the Minnesota Supreme Court declined to exercise discretionary review of *Final Exit Network II*. App. B.

REASONS TO GRANT THE WRIT

There are compelling reasons to grant the writ. The Minnesota Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). The Minnesota decisions are irreconcilable with this Court's First Amendment holdings.

In addition, the Minnesota "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." Supreme Court Rule 10(b). California, like Minnesota, has a criminal statute that penalizes one who "advises," "encourages," or "aids" in a "suicide." Cal. Penal Code § 401. Yet a conviction in California is permissible only if "the defendant undertook some active and direct participation in bringing about the suicide." *In re Ryan N.*, 92 Cal. App. 4th 1359, 1375, 112 Cal. Rptr.

2d 620, 632 (2001). California and Minnesota are thus in conflict on the application of free speech principles to their virtually identical laws on "aiding" or "assisting" in a suicide.

After *Melchert-Dinkel*, the Minnesota law prohibits pure First Amendment-protected speech as an alternative form of prohibited assistance in a suicide. The jury instruction requires a defendant to be convicted for "enabling" a suicide "through either physical conduct or words." This Court is "bound by the construction given" to the statute by the Minnesota Supreme Court. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 (1992). The jury instructions are "a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *Virginia v. Black*, 538 U.S. 343, 364 (2003), *quoting Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

This Court should intervene to enforce its well-established rules of law protecting freedom of speech.

A. Minnesota impermissibly seeks to erect a barrier against an established American social movement.

American mores on death are undergoing rapid change. Since the 1990s, physician aid-in-dying laws — or "death with dignity" laws — have been enacted in five states and the District of Columbia.[4] While this case is not about a death-with-dignity law, the passage of these laws reflects the growing American view that people should be allowed more freedom of choices in how they die. The "States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." *Glucksberg*, 521 U.S. at 719. The viewpoint-based Minnesota rule intentionally cuts off an aspect of this conversation, openly holding that it is a crime to speak the truth about how to die.

The Minnesota statute targets not only "subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995). After all, it is no crime in Minnesota to persuade someone to let the dying process run its full course. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Id* at 829.

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4. *See* Cal. Health & Safety Code § 443 *et seq.* ("End of Life Option Act"); Colo. Rev. Stat. Ann. § 25-48-101 *et seq.* ("Colorado End of Life Options Act"); Ore. Rev. Stat. § 127.800 *et seq.* ("Death With Dignity Act"); Wash. Rev. Code § 70.245.010 *et seq.* ("Washington Death With Dignity Act"); Vt. Stat. Ann. tit. 18, § 5281 ("Patient Choice at End of Life"); and D.C. Laws 21-182 ("Death with Dignity Act of 2016").

Thus, in Minnesota, "official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The testimony at trial showed that the Network was formed in part to protest against laws that deny options in dying. *E.g.*, App. 83a-85a., 97a-98a. Knowing their activities would offend some, the Network set out to provide information on suicide to its members and sought legal advice in order to avoid breaking the laws against assisting in a suicide. App. 98a-99a. The statute, as interpreted, is an attempt to stifle this message and movement.

Suicide itself is not a crime anywhere in the United States. *See Glucksberg*, 521 U.S. at 713. Thirty-nine states have statutes prohibiting aiding, assisting, abetting, causing, advising, encouraging, promoting, coercing, facilitating, soliciting, or inciting a suicide. Twelve of those state statutes require "physical" assistance (by assisting in the suicide or providing the means), and thus on their face appear to preclude a conviction for pure speech.[5] California, by judicial interpretation, has precluded a conviction for pure speech. *In re Ryan N.* This leaves 26 states with statutes that could import the Minnesota

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5. *See* Ariz. Rev. Stat. Ann. § 13-1103 ("providing the physical means"); Ga. Code Ann. § 16-5-5 ("physically helping or physically providing the means"); Ill. Stat. Ch. 720 § 5/12-34.5(a)(2) ("offers and provides the physical means" or "participates in a physical act"); Idaho Code Ann. § 18-4017(a)-(b) ("[p]rovides the physical means" or "[p]articipates in a physical act"); Ind. Code Ann. § 35-42-1-2.5(b) (same); Kan. Stat. Ann. § 21-5407 (same); Ky. Rev. Stat. Ann. § 216.302 (same); Md. Code Ann., Crim. Law § 3-102(2)-(3) (same); Ohio Rev. Code Ann. § 3795.04 (same); R.I. Gen. Laws Ann. § 11-60-3 (same); S.C. Code Ann. § 16-3-1090 (same); Tenn. Code Ann. § 39-13-216 (same).

precedent by criminalizing "speech" that "enables" a "suicide."

Besides California and Minnesota, ten other States have statutes that might or clearly do authorize a conviction for pure speech.[6] We have found no case in which any of these other statutory provisions was challenged on free speech grounds or a conviction based on speech alone was affirmed.

Few conversations in any person's life could be more profound and important than those on the subject of death. Like the unconstitutional federal law in *United States v. Alvarez*, 567 U.S. 709, __, 132 S. Ct. 2537, 2547 (2012), the *Melchert-Dinkel* holding would apply "to personal, whispered conversations within a home."

The "enables" provision applies to distraught Minnesotans attempting to discuss the imminent death of a loved one. *See Final Exit Network I* at *5; App. 33a. (the statue applies "in the private setting of a hospital room or family home"). If a competent, terminally ill, imminently dying man speaks with his wife about hastening his death, the wife becomes a felon if she urges him not to shoot himself, and

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6. *See* Iowa Code Ann. § 707A.2 ("assists, solicits, or incites"); La. Rev. Stat. Ann. § 14:32.12 A.(1) ("advising or encouraging . . . or the providing of the physical means or the knowledge of such means"); Me. Rev. Stat. tit. 17-A, § 204 ("aiding or soliciting"); Mich. Comp. Laws Ann. § 750.329a(1)(c) ("[h]elps the individual plan"); Miss. Code. Ann. § 97-3-49 ("advises, encourages, abets, or assists"); N.H. Rev. Stat. Ann. § 630:4 ("aids or solicits"); N.D. Cent. Code Ann. § 12.1-16-04.1 ("aids, abets, facilitates, solicits, or incites"); Okla. Stat. Ann. tit. 21, § 813 ("advises, encourages, abets, or assists"); S.D. Codified Laws § 22-16-37 ("advises, encourages, abets, or assists").

instead informs him of the exact amount and combination of drugs needed to die with certainty. And so does any Network volunteer who participates in such conversations with both the husband and the wife.

The Network's volunteers tell people where to find the information they need on the Internet or at a bookstore or library and then talk to them about what they have learned elsewhere in order to ensure that they have understood it correctly. *E.g.,* App. 86a-89a, 95a-98a, 103a-104a. A statute could hardly be more underinclusive than Minnesota's. At oral argument in *Final Exit Network II*, the State acknowledged that if a Minnesota library patron tells the librarian he is considering suicide, the librarian commits the crime if he shows the patron where to find the library's copy of *Final Exit* or any other source materials on suicide.

B. Minnesota does not have a compelling interest in prohibiting speech that "enables" a "suicide."

This case is not about assistance in a suicide. The State and the Network agree the government may criminalize assistance in a suicide, *see Glucksberg*, 521 U.S. at 728-29; *Vacco*, 521 U.S. at 796-97, and Minnesota does so. The Minnesota Supreme Court held that its criminalization of "speech" that "enables" a "suicide" advances the State's "compelling interest in preserving human life." *Melchert-Dinkel* at 22; App. 52a-53a. The Minnesota Supreme Court cited *Glucksberg*, 521 U.S. at 735, to support the conclusion that the State has a compelling interest in a prohibition on assisting in a

suicide, including a prohibition of speech that "enables" a suicide.

But *Glucksberg* addressed only a statute on assisting in a suicide, not a prohibition of speech. The speech prohibited by the Minnesota Supreme Court's "enablement" provision is too attenuated from the State's compelling interest in the preservation of human life to stand as a compelling interest in a ban on speech. Having banned assistance in a suicide, the State has no separate compelling interest in prohibiting First Amendment-protected speech on the subject. *Cf. Final Exit Network, Inc. v. Georgia*, 290 Ga. 508, 510, 722 S.E.2d 722, 724-25 (2012) (State needed a "more particularized" interest than "preserving human life" in order to establish a compelling interest in restricting freedom of speech while seeking to diminish suicides).

C. The Minnesota statute is unconstitutional facially or as applied.

The Minnesota statute is unconstitutional under the First Amendment in a facial or as applied challenge. If the statute is seen as including only the words enacted by the Minnesota Legislature, the statute is unconstitutional as applied by the Minnesota Supreme Court in its *Melchert-Dinkel* holding. If in a facial analysis the Minnesota statute is deemed to require the application of *Melchert-Dinkel* to determine what is on the "face" of the statute, the statute is facially unconstitutional. The difference is mere semantics. Likewise, a statute against "assisting" in a suicide is overbroad as

interpreted in *Melchert-Dinkel* to prohibit First Amendment-protected speech.

In any analysis, the Minnesota prohibition of "speech" that "enables" a suicide, standing alone, is unconstitutional because "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or the statute "lacks any plainly legitimate sweep," *Stevens*, 559 U.S. at 472 (internal quotation marks omitted). The "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 413-14 (1989). And "a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).

D. The new "enables" clause is no more narrowly tailored than the severed "advises" or "encourages" clauses were.

As it was written by the Legislature, the Minnesota statute imposed penalties on one who "advises," "encourages," or "assists" in a suicide, but the Minnesota Supreme Court severed the "advises" and "encourages" clauses on grounds they failed strict scrutiny. The Minnesota Supreme Court then redefined "assists" to prohibit "speech" that "enables" a suicide. Yet a prohibition on "speech" that "enables" a suicide is no more narrowly tailored than the severed "advises" and "encourages" clauses.

In the context of the application of the statute, there is no practical difference between advising,

encouraging, or enabling. One meaning of all three terms — the meaning used in the context of the Minnesota statute — is to give information about how to accomplish a goal.

The Minnesota appellate courts both found that the word "advise" means to "inform." *Melchert-Dinkel* at 23, App. 36a; *Final Exit Network I* at *5, App. 33a. But communications that "inform" cannot be distinguished from communications that "enable." *Melchert-Dinkel* itself implicitly held that to "inform" is to "enable," observing that the word "assists" criminalizes "speech" that "involves enabling the person to commit suicide" by "instructing another on suicide methods," which is to say, by informing the person.

Both the Minnesota Supreme Court and the Court of Appeals said one meaning of "encourage" is "to '[g]ive courage, confidence, or hope.'" *Melchert-Dinkel* at 23, App. 56a; *Final Exit Network I* at *5, App. 33a. One can enhance a listener's "courage, confidence, or hope" by giving information that instills in the listener the knowledge that he can accomplish the matter at hand, as reflected by the roots of "encourage" — to "en-courage," or to inspire and facilitate courage (or as the Minnesota Supreme Court put it, at App. 61a-62a, to "provide[] support or rall[y] courage"). The Minnesota Supreme Court said the word "assist" means "to 'provide (a person etc.) with what is needed for a purpose.' The New Shorter Oxford English Dictionary 132, 1216 (1993)." App. 60a.

E. The Minnesota statute is "wildly underinclusive."

The information provided by the Exit Guides to Ms. Dunn is readily available in bookstores, libraries, and online and is depicted in movies, documentaries, and articles of every sort. Minnesota does nothing to advance its "compelling interest in the preservation of human life" by limiting the availability of the information the Network was convicted of imparting to Ms. Dunn. As a result, "less specifically targeted information about methods of suicide is easily accessible in numerous fora and just as likely to facilitate suicide." *Final Exit Network I* at *7; App. 36a. Indeed, *Melchert-Dinkel* explicitly insulates all these information providers from punishment, yet the Network was convicted in part for informing Ms. Dunn that she could obtain a copy of *Final Exit* online, at a bookstore, or in a library.

A "wildly underinclusive" prohibition of speech "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 131 S. Ct. at 2740. *Brown* held that the government may pursue "legitimate" goals, "but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 131 S. Ct. at 2741-42. *See also Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015) ("Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.") (emphasis in original).

F. There is no other basis for a finding that the Minnesota statute is narrowly tailored.

To show that a prohibition on speech is "narrowly tailored," the government "must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.'" *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. . . To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *United States v. Playboy Entm't Group, Inc*, 529 U.S. 803, 813 (2000) (citations omitted).

There is no basis to suggest a law prohibiting assistance in suicide (as that concept was understood before *Melchert-Dinkel*) would be "ineffective to achieve" its goal. The legislature *must* rely on that alternative before banning speech on the subject. *Id.*; *R.A.V.*, 505 U.S. at 395 ("the 'danger of censorship' presented by a facially content-based statute . . . requires that that weapon be employed only where it is '*necessary* to serve the asserted interest'") (citations omitted, emphasis in original).

Other State statutes provide examples of much more narrow tailoring than Minnesota's. In Michigan, a statute enacted in the Kevorkian era defines "criminal assistance to the killing of an individual" to be accomplished by anyone who (a) "[p]rovides the means," (b) "[p]articipates in an act, or (c) "[*h]elps the individual plan*" a suicide. Mich. Comp. Laws Ann. § 750.329a (emphasis added). The unique "helps plan"

clause in the Michigan law might or might not survive strict scrutiny, but at least Michigan has tried to narrowly tailor a statute specifically against helping to plan a suicide; Minnesota has not.

The Minnesota Supreme Court said a prohibition on "speech" that "enables" a suicide is narrowly tailored because it "signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support." *Melchert-Dinkel* at 23; App. 55a-56a. This notion was reflected in the jury instructions. *Final Exit Network II* at 302; App. 7a. This language does nothing to tailor a ban on "speech" that "enables" a suicide.

"Speech" that "enables" a suicide could be embedded in a mountain of speech that "merely" expresses a "moral viewpoint" or provides "general comfort or support," and indeed it surely always would be, as it was in this case. This does not narrowly tailor the fact that uttering "speech" that "enables" a "suicide" is a crime in Minnesota.

G. Review of this case need not involve whether "causing" a suicide could be prohibited.

It may be important to note that this case would not require the Court to consider whether a State could criminalize *causing* a suicide. In *Melchert-Dinkel*, the Minnesota Supreme Court said: "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." *Melchert-Dinkel* at 23; App. 56a (emphasis added). Whatever the Minnesota Supreme Court meant in this choice of words, *Melchert-Dinkel* did not say a conviction for assisting in a suicide requires proof that the defendant *caused* the suicide.

In keeping with *Melchert-Dinkel*, the jury instructions made no reference to causation as an element of the crime. No evidence of causation was introduced at trial. The fact is that the Minnesota statute at issue does not prohibit "causing" a suicide. *See Final Exit Network I* at *5; App. 33a (saying the statute does not "require causation or even express promotion of suicide" to establish the crime). A requirement of causation might narrowly tailor the Minnesota statute or might even remove the speech from First Amendment protection, both of which are issues not presented by this case.

A prohibition of "causing" a suicide would be qualitatively different from Minnesota's prohibition of "speech" that "enables" a suicide. Seventeen states have statutes that prohibit "causing" a suicide.[7] Under Minnesota law, "causing" a death is murder. *See* Minn. Stat. § 609.185(a)(1) (it is murder when one "causes the death of a human being with

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7. *See* Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-56; Del. Code Ann. tit. 11, § 645; Haw. Rev. Stat. § 707-702; Ind. Code Ann. § 35-42-1-2; Kan. Stat. Ann. § 21-5407(a)(1); Ky. Rev. Stat. Ann. § 216.302(1); Md. Code Ann., Crim. Law § 3-102(1); N.H. Rev. Stat. Ann. § 630:4; N.J. Stat. Ann. § 2C:11-6; N.Y. Penal Law § 120.30; N.D. Cent. Code Ann. § 12.1-16-04.2; Or. Rev. Stat. Ann. § 163.193; 18 Pa. Cons. Stat. Ann. § 2505; S.C. Code Ann. § 16-3-1090(B)(1); and Wash. Rev. Code Ann. § 9A.36.060.

premeditation and with intent to effect the death of the person").

In Massachusetts, which has no statute on assisting in a suicide, a charge of involuntary manslaughter may be based on "verbal conduct" alone if the words "cause" a suicide. *Massachusetts v. Carter*, 474 Mass. 624, 636, 52 N.E.3d 1064, 1063-64 (2016). In Illinois, the statute on assisting in a suicide provides an example of an effort to narrowly tailor a law to prohibit speech that *causes* a suicide:

> A person commits inducement to commit suicide when he or she . . . : Knowingly coerces another to commit suicide and the other person commits or attempts to commit suicide as a direct result of the coercion, and he or she exercises substantial control over the other person through (i) control of the other person's physical location or circumstances; (ii) use of psychological pressure; or (iii) use of actual or ostensible religious, political, social, philosophical or other principles.

Ill. Stat. Ch. 720 § 5/12-34.5.

Nothing in the Minnesota statute, and nothing in *Melchert-Dinkel*, requires *causation* of the suicide. In *Final Exit Network I*, the Court of Appeals said that to "protect vulnerable people from being coerced or unduly influenced to commit suicide, the state could draft a statute that prohibits only that speech." *Final Exit Network I* at * 6; App. 34a.

This case does not raise an issue of whether a State may prohibit speech that causes a suicide.

CONCLUSION

The Minnesota statute, as definitively interpreted by the Minnesota Supreme Court, presents an important First Amendment question. The Minnesota Supreme Court's construction of the statute compelled a conviction based solely on protected speech. The Court should grant review to assess whether the conviction may stand.

Respectfully submitted,

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JUNE 2017

APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1826

State of Minnesota,
Respondent,

vs.

Final Exit Network, Inc.,
Appellant.

Filed December 19, 2016
Affirmed
Smith, Tracy M., Judge

Dakota County District Court
File No. 19HA CR-12-1718

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Chief Deputy County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

Robert Rivas (pro hac vice), Tallahassee, Florida; and Paul Engh, Minneapolis, Minnesota (for appellant)

Randall D. Tigue, Randall Tigue Law Office, P.A., Golden Valley, Minnesota (for amicus curiae Atheists for Human Rights)

Edward Rudofsky (pro hac vice), Zane and Rudofsky, New York, New York; and Sam Glover, Minneapolis, Minnesota (for amicus curiae First Amendment Lawyers Association)

Patrick C. Elliott, Madison, Wisconsin (for amicus curiae Freedom from Religion Foundation)

Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and

Rodenberg, Judge.

S Y L L A B U S

The district court's jury instructions on assisting another in taking the other's life were not unconstitutionally overbroad under the First Amendment because the instructions followed the language of the Minnesota Supreme Court's decision in *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014).

