STATE OF MINNESOTA
IN COURT OF APPEALS
Case No. A15-1826

Final Exit Network, Inc.,

Appellant,

v.

State of Minnesota,

Respondent.

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

FFRF is a non-profit organization whose primary purposes are to protect the constitutional principle of separation between state and church and to represent the rights and views of nontheists and freethinkers.[1] FFRF has more than 23,500 members nationally and more than 500 Minnesota members, as well as two local chapters within Minnesota. FFRF has advocated for decades to allow persons who are suffering chronic pain and terminal illnesses to make choices to die on their own terms, not religiously dictated terms. Likewise, FFRF opposes government restrictions on speech that prohibit that choice, including sharing humane end of life information.

ARGUMENT

1. Citizens have a broad First Amendment right to receive information.

This case involves not just the right of Final Exit Network to speak, but also the right of Minnesotans in general to access information. Popular speech is rarely restricted by government action. Instead, speech restrictions frequently target controversial points of view held by those in the minority. Speech that confronts deeply held moral views is often the subject of constitutional cases. *See, e.g., Hustler Magazine Inc. v. Falwell,* 485 U.S. 46 (1988) (holding that "outrageous" parody advertisement concerning nationally

[1] No party or party's counsel authored the brief in whole or in part, and no person other than *amicus curiae* contributed money to fund its preparation and submission.

known minister was speech protected from damages claim); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952) (striking down New York law prohibiting the showing of "sacrilegious" films); *Epperson v. Arkansas,* 393 U. S. 97 (1968), (holding that a state law that prohibited the teaching of evolution in public schools violated the Establishment Clause of the First Amendment).

The First Amendment protects not only the right to speak, but also the right of citizens to hear or receive speech. As the Supreme Court stated in *Martin v. City of Struthers*:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature… **and necessarily protects the right to receive it.**

319 U.S. 141, 143 (1943) (citations omitted) (emphasis added).

The Supreme Court has continually affirmed the rights of recipients to receive speech deemed to be immoral or dangerous by the government. The Court has not waivered in protecting the receipt of information in such cases. In *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, the Court struck down the removal of controversial books from public school libraries. 457 U.S. 853 (1982). The school board "characterized the removed books as 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,' and concluded that '[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical

dangers.'" *Id*. at 857. The Supreme Court emphasized, "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id*. at 866, *quoting First National Bank of Boston v. Bellotti,* 435 U.S. 765, 783 (1978). The Court said, "we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" *Id., quoting Stanley v. Georgia,* 394 U.S. 557, 564 (1969). The Court noted one of the key concepts inherent in the First Amendment: "[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id*. (emphasis in original).

Because of these interests, the First Amendment rights implicated are not just those of Final Exit Network. This case implicates the rights of all Minnesotans to receive factual information on end of life matters.

2. MN Stat. § 609.215(1), as described in the jury instruction, violates the First Amendment rights of speakers, as well as the rights of recipients of speech.

A) Government restrictions that include a substantial amount of protected speech are overbroad under the First Amendment.

It is well settled that a restriction that is broad enough to include protected First Amendment speech or conduct is constitutionally infirm. In *Coates v. City of Cincinnati*, the U.S. Supreme Court struck down an ordinance that made it a crime for three or more people to gather on sidewalks "in a

manner annoying to persons passing by." 402 U.S. 611, 611 (1971). The Court determined that the ordinance was "unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id*. at 614. Likewise, in *City of Houston v. Hill,* the Supreme Court found that an ordinance that made it unlawful to "interrupt" an officer in the performance of her duties was overbroad because it "criminalizes a substantial amount of constitutionally protected speech." 482 U.S. 451, 466 (1987). When an ordinance or statute "is susceptible of regular application to protected expression," it is overbroad and facially invalid. *Id*. at 467.

The far reaching application of the speech restrictions leveled against Final Exit Network are reminiscent of one of the seminal Supreme Court cases on the right to privacy. In *Griswold v. Connecticut,* Planned Parenthood and a licensed physician challenged a state law that not only criminalized the use of "any drug, medicinal article or instrument for the purpose of preventing conception," but also provided that **"[a]ny person who assists**, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." 381 U.S. 479, 480 (1965) (emphasis added). The Court found that the appellants had standing to challenge the contraceptive statute and considered the rights of the recipients of contraceptives. *Id*. at 481. The Court said, "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential

relation to them." *Id*. The rights of Minnesotans are likely to be diluted or adversely affected unless their right to receive end of life information is considered.

