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Prosecuting Fatal Speech: What Minnesota's *State v. Final Exit Network* Means for Assisted-Suicide Laws Across the Country

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I. Introduction

"We hold that mentally competent adults who suffer from a terminal illness . . . have a basic human right to choose to end their lives when they judge their quality of life to be unacceptable."[1] This statement is the basic mission of Final Exit Network, a right-to-die organization that advocates the legalization of assisted suicide.[2] Assisted suicide is among the most controversial topics in the United States today. It is such a contentious issue because it extends beyond politics, delving into matters of personal autonomy and morality. Quite literally, it is a matter of life or death. The United States Supreme Court has held that prohibiting assisted suicide does not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[3] As a result of those decisions, the debate has shifted to the states. Currently, the vast majority of states make it illegal to assist someone in committing suicide.[4]

The controversy surrounding this issue often focuses on due process rights. This Note, however, will discuss the issue in a different context—free speech. With physician-assisted suicide illegal in most states, right-to-die groups have taken the initiative to help people suffering from terminal illnesses by providing guidance on how to take their own life so that they can achieve "death with dignity."[5] But the actions of these groups can violate statutory prohibitions on assisting a suicide. And when these groups do not actually provide physical assistance to the terminally ill, but instead only give advice and information, then the right to free speech is implicated.

State v. Final Exit Network, Inc.[6] is a noteworthy Minnesota case from recent years in which the issues of assisted suicide and free speech have

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1. *Our Guiding Principles*, FINAL EXIT NETWORK, https://web.archive.org/web/20180701120417/https://www.finalexitnetwork.org/Mission.html (last visited Feb. 25, 2019).

2. *Id.*

3. Washington v. Glucksberg, 521 U.S. 702, 705-06 (1997); Vacco v. Quill, 521 U.S. 793, 797 (1997).

4. *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG (Feb. 21, 2017), https://euthanasia.procon.org/view.resource.php?resourceID=000132.

5. DEATH WITH DIGNITY, https://www.deathwithdignity.org (last visited Feb. 18, 2018).

6. 889 N.W.2d 296 (Minn. Ct. App. 2016), *cert. denied*, 138 S. Ct. 145 (2017).

arisen. Final Exit Network was charged with violating Minnesota's prohibition on assisted suicide when it advised and informed someone on how to kill herself. The organization did not provide any physical assistance that enabled the victim to commit suicide.[7] Nevertheless, the company's counseling on suicide qualified as assistance within the meaning of the relevant Minnesota statute.[8] Final Exit Network challenged the law as unconstitutional under the First Amendment, arguing that it restricted speech based on content.[9]

This Note will analyze *State v. Final Exit Network*. Part II provides a background for previous cases from the United States Supreme Court and the Minnesota Supreme Court that dealt with assisted suicide and free speech. Part III describes the facts surrounding *Final Exit Network* and analyzes the court's reasoning. Part IV argues that the statute in question may not violate the First Amendment, though the court's interpretation of "assisting" a suicide to include pure speech is questionable. The Note then compares Minnesota's ban on assisted suicide to other states' statutes and discusses the implications of the case on those statutes. In particular, it examines Oklahoma's prohibition on assisted suicide, which is especially broad and therefore potentially problematic. After observing that many other states avoid First Amendment issues by clearly defining "assisting" a suicide to require physical assistance, it argues that state legislatures would be wise not to define "assist" to include mere speech.