O P I N I O N

SMITH, TRACY M., Judge

Appellant Final Exit Network, Inc. (Final Exit) appeals its conviction of assisting in a suicide. Final Exit argues that Minn. Stat. § 609.215, subd. 1 (2014), which makes it a crime for a person to intentionally assist another in taking the other's life, is facially unconstitutional under the First Amendment. Final Exit also asserts an as-applied challenge to the jury instructions and to the application of the statute to the facts of this case. Because we conclude that the Minnesota Supreme Court's decision in *Melchert-Dinkel*, 844 N.W.2d at 13, bars Final Exit's facial and as-applied challenges, we affirm.

FACTS

Final Exit is a nonprofit company incorporated in the state of Georgia that advocates for the right to die. An individual may become a member of Final Exit by paying an annual fee of $50. Final Exit provides its members experiencing debilitating mental or physical illness with counseling services and information on end-of-life care, including methods to hasten death by suicide.

When a member makes the decision to end his or her life, the member contacts Final Exit requesting "exit services" and provides Final Exit with a personal statement and

medical diagnosis.[1] In order to receive exit services, a member must demonstrate that the member has "an incurable condition which causes intolerable suffering" and is mentally competent, physically strong enough to perform the required tasks, and able to procure the necessary equipment.

A Final Exit case coordinator contacts the member seeking exit services and conducts a telephone interview to assess whether the member is mentally sound and an appropriate candidate for exit services. The case coordinator then refers the case to a first responder, who conducts a lengthier interview. The first responder informs the member that the member must read the book *Final Exit* (3d ed.) with an addendum or watch a video called *Final Exit*. These materials instruct the member on death by helium asphyxiation. Once the member has read the book or watched the video, the first responder may provide the member with the names and addresses of manufacturers who sell the hood used to commit suicide by way of helium asphyxiation. The first responder also collects information about the member's living situation and the family's knowledge of the member's plan to commit suicide to assess whether "the applicant's environment is secure enough for [Final Exit] to work in." Final Exit's medical director then reviews the member's information and assesses whether the member has a "horrible disease" and has done everything possible "to make life bearable." The medical director makes the final decision on whether Final Exit will provide a member with exit services.

[1] Final Exit uses the words "exit" or "self-deliverance" instead of "suicide" to distinguish between the "self-caused death of someone who is 'suicidal' and that of someone who is not 'suicidal,' and thus does not want to die, but who has made a rational choice to discontinue intolerable and irremediable suffering."

After a member is approved for exit services, Final Exit assigns an "exit guide" to prepare the member for his or her suicide. At least one month before the suicide, the guide informs the member where to purchase the necessary equipment. The guide does not physically assist the member in acquiring the equipment. The guide visits the member in person and rehearses the procedure with the member before the planned day of the suicide. During the rehearsal, the member assembles the equipment and the guide answers any questions the member may have about whether the hood is properly connected to the tanks. On the day of the suicide, two guides are usually present and discreetly arrive and leave the member's residence to avoid being seen. The guides do not physically assist the member in conducting the procedure. The guides watch the member put on the hood and perform the procedure. After the procedure, a guide checks the member's pulse to determine that the member has died and then disposes of the equipment.

At issue in this case is Final Exit's role in the suicide of D.D. D.D. suffered from chronic pain from 1996 until her death in May 2007. D.D. applied for membership and requested exit services from Final Exit in January 2007. A first responder interviewed D.D. in early February and provided her with information about reading *Final Exit* and "general information" about Final Exit's "preferred inhalation method." On February 6, Final Exit's medical director approved D.D. for exit services. D.D. did not inform her family of her plans to commit suicide. One week before D.D. committed suicide in May, D.D.'s guide traveled to Minneapolis and drove to D.D.'s home.[2] On the day of the suicide,

[2] D.D.'s guide had died by the time of trial, and there was therefore no direct testimony regarding what occurred at the meeting. There was, however, testimony and evidence

Final Exit's medical director and D.D.'s guide flew to Minneapolis-St. Paul Airport and drove to D.D.'s home. The necessary equipment for helium asphyxiation was in her living room when they arrived. Neither the medical director nor the guide touched the equipment. As testified to by the medical director,[3] if D.D. had not connected the helium tanks and hood properly, they would have advised her on how to correct the mistake. When she was ready, D.D. placed the hood on her head and turned the valves to the helium tank. D.D. died at approximately 12:30 p.m. The medical director checked D.D.'s pulse after the procedure to ensure that she had died. The medical director and guide removed the hood from D.D., left D.D.'s home, and disposed of the equipment in a dumpster. D.D. had requested that the exit guides dispose of the equipment to avoid the stigma of suicide.

D.D.'s husband discovered D.D. at approximately 6:30 p.m. that evening and called emergency services. A police officer arrived and observed that D.D. was propped up on the couch, tucked beneath a blanket, and had her hands "crossed and peaceful looking" on her chest. Following an autopsy, the medical examiner concluded that D.D. had died of atherosclerotic-coronary-artery disease, a hardening of the arteries. No criminal investigation of D.D.'s death took place at that time.

As part of an unrelated matter, the Georgia Bureau of Investigations (GBI) conducted an investigation into Final Exit's business activities and seized materials related to D.D.'s death. GBI provided evidence about Final Exit's role in D.D.'s suicide to the

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regarding Final Exit's general policies and practices to rehearse the helium-asphyxiation procedure with the member at this meeting.

[3] The medical director was given use immunity at trial.

Minnesota Bureau of Criminal Apprehension, which opened an investigation in the beginning of 2010. In May 2012, a grand jury indicted Final Exit for "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life." Minn. Stat. § 609.215, subd. 1.

The district court concluded in a pretrial order that the "advises" prohibition in the statute is unconstitutionally overbroad under the First Amendment, but the "encourages" prohibition survives strict scrutiny. The state filed a pretrial appeal. In an unpublished opinion released in September 2013, this court held that both the "advises" and "encourages" prohibitions are unconstitutional under the First Amendment. *State v. Final Exit Network, Inc.*, No. A13-0563, 2013 WL 5418170 at *7 (Minn. App. Sept. 30, 2013), *stay vacated* (Minn. June 17, 2014). The Minnesota Supreme Court granted review of this court's decision but stayed the proceedings pending its decision in *Melchert-Dinkel*.

In *Melchert-Dinkel*, the Minnesota Supreme Court addressed the constitutionality of Minn. Stat. § 609.215, subd. 1. In its decision, the court severed the "advises" and "encourages" provisions from the statute. 844 N.W.2d at 23-24. The court concluded that the statute's "advises" and "encourages" prohibitions are facially unconstitutional under the First Amendment because they broadly restrict general discussions about suicide. *Id.* at 23-24. The court, however, upheld the statute's "assists" prohibition as constitutional. *Id.* The court interpreted "assists" to "proscribe[] speech or conduct that provides another person with what is needed for the person to commit suicide." *Id.* at 23. It also determined that "assists" is sufficiently narrow because speech or conduct enabling another to commit suicide "must be targeted at a specific individual." *Id.* The court held that "speech

instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide." *Id.* After deciding *Melchert-Dinkel*, the Minnesota Supreme Court denied further review of *State v. Final Exit Network, Inc.*

Before trial, both Final Exit and the state submitted proposed jury instructions. Final Exit proposed jury instructions defining "assists" as

> to provide tangible physical assistance in the suicide. One does not "assist" in a suicide by merely being present, or by advising on the subject, encouraging the suicide, or providing information or knowledge. One does not "assist" in a suicide by merely instructing another on suicide methods. Similarly, one does not "assist" in a suicide by expressing a viewpoint on whether the suicide is morally justifiable under the circumstances or by providing emotional support to another who is committing suicide. One must affirmatively "assist" in a suicide to be guilty of the crime.

The district court issued an order on jury instructions in February 2015 defining "assists" as follows:

> To "assist" means that [Defendant] enabled [D.D.] through either physical conduct or words that were specifically directed at [D.D.] and that the conduct or words enabled [D.D.] to take her own life. One has not "assisted" where one has only expressed a moral viewpoint on suicide or provided mere comfort or support.

Final Exit moved for a rehearing on the jury instructions on the meaning of "assists," arguing that the jury instructions were overbroad under the First Amendment. The district court denied this motion.

Trial lasted for six days in May 2015. A jury found Final Exit guilty of assisting another in taking the other's own life.

Final Exit appeals.

ISSUES

I. Is Minn. Stat. § 609.215, subd. 1, facially unconstitutional under the First Amendment?

II. Is Minn. Stat. § 609.215, subd. 1, unconstitutional under the First Amendment as applied to the facts of Final Exit's case?

ANALYSIS

Final Exit raises both facial and as-applied First Amendment freedom-of-speech challenges to Minn. Stat. § 609.215, subd. 1, (the statute) on appeal. We review the constitutionality of a statute de novo. *Melchert-Dinkel*, 844 N.W.2d at 18. The statute criminalizes "intentionally . . . assist[ing] another in taking the other's own life." Minn. Stat. § 609.215, subd. 1. In *Melchert-Dinkel*, the Minnesota Supreme Court interpreted the term "assists" as "proscrib[ing] speech or conduct that provides another person with what is needed for the person to commit suicide" or "enabl[ing] the person to commit suicide." *Melchert-Dinkel*, 844 N.W.2d at 23. Speech enabling a suicide must "be targeted at a specific individual." *Id.* "[M]erely expressing a moral viewpoint or providing general comfort or support" does not rise to the level of "assisting." *Id.*

The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, and applies to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630 (1925). When a statute "explicitly regulates expression based on content," it is "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 1584 (2010) (quotation omitted). Criminal statutes allowing for prosecution of an individual based entirely on

what the individual has said are generally content-based restrictions. *Melchert-Dinkel*, 844 N.W.2d at 19. Absent an exception from First Amendment protection, a content-based restriction is invalid unless it survives strict scrutiny, meaning (1) "it is justified by a compelling government interest," (2) it "is narrowly drawn to serve that interest," and (3) there is "a direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799, 131 S. Ct. 2729, 2738 (2011). A compelling government interest "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805, 131 S. Ct. at 2741-42. The government must use the "least restrictive means" to further a compelling interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

An individual may bring both facial and as-applied challenges against government action, but the same substantive First Amendment standard applies to each type of challenge. *Rew v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014).

I. According to *Melchert-Dinkel*, Minn. Stat. § 609.215, subd. 1, is not facially unconstitutional under the First Amendment.

Final Exit first argues that the "assists" provision in the statute is facially unconstitutional. We are bound by Minnesota Supreme Court precedent. *State v. Grisby*, 806 N.W.2d 101, 114 (Minn. App. 2011), *aff'd* 818 N.W.2d 511 (Minn. 2012) (affirming this court's use of Minnesota Supreme Court precedent).

The Minnesota Supreme Court concluded in *Melchert-Dinkel* that the statute's "assists" prohibition is a content-based restriction and survives strict scrutiny under the

First Amendment. 844 N.W.2d at 21-23. The court concluded that the government has a compelling interest in preserving human life and preventing suicide. *Id.* at 22 (citing *Washington v. Glucksberg*, 521 U.S. 702, 728-34, 117 S. Ct. 2258, 2271-75 (1997)). The court further concluded that the statute is narrowly tailored to effectuate this compelling interest. By its reference to assisting "another," the statute only reaches "targeted speech aimed at a specific individual." *Id.* at 22. In addition, "assists" further narrows the statute's reach by criminalizing only speech that "enabl[es] the person to commit suicide" or "instruct[s] another on suicide methods." *Id.* at 23. For these reasons, the Minnesota Supreme Court concluded that the statutory prohibition on "only speech that assists suicide, combined with the statutory limitation that such enablement must be targeted at a specific individual," renders the statute narrowly tailored and linked to the state's compelling interest in the preservation of life. *Id.* The statute's "assists" provision thus survives strict scrutiny and Final Exit's facial challenge to the statute. *Id.*

II. Minn. Stat. § 609.215, subd. 1, is not unconstitutional as applied to the facts of Final Exit's case.

Final Exit also raises as-applied challenges to the statute. In its brief and at oral arguments, Final Exit failed to distinguish between its as-applied and facial challenges. Rather, Final Exit suggested that these challenges overlap. While facial and as-applied challenges use the same substantive First Amendment law, the challenges depend on different legal analyses. An as-applied challenge uses the same substantive First Amendment standards as a facial challenge, *Rew*, 845 N.W.2d at 778, but involves "a judgment as to the constitutionality of a statute based on the harm to the litigating party."

State v. Mireles, 619 N.W.2d 558, 561 n.1 (Minn. App. 2000). We examine the constitutionality of the statute, limited to the "context of the specific circumstances" presented in the case. *Rew*, 845 N.W.2d at 780.

A. The jury instructions are not unconstitutionally overbroad.

Final Exit argues that the jury instructions are unconstitutionally overbroad under the First Amendment. Final Exit does not argue that the jury instructions are erroneous and we do not consider any arguments to that effect. Rather, Final Exit argues that the jury instructions applied an unconstitutionally overbroad interpretation of *Melchert-Dinkel*.

The overbreadth doctrine provides an alternative to strict scrutiny in the First Amendment context. *Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587. A restriction on speech is unconstitutionally overbroad under the First Amendment if it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118-19, 123 S. Ct. 2191, 2196 (2003) (quotations omitted). An overbroad statute is invalid until it is narrowed to remove "the seeming threat or deterrence to constitutionally protected expression." *Id.* at 119, 123 S. Ct. at 2196. The overbreadth doctrine protects against "chilling" of free expression when a statute would otherwise prompt individuals to "abstain from protected speech." *Id.*

Final Exit's overbreadth argument seeks to revive its facial challenge to the statute. In support of its overbreadth claim, Final Exit cites the U.S. Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343, 364, 123 S. Ct. 1536, 1550 (2003). In *Black*, the Court concluded that the plain language of a Virginia statute did not violate the First Amendment, but the jury instructions, which had not been disavowed by the Virginia Supreme Court,

rendered the statute facially unconstitutional. *Id.* The jury instructions in *Black* broadened Virginia's cross-burning statute to reach political speech with no intent to intimidate and thus conflicted with Supreme Court precedent. *Id.* *Black* is distinguishable from this case, because the district court's jury instructions comport with the Minnesota Supreme Court's decision in *Melchert-Dinkel* and do not expand the statute's reach beyond its plainly legitimate sweep.

The district court's jury instructions in this case follow the language of the *Melchert-Dinkel* decision. The jury instructions require the jury to find "either physical conduct or words that were specifically directed at [D.D.] and that the conduct or words enabled [D.D.] to take her own life." *Melchert-Dinkel* construes "assists" to include speech or physical conduct that "involves enabling the person to commit suicide" and is "targeted at a specific individual." 844 N.W.2d at 23. The jury instructions also clarify that "[o]ne has not 'assisted' where one has only expressed a moral viewpoint on suicide or provided mere comfort or support," a proposition that finds support in *Melchert-Dinkel*. *Id.* ("['Assists'] signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support."). If the jury instructions in this case are overbroad, so too is the Minnesota Supreme Court's interpretation of the statute in *Melchert-Dinkel*. We will not question Minnesota Supreme Court precedent. *Grisby*, 804 N.W.2d at 114.

Additionally, Final Exit's proposed jury instructions would misinterpret the statute in light of *Melchert-Dinkel*. Final Exit's proposed jury instructions define "assists" to mean "to provide tangible physical assistance in the suicide." This definition ignores the

Minnesota Supreme Court's conclusion that "speech alone may also enable a person to commit suicide." *Melchert-Dinkel*, 844 N.W.2d at 23. Moreover, Final Exit's proposed instructions state that "[o]ne does not 'assist' in a suicide by merely instructing another on suicide methods." This statement directly contradicts *Melchert-Dinkel*. The Minnesota Supreme Court explicitly defined "assists" to include "speech instructing another on suicide methods." *Id.* Even if the district court's jury instructions had erroneously applied *Melchert-Dinkel*, Final Exit's proposed instructions would not be among the acceptable alternatives because they misstate the law. *See State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) ("A jury instruction is erroneous if it materially misstates the applicable law.").

We are bound by the Minnesota Supreme Court's decision in *Melchert-Dinkel*. *See Grisby*, 804 N.W.2d at 114. We therefore reject Final Exit's overbreadth challenge to the district court's jury instructions because the jury instructions use the same language as *Melchert-Dinkel*, 844 N.W.2d at 23.

B. Minn. Stat. § 609.215, subd. 1, is not unconstitutional under the First Amendment as applied to the facts of Final Exit's case.

Final Exit argues that the statute cannot survive strict scrutiny as applied to the facts of this case. To evaluate this as-applied challenge, we again examine whether the statute furthers a compelling state interest. *Rew*, 845 N.W.2d at 780. We also ask whether the prohibition on "assisting" in a suicide burdens Final Exit's speech no more than necessary and is therefore narrowly tailored. *Id.* Final Exit argues (1) the statute is not supported by

a compelling state interest in this case and (2) the statute is not narrowly tailored because it is underinclusive as applied to this case. We reject both of Final Exit's arguments.

1. Minn. Stat. § 609.215, subd. 1, furthers the state's compelling interest in the preservation of human life in this case.

Final Exit and amicus curiae, Atheists for Human Rights, contend that the government has no compelling interest in mandating "suffering by the mentally competent terminally ill whose condition causes them to suffer intolerably."[4] In *Melchert-Dinkel*, the Minnesota Supreme Court concluded that the state has a compelling interest in the preservation of human life. 844 N.W.2d at 22.

Final Exit again seeks to challenge the Minnesota Supreme Court's holding in *Melchert-Dinkel*. None of the facts in this case alters the state's compelling interest as found by the Minnesota Supreme Court in *Melchert-Dinkel*. The state has a compelling interest in the preservation of D.D.'s life and the prevention of her suicide, regardless of her incurable condition. The fact that Final Exit provides its services only to members with incurable conditions does not negate the state's compelling interest. *Id.*

[4] Atheists for Human Rights also argues that the state's interest must be "entirely secular in nature." They derive this principle from the U.S. Supreme Court's decision in *Edwards v. Aguillard*, which considered a statute's constitutionality under the Establishment Clause. 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987). *Aguillard* contained no analysis of First Amendment freedom-of-speech protections. Because it was raised by amicus, and not Final Exit, the argument that the statute in this case is not secular in nature, in violation of the Establishment Clause, is not properly before this court. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012) ("Generally, we do not decide issues raised by an amicus that are not raised by the litigants themselves.").

2. Minn. Stat. § 609.215, subd. 1, is narrowly tailored to advance the state's interest in the preservation of human life in this case.

