

No. 16-1479

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In the  
Supreme Court of the United States

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Final Exit Network, Inc.,  
*Petitioner,*

v.

State of Minnesota,  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MINNESOTA

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**BRIEF IN OPPOSITION**

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## **DECISION BELOW**

Respondent agrees the cases cited in this section of the Petition are the applicable Minnesota appellate court decisions.

## **JURISDICTION**

Respondent agrees with the jurisdictional statement as contained in the Petition.

## **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

Respondent agrees with the statutory and constitutional provisions contained in the Petition.

## **STATEMENT OF THE CASE AND FACTS**

On May 30, 2007, Doreen Dunn's husband came home from work around 6:30 p.m. and found his wife lying unresponsive on the living room sofa and immediately telephoned for emergency assistance. Emergency personnel responded and determined that Mrs. Dunn was deceased. A police investigation of the scene revealed no apparent factors that may have contributed to Mrs. Dunn's death. An autopsy was completed on Mrs. Dunn. The medical examiner did not find any apparent cause of death, however discovered some blockage of Mrs. Dunn's coronary arteries, and thus determined the cause of death was natural and attributable to atherosclerosis coronary artery disease.

Nearly a decade earlier, Mrs. Dunn had a myelogram that resulted in an immediate severe physical reaction to the procedure. Thereafter she

was diagnosed with "Central Pain Syndrome" and began to experience chronic pain and a plethora of medical ailments. None of these conditions were considered life threatening or fatal. However, as a result of her physical condition, Mrs. Dunn became depressed, angry, frustrated, anxious, and on occasions would express to family members that she felt her only release from her debilitating condition was death.

In 2010, the Georgia Bureau of Investigation (GBI) contacted Minnesota law enforcement agencies and provided the agencies with information and documents obtained during its investigation of Final Exit Network (FEN), a Georgia non-profit corporation. GBI investigators had learned through their investigation that FEN provided what the corporation identified as "exit services" to many of its members. An "exit" is what FEN described as the act of "suicide". FEN services that assist a member in committing suicide are referred to as "exit services." "Exit services" were available to persons who had terminal or non-terminal illnesses, and in certain instances, individuals experiencing long-term mental illness. Whether FEN offered "exit services" was based upon a determination of whether the member is suffering "more than [he or she could] bear" and on the "quality of life" the member is experiencing. Only persons accepted to FEN membership and who paid a \$50 membership fee, or whom FEN waived the membership fee, were eligible for "exit services".

FEN volunteers, identified as "case coordinators", "first responders", or "exit guides", were assigned to provide exit services to its members. In accordance with FEN policies and procedures, a member's application for exit services is reviewed and either rejected or approved by the "medical

committee” or “medical director”. Once accepted for exit services the member is then paired with FEN volunteers trained in the organization’s “exit services” program protocols. Members accepted for “exit services” are instructed that they must read “Final Exit, 3rd Edition with Addendum” or view the DVD or videotape version, which according to FEN training materials provides a explanation of various suicide methods. FEN believes that this knowledge is essential for a complete understanding of the applicant’s options. Members are informed of the cost to purchase the book and that FEN may loan out a copy of these materials when the member does not have the financial means to purchase the book or audio/video materials.

FEN volunteers inform members that the preferred method of taking one’s life is the helium asphyxiation method. According to FEN protocols, asphyxiation by helium is accomplished by connecting plastic tubing to two helium tanks, and then inserting the plastic tubing into a plastic hood or bag. The hood or bag is then pulled over the individual’s head and fit securely around the individual’s neck. As part of its “exit services” FEN informs members of the equipment needed and supplier addresses of where to obtain the hood, names of stores where helium tanks and tubing can be purchased, and the cost of the equipment; all of which is necessary to end the member’s life through helium asphyxiation. FEN volunteers actively discourage members to complete an “exit” without the help of an “exit guide” to avoid the possibility the member may “botch [the suicide] and be in worse shape than before due to getting the helium flow wrong or may claw at and dislodge the bag which if

committee" or "medical director". Once accepted for exit services the member is then paired with FEN volunteers trained in the organization's "exit services" program protocols. Members accepted for "exit services" are instructed that they must read "Final Exit, 3rd Edition with Addendum" or view the DVD or videotape version, which according to FEN training materials provides a explanation of various suicide methods. FEN believes that this knowledge is essential for a complete understanding of the applicant's options. Members are informed of the cost to purchase the book and that FEN may loan out a copy of these materials when the member does not have the financial means to purchase the book or audio/video materials.