II. Law Before the Case

A. United States Supreme Court—Assisted Suicide

The United States Supreme Court has not ruled on any cases involving assisted suicide from a free-speech perspective, but it has examined the issue of assisted suicide in different contexts. Most notably, in *Washington v. Glucksberg*, the Court upheld a state law that prohibited aiding someone in committing suicide.[10] It held that the law did not violate the Due Process Clause of the Fourteenth Amendment.[11] The Court determined that there was no fundamental liberty interest to commit suicide because American and English society had a long history and tradition of opposition to

7. *Id.* at 300.
8. *Id.* at 305.
9. *Id.*
10. Washington v. Glucksberg, 521 U.S. 702 (1997).
11. *Id.* at 735.

suicide.[12] Since the liberty interest in question was not fundamental, the statute simply needed to be rationally related to legitimate government interests in order to be constitutional.[13] This statute satisfied the standard because it furthered the government's interest in preserving human life, protecting the integrity of the medical profession, protecting vulnerable groups (e.g., the elderly or disabled) from abuse, and preventing an expansion of the law to allow euthanasia.[14]

Similarly, in *Vacco v. Quill*, the Court held that prohibitions on assisted suicide did not violate the Equal Protection Clause of the Fourteenth Amendment.[15] The state statute in question did not implicate equal protection because it did not draw any distinctions between classes of people—no one was permitted to commit suicide.[16] Therefore, the law was constitutional because it furthered the legitimate government interests that the Court had discussed in *Glucksberg*.[17] Due to these decisions, many states have made it a crime to aid a suicide.

B. United States Supreme Court—Free Speech

In respect to free speech, the United States Supreme Court has made many decisions regarding content-based restrictions to speech (though none in connection with assisted suicide). Based on these rulings, the states must meet stringent requirements in order to prohibit pure speech due to content.[18] Under the First Amendment, any statute that regulates speech based on content is presumptively invalid.[19] Nevertheless, there are several categories of speech to which the Court has not extended First Amendment protection.[20] These categories include obscenity,[21] defamation,[22] incitement

12. *Id.* at 728.
13. *Id.*
14. *Id.* at 728–33.
15. 521 U.S. 793 (1997).
16. *Id.* at 800. The Court rejected the argument that there was a suspect classification between terminally ill patients who were attached to life-support equipment and patients who were not. *Id.* at 800–01. It reasoned that such a distinction was rational because merely withdrawing life-support equipment brings about death by natural causes, but assisted suicide kills the patient directly. *Id.*
17. *Id.* at 808–09.
18. *See* Boos v. Barry, 485 U.S. 312, 321–22 (1988).
19. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
20. *Id.* at 382–83.
21. Roth v. United States, 354 U.S. 476, 485 (1957); *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792–93 (2011) (noting that obscenity includes only depictions of sexual conduct, not "whatever a legislature finds shocking").
22. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

to imminent lawless action,[23] speech integral to criminal conduct,[24] and fighting words.[25] The Court generally has been unwilling to expand these categories of unprotected speech to encompass new types of speech.[26] Thus, any content-based restriction that does not clearly fall into one of those categories will most likely be presumptively invalid under the First Amendment.

Even if the speech is not considered unprotected, a content-based restriction may still be constitutional.[27] But the standard is much higher, as the statute must satisfy strict scrutiny.[28] This standard requires that the statute be narrowly tailored to further a compelling government interest.[29] Although the government can sometimes demonstrate that its restriction on speech advances a compelling interest, it is challenging to prove that the statute is narrowly tailored. Two instances in which a statute is not narrowly tailored are when it is overbroad or underinclusive. A statute is overbroad when it extends beyond its original purpose to encompass many types of ordinary, lawful speech.[30] Overbroad restrictions apply to a substantial number of areas beyond the legislature's intention, which is why they are unconstitutional on their face.[31] Conversely, a statute is underinclusive compared to its alleged purpose when it singles out certain speech, while permitting other similar types of speech that offend the same principles.[32] When a statute is underinclusive, there are concerns about whether the government truly intends to pursue its compelling interest.[33]

The Court has not hesitated to strike down laws as violating the First Amendment for failing to be narrowly tailored, even though the

23. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

24. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

25. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

26. *See, e.g.*, *Brown*, 564 U.S. at 792 (holding that the Court cannot create categories of unprotected speech unless there is strong evidence that such speech has been historically unprotected); United States v. Stevens, 559 U.S. 460, 472 (2010) (refusing to characterize depictions of animal cruelty as outside the protection of the First Amendment).

27. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

28. *Id.* at 230.

29. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

30. *Stevens*, 559 U.S. at 473.

31. *Id.* A party may succeed in a facial challenge to a statute even if the statute is constitutional as applied in that case. Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973). The opposite is also true: a statute that is constitutional on its face may be unconstitutional when applied to a certain case. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 477–78 (1995).

32. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 802 (2011).

33. *Id.*

government could show a compelling interest. In *United States v. Stevens*, the Court ruled that a federal statute that banned the sale of depictions of animal cruelty was facially unconstitutional.[34] The primary purpose of the statute was to ban the creation of "crush videos"—videos that showed people crushing animals to death in order to cause sexual arousal in the viewers.[35] Despite the government's interest in eliminating the dissemination of these videos, the statute could also extend to lawful depictions of hunting.[36] The demand for hunting publications heavily outweighed the demand for crush videos.[37] Therefore, the statute was overbroad, as it would encompass a substantial amount of speech that is clearly protected under the First Amendment.[38]

In *Brown v. Entertainment Merchants Ass'n*, the Court once again struck down a content-based restriction on speech for not being narrowly tailored, but this time because the statute was underinclusive.[39] That case involved a California statute that banned the sale of violent video games to minors.[40] Although California had an interest in preventing harm to minors, its manner of pursuing that interest raised doubts about its intentions.[41] The statute targeted only videogames, but had no impact on books, movies, and TV shows, which could be just as violent and harmful to children as videogames.[42] Because the statute was underinclusive, it failed strict scrutiny and was unconstitutional.[43] The ramifications of these recent decisions are that content-based restrictions on speech face a steep challenge. Even if a statute furthers a compelling government interest, it may still be unconstitutional if the legislature's actions cover an amount of speech that is too broad or not broad enough.

C. Minnesota Supreme Court—Assisted Suicide and Free Speech

Unlike the United States Supreme Court, the Minnesota Supreme Court has examined whether a statutory ban on assisting a suicide violates the right to free speech. The same statute from *Final Exit Network* was in

34. 559 U.S. at 482.
35. *Id.* at 465–66.
36. *Id.* at 476.
37. *Id.*
38. *Id.*
39. 564 U.S. 786, 802 (2011).
40. *Id.* at 789.
41. *Id.* at 802.
42. *Id.*
43. *Id.* at 805.

dispute two years earlier in *State v. Melchert-Dinkel*.[44] Minnesota's statute on aiding suicide provided: "[w]hoever intentionally advises, encourages, or assists another in taking the other's own life may be sentenced to imprisonment . . . or to payment of a fine . . . ."[45] The issue before the court was whether the statute violated the First Amendment by punishing someone for "assisting, advising, or encouraging another in committing suicide."[46]

The Minnesota Supreme Court ruled that the prohibition on advising and encouraging someone to commit suicide was unconstitutional under the First Amendment, but that the ban on assisting a suicide was constitutional.[47] Speech that enabled someone to commit suicide did not fall into an unprotected category of speech such as speech integral to criminal conduct or incitement to imminent lawless action, as suicide was not a crime in Minnesota.[48] As a result, the statute was subject to strict scrutiny because it restricted speech based on content.[49] Under strict scrutiny, content-based restrictions are constitutional only if the law (1) is necessary to further a compelling government interest and (2) is narrowly tailored to furthering that interest.[50]

The court determined that the state met the first requirement because it had a "compelling interest in preserving human life."[51] But the "advising" and "encouraging" parts of the statute were not narrowly tailored.[52] Such terms were broad and could encompass speech that generally supported suicide.[53] In contrast, the "assisting" provision was narrowly tailored.[54] It criminalized only acts and speech that targeted a specific individual and directly caused him to commit suicide.[55] Notably, the court interpreted the word "assists" to include pure speech that enabled someone to commit suicide, so that a physical act was unnecessary to "assist" a person in taking his own life.[56] The court then severed and excised the words "advises" and

44. 844 N.W.2d 13, 18 (Minn. 2014).
45. MINN. STAT. ANN. § 609.215 (2016).
46. *Melchert-Dinkel*, 844 N.W.2d at 18.
47. *Id.*
48. *Id.* at 19–21.
49. *Id.* at 21.
50. *Id.*
51. *Id.* at 22.
52. *Id.* at 23–24.
53. *Id.* at 24.
54. *Id.* at 22–23.
55. *Id.*
56. *Id.* at 23.