Even if the statute advances a compelling state interest, Final Exit contends that the statute is not narrowly tailored as applied to this case. In particular, Final Exit argues that the statute is underinclusive as applied.

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least restrictive alternative).

Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005) (describing narrow tailoring while analyzing a First Amendment challenge to a Minnesota canon of judicial conduct). The underinclusiveness doctrine protects against government acts that may be designed to "give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S. Ct. 2038, 2043 (1994) (quotation omitted) (holding that a statute banning residential signs, except those that fell within one of ten exceptions, was facially unconstitutional because it was underinclusive). The government's exemption of some speech "from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52, 114 S. Ct. at 2044.

Final Exit cites the U.S. Supreme Court's decision in *Brown v. Entm't Merchs. Ass'n* as an example of application of the underinclusiveness doctrine. 564 U.S. at 786, 131 S.

Ct. at 2729. In *Brown*, the Court invalidated a California statute prohibiting the sale of violent video games to minors as facially unconstitutional under the First Amendment because the statute was underinclusive. *Id.* at 789, 802, 131 S. Ct. at 2732-33, 2740. The Court assumed that California had an interest in shielding children from violent media. *Id.* at 800-01, 131 S. Ct. at 2739-40. But, given this governmental interest, the Court concluded that the restriction of the sale of video games to minors was "wildly underinclusive." *Id.* at 802, 131 S. Ct. at 2740. The statute did not prevent minors from consuming other violent media, such as books, cartoons, or movies. *Id.* The statute restricted minors' access to some violent media, but in doing so "singled out the purveyors of video games for disfavored treatment." *Id.* The Court therefore invalidated the statute as facially unconstitutional because it was underinclusive. *Id.*

Final Exit argues that the statute is underinclusive because the statute does not equally prohibit speech that provides information about suicide methods. According to Final Exit, the information it provides is unprotected simply because it is provided to a particular individual, *see Melchert-Dinkel*, 844 N.W.2d at 23 ("[S]peech instructing another on suicide methods falls within the ambit of constitutional limitations on speech."), but a book or Internet article providing the same information—instructions on suicide methods—is protected speech under *Melchert-Dinkel* because the speech is not targeted at a particular individual. *Id.* at 24. Final Exit analogizes the facts of its case to *Brown* because dissemination of information on suicide methods through other means of communication, such as books or articles on the Internet, remains protected, while dissemination of information to specific individuals is unprotected.

Final Exit's underinclusiveness argument is, in essence, an attempt to invalidate a central holding of *Melchert-Dinkel*. The Minnesota Supreme Court in *Melchert-Dinkel* concluded that the statute's "assists" provision is narrowly tailored precisely because it reaches "targeted speech aimed at a specific individual." *Id.* at 22. The court expressly distinguished this type of speech from speech that advises or encourages suicide but is not targeted at a specific individual. *Id.* Unlike in *Brown*, where the statute regulated some violent speech, while failing to regulate other equally violent types of speech, and thus was underinclusive, the statute here does not fail to regulate speech that is equivalent to the proscribed targeted speech. The court in *Melchert-Dinkel* found the statute narrowly tailored, and we are bound by that decision. *See Grisby*, 804 N.W.2d at 114.

As applied to Final Exit in this case, we conclude that the statute burdened no more speech than necessary to further the state's compelling interest in preserving D.D.'s life. *Rew*, 845 N.W.2d at 784. Final Exit informed D.D. which book to read and about Final Exit's "preferred inhalation method." On the day of her death, Final Exit's representatives observed D.D. connect the tubing to the helium tanks and would have explained how to hook it up properly had she not done so. The medical director checked D.D.'s pulse to ensure that she had died. Consistent with their plan with D.D., Final Exit representatives removed the equipment from D.D.'s home and disposed of it in a dumpster to create the appearance of natural death. In the "context of the specific circumstances" presented in this case, *see id.* at 780, the statute was applied to restrict Final Exit's speech instructing D.D. on suicide methods. No less restrictive alternative would have served the state's interest in protecting D.D.'s life. *Sable Commc'ns*, 492 U.S. at 126, 109 S. Ct. at 2836.

The statute does not prohibit Final Exit's policy advocacy for the right to die or the emotional support it provides its members by listening to their stories. *Melchert-Dinkel*, 844 N.W.2d at 23-24. But Final Exit was not convicted for speech "tangential to the act of suicide." *See id.* Final Exit was convicted for "instructing another on suicide methods." *See id.* at 23. The statute therefore did not prevent Final Exit "from expressing [its] ideas and messages in a number of other forums and ways." *See Rew*, 845 N.W.2d at 781.

The statute in this case is narrowly tailored to serve the government's compelling interest in the preservation of human life. We therefore conclude that the statute survives strict scrutiny and is constitutionally permissible as applied to this case.[5] *Melchert-Dinkel*, 844 N.W.2d at 23-24.

D E C I S I O N

Because the Minnesota Supreme Court held in *Melchert-Dinkel* that the "assists" provision of Minn. Stat. § 609.215, subd.1, is facially constitutional under the First Amendment, and because the statute is constitutional as applied to this case, we conclude that Final Exit's conviction for intentionally assisting another in taking the other's own life did not violate the First Amendment.

Affirmed.

[5] An amicus curiae brief submitted by the First Amendment Lawyers Association argues that the statute was unconstitutionally vague at the time Final Exit allegedly assisted in D.D.'s suicide. Neither party briefed this argument. We do not consider it. *League of Women Voters Minn.*, 819 N.W.2d at 645 n.7 ("Generally, we do not decide issues raised by an amicus that are not raised by the litigants themselves.").

APPENDX B

STATE OF MINNESOTA

IN SUPREME COURT

A15-1826

State of Minnesota,

Respondent,

vs.

Final Exit Network, Inc.,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Final Exit Network, Inc. for further review be, and the same is, denied.

Dated: March 14, 2017

BY THE COURT:

Lorie S. Gildea
Chief Justice

LILLEHAUG, J., took no part in the consideration or decision of this case.

APPENDIX C

STATE OF MINNESOTA **COURT OF APPEALS**

JUDGMENT

State of Minnesota, Respondent, vs. Final Exit Network, Inc., Appellant

Appellate Court # A15-1826

Trial Court # 19HA-CR-12-1718

Pursuant to a decision of the Minnesota Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Dakota County District Court, Hastings Criminal Division herein appealed from be and the same hereby is affirmed and judgment is entered accordingly.

Dated and signed: March 15, 2017

FOR THE COURT

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: _____
Assistant Clerk

STATE OF MINNESOTA

COURT OF APPEALS
TRANSCRIPT OF JUDGMENT

I, AnnMarie S. O'Neill, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul *March 15, 2017*
Dated

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: _____
Assistant Clerk

APPENDIX D

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0563
A13-0564
A13-0565

State of Minnesota,
Appellant,

vs.

Final Exit Network, Inc.,
Respondent (A13-0565),

Lawrence Deems Egbert,
Respondent (A13-0564),

Roberta L. Massey,
Respondent (A13-0563).

Filed September 30, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Dakota County District Court
File Nos. 19HA-CR-12-1721, 19HA-CR-12-1719, 19HA-CR-12-1718

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Chief Deputy County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for appellant)

Robert Rivas (pro hac vice), General Counsel, Final Exit Network, Inc., Tallahassee, Florida; and

Mark D. Nyvold, Fridley, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

These consolidated pretrial appeals concern the constitutionality of Minn. Stat. § 609.215, subd. 1 (2006), which criminalizes speech that "advises" and "encourages" another in taking the other's life. Appellant State of Minnesota argues that the district court erred by determining that criminalizing speech that "advises" suicide violates the First Amendment to the United States Constitution. By notices of related appeals, respondents argue that the district court erred by determining that the statute's provision relating to speech that "encourages" can be narrowly construed to be constitutional. Respondents also argue that the district court erred by concluding that probable cause supports the indictment charging them with violating Minn. Stat. § 609.215 (2006). We affirm in part, reverse in part, and remand.

FACTS

Respondent Final Exit Network, Inc. (FEN) is a Georgia non-profit corporation that provides its members end-of-life counseling and exit-guide services, which include information and support for members seeking to hasten their deaths. If a member is interested in exit-guide services, a first responder interviews the member by phone to gather information about the member's medical condition, family history, reasons for wishing to hasten death, and desired timing of death. The first responder also asks the member to submit a personal letter relating these facts, along with documentation of the

member's medical condition, and instructs the member to read the book *Final Exit* by Derek Humphry or watch the video *Final Exit*.

FEN's medical director, respondent Lawrence Egbert, reviews the first responder's interview notes and the member's medical documentation and personal letter and either approves or rejects the member's request for exit-guide services. If Egbert approves the request, FEN's case coordinator, respondent Roberta Massey, assigns exit guides according to the member's location. Both Egbert and Massey also serve as exit guides. The assigned exit guides contact the member, develop a relationship with him or her, and provide information about helium asphyxiation, FEN's recommended method of hastening death. The exit guides instruct the member to purchase two specific types of helium tanks from a party store, a plastic "hood," and plastic tubing with joints that allow the lines from each tank to connect to a single tube running into the hood. FEN requires that members have the physical ability to perform those tasks themselves and tells exit guides never to purchase or set up the materials for a member. Two exit guides are present for the death and may hold the member's hands, not only for support and comfort, but also to prevent involuntary jerking that could result in tearing the plastic hood. The exit guides remain with the member until they are certain that the member is dead. They then remove from the residence and discard the helium tanks, the tubing, the hood, and any materials related to FEN.

The charges at issue here stem from the alleged involvement of FEN, Egbert, and Massey in the death of 57-year-old Doreen Dunn. At the time of Dunn's death in May 2007, she had been living with chronic pain for more than a decade, as a result of various

medical conditions, and had discussed suicide with her husband, who opposed it. But there was no sign of suicide in Dunn's home, and her autopsy listed her cause of death as atherosclerotic coronary artery disease. Law enforcement subsequently received information linking FEN to Dunn's death. Internal FEN records indicate that Dunn became a FEN member in early 2007. Telephone and fax records reveal Dunn had regular contact with various FEN representatives throughout early 2007, including faxing a personal letter and medical documentation to Massey. Flight records and internal FEN records show that Egbert and exit guide Jerry Dincin made single-day roundtrip flights from their home states of Maryland and Illinois, respectively, to Minnesota on the day of Dunn's death. And FEN records note when Dunn died.

In May 2012, a grand jury returned a 17-count indictment charging Egbert and FEN with (1) advising, encouraging, or assisting another in committing suicide; (2) aiding and abetting the offense of advising, encouraging, or assisting another in committing suicide; (3) interfering with a body or death scene; and (4) aiding and abetting the offense of interfering with a body or death scene; and charging Massey with (1) advising, encouraging, or assisting another in committing suicide; (2) aiding and abetting the offense of advising, encouraging, or assisting another in committing suicide; and (3) aiding and abetting the offense of interfering with a body or death scene.[1]

[1] The grand jury also indicted Dincin on the same charges as Egbert and indicted FEN president Thomas "Ted" Goodwin on charges of aiding and abetting the two primary offenses. Dincin has since died, and the charges against him were dismissed; the district court held that Minn. Stat. § 609.215 is unconstitutional as applied to Goodwin and dismissed the charges against him.

Massey, Egbert, and FEN moved to dismiss the charges of advising, encouraging, or assisting another in committing suicide, arguing that the parts of the statute that criminalize advising and encouraging are facially overbroad in violation of the First Amendment, and that the evidence presented to the grand jury did not establish probable cause to support the charges. The district court granted the motions in part, holding that the prohibition on advising is unconstitutionally overbroad but that the prohibition on encouraging is not because it can be narrowly construed to impose a necessary restriction only on speech meant to induce another to commit suicide. The district court further concluded that the evidence presented to the grand jury established a reasonable probability that Egbert's conduct fell within the constitutional parameters of Minn. Stat. § 609.215 and denied Egbert's and FEN's motions to dismiss for lack of probable cause. The district court also held the evidence established a reasonable probability that Massey aided and abetted Egbert (and Dincin) in that conduct, and denied her motion to dismiss as to the aiding-and-abetting charge but dismissed the charge of advising, encouraging, or assisting another in committing suicide.

The state filed these pretrial appeals challenging the district court's ruling on the "advises" part of the statute. We consolidated the three appeals. Egbert, Massey, and FEN (collectively, respondents) filed a notice of related appeal challenging the district court's ruling with respect to the "encourages" part of the statute and the district court's denial of their motion to dismiss the indictments for lack of probable cause.

D E C I S I O N

I. Minn. Stat. § 609.215's criminalization of speech that "advises" and "encourages" another in taking the other's life infringes on protected speech and is facially overbroad.

The parties[2] challenge the district court's determinations that the criminalization of speech that "advises" is facially overbroad but the criminalization of speech that "encourages" can be narrowly construed to avoid overbreadth.[3] The constitutionality of a statute presents a question of law, which we review de novo. *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012), *cert. denied*, 133 S. Ct. 1493 (2013). Under the First Amendment, "esthetic and moral judgments" are for the individual to make, and the government generally may not restrict expression "because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quotations omitted). "Content-based restrictions of speech are presumptively invalid, and ordinarily subject to strict scrutiny." *Crawley*, 819 N.W.2d at 100 (footnote omitted) (citations omitted). Certain content-defined categories of speech, however, do

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[2] The state initiated this pretrial appeal and therefore must demonstrate that the asserted error will have a "critical impact" on the outcome of the case. *State v. Schmidt*, 612 N.W.2d 871, 875 (Minn. 2000). Respondents do not dispute that this requirement is satisfied. Because the district court's ruling prompted the district court to dismiss one charge against Massey and reduces the state's case to circumstantial evidence on narrowed charges, we agree.

[3] This court rejected a similar constitutional challenge to Minn. Stat. § 609.215 in *State v. Melchert-Dinkel*, 816 N.W.2d 703 (Minn. App. 2012), *review granted* (Minn. Oct. 16, 2012), which is currently pending before our supreme court. Accordingly, our decision in *Melchert-Dinkel* has only "minimal precedential value" to our analysis in this case. *Fabio v. Bellomo*, 489 N.W.2d 241, 245 n.1 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993); *see also Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 276 (Minn. 2002) (noting that court of appeals is not a court of last resort as to the construction of statutes).

not receive the full protection of the First Amendment and may be regulated more freely. *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 2543 (1992) (discussing regulation of unprotected speech).

As the state concedes, the prohibitions on intentionally advising and encouraging another in committing suicide are content-based restrictions on speech because "whether a person may be prosecuted under the statute depends entirely on what the person says." *See Crawley*, 819 N.W.2d at 101. We therefore consider (1) whether the First Amendment protects speech advising or encouraging another in suicide and, if so, (2) whether the criminalization of such speech survives strict scrutiny.

A. Protected vs. unprotected speech

First Amendment protection presumptively extends to all speech, from the "[w]holly neutral futilities" of private everyday life to the discomfiting array of public discourse. *See Cohen v. California*, 403 U.S. 15, 20-21, 25, 91 S. Ct. 1780, 1785-86, 1788 (1971) (alteration in original) (quotation omitted) (holding "distasteful" objection to military draft emblazoned on a jacket is protected speech); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (holding that "contemptible" false claim to Congressional Medal of Honor is protected speech); *Brown*, 131 S. Ct. at 2738 (holding that "disgusting" graphically violent video games sold to children are protected speech). Freedom of speech excludes only those "historic and traditional categories" of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 130 S. Ct. at 1584 (quotations omitted). These "well-

defined and narrowly limited" categories of unprotected speech are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.*

The state acknowledges that speech intentionally advising or encouraging another in committing suicide does not fall within any of these traditional categories but urges us to recognize such speech as a new category of unprotected speech.[4] The state contends that speech advising or encouraging another in suicide has little social value and is comparable to the historically unprotected category of speech integral to criminal conduct because suicide is historically recognized as a "grievous public wrong akin to conduct statutorily identified as a crime." We are not persuaded.

First, the Supreme Court expressly rejected the cost-benefit analysis the state advocates. In *Stevens*, the government urged the Supreme Court to recognize depictions of animal cruelty as a new category of unprotected speech, arguing that recognition should turn on the use of a simple balancing test that weighs "the value of the speech against its societal costs." *Id.* at 1585. The Supreme Court rejected that proposal as "startling and dangerous," explaining that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.*

[4] The state does not expressly challenge the district court's conclusion that speech encouraging another in taking the other's own life is protected speech. For the sake of clarity, however, we construe the state's argument to encompass both categories of speech.

Second, while the Supreme Court has stated that there may be "some categories of speech that have been historically unprotected [though] not yet . . . specifically identified or discussed as such in [Supreme Court] case law," *id.* at 1586, it cautioned that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown*, 131 S. Ct. at 2734. Rather, the state must present "persuasive evidence" that the content-based speech restriction in question "is part of a long (if heretofore unrecognized) tradition of proscription." *Id.*; *see also Alvarez*, 132 S. Ct. at 2547 (declining to recognize new category of unprotected speech absent such evidence).

The state has not done so here. The state asserts only that speech intentionally advising or encouraging another in suicide is similar to speech integral to criminal conduct and therefore similarly unprotected. We disagree. While the Supreme Court has permitted clarification of traditionally unprotected categories of speech, *see Ginsberg v. New York*, 390 U.S. 629, 638, 88 S. Ct. 1274, 1279-80 (1968) (permitting adjustment of obscenity category to account for minors), it has rejected similar attempts to shoehorn new categories into traditionally unprotected categories of speech, *see Alvarez*, 132 S. Ct. at 2545 (rejecting argument that all false speech is unprotected because defamation and fraud are unprotected); *Brown*, 131 S. Ct. at 2734-35 (rejecting argument that graphic violence is unprotected because it is similar to obscenity). In short, the specific content-defined category of speech must itself be traditionally proscribed. We discern no such tradition with respect to speech advising or encouraging another in suicide. To the contrary, while assisting suicide is traditionally and broadly proscribed, *see generally*

Washington v. Glucksberg, 521 U.S. 702, 714-16, 117 S. Ct. 2258, 2264-65 (1997), few states join Minnesota in taking the additional step of criminalizing speech advising or encouraging another in the noncriminal act of taking one's own life.[5] *See* Cal. Penal Code § 401 (West 2010); La. Rev. Stat. Ann. § 14: 32.12 (West 2007); Miss. Code Ann. § 97-3-49 (West 2006); Okla. Stat. Ann. tit. 21, § 813 (West 2002); S.D. Codified Laws § 22-16-37 (2006); *Standford v. Kentucky*, 492 U.S. 361, 373, 109 S. Ct. 2969, 2977 (1989) (stating that "the primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws"). Accordingly, we discern no "long . . . tradition of proscri[bing]" speech that advises or encourages another in taking the other's life.