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severe enough could leave person in persistent vegetative state.”

FEN operates unregulated under a veil of secrecy. Exit guides assigned to a member instruct the member to be wary of whom they tell their plans to end their life. During some of the initial contact with an applicant seeking exit services, FEN volunteers are trained to assess whether the applicant’s environment (location of the suicide) is secure so exit guides can enter undetected. Members are instructed to maintain confidentiality about FEN’s involvement “to prevent any appearance of illegal activity in planning and witnessing what law would term a suicide.”

FEN assigns “exit guides” to assist members in accomplishing their suicide. According to FEN training materials, once a member sets the suicide date, “the member and the guide plan the death event together.” “Exit guides” ensure the member understands the mechanisms for taking his or her own life through helium asphyxiation. The exit guide goes to the member’s home or location of suicide to ensure the member has the necessary equipment to accomplish the suicide; inspects the equipment to ensure it is hooked up properly; and rehearses with the member on how to use the equipment. The exit guide is present on the date of the suicide to answer questions on how to hook up the equipment and to do a final inspection to make sure everything is connected properly to ensure death by asphyxiation will occur. Once the suicide has been completed the exit guide will remove the paraphernalia (helium tanks, tubing, plastic hood/bag, and any written materials evidencing suicide as the cause of death), and dispose the paraphernalia in a commercial

dumpster to prevent others from learning the member's cause of death.

Law enforcement investigators discovered amongst seized FEN documents, a handwritten letter that was signed by Mrs. Dunn, requesting FEN provide her with "exit services" and delineating her reasons for wanting to "exit". There was also a one-page unsigned letter that was on Mrs. Dunn's doctor's letterhead, outlining Mrs. Dunn's medical conditions. The documents submitted by Mrs. Dunn included: a completed membership form; \$50 money order to cover the membership fee; a personal letter explaining her physical ailments and length; and the negative impact her physical ailments had on her quality of her life. There was also a description of her medical condition on the letterhead of her personal physician. Additional documentation indicated that a FEN volunteer provided Mrs. Dunn with general information about the "inhalation method" and that she had indicated she was okay with the "helium" method of taking her own life.

Dr. Lawrence Egbert volunteered as the medical director for FEN and approved Mrs. Dunn for exit services. Egbert and Jerry Dincin volunteered as "exit guides" for FEN and were assigned to Mrs. Dunn's case. Rental car and flight records revealed Dincin had travelled to Mrs. Dunn's residence approximately one week before Mrs. Dunn's death. At trial Egbert testified and confirmed that he and Dincin arrived at Mrs. Dunn's residence on the day of her death and were present at the time of her death. Egbert testified that Mrs. Dunn ended her own life through the FEN preferred method of helium asphyxiation in accordance with FEN policies and procedures. This included the inspection of the equipment to ensure that it was hooked up properly

to allow the correct flow of helium into the plastic hood and that the hood was securely in place so it would not dislodge during the asphyxiation process. According to Egbert, they would also have answered any questions Mrs. Dunn may have about the process. Egbert explained that if the equipment had not been hooked up properly he would have explained the correct process to Mrs. Dunn.