In *Griswold,* the Court concluded that the law could not stand in light of the principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id*. at 485, *quoting NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

B) Despite a constricting interpretation on what it means to "assist" a suicide, Final Exit Network was prosecuted for protected speech activities.

To the extent that Minn. Stat. § 609.215(1) may constitutionally regulate or prohibit activities that assist a suicide, the prosecution of Final Exit Network goes beyond constitutional bounds when it restricts pure speech that is informational, supportive, builds confidence, or is otherwise too attenuated from the act of suicide.

In overbreadth challenges under the First Amendment, the Supreme Court considers a state's jury instruction to be incorporated into state law. In *Virginia v. Black,* the Court held that a prima facie case provision in a cross burning statute, "as interpreted by the jury instruction," rendered the statute unconstitutionally overbroad. 538 U.S. 343, 364 (2003); *see also, Terminiello v. Chicago,* 337 U.S. 1, 4 (1949) (construing its ruling on a jury instruction to

be a question of state law that "is binding on us as though the precise words had been written into the ordinance"). In *Virginia v. Black,* the law, as interpreted by the jury instruction, was overbroad because it could restrict "core political speech" in addition to speech that would be "constitutionally proscribable intimidation." 538 U.S. at 365.

In *State v. Melchert-Dinkel,* 844 N.W.2d 13 (Minn. 2014), the Minnesota Supreme Court attempted to salvage the "assist" portion of Minn Stat. § 609.215(1). The Minnesota Supreme Court found that the statute "proscribes speech or conduct that provides another person with what is needed for the person to commit suicide." *Id.* at 23. According to the court, "'assist,' by its plain meaning, involves enabling the person to commit suicide." *Id.* The court said, "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." *Id.* While certain types of speech "instructing another on suicide methods" could be prohibited according to the court, speech that "advises" and "encourages" suicide is protected speech. *Id.* at 24.

Despite these limiting constructions by Minnesota courts, the "assist" portion of the statute, as applied to Final Exit Network, sweeps in protected speech. When the *Melchert-Dinkel* case returned to the Minnesota Court of Appeals, this court addressed additional forms of speech that would not be considered criminal under the statute. See No. A15-0073, 2015 WL 9437531,

at *11 (Minn. Ct. App. Dec. 28, 2015), *citing Melchert-Dinkel,* 844 N.W. 2d at 23 (finding that "assisting suicide under the statute requires more than 'providing general comfort or support' and more than merely providing information, 'courage, confidence, or hope.'").

Final Exit Network was prosecuted for speech that "enabled" Doreen Dunn to commit suicide, which included speech within the protected categories of providing information and confidence. Despite objection from Final Exit Network, the trial court's jury instruction said in part: "To 'assist' means that [Defendant] enabled Doreen Dunn through either her physical conduct or words that were specifically directed at Doreen Dunn and that the conduct or words enabled Doreen Dunn to take her own life." Trial Court's Feb. 23, 2015 Order on Jury Instructions, dated Feb. 23, 2015 (Doc. ID #23) at 2. This instruction on enabling covers both prohibited speech according to the Minnesota Supreme Court (e.g., directly instructing another on suicide methods) and protected speech (e.g., providing information and confidence that "enabled").

Even worse, under the jury instruction, a reasonable member of the jury would consider the very same protected speech that "encourages" or "advises" another in committing suicide as being speech that illegally "enables" a suicide. The jury instruction did not include any further limiting wording on what it means to enable other than to explicitly allow speech that provided "mere comfort or support." As such, speech that informs, "advises," or

"encourages" a suicide very well was encompassed within the broad category of speech that "enables" a suicide.

Criminal convictions for illegal acts must be overturned on free speech grounds when both unprotected and protected speech were the subject of the prosecution. *See United States v. Ellyson,* 326 F.3d 522, 531 (4th Cir. 2003) (overturning conviction under the Child Pornography Prevention Act of 1996 when the evidence presented and court's instructions "permitted the jury to convict [the defendant] on both a constitutional and unconstitutional basis."). Because Final Exit Network was prosecuted for speech that was within the category of protected speech, its conviction must be overturned.