Because the state has not demonstrated that speech intentionally advising or encouraging another in the commission of suicide is traditionally unprotected speech, the prohibition of such speech in Minn. Stat. § 609.215 is invalid unless the state can demonstrate that it passes strict scrutiny. *See Brown*, 131 S. Ct. at 2738.

B. Strict scrutiny

A restriction on the content of protected speech passes strict scrutiny when it is (1) justified by a compelling government interest and (2) narrowly drawn to serve that interest. *Id.* A restriction is narrowly drawn when it is "actually necessary" to achieve the government's interest. *Alvarez*, 132 S. Ct. at 2549 (quotation omitted). That is, "[t]here must be a direct causal link between the restriction imposed and the injury to be

[5] Indeed, review of the history and evolution of criminal laws related to suicide reveals that criminalization of advising or encouraging another in suicide was based on a theory of aiding and abetting the then-crime of suicide. *See Glucksberg*, 521 U.S. at 715-16, 117 S. Ct. at 2264-65.

prevented," and the restriction must be "the least restrictive means among available, effective alternatives." *Id.* at 2549, 2551 (quotation omitted). A law that restricts substantially more or less speech than necessary fails this test. *See Brown*, 131 S. Ct. at 2738-42 (discussing overbreadth and underbreadth); *Stevens*, 130 S. Ct. at 1587 (stating that a law "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").

As to the first prong of the strict-scrutiny analysis, it is well established that the state has a compelling interest in preserving human life. *See Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282, 110 S. Ct. 2841, 2853 (1990). This extends to preventing suicide and protecting vulnerable groups from suicidal impulses and undue influence, but the state also has an interest in protecting the individual's "dignity and independence at the end of life." *See Glucksberg*, 521 U.S. at 716, 730-31, 117 S. Ct. at 2265, 2272-73.

To determine whether Minnesota's prohibition of speech advising or encouraging another in suicide is necessary to serve the state's interests, we must first identify what speech the statute restricts. *See United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838 (2008) (stating that "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers"). We construe statutes de novo, with the goal of ascertaining and giving effect to the legislature's intent. *Crawley*, 819 N.W.2d at 102. We consider the statute "as a whole," giving words and phrases their plain and ordinary meaning. *In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013).

The plain language of Minn. Stat. § 609.215 is broad, criminalizing any speech that "intentionally advises [or] encourages . . . another in taking the other's own life." While the statute does not define its terms, advise ordinarily means to "offer advice to," to counsel, or to inform. *See The American Heritage Dictionary* 25 (5th ed. 2011); *Webster's Third New Int'l Dictionary* 32 (unabr. 1993). And encourage means to "inspire with hope, courage, or confidence," to support, or to stimulate or spur on. *The American Heritage Dictionary* 587 (5th ed. 2011); *Webster's Third New Int'l Dictionary* 747 (1993). None of these definitions requires the speaker to take the active role in another's suicide that the term assists requires.[6] *See American Heritage Dictionary* 108 (5th ed. 2011) (defining assist as to give help, support, or aid to another); *Webster's Third New Int'l Dictionary* 132 (unabr. 1993) (defining assist as to perform some service for another). Nor does the statute require causation or even express promotion of suicide but only advising or encouraging another "in taking the other's own life." As written, therefore, Minn. Stat. § 609.215 criminalizes any and all expressions of support, guidance, planning, or education to people who want to end their own lives, whether from a public platform, such as a book, or in the private setting of a hospital room or family home. It likely criminalizes even patently political speech endorsing a right to die.

As the district court concluded, and the state now concedes, the state's interest in preventing suicide does not justify these extreme limitations on protected speech about suicide. No significant causal connection exists between the broad range of advising and

[6] We observe that several other states refer to aiding or facilitating suicide, e.g., N.J. Stat. § 2C:11-6 (West 2005) ("aids"); N.D. Cent. Code Ann. § 12.1-16-04 (West 2012) ("facilitates"), which we consider synonymous with assisting.

encouraging speech prohibited by Minn. Stat. § 609.215 and suicide. And the state could achieve its goals through less-restrictive means. To protect vulnerable people from being coerced or unduly influenced to commit suicide, the state could draft a statute that prohibits only that speech.[7] *See, e.g.*, Del. Code Ann. tit. 11, § 645 (West 2007) ("causes"); 720 Ill. Comp. Stat. Ann. § 5/12-34.5 (West 2013) ("coerces"); 18 Pa. Cons. Stat. Ann. § 2505 (West 1983) ("causes . . . by force, duress or deception"). And the state has already expressly prohibited assisting suicide, so restrictions on advising and encouraging speech are not necessary to prevent assisted suicide.

The district court nonetheless concluded that the prohibition of speech that "encourages" another in suicide can be narrowly construed to survive strict scrutiny. And the state argues that our supreme court's recent decision in *Crawley* requires us to similarly construe "advises" to limit the reach of that prohibition on speech to only those categories of speech that necessarily infringe on the state's compelling interest.[8] We disagree. In *Crawley*, the supreme court held that a statute criminalizing false reports about police officers is constitutional when narrowly construed to encompass only unprotected defamatory speech. 819 N.W.2d at 105-07. But it did not do so based on a

[7] We further observe that the term "encourages" plausibly encompasses urging speech, but that is not necessarily the same as speech causing another to commit suicide through undue influence or duress—speech that likely would be unprotected speech integral to separate actionable offenses. Consequently, we cannot say that Minn. Stat. § 609.215 addresses this category of speech at all, let alone as part of an overbroad restriction on encouraging speech.

[8] The state urges us to construe the statute to prohibit only speech "that intentionally advises a specific person, with the specific intent to aid the person in taking the other person's own life," but acknowledges that the plain language of the statute does not so read.

freewheeling authority to revise facially unconstitutional statutes. Rather, it relied on the Supreme Court's authorization and encouragement to state supreme courts to "sustain the constitutionality of state statutes regulating speech by construing them narrowly *to punish only unprotected speech*." *Crawley*, 819 N.W.2d at 105 (emphasis added) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 770 (1942)); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973) (explaining that a statute should not be declared invalid for facial overbreadth if a "limiting construction has been or could be placed on the challenged statute" to "remove the seeming threat or deterrence to constitutionally protected expression"). Because the statute at issue in *Crawley* encompassed unprotected defamatory speech and protected non-defamatory speech, the supreme court construed the statute narrowly to punish only the unprotected category of speech. 819 N.W.2d at 104, 107. That same approach cannot save the "advises" and "encourages" provisions in Minn. Stat. § 609.215.

The plain language of Minn. Stat. § 609.215 limits only protected speech. When a statute addresses only protected speech, a court cannot "rewrite a . . . law to conform it to constitutional requirements." *See Stevens*, 130 S. Ct. at 1592 (quotation omitted); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) ("Although this court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute."). To do so "would constitute a serious invasion of the legislative domain" and "sharply diminish" the legislature's incentive to draft appropriately narrow laws in the first place. *Stevens*, 130 S. Ct. at 1592. Because section 609.215 lacks any identifiable category of

unprotected speech to which the statute's scope can be limited, we cannot impose a narrowing construction that saves the statute.

Moreover, even as construed by the state, the statute chills a significant amount of protected speech that does not bear a necessary relationship to the state's objective of preventing suicide. In particular, the state asserts that it would only seek to proscribe speech intended to educate a specific person whom the actor knows to be contemplating suicide about methods of doing so. This prohibition is significantly more narrow than the sweeping statutory language but still bears no necessary relationship to preventing suicide since less specifically targeted information about methods of suicide is easily accessible in numerous fora and just as likely to facilitate suicide.

We do not doubt the state's substantial concern about suicide and the vulnerability of those contemplating ending their lives. But the state may not infringe on constitutionally protected speech, no matter how significant the concern, unless it demonstrates that doing so is necessary to address that concern. Because it has failed to do so here, we conclude that the provisions in Minn. Stat. § 609.215 criminalizing speech advising or encouraging another in taking the other's own life are unconstitutional.

II. The district court did not err by denying respondents' motion to dismiss the indictments for lack of probable cause.

A grand jury indictment carries "a presumption of regularity," and the defendant seeking to overturn it "bears a heavy burden." *State v. Eibensteiner*, 690 N.W.2d 140, 151 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005). Probable cause exists to charge a defendant when evidence worthy of the grand jury's consideration—both direct

and circumstantial—renders the charge reasonably probable. *State v. Flicek*, 657 N.W.2d 592, 596 (Minn. App. 2003); *see State v. Martin*, 567 N.W.2d 62, 66 (Minn. App. 1997) (permitting reliance on circumstantial evidence), *review denied* (Minn. Sept. 18, 1997). A reviewing court defers to the grand jury's role as fact-finder and should dismiss an indictment only when there are no issues of fact and the defendant's conduct could not constitute the offense as a matter of law. *Eibensteiner*, 690 N.W.2d at 151; *see also* Minn. R. Crim. P. 17.06, subd. 2(1)(a). We review de novo a district court's decision on a motion to dismiss an indictment for lack of probable cause. *See State v. Inthavong*, 402 N.W.2d 799, 802-03 (Minn. 1987) (considering directly the sufficiency of evidence before grand jury); *Eibensteiner*, 690 N.W.2d at 154 (same).

Respondents argue that the indictment must be dismissed because the grand jury was instructed to indict if there is probable cause to believe respondents intentionally advised, encouraged, or assisted Dunn in committing suicide, rather than receiving a more limited instruction consistent with our conclusion that the constitutional reach of Minn. Stat. § 609.215 is limited to criminalizing intentionally assisting another in committing suicide. We disagree. "[E]rroneous instructions given a grand jury, whether by the court or the prosecutor, will not invalidate an indictment absent a showing of prejudice," which "ordinarily will be found only on those rare occasions where the grand jury instructions are so egregiously misleading or deficient that the fundamental integrity of the indictment process itself is compromised." *Inthavong*, 402 N.W.2d at 802. And as the state pointed out at oral argument, it was not required to charge the offenses at issue here by indictment. *See* Minn. R. Crim. P. 17.01, subd. 1 (requiring indictment only for

offenses punishable by life imprisonment and permitting all other offenses to be charged by complaint). Accordingly, any flaws in the instructions to the grand jury are harmless so long as the evidence establishes a reasonable probability that respondents' conduct fell within the constitutional parameters of Minn. Stat. § 609.215.

The record indicates that Egbert and Dincin were Dunn's exit guides. While the record contains evidence that FEN instructs exit guides not to participate in procuring or assembling the materials used for helium asphyxiation, it also contains evidence suggesting such participation in Dunn's case. Specifically, Dunn's physical limitations, which prevented her from engaging in activities requiring fine motor skills or driving more than a few blocks from home alone, and the apparent absence of the materials necessary for helium asphyxiation in the home before her death reasonably support an inference that Egbert and/or Dincin procured or assembled the materials for her, thereby assisting in her suicide. And evidence that FEN expressly permits exit guides to hold a member's hand to prevent tearing of the plastic hood and instructs them to ensure the member is dead before removing the hood could reasonably be considered assistance in suicide attributable equally to Egbert and FEN. *See State v. Christy Pontiac-GMC, Inc.*, 354 N.W.2d 17, 20 (Minn. 1984) (stating that corporate liability for specific-intent crimes requires proof that (1) the agent was acting within the scope of employment, (2) in furtherance of the corporation's business interests, and (3) the criminal acts were authorized, tolerated, or ratified by corporate management). Finally, the evidence of Massey's role in FEN and her communications with Dunn, Dincin, and Egbert specifically about Dunn's request for exit-guide services, establishes a reasonable

probability that she intentionally aided and abetted Egbert and Dincin in assisting Dunn's suicide. On this record, the district court did not err by denying respondents' motions to dismiss the indictments.

In sum, the provisions in Minn. Stat. § 609.215 criminalizing speech intentionally advising or encouraging another in taking the other's own life are unconstitutional infringements on protected speech. However, the record contains sufficient evidence to establish a reasonable probability that each respondent violated the undisputedly constitutional prohibition on assisting suicide. Accordingly, the district court did not err by denying respondents' motions to dismiss the indictments.

Affirmed in part, reversed in part, and remanded.

APPENDIX E

STATE OF MINNESOTA

IN SUPREME COURT

A11-0987

Court of Appeals

Anderson, J.
Dissenting, Page, J.
Took no part, Wright, and Lillehaug, JJ.

State of Minnesota,

Respondent,

vs.

Filed: March 19, 2014
Office of Appellate Courts

William Francis Melchert-Dinkel,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Benjamin Bejar, Assistant County Attorney, Faribault, Minnesota, for respondent.

Terry A. Watkins, Watkins Law Office, LLC, Faribault, Minnesota, for appellant.

Cort C. Holten, Jeffrey D. Bores, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Minnesota Police and Peace Officers Association Legal Defense Fund.

Robert Rivas, Sachs Sax Caplan, P.L., Tallahassee, Florida, for amici curiae Final Exit Network, Inc. and Jerry Dincin.

Kyle White, Saint Paul, Minnesota, for amicus curiae National Alliance on Mental Illness of Minnesota.

S Y L L A B U S

1. The speech prohibited by Minn. Stat. § 609.215, subd. 1 (2012), does not fall within the "speech integral to criminal conduct" or "incitement" categories of unprotected First Amendment speech.

2. The specific speech used by Melchert-Dinkel in this case does not fall within the "fraud" category of unprotected First Amendment speech.

3. The statutory prohibition against assisting another to commit suicide does not violate the First Amendment because it is narrowly drawn to serve a compelling government interest.

4. The statutory prohibitions against encouraging and advising another to commit suicide violate the First Amendment because they are not narrowly drawn to serve a compelling government interest.

5. The terms "advises" and "encourages" are severed from Minn. Stat. § 609.215, subd. 1, as unconstitutional.

6. Because the district court made no findings regarding whether appellant assisted the victims' suicides, a remand is required.

Reversed and remanded.

O P I N I O N

ANDERSON, Justice.

After communicating with appellant William Melchert-Dinkel, Mark Drybrough and Nadia Kajouji each committed suicide. This appeal presents the issue of whether the State of Minnesota may, consistent with the First Amendment, prosecute Melchert-

Dinkel for advising, encouraging, or assisting another in committing suicide in violation of Minn. Stat. § 609.215, subd. 1 (2012), which makes it illegal to "intentionally advise[], encourage[], or assist[] another in taking the other's own life." We conclude that the State may prosecute Melchert-Dinkel for assisting another in committing suicide, but not for encouraging or advising another to commit suicide.[1] Because the district court did not make a specific finding on whether Melchert-Dinkel assisted the victims' suicides, we remand for further proceedings consistent with his opinion.

Melchert-Dinkel, a resident of Faribault, was convicted of two counts of aiding suicide under Minn. Stat. § 609.215, subd. 1. Posing as a depressed and suicidal young female nurse, Melchert-Dinkel responded to posts on suicide websites by Mark Drybrough of Coventry, England, and Nadia Kajouji of Ottawa, Canada. In each case, he feigned caring and understanding to win the trust of the victims while encouraging each to hang themselves, falsely claiming that he would also commit suicide, and attempting to persuade them to let him watch the hangings via webcam.

Drybrough, who was 32 years old at the time Melchert-Dinkel contacted him in 2005, had suffered from significant mental and physical health problems for many years, including a condition that was "like having [the] flu all the time." His contact with Melchert-Dinkel began after the appellant responded to Drybrough's posting in an online forum about suicide asking about methods to commit suicide by hanging without "access

[1] For purposes of this opinion, we use the phrasing of encouraging or advising another *to* commit suicide interchangeably with the statutory language of advising or encouraging "another *in* taking the other's own life." Minn. Stat. § 609.215, subd. 1 (emphasis added).

to anything high up to tie the rope to." Melchert-Dinkel described how to commit suicide by hanging by tying a rope to a doorknob and slinging the rope over the top of the door.

In a series of online conversations with Melchert-Dinkel, Drybrough described an existence in which he was trapped between a life so miserable he wanted to end it, and the fear, uncertainty, and even occasional bouts of hope for a better future that prevented him from following through on his suicidal thoughts. Drybrough described practicing the hanging method Melchert-Dinkel taught him, but he was unable to fully commit and worried about his parents seeing the marks on his neck. Through all of this, Melchert-Dinkel presented himself as a compassionate and caring nurse, who not only could relate to Drybrough's misery, but also could provide practical advice due to her medical experience. He told Drybrough that he hoped "to be a [friend] at the end for you [as you] are for me." In Drybrough's last message, sent on July 23, 2005, he told Melchert-Dinkel that he was scared:

> I keep holding on to the hope that things might change. . . . I'm dying but slowly, day by day. I don't want to waste [anyone's] time. If you want someone who's suicidal, I'm just not there yet. You either do it or you don't, and I don't and [haven't]. [I'm] used to being alone. Sorry. I admire your courage, I wish I had it.

Drybrough hanged himself four days later.

On March 1, 2008, 19-year-old Nadia Kajouji of Ottawa, Canada, posted a message on a suicide website asking for advice on suicide methods that would be quick, reliable, and appear to be an accident to her family and friends. Five days later, Melchert-Dinkel responded, pretending to be a 31-year-old emergency room nurse who

was also suicidal. Again, he presented himself as a caring and compassionate friend who understood Kajouji's plight and wanted to help.

Kajouji described her plan to jump off a bridge into a hole in the ice covering the river below while wearing ice skates, which she hoped would make her death look like an accident. Melchert-Dinkel tried repeatedly to dissuade her from her plan and convince her instead to hang herself. He also made oblique attempts to persuade her to kill herself immediately, saying they "would die today if we could" and "I wish [we both] could die now."

Melchert-Dinkel had a short instant message conversation with Kajouji on March 9, in which Kajouji informed him that she would be following through with her bridge-jumping plan later that night. Melchert-Dinkel suggested hanging one last time and claimed that he would be committing suicide the next day. Kajouji sent an e-mail to her roommates that night saying that she was going ice-skating. She was never seen again. Six weeks later, her body, ice skates still attached, was found in the river.

After being contacted by an individual concerned about an online predator who was encouraging people to commit suicide by hanging, Minnesota law enforcement officials eventually determined that both Drybrough and Kajouji had engaged in e-mail and chat communications with someone using different accounts but the same IP address. They tracked the address to Melchert-Dinkel's computer, and after initially blaming his daughters, Melchert-Dinkel confessed to communicating with Drybrough and Kajouji.