Egbert testified that he observed Mrs. Dunn connect the tubing and place the hood on her head. Egbert also observed helium flow into the hood. At trial, evidence was presented that would call into question the ability of Mrs. Dunn to perform these necessary acts without the physical assistance of Egbert or Dincin. For example, Mrs. Dunn's family described that in the year leading up to her death, they observed her dexterity challenges and difficulty with "fine motor skills" involving the use of her fingers and hands, including difficulty in opening pill bottles, lifting hardbound books, and difficulty showering and dressing herself.

Egbert testified that immediately prior to her death he asked Mrs. Dunn if she still wanted to complete the exit. She replied in the affirmative. She then pulled the hood down over her head and snugged it up around her neck. He watched her breathing deeply, turning gray and bluish in color, her breathing slowed, and she then eventually stopped breathing. Pursuant to FEN protocol, Egbert waited approximately ten to fifteen minutes before checking Mrs. Dunn's pulse. Pursuant to FEN protocols, after Mrs. Dunn's death, Dincin and Egbert removed the hood, tubing, and helium tanks and disposed of the paraphernalia in a commercial dumpster to avoid her family and others from learning the cause of her death was suicide. Mrs.

Dunn's family, law enforcement, and the medical examiner were never contacted by FEN to advise of its involvement in Mrs. Dunn's death.

FEN was indicted for the criminal offenses of assisting suicide (Minn. Stat. § 609.215, subd. 1) and interference with a death scene (Minn. Stat. § 609.502, subd. 1).<sup>1</sup> FEN pled not guilty and the case proceeded to jury trial. On the crime of assisting suicide, the jury was instructed as follows:

The Statutes of Minnesota provide that whoever intentionally assists another in taking the other's own life is guilty of a crime.

The elements of assisting suicide are:

First, that Doreen Dunn took her own life.

Second, that the defendant's agents intentionally assisted Doreen Dunn in taking her own life. An agent is an officer, director, employee or other person authorized by the corporation to act on its behalf.

Intentionally means that the defendant's agents either acted with the purpose of assisting Doreen Dunn in taking her own life or believed that its act or acts, if successful, would assist Doreen Dunn in taking her own life.

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<sup>1</sup> FEN was also indicted for the offenses of aiding and abetting assisting suicide and aiding and abetting interference with a death which were subsequently dismissed upon motion of the State.

In addition, the defendant's agent or agents must have had knowledge of those facts that are necessary to make its conduct criminal.

To "assists" means that defendant's agent or agents enabled Doreen Dunn through either physical conduct or words that were specifically directed at Doreen Dunn 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.

Third, that all of the above acts took place on February 1st, 2007, through May 30th, 2007 in Dakota County, Minnesota.

On May 15, 2015, a jury convicted FEN of both offenses.

#### **REASONS FOR DENYING WRIT OF CERTIORARI**

Minnesota has a compelling state interest in the preservation of life. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). In furtherance of this interest, Minnesota has criminalized actions that assist another to commit suicide. Minn. Stat. § 609.215, subd. 1. In *Melchert-Dinkel*, 844 N.W.2d 13, 23 (Minn. 2014) the Minnesota Supreme Court interpreted the term "assists" in a manner to include "direct" and "causal" speech that assists another in committing suicide that is "beyond merely expressing a moral viewpoint or providing general comfort and support." *Id.* at 23. Consistent with the plain language of the statute and common definition of the term "assists", the Minnesota Supreme Court

determined that speech alone may also enable a person to commit suicide if the following facts exist: the speech was performed with the intent to assist a specific person in committing suicide; the speech was specifically targeted at the person contemplating suicide; and that the speech enabled the person to commit suicide. *Id.* The jury instruction in the instant case relating to the required elements of assisted suicide were consistent with the Minnesota Supreme Court's holding in *Melchert-Dinkel*.