C. A restriction on speech that "enables" suicide chills constitutionally protected speech.

The State's case also included speech that could hardly be construed to fit within any construction of the assist statute. Final Exit Network was prosecuted, in part, for core speech activity that merely "led" Doreen Dunn "to further knowledge and discovery." During closing argument the State argued:

> 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.

(TR-590).

This prosecution "would create an unacceptable risk of the suppression of ideas." *Virginia v. Black,* 538 U.S. at 365 (citations omitted). Suppressing

information on this subject has a direct impact on freethinkers and others who support the rights of individuals to make end of life decisions free from religious dogma. When speakers on end of life matters are silenced, the constitutional rights of those who are dying or suffering from chronic and incurable pain are also impacted.

The "enabling" interpretation of the statute will have a chilling effect on speech because it is impossible to discern what speech is permitted under the law. Could a friend tell someone who has a terminal illness about the book Final Exit? Could that friend answer questions about the definition of a word in the book? To what extent does the statute allow someone to discuss suicide with a terminally ill family member? Could a husband and wife who reside in another state make arrangements to move to a state that permits physician-assisted suicide so that the wife may hasten her death?[2] To parse the words that would "enable" a suicide under Minn. Stat. § 609.215(1) is to parse the First Amendment and chill protected speech.

The concern about prosecutorial abuse is not hypothetical. Barbara Mancini, a member of the Freedom From Religion Foundation, was arrested and prosecuted in Pennsylvania for allegedly assisting her ill 93-year-old father in attempting to commit suicide. As the trial court described the state's case,

[2] Steve Dubois and Terrence Petty, *Brittany Maynard stuck by her decision*, The Seattle Times, Nov. 3, 2014, http://www.seattletimes.com/nation-world/terminally-ill-woman-in-oregon-takes-own-life/.

"The Commonwealth essentially contends that Defendant caused her elderly and ailing father, Joseph Yourshaw, to attempt to commit suicide by first seeking that morphine be prescribed for him and later handing him a bottle containing the drug while knowing that he intended to kill himself by drinking an excessive amount of the medication, which he then consumed." Order of Dismissal, *Commonwealth v. Mancini,* No. 1305-13 (Schuylkill Ct. Com. Pl. Feb. 11, 2014).[3] Mancini argued that the actions she took did not cause a suicide or an attempted suicide and that the state failed to prove its version of the asserted facts.

Her father was "in the end stage of his life, he wanted to die at home and he did not want to be resuscitated when the time came that he was to die." *Id.* at 39. Her father discussed his decision to cease taking medicines for his conditions with his family "with knowledge that this decision would likely hasten his death." (Barbara Mancini, *Death with dignity quest personal for Barbara Mancini*, Freethought Today, Dec. 2014).[4] Barbara, a nurse by profession, was present when her father took medically prescribed morphine while in home hospice care.

What followed could best be described as a nightmare. The hospice provider took extraordinary measures to prolong his life. As Barbara explained,

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[3] https://ffrf.org/uploads/legal/Mancini-Dismissal.pdf

[4] https://ffrf.org/publications/freethought-today/item/22158-death-with-dignity-quest-personal-for-barbara-mancini

"Instead of having the peaceful and dignified death at home that he hoped for, he died after prolonged suffering and being subjected to exactly the medical treatment that he specified in his written advanced directives that he never wanted." *Id*. She said of her prosecution, "The Pennsylvania attorney general began a year-long zealous prosecution of me. I was placed on unpaid leave from my job. The prosecutor had the court put a gag order on me. I incurred over $100,000 in legal fees. The emotional and financial burden on my family and me was enormous." *Id*. Ultimately, a judge dismissed the charges, finding that the state's overzealous prosecution failed to present adequate evidence to bring the charge. Order of Dismissal at 44. By that time, the damage to Barbara and her family had already been done.

The broad interpretation of Minn. Stat. § 609.215(1) impacts daughters, sons, husbands, wives, and other loved ones who would seek to speak, or receive speech, about the issue of hastening death.

CONCLUSION

Minn. Stat. § 609.215(1) does not withstand constitutional scrutiny under the jury instruction that was provided.

Respectfully Submitted,

/s/ *Patrick C. Elliott*

April 11, 2016

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