Melchert-Dinkel was tried in the Rice County District Court on two counts of aiding suicide under Minn. Stat. § 609.215, subd. 1. He agreed to a stipulated facts trial

to preserve his right to appeal his convictions based on sufficiency of the evidence. The district court found him guilty on both counts. The district court specifically found that Melchert-Dinkel "intentionally *advised* and *encouraged*" both Drybrough and Kajouji to take their own lives, concluding that the speech at issue fell outside the protections of the First Amendment. *State v. Melchert-Dinkel*, No. 66-CR-10-1193, Order at 28, 32 (Rice Cnty. Dist. Ct. filed March 15, 2011) (emphasis added).

On appeal to the court of appeals, Melchert-Dinkel argued that Minn. Stat. § 609.215, subd. 1, violates the First Amendment on its face and as applied to his specific speech. The State argued that, on its face, the statute prohibits speech that is not protected by the First Amendment—specifically speech that is "integral to [an] unlawful act" or that "imminently incites lawless conduct." Additionally, the State argued that, even if the statute reaches some speech that is protected by the First Amendment, the statute is constitutional because it is narrowly tailored to serve the State's compelling interests in preserving life and protecting vulnerable members of society. Concluding that "speech that intentionally advises, encourages, or assists another to commit suicide is an integral part" of both "the criminal conduct of physically assisting suicide" and another person's suicide, which is "harmful conduct that the state opposes as a matter of public policy," the court of appeals held that Minn. Stat. § 609.215, subd. 1, prohibits speech that is unprotected by the First Amendment. *State v. Melchert-Dinkel*, 816 N.W.2d 703, 714 (Minn. App. 2012). The court of appeals also held that there is "no apparent unconstitutional overbreadth because the statute covers so little, and the broad arena of pro-suicide speech not proscribed by the statute includes the full spectrum of

social or political communication on the topic." *Id.* at 715. Melchert-Dinkel filed a petition for review, which we granted.[2]

The question before us is whether the State can, consistent with the First Amendment, prosecute Melchert-Dinkel for assisting, advising, or encouraging another in committing suicide. For the reasons set forth below, we conclude that the State may prosecute Melchert-Dinkel for assisting another in committing suicide, but not for encouraging or advising another to commit suicide.

I.

We review the constitutionality of statutes de novo. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 298 (Minn. 2000). The State bears the burden of showing that a content-based restriction on speech does not violate the First Amendment. *State v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 885-86 (Minn. 1992).

The First Amendment to the U.S. Constitution, which applies to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). 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

[2] After we granted review and granted leave to some parties to appear as amici, the State moved to strike the amicus brief filed by Final Exit Network, Inc. and Jerry Dincin because that brief did not support the State's position in this case. Without deciding whether the Final Exit Network's brief was timely, Minn. R. Civ. App. P. 129.02, we note that the brief complied with the requirement to "indicate whether [it] . . . suggest[s] affirmance or reversal." Minn. R. Civ. App. P. 129.01. We therefore deny the motion to strike.

subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Allowing the government to restrict expressive activity because of its content "would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Id.* at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). One example of a content-based restriction of speech is when the decision of whether to prosecute an individual depends entirely on what he or she says. *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012) (citing *Holder v. Humanitarian Law Project*, ___ U.S. ___, 130 S. Ct. 2705, 2712, 2723-24 (2010)).

But the Supreme Court has long permitted some content-based restrictions in a few limited areas, in which speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Among the traditional exceptions to the First Amendment are speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and fraud, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003). The State asserts that the speech at issue is unprotected because it falls under each of these three exceptions, which we now consider in turn.

A.

The State first argues that, on its face, Minn. Stat. § 609.215, subd. 1, proscribes speech that falls under the "speech integral to criminal conduct" exception to the First Amendment. We disagree.

The Supreme Court has held that the First Amendment's protections do not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney*, 336 U.S. at 498. In *Giboney*, the Court upheld an injunction against union picketing, by which the union was attempting to compel a wholesale distributor to sign an agreement that would have violated Missouri's antitrust laws. *Id.* at 492-93, 504. The Court based its holding on the fact that the "sole, unlawful immediate objective [of the picketing] was to induce [the distributor] to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers." *Id.* at 502; *see also New York v. Ferber*, 458 U.S. 747, 761-62 (1982) (excluding the advertising and sale of child pornography from First Amendment protection partly because these activities were an "integral part" of its unlawful production).

Minnesota Statutes § 609.215, subd. 1, provides that "[w]hoever intentionally advises, encourages, or assists another in taking the other's own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both." While suicide itself was once a criminal offense in Minnesota, the Legislature repealed the statute criminalizing it in 1911. Act of April 20, 1911, ch. 293, 1911 Minn. Laws 409, 409. Suicide also is no longer a crime in the United Kingdom or Canada. *See* Suicide Act 1961, 9 Eliz. 2, c. 60, § 1 (U.K.); *Rodriguez v. British Columbia*

(Attorney General), [1993] 3 S.C.R. 519, 597-98 (Can.) (discussing the decriminalization of attempted suicide). Thus, the major challenge with applying the "speech integral to criminal conduct" exception is that suicide is not illegal in any of the jurisdictions at issue. The holding in *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. *Giboney*, 336 U.S. at 498 (emphasis added). It is true, as the court of appeals noted, that "suicide, despite no longer being illegal in Minnesota, remains harmful conduct that the state opposes as a matter of public policy." *Melchert-Dinkel*, 816 N.W.2d at 714. But the Supreme Court has never recognized an exception to the First Amendment for speech that is integral to merely harmful conduct, as opposed to illegal conduct.

Applying the "speech integral to criminal conduct" exception to harmful conduct would be an expansion of the exception, and following the guidance of the Supreme Court, we are wary of declaring any new categories of speech that fall outside of the First Amendment's umbrella protections. *See Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, 131 S. Ct. 2729, 2734 (2011) ("[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment of the American people, embodied in the First Amendment, that the benefits of its restrictions on the Government outweigh the costs." (citations omitted) (internal quotation marks omitted)); *United States v. Stevens*, 559 U.S. 460, 472 (2010) (stating that the Supreme Court "cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First

Amendment"). Accordingly, we reject the court of appeals' approach, which expanded the "speech integral to criminal conduct" exception to include speech integral to "harmful, proscribable conduct." *See Melchert-Dinkel*, 816 N.W.2d at 713.

The State urges us to hold, as did the court of appeals, that the "speech integral to criminal conduct" exception applies here because speech that intentionally advises, encourages, or assists another in committing suicide "is an integral part of the criminal conduct of physically assisting suicide." *Id.* at 714. But the statute, on its face, does not require a person to *physically* assist the suicide. In the absence of a physical-assistance requirement, the analysis proposed by the State is circular because it effectively upholds the statute on the ground that the speech prohibited by section 609.215 is an integral part of a violation of section 609.215. Accordingly, we reject the State's argument that the "speech integral to criminal conduct" exception to the First Amendment applies here.

B.

The State next argues that, on its face, Minn. Stat. § 609.215, subd. 1, proscribes speech that falls under the "incitement" exception to the First Amendment. We again disagree.

The First Amendment only 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." *Brandenburg*, 395 U.S. at 447. Mere "advocacy of illegal action at some indefinite future time" is "not sufficient to permit the State to punish" speech. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

The State argues that we should focus on the "imminence" requirement and conclude that "imminent" does not necessarily mean "immediate," and that, in any event, Melchert-Dinkel's conduct would qualify even under an "immediate" standard. Even if that were true, again the obvious problem is that suicide is no longer a criminal act in any jurisdiction relevant to this matter. It is difficult to articulate a rule consistent with the First Amendment that punishes an individual for "inciting" activity that is not actually "lawless action." Thus, the State's argument fails because suicide is not unlawful and cannot be considered "lawless action." Accordingly, we reject the State's argument that the "incitement" exception to the First Amendment applies here.

C.

Finally, the State argues that, as applied to Melchert-Dinkel, Minn. Stat. § 609.215, subd. 1, does not violate the First Amendment because his communications with the victims involved "deceit, fraud, and lies," and therefore the speech used by Melchert-Dinkel falls under the "fraud" exception to the First Amendment. We again disagree.

There is no dispute as to either the depravity of Melchert-Dinkel's conduct or the fact that he lied to his victims. But to the extent the State argues that Melchert-Dinkel's speech is unprotected simply because he was lying, the argument fails. A plurality of the Supreme Court has recognized that speech is not unprotected simply because the speaker knows that he or she is lying. *United States v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537, 2545-47 (2012) (plurality opinion) (striking down a statute that criminalized lying about the receipt of military decorations or medals). Allowing the government to declare false

speech to be a criminal offense would allow governments to compile "an endless list of subjects the National Government or the States could single out." *Id.* at ___, 132 S. Ct. at 2547.

To the extent the State argues that Melchert-Dinkel's speech is unprotected because it amounted to fraud, that argument fails as well. As a plurality of the Court recognized in *Alvarez*, the government can restrict speech when false claims are made to "gain a material advantage," including money or "other valuable considerations," such as offers of employment. *Id.* at ___, 132 S. Ct. at 2547-48. But there are a multitude of scenarios in which the speech prohibited by Minn. Stat. § 609.215, subd. 1, would not be fraudulent, and thus this exception does not protect the statute from a facial challenge. Furthermore, we fail to see how, even under the unusual facts of this case, Melchert-Dinkel gained a material advantage or valuable consideration from his false speech. Accordingly, we reject the State's argument that the "fraud" exception to the First Amendment applies here.[3]

II.

The fact that the State's unprotected-speech arguments are unavailing does not end our inquiry. The government can still proscribe protected speech if it can show that the restriction passes "strict scrutiny," meaning that the law (1) is justified by a compelling

[3] We recognize that speech may also fall in a heretofore unrecognized category of unprotected First Amendment speech. *See Stevens*, 559 U.S. at 472 (acknowledging the possibility that there "are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law"). But given that this argument was not made in this appeal, we decline to address the possibility of additional categories of unprotected speech here.

government interest and (2) is narrowly drawn to serve that interest. *Brown*, ___ U.S. at ___, 131 S. Ct. at 2738. The State "must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Id.* (citations omitted) (internal quotation marks omitted). In other words, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Alvarez*, ___ U.S. at ___, 132 S. Ct. at 2549.

Minnesota Statute § 609.215, subd. 1, prohibits a person from assisting, advising, or encouraging another in committing suicide. The State has satisfied the first prong of the strict scrutiny test because the State has a compelling interest in preserving human life.[4] *See Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 485 (1983). With regard to the second prong of the strict scrutiny test, we consider whether the prohibitions against assisting, advising, or encouraging are narrowly drawn to serve the State's interest in preserving human life, beginning with the prohibition against "assist[ing]" another to commit suicide.

A.

Although the U.S. Supreme Court has never considered a First Amendment challenge to a statutory prohibition against assisting another in committing suicide, the

[4] This compelling interest in preserving human life by preventing suicide is illustrated, in part, by the amicus brief filed by National Alliance on Mental Illness of Minnesota. The brief notes that in 2010 there were more than 38,000 suicides in the United States, including 599 suicides in Minnesota. Suicide was the second leading cause of death for people aged 10 to 24 that year. The brief also reports that about 15 percent of Americans will suffer clinical depression at some point and 30 percent of all clinically depressed patients attempt suicide. We have no doubt that suicide is a significant public health concern.

Court did reject a due process challenge to a statute that prohibited a person from knowingly causing or aiding another person to attempt suicide in *Washington v. Glucksberg*, 521 U.S. 702, 707, 735 (1997). The Court in *Glucksberg* noted that the law had historically rejected, rather than protected, attempts to permit assisted suicide. *Id.* at 723, 728. The Court, therefore, reasoned that the right to assistance in committing suicide is not specially protected as a fundamental liberty interest that is " 'deeply rooted in this Nation's history and tradition' ." *Id.* at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). The *Glucksberg* Court went on to conclude that there was no question that the prohibition against causing or aiding suicide was rationally related to the State's legitimate interest in preserving human life, protecting vulnerable groups, protecting the integrity of the medical profession, and avoiding the path towards voluntary or involuntary euthanasia. *Glucksberg*, 521 U.S. at 728-34. We acknowledge that *Glucksberg* is not controlling here because it involved an application of the rational basis test in the context of a due process challenge. Nevertheless, the *Glucksberg* Court's emphatic statement that the rational basis test was "unquestionably met," *id.* at 728, suggests that a properly tailored prohibition against assisting suicide might survive a higher level of scrutiny.

Keeping in mind the historical background and legal principles set forth in *Glucksberg*, we turn to the statutory prohibition against assisting another in committing suicide. We note first that section 609.215 prohibits assisting, advising, or encouraging "another in taking the other's own life." The use of the word "another," which refers to an individual, rather than "others," which would refer to a larger audience, shows that the

Legislature intended for this statute only to reach directly targeted speech aimed at a specific individual. The requirement that the speech be aimed at a particular individual narrows the reach of the statute significantly, as it excludes any general public discussion on the topic of suicide from penalty.[5]

The restriction on speech is also narrowed by the term "assists" itself. Minnesota Statutes § 609.215, subd. 1, does not define the word "assists." In the absence of an applicable statutory definition, we generally give statutory terms their common and ordinary meanings. *See State v. Leathers*, 799 N.W.2d 606, 609 (Minn. 2011) (citing Minn. Stat. § 645.08 (2010)). The ordinary definition of the verb "assist" is "help," which in turn is defined as to "provide (a person etc.) with what is needed for a purpose." *The New Shorter Oxford English Dictionary* 132, 1216 (1993). Consistent with the plain language of the statute, we therefore conclude that the "assist[]" prohibition of section 609.215, subdivision 1, proscribes speech or conduct that provides another person with what is needed for the person to commit suicide. This signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support. Rather, "assist," by its plain meaning, involves enabling the person to commit suicide. While enablement perhaps most obviously occurs in the context of physical assistance, speech alone may also enable a person to commit suicide. Here, we need only

[5] This narrowing resolves the concerns of the dissent that the rule announced today would prohibit the publication of books that describe successful suicidal behavior. The statute is only concerned with speech directly targeted at an individual, not speech made in public discourse.

note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide.

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. We therefore reject Melchert-Dinkel's argument that the statutory prohibition against assisting another in committing suicide facially violates the First Amendment.

B.

Our conclusion that the statutory prohibition against assisting another in committing suicide survives strict scrutiny does not end our analysis because section 609.215, subdivision 1, also prohibits "advis[ing]" and "encourag[ing]" another to commit suicide. The statute does not define "advises" or "encourages." As mentioned earlier, in the absence of applicable statutory definitions, we generally give statutory terms their ordinary and common meanings. *See Leathers*, 799 N.W.2d at 609. The ordinary definition of the verb "advise" is to "[i]nform." *The New Shorter Oxford English Dictionary* 32 (1993). The ordinary definition of the verb "encourage" is to "[g]ive courage, confidence, or hope." *Id.* at 814.

Unlike the definition of "assist," nothing in the definitions of "advise" or "encourage" requires a direct, causal connection to a suicide. While the prohibition on assisting covers a range of conduct and limits only a small amount of speech, the

common definitions of "advise" and "encourage" broadly include speech that provides support or rallies courage. Thus, a prohibition on advising or encouraging includes speech that is more tangential to the act of suicide and the State's compelling interest in preserving life than is speech that "assists" suicide. Furthermore, the "advise[]" and "encourage[]" prohibitions are broad enough to permit the State to prosecute general discussions of suicide with specific individuals or groups. 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 the hierarchy of First Amendment values.' " *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Therefore, because the "advise[]" and "encourage[]" prohibitions are not narrowly drawn to serve the State's compelling interest in preserving human life, we conclude that they do not survive strict scrutiny.

C.

We must next determine if we can sever the offending portions of the statute while leaving other portions of the statute intact.

When deciding severability issues we, insofar as possible, attempt to "effectuate the intent of the legislature had it known that a provision of the law was invalid." *State v. Shattuck*, 704 N.W.2d 131, 143 (Minn. 2005). We are to presume that statutes are severable unless the Legislature has specifically stated otherwise. Minn. Stat. § 645.20 (2012) ("Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable."). We also attempt to retain as much of the

original statute as possible while striking the portions that render the statute unconstitutional. *Shattuck*, 704 N.W.2d at 143.

Severing unconstitutional provisions is permissible unless we conclude that one of two exceptions applies. *Id.* First, a statute cannot be severed if we determine that the valid provisions "are so essentially and inseparably connected with, and so dependent upon, the void provisions" that the Legislature would not have enacted the valid provisions without the voided language. *Id.* Second, we are not to sever a statute if "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.*

Because the Legislature did not specifically instruct otherwise, we presume the Legislature intended for Minn. Stat. § 609.215, subd. 1, to be severable, so the prohibition against assisting suicide remains valid unless it is inseparable from or incomplete without the prohibitions against advising and encouraging another to commit suicide. As discussed earlier, assisting is a separate and distinct concept from advising or encouraging, and therefore it is neither dependent on nor incomplete without the other terms. Further, a statute that only prohibits assistance is still capable of execution in accordance with legislative intent, and because a substantial part of the original statute remains, we conclude this result is what the Legislature would have wanted if it had known the other portions were unconstitutional. Therefore, we sever and excise the portions of Minn. Stat. § 609.215 that pertain to advising or encouraging, but leave intact the "assist[ing]" portions of the statute.

III.

Having decided that the words "advises" and "encourages" must be severed from the statute, we turn next to Melchert-Dinkel's conviction.[6] The district court found, and the court of appeals affirmed, that Melchert-Dinkel "intentionally advised and encouraged" both Mark Drybrough and Nadia Kajouji in taking their own lives. The district court, understandably, made no findings as to whether Melchert-Dinkel's actions also constituted assisting the victims in taking their own lives.[7] Because Melchert-Dinkel was found guilty, and convicted, under the portions of the statute that we have now excised as unconstitutional, but not under the remaining constitutional portion of the

[6] Contrary to the dissent's assertion that this was "an advise-or-encourage" case, evidence was presented at trial on all three actions listed in the statute, including evidence that Melchert-Dinkel assisted in the suicides. The statement of probable cause in the complaint repeatedly uses the term "assists," including a statement from Melchert-Dinkel that "he had assisted 5 or less individuals in killing themselves." Both parties also used language of assistance in their statements to the court, including, as the dissent concedes, the State's request that the judge find Melchert-Dinkel guilty of "assisting, encouraging, and advising" both victims. Because both parties proceeded at trial as if "assisted" was part of the complaint for both victims, and even now do not make any argument that Melchert-Dinkel was not charged with assisting in the suicides, the record does not support the dissent's characterization of the case.