**A. Petitioner has incorrectly asserted that Minnesota Supreme Court has interpreted a federal question contrary to the decision of another state court of last resort.**

Petitioner argues that this Court should grant the petition as the Minnesota Supreme Court decision in *Melchert-Dinkel* is contrary to the position taken by the court in *In re Ryan N.*, 92 Cal. App. 4th 1359, 1375, 112 Cal Rptr. 2d 620, 632 (2001). In *Ryan*, the issue before the court was whether there was sufficient evidence to support a conviction for assisting suicide under California's statute. The issue as to whether California's assisting suicide statute violated the freedom of speech protections of the First Amendment was never raised or discussed by the California appellate court. As such, any attempt to argue that *Ryan* decided an important federal question in a manner that is contrary to that of the Minnesota Supreme Court is without merit and should be rejected.

**B. Minnesota has not impermissibly sought to erect a barrier against an established American social movement.**

Petitioner argues that this Court should grant the petition as Minnesota has impermissibly sought to erect a barrier against an established American social movement. The right to assist another in committing suicide is not a protected fundamental liberty interest that is, “deeply rooted in this Nation’s history and tradition.” *Glucksberg*, 521 U.S. 720, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)). To the contrary, this Court in *Glucksberg* held that prohibiting causing or aiding a suicide was interconnected with the State’s interest in preserving human life and protecting vulnerable groups, protecting the integrity of the medical profession, and avoiding emergence towards voluntary or involuntary euthanasia. *Id.* at 728-34. Therefore, Petitioner’s assertion would require this Court to issue a decision that is inconsistent with this Court’s acknowledgement of the compelling interest states have in regulating such acts. Accordingly, Petitioner’s argument related to Minnesota erecting a barrier against an established social movement should be summarily rejected.

**C. Minnesota’s assisted suicide law is narrowly tailored in a manner that does not prohibit general expression of viewpoints on the merits of assisted suicide.**

Contrary to Petitioner’s assertions, Minnesota’s assisted suicide law does not stifle the expression of mere viewpoints related to suicide or the offering of comfort and support to someone

contemplating suicide. The law does not target subject matter or particular views on assisted suicide, and as Petitioner acknowledges, persuading someone to let the dying process run its course. Pet. 15. In requiring that there be a “direct and causal” link between the speech and the individual’s suicide, the Minnesota Supreme Court has narrowly tailored Minnesota’s assisted suicide statute in a manner that allows persons the right to freely express viewpoints on the merits and methods of suicide in a public forum, while proscribing only speech and actions that are specifically intended to assist a specific individual in committing suicide. Accordingly, Petitioner’s argument that this Court should grant its petition on the grounds that Minnesota’s assisted suicide law stifles general expression and viewpoint should be rejected.

**D. Minnesota does not proscribe speech that simply enables suicide.**

Contrary to Petitioner’s assertions, *Melchert-Dinkel* did not hold that “enabling” a suicide by providing information in a public forum about suicide methods constitutes the act of assisting suicide under Minnesota law. Rather, *Melchert-Dinkel* narrowly interpreted the statute to require a “direct and causal” involvement in the suicide. The direct and causal involvement must be by physical assistance or speech that: is performed with the specific intent of assisting the person in committing suicide; is directly targeted at the specific individual contemplating suicide; provides the person with what is necessary to complete the suicide; and enables or causes the suicide. *Melchert-Dinkel*, 844 N.W.2d at 22-23. Minnesota’s assisted suicide statute requires more

than speech that merely enables a person to commit suicide and Petitioner's argument should be rejected.

**E. Minnesota's assisted suicide statute is constitutional facially and as applied.**

This Court has cautioned that declaring a criminal statute overbroad and facially unconstitutional under the First Amendment can be so wide-reaching in its impact that it can effectively invalidate a statute that serves a legitimate compelling state interest in regulating conduct harmful to its citizens. *New York v. Ferber*, 458 U.S.747, 767 (1982). The law is well-settled that in order to succeed in facial attack, a defendant must establish that no set of circumstances exists under which the statute would be valid or that the statute lacks any plainly legitimate sweep. *U.S. v. Stevens*, 559 U.S. 460,472 (2010) (citations and quotation marks omitted).