"encourages" from the statute, leaving the "assists" provision intact.[57] *Melchert-Dinkel* had a significant impact on future cases. The Minnesota Court of Appeals relied heavily on it when deciding *Final Exit Network*, and the Minnesota Supreme Court's interpretation of "assists" was the basis for prosecuting Final Exit Network.

III. Statement of the Case

A. Facts

Final Exit Network (Final Exit) was a nonprofit company that provided services to people who wished to end their life by committing suicide.[58] Someone could become a member of Final Exit by paying an annual fee.[59] Members who wanted to commit suicide would request exit services from Final Exit.[60] The company would then follow a certain procedure to aid that member in committing suicide.[61] This procedure included ensuring that the member was mentally competent and suffering from an incurable condition, conducting a telephone interview with the member, requiring the member either to read a book or watch a movie regarding death by helium asphyxiation, and providing the member with information about buying the materials necessary for suicide by helium asphyxiation.[62] Once these steps were completed, Final Exit's medical director determined whether to provide the member with the company's services, based on the member's medical condition.[63] When a member was approved for exit services, the company appointed an exit guide, who informed the member on where to buy the necessary equipment and visited the member in person before the suicide.[64] On the day of the suicide, two guides from Final Exit were present at the member's home.[65] They did not physically assist the member in committing suicide, but they checked to ensure that the member was dead and then removed the equipment.[66]

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57. *Id.* at 24.
58. State v. Final Exit Network, Inc., 889 N.W.2d 296, 299 (Minn. Ct. App. 2016), *cert. denied*, 138 S. Ct. 145 (2017).
59. *Id.*
60. *Id.*
61. *Id.* at 300.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

D.D. was a woman who had suffered from chronic pain for eleven years.[67] She eventually became a member of Final Exit and requested exit services.[68] The company followed its standard procedure with D.D. and eventually approved her for exit services.[69] The guide that Final Exit appointed to D.D. and the company's medical director traveled to D.D.'s home in Minnesota for the suicide.[70] D.D. set up all of the equipment for helium asphyxiation by herself, before they arrived at her house.[71] Neither the guide nor the medical director physically aided D.D. in preparing the necessary equipment or committing suicide, as was consistent with Final Exit's normal procedures.[72] Nevertheless, if D.D. had made a mistake in setting up the equipment, they would have told her how to fix it so that the equipment was set up properly.[73] D.D. then committed suicide by way of helium asphyxiation.[74] The medical director checked D.D.'s pulse to make sure that she was dead, and then he and the guide disposed of the equipment.[75] D.D.'s husband found D.D. several hours later.[76]

Although there was no criminal investigation of D.D.'s death immediately, Final Exit's role in her death came to light a few years later as part of an investigation from the Georgia Bureau of Investigations (GBI).[77] GBI gave evidence regarding D.D.'s death to the Minnesota Bureau of Criminal Apprehension, which conducted its own investigation.[78] Following this investigation, a grand jury indicted Final Exit for violating Minnesota's assisted-suicide law, which provided: "[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."[79] Since the Minnesota Supreme Court in *Melchert-Dinkel* had severed the "advises" and "encourages" part of the statute, Final Exit faced charges only on the "assists" provision.

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 300–01.
71. *Id.* at 301.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* Final Exit is incorporated in Georgia, which is why the GBI investigated its business activities. *Id.* at 299, 301.
78. *Id.* at 301.
79. *Id.* (quoting MINN. STAT. § 609.215, subdiv. 1 (2016)).