[7] Although the dissent labels the omission of a finding on assistance "deliberate," we find no evidence to support this characterization. Rather, the evidence shows that the judge used the terms advise, encourage, assist, and aid inconsistently, with no clear distinctions between the terms. For example, at sentencing, the judge stated that Melchert-Dinkel was guilty of "two counts of aiding" suicide, a term broad enough to encompass advise, encourage, and assist, and he also referred to "Count 1 involving the *assisted* suicide of Mark Drybrough." (Emphasis added.)

statute, we reverse Melchert-Dinkel's conviction and remand to the district court for proceedings consistent with this opinion.[8]

Reversed and remanded.

WRIGHT, J., took no part in the consideration or decision of this case.

LILLEHAUG, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

[8] The dissent argues that there was insufficient evidence presented at trial to prove that Melchert-Dinkel assisted in the suicides of either Drybrough or Kajouji. This analysis presumes a narrower definition of "assist" than the one we announce today.

D I S S E N T

PAGE, Justice (dissenting).

I agree with the court's rationale and holding that the words "advises" and "encourages" must be severed from Minn. Stat. § 609.215, subd. 1 (2012), as unconstitutional. I disagree, however, with the court's remand to the district court for a determination of whether Melchert-Dinkel's actions constitute "assist[ing]" Mark Drybrough and Nadia Kajouji in taking their own lives for three reasons. First, the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Melchert-Dinkel actually "assist[ed]" Drybrough's and Kajouji's suicides. Second, from the very beginning of this prosecution, the State's case has focused on whether Melchert-Dinkel "advise[d]" or "encourage[d]" Drybrough and Kajouji to commit suicide, not whether he "assist[ed]" their suicides. Third, because the record demonstrates that the district court deliberately omitted the word "assisted" from its finding that Melchert-Dinkel "intentionally advised and encouraged" Drybrough and Kajouji in taking their own lives, a remand will be a waste of scarce judicial resources.

I.

Minnesota Statutes § 609.215, subd. 1, prohibits "advis[ing], encourag[ing], or assist[ing]" another person's suicide. Minn. Stat. § 609.215, subd. 1. In my view, the court misconstrues the meaning of the word "assists" as used in section 609.215. Moreover, when the word "assists" is given its proper meaning, there is no doubt that the State failed to present any evidence that Melchert-Dinkel "assist[ed]" Drybrough and Kajouji in their suicides.

"[A] statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant." *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (citation omitted) (internal quotation marks omitted). Additionally, the "meaning of doubtful words in a legislative act may be determined by reference to their association with other associated words and phrases." *State v. Suess*, 236 Minn. 174, 182, 52 N.W.2d 409, 415 (1952).

The court acknowledges that the most obvious form of assistance is physical assistance, but concludes that the defendant's speech is enough to support a finding that the defendant assisted the victim's suicide. This interpretation is inconsistent with well-established law, including *Boutin*, 591 N.W.2d at 716, because such an interpretation renders the word "assists" superfluous by conflating its meaning with the words "encourages" and "advises." Moreover, the court's avoidance of the dictionary definition of the word "assist" is telling. The court's analysis relies on the definition of the word "help," a word not used in the language of the statute. The same dictionary that the court relies on for the meaning of "help" defines "assist" as "[a]n *act* of helping" and to help "a person in necessity; an action, process, or result." *The New Shorter Oxford English Dictionary* 132 (1993) (emphasis added). Thus, the word "assists" as used in section 609.215 requires an *action* more concrete than speech instructing another on suicide methods. To hold otherwise arguably criminalizes the publication of books that simply

describe successful suicidal behavior.[1] I would interpret "assists" to require an action that furthers the suicide, such as providing materials or physically assisting the suicide. My interpretation is not only consistent with the dictionary definition of "assist," it does not render the word "assists" superfluous or criminalize the publication of books that simply describe successful suicidal behavior.

Although I agree that Melchert-Dinkel encouraged and advised the victims, he did not take any concrete action to assist in Drybrough's and Kajouji's tragic suicides. Because the State did not present any evidence that Melchert-Dinkel engaged in any act other than pure speech, I conclude that the State's evidence was insufficient to prove beyond a reasonable doubt that Melchert-Dinkel assisted their suicides. Consequently, Minn. Stat. § 609.035, subd. 1 (2012), clearly precludes further prosecution. Moreover, having obtained a conviction for encouraging and advising the suicides, the State is not entitled to a second bite at the apple on remand. A remand will do nothing more than waste judicial resources.

II.

Minnesota Statutes § 609.035, subd. 1, also precludes remand to the district court for another reason. That section states "[a]ll the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts." Minn. Stat. § 609.035, subd. 1. From the very beginning of this prosecution, the State's case focused on

[1] Footnote 4 of the court's opinion is curious. The footnote suggests, correctly, that a narrow construction may save a statute from constitutional infirmity. The problem here is that by interpreting the word "assist[]" to include pure speech, the court broadens and expands, rather than narrows the word "assists" as found in Minn. Stat. § 609.215.

whether Melchert-Dinkel "advise[d]" or "encourage[d]" the victims to commit suicide, not whether he "assist[ed]" their suicides. More specifically, count one of the complaint reads:

> On or about July 27, 2005, within the County of Rice, defendant William Francis Melchert-Dinkel did advise, encourage, or assist another in taking the other's own life, to-wit: *did advise and encourage* Mark Drybrough, of Coventry, UK, using internet correspondence, and Mark Drybrough did take his own life.

(Emphasis added.) Similarly, count two of the complaint reads:

> On or about March 9-10, 2008, within the County of Rice, defendant William Francis Melchert-Dinkel did advise and encourage another in taking the other's own life, to-wit: *did advise and encourage* Nadia Kajouji of Ottawa, Ontario, Canada using internet correspondence and Nadia Kajouji did take her own life.

(Emphasis added.) Admittedly, the State's closing argument referenced all three means of aiding suicide: advising, encouraging and assisting.[2] Nevertheless, when the State's case is viewed as a whole, including the language of the complaint and the evidence presented at trial, it leads to the unmistakable conclusion that this was an advise-or-encourage case.[3] On that basis, it is wholly inappropriate to remand an

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[2] In its closing argument, the State said, "I'm asking this Court to find Mr. Melchert Dinkel guilty on both counts: Count 1 for the intentional advising and encouraging and assisting of Mr. Mark Drybrough and his conduct which occurred on July 1 to July 27; and Count 2 with the assisting, encouraging, and advising Nadia Kajouji for his conduct on March 6 through March 10 of 2008."

[3] To be clear, I am not suggesting that the complaint in this case violated the "nature and cause" requirement of the Due Process Clause discussed in *State v. Kendell*, 723 N.W.2d 597, 611 (Minn. 2006), or that the State's failure to include the word "assist" in the to-wit section of the complaint would have supported a pretrial motion to dismiss under Minn. R. Crim. P. 17.06, subd. 1. Instead, I am simply noting that the record

(Footnote continued on next page.)

advise-or-encourage case to the district court for a determination of whether Melchert-Dinkel's actions constitute "assist[ing]."

III.

Finally, I would not remand to the district court because the record demonstrates that the district court deliberately omitted the word "assist" from its factual findings. The district court specifically found that, as to both counts, Melchert-Dinkel "intentionally advised and encouraged" Drybrough and Kajouji in taking their own lives. The word "assist" is plainly omitted from the district court's decision. It is true that, if a district court omits a finding on any issue of fact essential to sustain the general finding of guilt, the court shall be deemed to have made a finding consistent with the general finding. Minn. R. Crim. P. 26.01, subd. 2(e); *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008). But here, a finding that Melchert-Dinkel "assisted" was not an essential fact required to sustain the general finding of guilt because assisting was only one of three means by which Melchert-Dinkel could have committed the offense of aiding suicide. Having found that Melchert-Dinkel had advised and encouraged Drybrough and Kajouji to commit suicide, a finding that he also assisted was not essential to the general finding of guilt. The record in this case demonstrates that the district court deliberately omitted the word "assist" from its factual findings, and therefore a remand to decide whether

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(Footnote continued from previous page.)
before us case plainly demonstrates that from the very beginning of this prosecution, the State's case has focused on whether Melchert-Dinkel "advised" or "encouraged" the victims to commit suicide, and not whether he "assisted" their suicides.

Melchert-Dinkel's actions constitute "assist[ing]" Drybrough and Kajouji in taking their own lives will waste judicial resources.

IV.

For the reasons discussed above, I would not remand to the district court for further proceedings, and because the words "advis[ing]" and "encourage[ing]" as used in Minn. Stat. § 609.215, subd. 1, must be severed from the statute as unconstitutional, I would reverse Melchert-Dinkel's convictions.

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12/31/2014 10:00:27 AM
Dakota County, MN

APPENDIX F-1

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Final Exit Network, Inc. (# 1718),
Lawrence Deems Egbert (# 1719),
and Roberta L. Massey (# 1721),

Defendants.

Court File No. 19HA-CR-12-1718
consolidated with 1719 and 1721

DEFENDANTS' AMENDED BRIEF ON JURY INSTRUCTIONS

The defendants submit this amended brief on a crucial part of the jury instructions to be used at trial — the instruction on the meaning of "assists" in section 609.215, subd. 1 of Minnesota Statutes (the "Statute").

I. INTRODUCTION

The defendants are indicted on a primary charge of violating the Statute, under which one who "intentionally advises, encourages, or assists another in taking the other's own life" commits a felony. The defendants are also charged with a violation of section 609.502, subd. 1, interfering with the scene of a death, and "aiding and abetting" both substantive crimes. The "interfering" charges are not addressed in this brief, which is directed solely to the jury instructions on the charges of advising, encouraging, or assisting in a "suicide" (which also implicate the jury instructions on "aiding and abetting" the same).[1] The defendants Final Exit Network, Inc. (the "Network") and Roberta L. Massey hereby withdraw their December 4, 2014 brief on jury

[1]. At this time, the defendants make no objection to the State's proposed jury instructions, served on December 3, 2014, on "interference with a death scene" and "corporate liability." The defendants reserve the right to object and submit alternative jury instructions on these two issues if subsequent disclosures and proceedings suggest a need to do so.

instructions and are joined by the defendant Lawrence Deems Egbert in this substitute brief.

II. GENERAL BACKGROUND

The defendants moved to dismiss the indictment on grounds that the Statute's prohibitions on "advising" and "encouraging" a "suicide" are facially unconstitutional infringements on their First Amendment-protected right to freedom of speech. They prevailed in these arguments. *See State v. Final Exit Network, Inc.*, No. A13-0563, 2013 WL 5418170 (Minn. Ct. App. Sept. 30, 2013) (further review granted, Dec. 17, 2013, review denied, June 17, 2014).[2] While not "precedential," the unpublished *Final Exit Network* decision is now more than a mere precedent for the parties to this case: It is the "law of the case." *See, e.g., Lynch v. State*, 749 N.W.2d 318, 321 (Minn. 2008) ("when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case.*") (internal quotation marks and citation omitted, emphasis in original).

In *Final Exit Network*, the Court of Appeals struck the words "advises" and "encourages" from the Statute. In an unrelated case, the Supreme Court of Minnesota chose to "sever and excise the portions" of the Statute "that pertain to advising or encouraging, but leave intact the 'assisting' portions of the statute." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014). Now, only if one "intentionally . . . assists another in taking the other's own life" does he commit a felony. Moreover, the entirety of the *Final Exit Network* and *Melchert-Dinkel* decisions means a trial court must guard against any effort by the State to infringe upon the defendants' First Amendment-protected free speech rights by suggesting to the jury that mere communications

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[2]. The Supreme Court of Minnesota granted the State's Petition for Further Review and stayed all proceedings while the *Melchert-Dinkel* case was pending. After the disposition of *Melchert-Dinkel*, the Court dissolved the stay and denied further review.

could support a conviction, as the State argued to the grand jury. "Speech in support of suicide . . . is an expression of a viewpoint on a matter of public concern, and . . . is therefore entitled to special protection as the highest rung of the hierarchy of First Amendment values." *Melchert-Dinkel*, 844 N.W.2d at 24 (internal quotation marks omitted).

In its analysis, the *Final Exit Network* court held that the mere giving of information about suicide cannot be criminalized under the First Amendment. *Final Exit Network* at *5 (holding that one definition of "advise," among others, is "to inform," and the application of this definition in the Statute violates the First Amendment). The court found that the Statute violates the First Amendment because "[a]s written," it "criminalizes any and all expressions of support, guidance, planning, or education to people who want to end their own lives, whether from a public platform, such as a book, or in the private setting of a hospital room or family home." *Id*.

The *Final Exit Network* court found that Minnesota's speech prohibition could have been, but was not, narrowly tailored to serve a compelling state interest, observing that Delaware prohibits speech that "causes" a suicide, Illinois prohibits speech that "coerces" a suicide, and Pennsylvania prohibits speech that "causes" a suicide "by force, duress or deception." *Final Exit Network* at *6. Minnesota made no effort to narrowly craft its restriction on speech, and therefore — after "advises" and "encourages" were severed — the Statute contained no restriction on speech. "Because section 609.215 lacks any identifiable category of unprotected speech to which the statute's scope can be limited, we cannot impose a narrowing construction that saves the [S]tatute." *Id.*

The California courts have also addressed this issue. California and Minnesota are two of only six states in Union that prohibit not only assisting in a suicide, but also advising or encouraging one. *Final Exit Network* at *4. In *In re Ryan N.*, 92 Cal. App. 4th 1359, 112 Cal.

Rptr. 2d 620 (2001), the California Court of Appeals said:

> Although on its face the statute may appear to criminalize simply giving advice or encouragement to a potential suicide, the courts have . . . required something more than mere verbal solicitation of another person to commit a hypothetical act of suicide. Instead, the courts have interpreted the statute as proscribing "the *direct* aiding and abetting of a *specific suicidal act.* . . . Some *active and intentional participation* in the events leading to the suicide are required in order to establish a violation."

In re Ryan N., 92 Cal. App. 4th at 1374, 112 Cal. Rptr. 2d at 632 (emphasis in original) (citation omitted).

III. DEFENDANTS' PROPOSED JURY INSTRUCTION

In light of the foregoing, the defendants pray that the Court instruct the jury as follows on assisting in a suicide:

> The statutes of Minnesota provide that whoever intentionally assists another in taking the other person's own life is guilty of a crime.
>
> As applied to this case, the elements of the crime are:
>
> First, that Doreen Dunn actually took her own life.
>
> Second, that the defendant intentionally assisted Doreen Dunn in taking her own life.
>
> Third, that one or more of the above acts took place on May 30, 2007 in Dakota County.
>
> "Intentionally" means the defendant acted either with the purpose of assisting Doreen Dunn in taking her own life, or believed that [his or her] conduct, if successful, would assist Doreen Dunn in taking her own life.
>
> To "assist" means to provide tangible physical assistance in the suicide. One does not "assist" in a suicide by merely being present, or by advising on the subject, encouraging the suicide, or providing information or knowledge. One does not "assist" in a suicide by merely instructing another on suicide methods. Similarly, one does not "assist" in a suicide by expressing a viewpoint on whether the suicide is morally justifiable under the circumstances or by providing emotional support to another who is committing suicide. One must affirmatively "assist" in a suicide to be guilty of the crime.

> Suicide itself is not a crime in Minnesota and a person has no legal duty to stop or prevent another person from committing suicide.
>
> If you find that each of these three elements has been proven beyond a reasonable doubt, you must find the defendant guilty. If you find any one element, or more than one, has not been proven beyond a reasonable doubt, you must find the defendant not guilty.

The State's proposal is not materially different from the defendants' proposal except where the State defines "assist."

IV. OBJECTION TO THE STATE'S PROPOSAL

The State proposes that "assists" be defined as follows:

> ln order to have "assisted" Doreen Dunn in the taking of her own life[,] the [defendant] must have engaged in physical conduct or used words that were specifically directed at Doreen Dunn and that [sic] the conduct or words enabled Doreen Dunn to take her own life.

A jury instruction is to be evaluated "as far as possible from the standpoint of the total impact or impression upon the jury. The real test is 'what might the jury have understood from the language of the court?'" *Lieberman v. Korsh*, 264 Minn. 234, 240, 119 N.W.2d 180, 184 (1962). The State's minimalist instruction would impermissibly leave the jury to feel free to convict the defendants on the basis of First Amendment-protected communications (just as the State instructed the grand jury to, and the grand jury did, indict the defendants on the basis of First Amendment-protected communications).

The State's theory of its proposed definition relies on the following language of the *Melchert-Dinkel* decision:

> Consistent with the plain language of the statute, we therefore conclude that the "assist[ ]" prohibition of section 609.215, subdivision 1, proscribes speech or conduct that provides another person with what is needed for the person to commit suicide. This signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support. Rather, "assist," by its plain meaning, involves enabling the person to commit suicide. While enablement perhaps most obviously occurs in the context of

> physical assistance, speech alone may also enable a person to commit suicide. Here, we need only note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide. 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. This statement is dicta and is unhelpful to this case because the Supreme Court in *Melchert-Dinkel* was dealing with a radically different set of facts. Moreover, the Supreme Court decided to withdraw its grant of further review of the Court of Appeals' ruling in *Final Exit Network*, thus intentionally choosing to allow the Court of Appeals' decision to become the law of this case. *See* note 2, above.

In the event the Court chooses to favor the State with its preferred definition of "assists," the defendants nevertheless urge the Court to give a more complete instruction than the State's proposal, one that helps the jury to distinguish between the permissible and the impermissible bases for a conviction. If the Court elects to include a provision on the "enablement" theory in the jury instruction's definition of "assists," the defendants, while maintaining their objection, urge that the State's proposal be modified as follows:

> To "assist" means to engage in speech or conduct that provides another with what is needed for the other person to commit suicide. Most obviously, to "assist" means to provide tangible physical assistance in the suicide, thus enabling the person to commit suicide. A decision to find a defendant guilty for speech alone could conform to the definition of "assists" in the elements of this crime only if you find a direct, causal link between the speech and the suicide. Standing alone, one does not "assist" in a suicide by merely being present, or by advising on the subject, encouraging the suicide, or providing information or knowledge. One does not "assist" in a suicide by merely instructing another on suicide methods. Similarly, one does not "assist" in a suicide by expressing a viewpoint on whether the suicide is morally justifiable under the circumstances or by providing emotional support to another who is committing suicide. One may "assist" in a suicide only if the defendant's speech was indispensable to the other

person's ability to commit suicide.

Suicide is not a crime in Minnesota and a person has no legal duty to stop or prevent another person from committing suicide.