Minnesota's assisted suicide statute is constitutional facially and as applied. The statute was narrowly tailored by the Minnesota Supreme Court to proscribe only speech so intertwined with a specific suicide and not speech that is a mere expression of a viewpoint. Under Minnesota's assisted suicide law, the speaker must be intimately involved in a person's suicide by providing the mechanism (physical or otherwise) for a suicide or imparting knowledge to a specific individual with intent that the knowledge enables the suicide. The statute is facially constitutional and in this case as applied because there is a direct nexus between the speech, the speaker (FEN) and Mrs. Dunn, which enabled her death.

**F. Minnesota's assisted suicide statute is inclusive, while simultaneously protecting First Amendment right to free expression of ideas.**

Minnesota's compelling state interest in preserving life has been pursued by means that are neither seriously underinclusive or seriously overinclusive. Illustrative of the statute not being overinclusive is that it does not proscribe or censor speech in the form of a book outlining suicide methods, the merits of suicide, or a historical chronicle of the "right to die" or "death with dignity" movements, because speech in this form is an expression of a viewpoint and is not directly targeted to an individual with the intent that the information enable the specific individual to take his or her own life by a certain mode of suicide.

A person is not shielded from criminal prosecution simply because the speech the speaker targeted to a specific individual with the intent the person use this information to take his or her own life, or with belief this will occur, is available elsewhere. Directing a person to a specific source to obtain information about suicide methods, as a precursor to agreeing to help a person execute their suicide by a certain method, is proscribed speech because it is no longer the expression of a viewpoint in a public form. The speaker is now working with a specific individual to plan and affect that person's suicide.

The speech proscribed by Minnesota's assisting suicide statute does not regulate some speech directed to an individual enabling the person to commit suicide, while failing to regulate other equally problematic speech. Unlike the statute at issue in

*Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), Minnesota has established a compelling government interest in support of its assisted suicide statute. Minnesota's statute is not underinclusive as it proscribes all, not some, speech and conduct that is targeted at an individual with intent the speech enable a person to commit suicide and the person does in fact do so. The speech does not "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 (1994). Minnesota has recognized that speech that is intimately conveyed to its vulnerable citizens jeopardizes its compelling state interest to preserve life, especially where the listener is vulnerable due to having struggled with physical or mental illness. Accordingly, the statute addresses this state interest.

**G. The statute is narrowly tailored as there is no lesser restrictive measure to accomplish the state's compelling interest in preserving life.**

Minnesota employs the "least restrictive means" to further its compelling interest in preserving the lives of its often most vulnerable citizens. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). "No less restrictive alternative would have served the state's interest" in protecting Mrs. Dunn's life. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 307 (Minn. App. 2016). Minnesota already criminalizes as murder, conduct that directly causes death, such as shooting a person with a gun or stabbing a person with a knife that leads to the person's death. Acts leading to a person's death by helium asphyxiation, such as turning on the helium tanks after the tubing

was inserted under the hood, pulling down the hood over a person's face once the helium begins flowing into the hood, or holding the person's hands down to prevent the individual from dislodging the hood, could constitute murder because a person is not completing an overt act that directly caused the person's death.

The act of suicide does not involve a third party physically exerting the means leading to the person's death - that would be murder not suicide. Minnesota's assisted suicide statute requiring that a person "assist" a specific person by enabling them to take their own life, either by providing them with the physical means to do so, or the blue print that they assist the person in executing, is the least restrictive means to further Minnesota's compelling state interest in preserving life because the law requires in essence that the speaker and the targeted individual listener are working together so the individual is enabled to accomplish taking his or her own life.

## CONCLUSION

There is no compelling reason to grant the Petition for Writ of Certiorari. Contrary to Petitioner's assertion, Minnesota appellate courts have not decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court or with the decision of another state court of last resort. Instead, Minnesota's assisted suicide statute has been interpreted and applied in a narrowly tailored manner to protect a compelling state interest, the preservation of human life. Accordingly, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied in all respects. Respectfully submitted.

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