B. Issue

At the trial, the district court instructed the jury that "assists" meant that the 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."[80] This jury instruction was different than Final Exit's proposed jury instruction.[81] That instruction defined "assists" as providing "tangible physical assistance in the suicide."[82] Under the proposed instruction, merely advising and teaching someone about suicide methods would not qualify as assisting a suicide.[83] The district court denied Final Exit's motion for a rehearing on the jury instructions regarding the definition of "assists."[84] The jury found Final Exit guilty of assisting another in taking their own life.[85] Since the jury instructions defined "assists" so as to include words alone, Final Exit was found guilty because it gave D.D. instructions and advice on how to commit suicide.[86] Final Exit appealed, arguing that the statute was unconstitutional on its face and as applied to this case under the First Amendment.[87] It alleged that the statute amounted to content discrimination in violation of the First Amendment by criminalizing mere speech that advised someone on committing suicide.[88]

C. Decision

The Court of Appeals of Minnesota began by explaining the standard of review for First Amendment cases.[89] Because the statute allowed for prosecution of people based solely on what they have said, the restriction was based on content.[90] Accordingly, the statute was subject to strict scrutiny, which meant that it had to be justified by a compelling government interest and be narrowly tailored to furthering that interest—in other words, neither underinclusive nor overinclusive.[91]

80. *Id.* at 302.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *See id.*
87. *Id.*
88. *Id.* at 302–03.
89. *Id.*
90. *Id.* at 303.
91. *Id.*

The court first held that the statute was not unconstitutional on its face.[92] It based this holding on precedent from *Melchert-Dinkel*.[93] In that case, the Minnesota Supreme Court ruled that the statute survived strict scrutiny because the government had a compelling interest in preserving human life.[94] The statute was narrowly tailored to furthering that interest because it included only speech that was directly targeted at a specific individual, not broad public speech that promoted assisted suicide.[95] Since the court of appeals was bound by the decision of the Minnesota Supreme Court, the statute, on its face, withstood First Amendment strict scrutiny.[96]

The court then held that the statute was not unconstitutional as applied to Final Exit in this case.[97] It rejected Final Exit's argument that the jury instructions were unconstitutionally overbroad.[98] Once again, the court of appeals relied on precedent from *Melchert-Dinkel* in making its decision. *Melchert-Dinkel* had interpreted "assists" within the statute to include speech that directly enabled a specific person to commit suicide.[99] Therefore, the jury instruction that the district court adopted in this case—that "assists" meant words Final Exit specifically directed at D.D. and enabled her to take her own life—was consistent with precedent.[100] In contrast, Final Exit's proposed jury instruction clearly contradicted the Minnesota Supreme Court's interpretation of the statute.[101] As such, the district court's jury instructions were not unconstitutionally overbroad, but instead were consistent with the established law.[102]

In upholding the constitutionality of the statute as applied to this case, the court expanded upon the Minnesota Supreme Court's reasoning in *Melchert-Dinkel*.[103] It reiterated that the statute satisfied the first part of strict scrutiny because the state has a compelling interest in preserving human life.[104] It also rejected Final Exit's assertion that the government had no compelling interest in forcing terminally ill individuals to continue their

92. *Id.*
93. State v. Melchert-Dinkel, 844 N.W.2d 13 (Minn. 2014).
94. *Id.* at 22.
95. *Id.* at 22–23.
96. *Final Exit*, 889 N.W.2d at 303.
97. *Id.*
98. *Id.* at 304.
99. 844 N.W.2d at 23.
100. *Final Exit*, 889 N.W.2d at 304.
101. *Id.* at 305.
102. *Id.*
103. *Id.*
104. *Id.* at 305–06.

suffering.[105] The fact that D.D. suffered from a terminal illness was irrelevant; the state still had a compelling interest in preventing D.D. from taking her own life.[106]