V. CONCLUSION

Therefore, the defendants urge the Court to use the first of the foregoing two definitions of "assists" in its jury instruction. If the Court overrules the defendants' objection to the application of *Melchert-Dinkel's* "enablement" theory of the crime, the defendants then, and only then, urge the Court to modify the State's proposal in accordance with the second of the foregoing two proposed instructions.

Respectfully submitted,

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APPENDIX F-2

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, File No. 19HA-CR-12-1718

vs.

Final Exit Network, Inc.,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS

VOLUME I
TRIAL

* *

The above-entitled matter came on for hearing before the Honorable Christian S. Wilton, Judge of District Court, on the 11th day of May, 2015, at the Dakota County Courthouse, Hastings, Minnesota, commencing at approximately 9:00 a.m.

The State appeared through Dakota County Assistant Attorney, Phillip D. Prokopowicz, Esq., and Elizabeth Swank, Esq.; the Defendant was represented by Robert Rivas, Esq., and William Sherry, Esq.; and the following proceedings were had:

A Yes, I am.
Q And what additional education have you had since high school?
A I have a bachelor's degree in education. I have all but a master's degree, all but my thesis, in education and a year of law school.
Q And I assume the law school went by the wayside when the company started building up or --
A No. I always thought I was going to be a labor lawyer. And I wound up being swept a different way, and law school just had to go by the wayside.
Q Are you familiar with a corporation called Final Exit Network?
A Yes, I am.
Q Can you tell the jury how you're -- why you're familiar with that corporation?
A Well, I actually conceived of the idea of putting Final Exit Network together and drew in a number of people from the right-to-die movement. And we created this in 2004 to provide support to people who were suffering. And so this is, in my mind, kind of my baby with other founding members.
Q And, prior to that time, had you been involved in any other right-to-die movement?
A I had been involved in the Hemlock Society. I've been

was, I felt, the jewel in their crown, though. It was a very worthwhile program. And when someone is actively suffering terribly, medical science can't do anything for you to relieve that suffering. It's good for them to know that there's someone who will try to be there for them in some tangible, comforting way.

It was obvious this program was going to be disbanded. And I felt very strongly, with a number of other people, that it should not be allowed to do that. So we founded the Network to not only encompass the types of cases that would be taken on and served. But other people who were not terminally ill, there would be disease process that you can go on indefinitely interminably without medical help. Doctors don't know what to do to really, really relieve the suffering. I felt those people should be served. And so we broaden the scope of the program. We created a website deliberately so that we would come out into the sunlight. We wanted to be a focus for the right-to-die movement to have people begin to talk about whether or not this should be appropriate for all Americans in terms of being able to exercise their own individual rights. So we basically broadened and strengthened, I think, the program. And --

Q And other members, I assume, from Hemlock Society or

A -- it was made by him. The time and place of their death was made by them.
Q So the exit guide gets the information, sets up a personal meeting with the member.
A Right.
Q And what goes on during that -- what event, policy, protocol, procedures talk about as far as what goes on during that initial meeting?
A Okay. During the phone conversation with the case coordinator, not only were we required to get medical information, but they were told at that time that they needed to get a book published by Derek Humphry called *Final Exit* and that this would be something that we needed to have them have and to read and to understand. Okay.
Q And that was a requirement?
A That was a requirement.
Q Okay. And I assume that the member would have to sign off on that or at least tell them I did read it or I did receive it?
A When the exit guide would show up, they would actually make sure they had it. Okay. And that's -- and then they would talk about, you know. Are you really sure you want to do this? Okay. We had a three-step, at least, process where at every turn we would talk to

these people and say, are you sure you want to do this? And if they said, yes, I know I'm going to want to do this, we would actually have them sign and today's date as of this point, you know, this is what I think I want to do.

Q I want to move forward.

A And then, I mean, on the day that they've elected to die, one of the last things we do is say: Are you -- I mean, are you sure you want to do this because there's no turning back if you do this. And --

Q Let me ask you a little bit about the book then --

A All right.

Q -- *Final Exit*. It was written by who?

A Derek Humphry, the founder of the Hemlock Society, back in the '80s.

Q And was there an alternative to the book that members could use as well?

A Well, there was an addendum to that book we asked them to also procure. It could be gotten at the same time. If they go to an original edition, it didn't discuss helium gas. So we wanted them to have the information about a death by helium gas.

Q And why was the death of helium gas necessary for them to familiarize themselves with?

A Well, this is what we strongly suggested. If you died

by carbon monoxide or carbon dioxide poisoning, you know, other means of suffocation, putting a bag over your head and just suffocating to death, it's a very traumatic experience. The brain suffers oxygen deprivation. There's a screaming process in your head. I mean, it's terrible. Helium fakes the body out. If you have a hood over your head and helium gas is pumped in, it smells like air. It feels like air. You know, there's no taste. You breathe three or four times, maybe five, and the lights go out (indicating).

Q Is that why this was kind of the preferred method?

A Yes. Yes.

Q And was that the method that was recommended to members?

A Yes.

Q And that would have been the method recommended by a the case coordinator initial call?

A Well, the case coordinator generally didn't get into it at that time. Okay.

Q Okay.

A The methodology. That's the exit guide, you know. The case coordinator would tell them to buy the book. Okay. And we wanted them to understand about helium gas. But the case coordinator didn't discuss that. It was up to the exit guide to then ask if they have

questions. Now, was --
Q How about -- how about the first responder? Did they get in the actual mechanics of how you perform death by helium asphyxiation?
A No. They wouldn't go into the mechanics. They may mention death by helium, but they would not go into the mechanics.
Q So the book, though, that we've just discussed --
A Right.
Q -- that did provide the mechanics?
A That's exactly right.
Q Okay. And was there also a DVD that was published?
A There was a DVD put out.
Q And that also described or demonstrated the mechanics as far as how to actually do it?
A That's correct.
Q And I say "do it," death by helium asphyxiation?
A Yes.
Q And as far as copies of that book and that DVD, did you retain copies of that book?
A Until they were taken by the GBI.
Q Okay. And where were they located when they were taken by the GBI?
A In my home.
Q That's your Florida residence?

A My Florida residence. They were my own personal copies.
Q And when we say "GBI," we mean the Georgia Bureau of Investigation?
A Investigation, yes.
Q The personal copies that you had of the book --
A Yes.
Q -- and the DVD, did they accurately depict the mechanics that were endorsed by -- recommended by Final Exit Network --
A Yes.
Q -- as far as helium asphyxiation?
A Yes.
Q If I can then -- so we have the exit guide, who has now met with the member. The member has indicated a desire to move forward with taking their life.
A At some point maybe. Sometimes the relationship would go on for a year, year and a half.
Q Sure. And sometimes not, I assume.
A And then sometimes not, that's right.
Q Sometimes one meeting would have been enough?
A A minimum of one meeting. We tried to encourage two meetings. Okay.
Q But as these meetings progressed, the member is indicating, yes, I want to keep moving forward?

A Right.
Q Okay. What happens then eventually during these meetings?
A Well, they discuss the methodology. They discuss the fact that the helium tanks and the hood that are used in this have to be procured.
Q Okay.
A And this would have been also discussed before the first meeting. Okay.
Q It's also in the book, I assume?
A It is.
Q Okay.
A But there were times that when you had a first meeting they hadn't bought the tanks yet. So you make sure that they know that they need to have these tanks. And they need to be able to -- you know, part of the face-to-face was to make sure that they had the physical ability to put this together. It's not complex. But it takes a little bit of, you know, putting the tube over this and twisting a handle and putting the thing over your head. There's cases of, say, Parkinson's or MS when it gets very progressed. People lose the motor skills in their limbs to even be able to do that. If they've gone too far, we could not be with them.

Q Did Final Exit Network, between 2004 and 2009, provide information to the member as far as where to purchase the necessary equipment?
A Yes.
Q And you indicated helium tanks; is that right?
A Correct.
Q Were they given information of where to purchase or where they could get helium tanks?
A Well, we told them you could get them at any Target store or, you know, Toys R Us.
Q And these are helium tanks commonly used to blow up party balloons?
A Party balloons, yes.
Q As far as the -- did they -- did Final Exit Network have a recommendation as far as how much or how big the tanks were, how many tanks to purchase?
A We recommended two tanks. And it was in the book, I think, also, so --
Q Okay. The book which Final Exit Network endorsed?
A Right. I know it was on a DVD.
Q All right. And so it was the member's responsibility to actually purchase it?
A Yes.
Q But you did provide them information on where they could probably get it from?

A Uh-huh.
Q You have to say yes or no.
THE COURT: Hold on a second. Is that a yes?
THE WITNESS: Yes. If they ask.
BY MR. PROKOPOWICZ:
Q As you indicated, you indicated a lot of party -- Toys R Us, those types of -- Target, those types of things?
A Right. Yep.
Q Is that correct?
A But here again, it was in the DVD. And I don't know about the book, but it was in the DVD.
Q Right. And then as far as the tubing, you indicated there's some tubing --
A Yes.
Q -- involved. And I assume some connections for the tubing?
A Yes.
Q And did Final Exit Network indicate or advise either in the book or directly of where the member could get the necessary tubing?
A It came with the hood.
Q Okay. You said it came with the hood?
A Yeah.
Q Can you describe the hood for me?

A It was a plastic bag. It's about two and a half feet long (indicating) by this kind of circumference. And it had a drawstring around the neck.
Q Okay. And would the tubing then be connected to the hood?
A The tubing, which came with it, is actually in a little thing inside the -- the neck. It came with tubing.
Q Okay. And as far as the hood and the tubing, did Final Exit Network provide information to its member as far as where they could purchase that?
A I know that that was on -- always published on Derek's website. So that information, you know, I mean, he -- he had that available at -- you know, every week people could go to that.
Q As a member though, how would I know to go to that website? Who was telling me to go to that website or book or whatever?
A Well, I assume that they got it from some place. I'm not sure.
Q Did -- did Final Exit Network recommend particular areas to purchase it?
A No.
Q No businesses?
A No. There were two or three people that made these things. And we didn't want to be in the business of

recommending one over the other. There were at least three manufacturers at one point.

Q And what were the names of those manufacturers, do you recall?

A Right now I don't, no. There was one old lady in California. And she had a name. She's since deceased. Somebody else in Montana who's not doing that anymore. I really don't remember the names of these things.

Q You indicated Mr. Humphry possibly?

A There were -- he didn't manufacture these. Derek is a journalist and a -- but he does have a blog that he sends out to people in the right-to-die movement every day. You can subscribe to this. And he also has a website for an organization called ERGO.

Q Okay. Now, as far as -- so the member has the necessary equipment, the helium tanks --

A Right.

Q -- the tubing --

A Right.

Q -- with the hood? What happens then? Is there any practice, rehearsals, anything of that nature done?

A If they -- when they have it, and then we would, you know, talk to them about the let's see if you can put it on, I mean, because we wanted to make sure they could put it on and knew how to use it.

Q Okay. I assume that also included making sure things were collected, right?
A Yes.
Q Okay. And if a member had any questions about -- would a guide answer those questions as far as how do I connected it? Do I have this connected right?
A Yes.
Q Okay. So the guides were familiar with the actual mechanics of the process?
A Yeah. But, like I say, it's discussing the information that they've had. We wanted them to have it and was set up this way so they would get the information from another source. And we did this when we set up the network. This is part of the protocol.
Q Right.
A Then it was a question-and-answer session, just discussion of what they hopefully already knew.
Q And that's because the purpose of the organization is to give individuals information as to the means of which they can take their own life in a dignified manner?
A No. The organization was set up to provide emotional support to individuals -- okay -- and have them know that we're going to be there. But we did not want to be the ones giving them the information initially. We

could discuss with them what they knew and they had gotten. We were not going to physically assist them. We were not going to get the means or in any way provide that. We knew what assisting -- I mean, when we set this up, part of the reason that we did this it was like a three-prong attack. Okay. A) we wanted to provide comfort and support for the dying. B) we wanted to raise the level of consciousness in our country by talking openly about this. That there's a group of geriatric activists that are willing to sit and be with people and do, you know, what it takes to give them comfort. And we did this, like I say, through interviews. I was on TV, others of our people. I mean, radio interviews and PR. I mean, you couldn't be any more out front than we are. And then, thirdly, we knew that we might take a lightning strike and have an arrest. And, in fact, it was in part designed to do that because in every state in the union there are different laws written about what constitutes assisting in a suicide. Some say aiding, abetting, promoting, encouraging. It was just a patchwork quilt that has never been defined A) legislatively and B) in case law.

Q So you wanted to set up an organization that would push some test cases?

A Push the envelope. Push the envelope but stay within

the law as we knew it. And we had three attorneys involved with our protocols. I mean, the idea was to stay on the sunny side of the road though. Okay.

Q Okay. And during all of your training programs, that you had --

A Yes.

Q -- from 2004 to 2009, and all of your discussions regarding business practices, policies, protocols, how many times did you discuss the State of Minnesota law related to assisting suicide, specifically the State of Minnesota?

A We didn't.

Q Okay. Now --

A What we did is we had way back when --

Q I think you've answered my question, Mr. Goodwin.

A Okay.

MR. RIACH: I don't think he was finished, Your Honor.

THE COURT: Hold on a second. He answered the question. All right. Next question.

BY MR. PROKOPOWICZ:

Q Now, the -- the day of the exit.

A Yeah.

Q Let's move on to the day of the exit. What is the policy or the recommendation regarding how many

member if they did not have it?
A Right.
Q Then go under No. 3 and paragraph prior to proceeding.
A All right.
Q That talks about the rehearsal again; is that correct?
A Yes.
Q And the last sentence indicates that someone with experience with this method will be with you during your rehearsal and also the time you proceed to hasten -- hasten dying; is that correct?
A That's correct.
Q And basically what that, again, confirms, that exit guides were permitted under Final Exit Network's protocols and policies to be present with a member to rehearse; is that correct?
A That's correct.
Q And I assume that also means that if there are any questions or current concerns during that rehearsal, that exit guides would provide that information consistent with practices and protocol of Final Exit Network?
A That's correct.
Q In 2007, from January through May 30 of 2007, did you ever -- do you recall participating or discussing with anyone at Final Exit Network an exit to be involving a

member named Doreen Dunn?
A No. I think I was aware that Dr. Dincin and Dr. Egbert were going to Minnesota. That's all I knew.
Q You didn't know the name of the person?
A No. And, in fact, it was definitely not within our protocol for anybody on the board to know the names of people who were going to exit. Only those directly involved in the exit, which would have been the first responder, certainly the exit guides, the medical director.
Q And what was the thought process as far as keeping the board of director names confidential?
A Privacy. It was not -- we wanted as much privacy as possible, even within our own organization.
Q Okay. And as you sat as a member of the board of directors, exit guides would consult with yourself and other advisory committee or board members; is that right?
A Only if there was a problem that I needed to be involved in or the oversight committee. If there was a routine, you know, very straight forward case where there was no dissension or disagreement about the grounds, I would have not been brought into it, nor would any other board member.
Q But if you were, then you would offer some sort of

opinion or advice --
A We would.
Q -- which you thought what was -- was the appropriate action?
A We would convene a discussion, a conference call, and find out.
Q Do you remember any discussions of that nature involving Doreen Dunn?
A No, not at all.
MR. PROKOPOWICZ: Can I have a minute, Your Honor?
THE COURT: You may.
MR. PROKOPOWICZ: State has no further questions, Your Honor.
THE COURT: Thank you. Mr. Rivas, cross-examination.
MR. RIVAS: Yes. Thank you, Your Honor.
CROSS EXAMINATION BY MR. RIVAS:
Q Good afternoon, Mr. Goodwin.
A Good afternoon.
Q We're already acquainted, correct?
A We are.
Q Okay. Now, I have quite a few questions. Although, I don't think it's going to take terribly long. And I apologize in advance that it may be disjointed. I may

be bouncing back and forth to different subjects, but -- because I haven't organized this material.

But with that said, you have testified most recently within just the last few minutes about a number of things that involve information that Final Exit Network gives people?

A Right.

Q Where to buy, for instance, a helium tank to blow up balloons with?

A Right.

Q The mere fact that they're available at party balloon stores?

A That's correct.

Q When a person has read *Final Exit, Third Edition* with addendum --

A Right.

Q -- they're told those things right in the book?

A That's correct. It's all in the book.

Q In fact, they're readily available from countless sources everywhere, Internet --

A That's right.

Q -- turning up in searches? On any given day with any given exit, isn't it true that there's no way to suppose that the individual learned the revelation that they could buy a helium tank at a party balloon store

from Final Exit Network?
A I would assume they could have known that previously. And I have no way of knowing.
Q Or they could have looked it up or --
A Right.
Q Could have read *Final Exit*?
A That's correct.
Q As we sit here today, you have no knowledge of how Doreen Dunn found that information?
A Absolutely not.
Q With respect to helium tanks, with respect to the hoods, obtaining those -- those things?
A No. That's correct. I have no idea.
Q You testified about the policy regarding mental illness. And pursuant to the exhibit -- as reflected in the Exhibit 6G at Page 4, Paragraph 10, there's a description of the criteria for accepting a potential member for a final exit who has mental illness.
A Correct.
Q As you sit here today, can you tell the jury how many times, in all of your knowledge, anyone who's a member of Final Exit Network ever qualified to exit after an application of those criteria with respect to that applicant?
A To be honest --

APPENDIX F-3

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, File No. 19HA-CR-12-1718

vs.

Final Exit Network, Inc.,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
VOLUME III
TRIAL/CLOSING ARGUMENTS

* *

The above-entitled matter came on for hearing before the Honorable Christian S. Wilton, Judge of District Court, on the 13th day of May, 2015, at the Dakota County Courthouse, Hastings, Minnesota, commencing at approximately 9:00 a.m.

The State appeared through Dakota County Assistant Attorneys, Phillip D. Prokopowicz, Esq., and Elizabeth Swank, Esq.; the Defendant was represented by Robert Rivas, Esq., and William Sherry, Esq.; and the following proceedings were had:

(WHEREUPON, the following took place without the presence of the jury.)

THE COURT: The record should reflect that we are outside the presence of the jury. We're going to discuss jury instructions that have been handed out.

All right. In regard to Page 1 of the proposed jury instructions, Ms. Swank, is there any objection to Page 1 from the State?

MS. SWANK: No, Your Honor.

THE COURT: Mr. Sherry, any objection to Page 1 from the defense?

MR. SHERRY: No, Your Honor.

THE COURT: Ms. Swank, in regard to Page 2, any objections from the State?

MS. SWANK: No, Your Honor.