Furthermore, the statute in question met the second part of strict scrutiny because it was narrowly tailored to furthering the government's interest in protecting human life.[107] Final Exit argued that the statute was underinclusive because it singled out certain types of speech, but did not prohibit other speech that provided information about suicide.[108] Specifically, the statute criminalized only speech that was directed at a particular individual.[109] In contrast, books or internet articles that provided the same information about how to commit suicide did not fall under the scope of the statute.[110] But the court disagreed with Final Exit.[111] The statute's limit to speech that directly targeted a specific individual did not mean that the statute was underinclusive; rather, it meant that the statute was narrowly tailored.[112] Under the statute, Final Exit could still advocate for the right to die and provide emotional support to its members.[113] There remained many ways in which the company could disseminate its message.[114] The only speech of Final Exit that the statute restricted was the advice and instructions that it gave to D.D. specifically regarding how she could commit suicide.[115] Applied to the facts of this case, "the statute burdened no more speech than necessary to further the state's compelling interest in preserving D.D.'s life."[116] As such, it was narrowly tailored: "[n]o less restrictive alternative would have served the state's interest in protecting D.D.'s life."[117] Because it was narrowly tailored to further a compelling government interest, the statute survived strict scrutiny.[118] Even

105. *Id.* at 306.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 306–07.
111. *Id.* at 307.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

though it placed a content-based restriction on free speech, it was still constitutional under the First Amendment.[119]

IV. Analysis

A. Consistency with Precedent

Generally, the decision of the Minnesota Court of Appeals is consistent with current First Amendment jurisprudence, as the statute meets the requirements of strict scruti*ny for content-based restrictions. Preserving human life and preventing suicide are compelling government interests. In previous assisted-suicide cases, the United States Supreme Court has recognized these interests as legitimate.[120] Although the Court has not explicitly stated that preserving human life reaches the level of a compelling interest, the Court would likely find it compelling because of its long history and tradition.[121] Within the context of assisted suicide, another similar interest that the Court has recognized, and may find compelling, is protecting the physically handicapped from abuse.[122] But proving that the

119. *Id.* at 307–08.

120. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

121. Despite recognizing a constitutional right to abortion, the Court has suggested that there is a compelling interest in preserving life in multiple cases involving abortion. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (noting that "the State has a substantial interest in potential life"); Roe v. Wade, 410 U.S. 113, 163 (1973) (determining that the government's interest in preserving life becomes compelling after viability of the fetus). In respect to the issue of refusing medical treatment, the Court has allowed states to "assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990) (upholding the requirement of clear and convincing evidence of the patient's intent before terminating life-sustaining treatment for the patient in a vegetative state).

122. *See* Washington v. Glucksberg, 521 U.S. 702, 731–32 (1997) ("The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'"). Opponents of assisted suicide are especially concerned that assisted suicide promotes the idea that it is better to commit suicide than to live with a disability. *See, e.g.*, Diane Coleman, *Why Do Disability Rights Organizations Oppose Assisted Suicide Laws?*, NOT DEAD YET, https://notdeadyet.org/why-do-disability-rights-organizations-oppose-assisted-suicide-laws (last visited Feb. 18, 2018) ("For [doctors who perform assisted suicides], it apparently goes without saying that disability is a fate worse than death."); Marilyn Golden, *Why Assisted Suicide Must Not Be Legalized*, DISABILITY RIGHTS EDUC. & DEF. FUND, https://web.archive.org/web/20171021045257/https://dredf.org/assisted_suicide/assistedsuicide.html (last visited Mar. 10, 2019) (observing that in many countries and states where assisted suicide is legal, people who commit suicide do so because of the belief that

statute is narrowly tailored is more challenging. The Court has had no issue with striking down content-based restrictions that are not narrowly tailored, no matter how compelling an interest the government has in such restrictions. Here, the Minnesota court interpreted the statute so that it applies only to speech that targets a specific person and directly causes that person to commit suicide. Based on that interpretation, the statute would probably be narrowly tailored. It would not extend to people that simply advocate for the right to die, nor to media that describe how to commit suicide, as those situations do not satisfy the requirement that the speech be targeted at a certain person. Thus, there is a strong argument that the Minnesota court's decision is consistent with First Amendment law.

Nevertheless, the most significant issue with this case is the court's reliance on the Minnesota Supreme Court's interpretation of "assists" within the meaning of the statute. Based on the plain meaning of the word, it is not clear that "assists" would include mere speech without physical assistance.[123] There is nothing within the statute that suggests that the legislature intended for the word to be defined in such a manner. Furthermore, the court interpreted "assists" to include only speech that was directly targeted at a particular individual, and not books or other media that explained how to commit suicide. Though such an interpretation makes the statute narrowly tailored, such a distinction between types of speech is not apparent from the text of the statute or from the plain meaning of the word. If "assists" includes pure speech, then it is not clear why speech that is not targeted to a specific individual (which could easily "assist" someone

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there is no dignity in being disabled); William Peace, *The New York Times and Assisted Suicide*, BAD CRIPPLE (Aug. 16, 2017, 3:24 PM), https://badcripple.blogspot.com/2017/08/the-new-york-times-and-assisted-suicide.html ("Replace the condition ALS with any other neurological calamity as a means of justifying death with dignity. This indicates just how deeply ableism is entrenched into the fabric of society. Alzheimer's is a fate worse than death. Quadriplegia is a fate worse than death. Multiple Sclerosis is a fate worse than death. Muscular Dystrophy is a fate worse than death. Parkinson's disease is a fate worse than death.") (responding to a *New York Times* author who stated that ALS would be a fate worse than death for her mother).

123. This was a central argument of Justice Page's dissenting opinion in *Melchert-Dinkel*. State v. Melchert-Dinkel, 844 N.W.2d 13, 26 (Minn. 2014) (Page, J., dissenting) ("The [New Shorter Oxford English Dictionary] defines 'assist' as '[a]n *act* of helping' and to help 'a person in necessity; an action, process, or result.' . . . Thus, the word 'assists' . . . requires an *action* more concrete than speech instructing another on suicide methods. . . . 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." (citation omitted)).

based on the common meaning of the word) would not fall within the parameters of the statute.

As such, by interpreting "assists" to include pure speech in *Melchert-Dinkel*, the Minnesota Supreme Court took a risk that the statute would later be struck down under the First Amendment. State courts sometimes interpret statutes in a manner that departs from the plain text in order to make them consistent with the Constitution.[124] But in *Melchert-Dinkel*, rather than avoiding constitutional questions, the court actually created more problems by implicating free speech. Under an assisted-suicide statute that regulates only conduct (i.e., physical assistance of a suicide), there is no risk that the statute violates the First Amendment. But a statute that encompasses speech could be struck down as unconstitutional, if the issue were to reach the United States Supreme Court.[125] The statute may still be constitutional. The requirements that the Minnesota Supreme Court established in *Melchert-Dinkel*—that the speech be targeted at a specific individual and that there be a direct, causal link between the speech and the suicide—may be sufficient to meet the rigorous standard that content-based restrictions must satisfy. But there is no guarantee as to how the Court would rule on the issue. The Minnesota Supreme Court's interpretation of the assisted-suicide statute creates the possibility that the law will be ruled unconstitutional, when an alternative interpretation that requires physical

124. For example, the Minnesota Supreme Court narrowly interpreted a constitutionally suspect ordinance in *R.A.V. v. City of St. Paul*. 505 U.S. 377 (1992). In that case, the St. Paul Bias-Motivated Crime Ordinance made it a misdemeanor to display a symbol or object (e.g., a burning cross) that "arouses anger, alarm or resentment in others" on the basis of certain protected characteristics such as race, gender, and religion. *Id.* at 380. The Minnesota Supreme Court interpreted the statute to prohibit only fighting words—"conduct that itself inflicts injury or tends to incite immediate violence." *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). It therefore upheld the ordinance on the basis that fighting words are categorically unprotected under the First Amendment. *Id.* at 511. This interpretation was an attempt to save the ordinance from a First Amendment challenge, as the court itself recognized that the ordinance "should have been more carefully drafted." *Id.* The United States Supreme Court was then bound by the Minnesota court's construction that the statute was limited to fighting words. *R.A.V.*, 505 U.S. at 381. Despite the Minnesota Supreme Court's attempts to save the ordinance, the United States Supreme Court nevertheless found it unconstitutional as content-based discrimination. *Id.* at 391.