THE COURT: Mr. Sherry, any objections to Page 2 of the proposed jury instructions?

MR. SHERRY: No.

THE COURT: Ms. Swank, in regard to Page 3, any objections to Page 3?

MS. SWANK: No, Your Honor.

THE COURT: Mr. Sherry, any objections to Page 3?

MR. SHERRY: No.

you've prepared there. Our only argument in response to the State is that I think the risk of confusion is at least equal, maybe greater, when you have multiple verdict forms to the jury. I don't think you can make it any more clear than the one you've got there. And that's the one we ask you to give.

THE COURT: All right. Thank you. I will use the one-page verdict form. And I will instruct the jury on that form being very careful to indicate what they are to do and not to do.

All right. This morning I've also received a memorandum from Mr. Rivas. It is a six-page memorandum in regard to the defendant's motion for rehearing on the jury instructions on the meaning of assist and an amendment of the indictment.

Mr. Rivas, I have read, at least three times, your motion and memorandum. I've also reviewed my order in regard to the definition of assist. I've also reviewed this morning, again, the State Supreme Court Melchert Dinkel, State versus Melchert Dinkel, found at 844 N.W. 2nd 13. I've reviewed the Court of Appeals' decision from this -- from Final Exit Network also. I went back and looked at the State's original brief and proposed jury instructions. And I have also gone back and looked at not only Mr. -- well, all of

the submissions on behalf of the defense when they were joined together in light of -- or for this specific matter.

Mr. Rivas, anything additional at least at this time by way of argument in regard to your brief?

MR. RIVAS: No, Your Honor.

THE COURT: Thank you. Mr. Prokopowicz, Ms. Swank, anything additional from the State in regard to the defendant's motion?

MS. SWANK: Your Honor, if I could briefly address the court?

THE COURT: Please.

MS. SWANK: As Your Honor is aware, the court instructions to the jury must not only define the charged offense, but also must explain the elements of the offense so the jury understands, clearly, what it is that they must consider in determining if the State has met the burden of proof beyond a reasonable doubt. And that is cited in State versus Ihle, I-H-L-E. I know in our previous submission you have a citation for that case.

The Court's instructions must also reflect the Supreme Court's narrow construction it has given to the application of the statute.

In this case, as the Court's referred to the Melchert Dinkel case, the Supreme Court did just that. They narrowed the construction of what it means to assist someone in committing suicide.

So, therefore, the Court must apply that narrow construction to its jury instructions that it provides to the court in any future case when it -- when it instructs a court -- or when it instructs a jury on what it means to assist someone in their suicide.

The Supreme Court also in Melchert Dinkel indicate what is prohibited speech. What is speech that is contrary to the First Amendment protections on freedom of speech. So what the Court must also do in its jury instruction is incorporate those restrictions in its definition of assisted suicide. The Court has done that in this case. In February of 2015 when you issued your order, you incorporated that narrow construction of what it means to assist someone in committing their suicide. Your definition also would alert the jury as to what they are not to consider when determining whether Final Exit Network assisted Ms. Dunn in committing her suicide.

Melchert Dinkel stands for the principle that the conduct and issue must be directed at a

specific individual, conduct meaning physical conduct or speech, words alone, must be directed and targeted at a specific individual, in this case Doreen Dunn, must be intentional speech that enabled her to take her life.

The instruction in this case, and phrasing that the Court has used, is almost directly from the Melchert Dinkel case. This is a Supreme Court case. Our case here, Final Exit Network case, was actually awaiting the decision in Melchert Dinkel case. And once the Court in Melchert Dinkel defined what it meant to assist someone in committing suicide, they didn't take up our case. They sent our case back. And I think the reason for that, Your Honor, is that they had determined that they had determined the perimeters of what it means to assist suicide.

The defense has indicated that it would be prejudiced by the State amending in this case the time period for which the charged offense of assisted suicide is alleged to have taken place. As the Court is aware, under Minnesota Rules of Criminal Procedure 17.05, the State is permitted to amend an indictment anytime before the verdict as long -- so long as no additional or different offense is charged -- no additional or different offense has been charged -- and

appear, to me at least, that the date in this case is an essential element. And, as both parties know, the District Court may allow the State to amend its complaint so that it comports with the evidence presented at trial.

The State made the motion before trial began. The defense was on notice. There have been no new documents filed, no new discovery. I understand that with the expansion the defense is concerned about other acts that have taken place. However, at least at this point, it's the Court's belief that this case is not going to rise or fall on the date change by itself.

And so for those reasons I'll deny the State's motion in regard to the amendment for 17.05.

MR. PROKOPOWICZ: Deny the State's motion?

THE COURT: I'm sorry. The defendant's motion. Thank you.

MR. PROKOPOWICZ: Thank you, Your Honor.

THE COURT: I've thought long and hard about the defense's motion in regard to the meaning of enable. And, as I indicated, I've gone back to read the Melchert Dinkel decision to look at the reasoning of our State Supreme Court.

The defense would ask me to do something

more than it has done so far, or that I've done so far, and that I require -- that I require that the enablement take place in close temporal and causative proximity to the decedent's choice to commit her, as the defense calls it, self-deliverance.

In terms of causative proximity, I believe that my jury instruction, in fact, does that in that it requires that the physical conduct or words be specifically directed at Doreen Dunn and that the conduct or words enables, specifically, Doreen Dunn to take her own life.

I've also indicated to the jury the things that don't count in terms of enablement, which are, if they've only expressed a moral viewpoint on suicide or if they've provided a mere comfort or support.

The temporal proximity is more complex. However, our State Supreme Court, nor can I find any other decision, that would require some kind of a time frame. In other words, that these actions happened within a week of Doreen Dunn's death or within a month of Doreen Dunn's death. And so I don't know that requiring temporal definition or temporal proximity makes any sense. Because I could see a scenario whereby someone were to, in fact, assist, buy the

equipment for her, give her the instructions, tell her how to do it, provide the tanks, the mask, give her all of those items necessary; and if she waited a year or nine months or six months, would they have assisted? And at least to my way of thinking, based on the current law, if they have provided or someone has provided those items, they then could be found guilty, potentially, of assisted suicide.

And so it's at least the Court's belief at this point that I have narrowly tailored and complied with the law of the land -- or of the State of Minnesota in Melchert Dinkel. I believe the elements to be clear, that the definitions are clear, and that the definition of assist is clear.

And so, for those reasons, I will deny the defense's motion for either -- well, for additional definitions or for an expanded thought on the meaning of enables.

All right. With that, Mr. Rivas, anything additional on those two items?

MR. RIVAS: Thank you, Your Honor.

THE COURT: Ms. Swank, anything additional on those two items?

MS. SWANK: No, Your Honor.

THE COURT: All right. One other item I

trial, the statements and arguments of lawyers are not evidence. But you should listen carefully because they've given a lot of thought to this case, and they will try to help you -- or help you and explain what they think is relevant in the evidence.

And the way this works is the State gets an opportunity to go first. The defense goes second. And then the State will get another opportunity for what's called a rebuttal argument.

Mr. Prokopowicz, you ready to proceed?

MR. PROKOPOWICZ: It is, Your Honor.

THE COURT: You may proceed.

MR. PROKOPOWICZ: Thank you. Counsel, Your Honor, may it please the Court, good afternoon.

Ladies and Gentlemen, you now know that Doreen Gunderson Dunn died on May 30th of 2007 at approximately 12:30 p.m. For approximately the next two to three years, the cause and the manner of her death remained a mystery. It was upheld from her family, friends, her loved ones, medical examiners and others.

Through this trial you have learned that, until recently, very few people knew, only a handful of individuals, that on May 30th of 2007 Doreen Dunn took her own life, committed suicide, through a process and

they also provided her with something else. Options, four options. And it provided her with the knowledge of one particular method which she would eventually choose, death by helium asphyxiation. That was what she chose. That is why she had to join the organization. She didn't have the knowledge. Her background was in music. Her background was in horticulture. The only information she had in all likelihood regarding medicine would have been as a result of her own treatments or general life experiences in the case.

An initial glance, well, this isn't that difficult, this helium by asphyxiation. All you got to do is buy a couple of tanks, connect a hose, put a bag over your head and run the tube in the hose and turn it on. Anybody could have figured that out. But is it?

You heard the death by helium asphyxiation. And you heard what it takes and the techniques that are used. And you saw it very graphically on the video you watched this morning.

Final Exit Network requires their members to obtain and review a copy of Final Exit Network, Third Edition, the addendum. The addendum which specifically talks about the mechanics of helium asphyxiation. The addendum which only can be purchased

from Derek Humphry's organization.

You saw all the specifics and the information that she was required to have and provided to her. Now, she may have purchased it on her own. But the bottom line is Final Exit Network gave her the information which led her to further knowledge and discovery about how to do it.

You saw the details. It goes into the types of tanks, where to purchase the tanks, the length of hose you're to buy, the T-joint, the diameter of the hose, what to take off, how to connect it in, how to take the wrench and move it, how to run the hose up into the hood, how to place the hood or the bag on top of your head, how to take a deep breathe, how long you'll be -- before you go into a coma and what to expect.

Life experiences. Common sense. Good judgment. I'll tell you that's not common knowledge.

What Doreen Dunn had was, in essence, a blueprint, a blueprint how to take her own life, a blueprint that was provided to her through the conduit, conduit of Final Exit Network, Incorporated.

Now, you may say: Wait a minute. This is Derek Humphry's operation. He's the one that came up with this particular procedure. How can Final Exit

Network somehow be held responsible for that? Kind of like an analogy of a bank robbery where the person gives the blueprints on the robbers on how to enter the bank that enables them to get in and steal the money. That somehow they're not responsible for aiding and assisting because they didn't draw the blueprint? That's the role. That's one of the roles that Final Exit Network played in this particular case.

They directly communicated the conduct and through words and gave Doreen Dunn the knowledge that she needed to enable her to take her death -- to take her life with helium asphyxiation. And she needed that knowledge because she had no background that would suggest that she would know that.

You heard a lot about the policies and the practices and the protocols of Final Exit Network. We had former president, Ted Goodwin, come and testify before you. And a number of documents replaced -- were placed into evidence that you'll be able to take back to the jury room and review and take a look at.

What was the role of the first responder? What were some of the items and requirements of exit guides? What were they told to do? How were they told to interact with members considering hastening their death through suicide? That they were there and they

were present to provide information as to where you could get the equipment, where you could purchase it, how much it costs, how much is it going to cost you to get that -- that book, Final Exit Network, where you send it off to, where you can purchase your equipment, where you can get your orchid bag to use in the process.

That is the information that was provided to Doreen Dunn. You can reasonably and rationally concluded from the mere procedures and protocols that were employed by Final Exit Network.

You heard what happened in this particular case. You heard Roberta Massey was the case coordinator who did the initial contact with Doreen Dunn and took the information that was necessary for Final Exit Network to have to make a determination.

You heard that Gene Carroll, another member of Final Exit Network, operated as the first responder and the information. In fact, you'll see the forms that he prepared and eventually forwarded to Dr. Egbert, the information that he took down.

And you heard from Dr. Egbert himself the review of those particular documents and his decision to accept Doreen Dunn on February 6th of 2007 to receive exit services. And you understand the role of

what exit guides do. They go out and they meet with the person, initially through phone calls. But as in this case at least one personal meeting between Jerry Dincin and Doreen Dunn at the residence in all likelihood based upon the car rental on May 24th.

And their job is to be there to answer questions, to discuss the pending exit and the reasons why and to ensure that they want to move forward that this is their choice. And, yes, they may very well, and probably did, offer alternatives; counselling, therapy. Have you considered this? But that does not take away from the fact, ladies and gentlemen, that when Doreen Dunn said: I'm willing, I want to go forward with this, that they indicated, through their actions, we're there to support you. We will be there. We will be there throughout this process to answer your questions about what happens. We will be there on the day it occurs in your house to make sure that you have the proper equipment. We will physically be there in the moments and minutes leading up to the final act to make sure that the equipment is properly connected. We will be there even before the act if you want to rehearse what is going to occur. We will be there. And, actually, according to at least one document, demonstrate for you on ourselves of how to work the

equipment.

Rehearsal is important, according to the video we saw this morning from Derek Humphry. We will be there to make sure that your wishes are carried out, your wishes that the fact that you committed suicide will not be detected by family and friends to avoid the stigma of suicide. We will be there for you and remove the equipment and take it out and dump it in a Dumpster.

That is beyond mere support. That is beyond comfort, ladies and gentlemen, under the laws of the State of Minnesota as far as assistance. That is actually we are there for a source. We communicate to you how to do this. We will demonstrate for you how to do this.

And that's what happened. And that's what happened on May 30th of 2007, according to Dr. Egbert, the last surviving person that was there that afternoon. The tanks were there. They were in place. The tubes were there. And they were there to watch her hook it up in a manner and a procedure consistent with what Doreen Dunn had learned, had learned from the materials that were provided her through the conduit of Final Exit Network, Incorporated.

But how do we get to the actual liability

APPENDIX F-4

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Final Exit Network, Inc.,

Defendants.

/

Court File No. 19HA-CR-12-1718

DEFENDANT'S MOTION FOR REHEARING OF JURY INSTRUCTION ON THE MEANING OF "ASSIST" AND AMENDMENT OF INDICTMENT

In *State v. Final Exit Network, Inc*., No. A13-0563, 2013 WL 5418170 (Minn. Ct. App. Sept. 30, 2013), review granted (Dec. 17, 2013), review denied (June 17, 2014), the Court of Appeals of Minnesota voided the words "advise" and "encourage" from 609.215, subd. 1 of Minnesota Statutes (the "Statute"). The court ruled that the First Amendment to the United States Constitution prohibited those words from being included in a statute because they were overbroad. In *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), the Supreme Court of Minnesota made the same ruling and severed the words "advise" and "encourage" from the statute.

This Court's pretrial rulings have nullified the central holdings of both the *Final Exit Network* and *Melchert-Dinkel* decisions, enabling a narrow exception mentioned in *Melchert-Dinkel* to swallow up the rule of *Final Exit Network* and *Melchert-Dinkel*. If there was anything left of the rule after the Court's order on the

definition of "assist" in the jury instructions, it was finally eliminated when the Court granted the State's last-minute motion to amend the indictment.

I. The Amendment to the Indictment

Nearly three years have passed since the State indicted the defendant in this case. On the last working day before the trial began, with no prior notice, the State moved pursuant to Minn. R. Crim. P. 17.05 to amend its indictment. Where the indictment had always alleged the crime took place on May 30, 2007, the amendment — and accordingly the jury instructions — would say the crime took place between February 1, 2007 and May 30, 2007.

The Court granted the State's motion upon a finding that the amendment would not prejudice the defendant's substantial rights. This conclusion could be reached only upon an assumption that the defendant's right to freedom of speech under the First Amendment is not a "substantial right," and that the entire course of the two years of appeals did not pertain to any of the defendant's "substantial rights."

For two years the State injudiciously forced the defendant to argue in two appellate courts about the application of the First Amendment ***to the indictment in this case***, as it stood when the grand jury handed it down. At every stage of the proceedings, from the motion to dismiss in this Court through the Supreme Court's

reversal of its decision to grant review of the Court of Appeals' decision, the indictment alleged that the crime was committed on one day. In all these proceedings, if the indictment had alleged that the crime took place during a four-month period of time leading to Doreen Dunn's death, instead of solely on the day of her death, this point would have been made over and over and over again by the defendants. It would have been highly likely to have been mentioned as a key component of the Court of Appeals' decision.

After all, the amendment fundamentally altered the nature of the crime and far more clearly implicated the defendant's free speech rights. The State needs to expand the time period for the commission of the crime primarily in order to enable the State to include a larger number of First Amendment-protected communications within the allegedly criminal activity. For instance, in its presentation of its case, the State has made clear that it is arguing that Final Exit Network's volunteers committed a crime simply by informing the decedent (if in fact the jury finds they did so) that helium tanks are available for purchase at party stores, and that the book *Final Exit* may be purchased online or in any bookstore in Minnesota.

Thus, the State seeks to criminalize the giving of truthful and accurate information about where and how to make a legal purchase of legally available and

legally sold products. This cannot possibly be the law as the Supreme Court of the United States interprets the First Amendment, but in fact it is the law of Minnesota under the Court's approved jury instruction, coupled with the amendment to the indictment, unless the Court alters its course before the jury is instructed.

The defendant's substantial rights were affected by the amendment to the indictment because of the direct First Amendment infringement occasioned by the amendment and because the State's failure to proceed on an accurate indictment from the beginning denied the defendant the ability to address the expanded time frame for the commission of the crime to the appeals courts.

II. The Meaning of "Enables"

In *Melchert-Dinkel*, the Supreme Court created a narrow exception to its rule that "advise" and "encourage" could not be criminalized. The Court said:

> Consistent with the plain language of the statute, we therefore conclude that the "assist[ ]" prohibition of section 609.215, subdivision 1, proscribes speech or conduct that provides another person with what is needed for the person to commit suicide. This signifies a level of involvement in the suicide beyond merely expressing a moral viewpoint or providing general comfort or support. Rather, "assist," by its plain meaning, involves enabling the person to commit suicide. While enablement perhaps most obviously occurs in the context of physical assistance, speech alone may also enable a person to commit suicide. Here, we need only note that speech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that assists another in committing suicide. 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. This paragraph must be read in the context of recognizing that the Supreme Court, for the prior 10 pages of its decision, had explained why it was overbroad and unconstitutional for the State to criminalize the advising or encouraging of "suicide." All of that explanation must be read into the "enabling" paragraph in order for its limited intention to be clear.

The Court should do something more than it has done so far — in the proposed draft jury instruction — to require that the "enablement" take place in close temporal and causative proximity to the decedent's choice to "commit" her self-deliverance. In defining the crime, as the jury instruction stands now, and as the current jury instruction is amended to correspond with the amendment to the indictment, there is no limitation on how remote in time the defendant's criminal speech might be from the actual suicide. Neither is there limit on how tangential the criminal speech might be in its causative effect on the suicide, of to how minor the causative effect might be in relation to the suicide itself.

The arguments that the State is making in trial illustrate the point. The State is quite correct that, as drafted, the jury instructions would enable a jury to convict

the defendants of "assisting" in a "suicide" merely because they advised Doreen Dunn of where she could purchase *Final Exit*, or what type of store sells party balloon tanks (not even naming any particular store, but merely telling her that helium tanks are generally available at party stores).

III. Conclusion

The Court should reverse its decision to grant the State leave to amend the indictment, and the Court should revise the definition of "assist" in the jury instructions.

Respectfully submitted,

For Final Exit Network, Inc.:

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