125. Since the Court denied certiorari in *Final Exit Network*, 138 S. Ct. 145 (2017), Minnesota's statute will remain for now. Nevertheless, the matter may come before the Court in the future, depending on how strictly prosecutors in Minnesota choose to enforce the law.

assistance would have avoided questions regarding the constitutionality of the law.

B. Comparisons to Other State Laws

As a state criminal case, *State v. Final Exit Network, Inc.* has no precedential impact on other states. However, it raises important questions about assisted-suicide laws that other states should consider. The majority of states have some sort of prohibition on assisting another person in committing suicide.[126] No statutory ban on assisting a suicide explicitly declares that speech alone is sufficient to violate the law. Furthermore, unlike Minnesota, no other state courts have interpreted the word "assists" within their statutes to include pure speech. And in many states, assisted-suicide laws have not been challenged based on free speech.[127] But such challenges may arise eventually, and *Final Exit*, along with *Melchert-Dinkel*, provides insight on this issue that will likely affect other states in the future.

1. Oklahoma Law

Oklahoma's ban on assisted suicide presents significant questions regarding its constitutionality due to its similarity to Minnesota's statute prior to the *Melchert-Dinkel* decision. Oklahoma's criminal statute regarding assisted suicide provides: "[a]ny person guilty of aiding suicide shall be guilty of a felony."[128] A person is guilty of aiding suicide when he "willfully, in any manner, advises, encourages, abets, or assists another person in taking his own life."[129] This statute contains the same words, "advises" and "encourages," that were severed from Minnesota's assisted-suicide statute in *Melchert-Dinkel*. Additionally, the phrase "in any manner" is even broader than the Minnesota statute. Due to its vagueness, the phrase could easily encompass pure speech. Merely publishing books

126. *States with Legal Physician-Assisted Suicide,* PROCON.ORG, https://euthanasia.procon.org/view.resource.php?resourceID=000132 (last visited Dec.16, 2018).

127. Usually, any challenges to assisted-suicide statutes are based on due process and ideas of privacy and personal autonomy. Although *Glucksberg* clarified that such statutes do not violate the Due Process Clause of the United States Constitution, some state courts have heard—and rejected—arguments that the statutes violate certain provisions of the state constitution. *See* Morris v. Brandenburg, 376 P.3d 836 (N.M. 2016) (holding that prohibition on physician-assisted suicide does not violate the due process clause of the New Mexico Constitution); Krischer v. McIver, 697 So. 2d 97 (Fla. 1997) (holding that prohibition on assisted suicide does not violate the privacy clause of the Florida Constitution).

128. 21 OKLA. STAT. § 817 (2011).

129. *Id.* § 813.

and articles that promote the legalization of assisted suicide might violate the statute, in that such action "encourages" suicide "in any manner." So far, Oklahoma has not faced any constitutional challenges to the statute. But if such a case should arise, the phrase "in any manner," along with the prohibition on encouraging and advising a suicide, presents a high risk that the statute would be struck down on its face for overbreadth.

Nevertheless, the "assists" provision would probably withstand any facial constitutional challenges. The Minnesota Supreme Court left the "assists" provision intact when it severed the words "advises" and "encourages" from the statute in *Melchert-Dinkel*. A similar result could occur in Oklahoma: assisting a suicide could still remain illegal even if the criminalization of advising or encouraging a suicide were struck down. And Oklahoma is less likely to confront First Amendment challenges to the "assists" part of its statute. Although the criminal statute does not define the term "assists," Oklahoma has a civil statute, called the Assisted Suicide Prevention Act, which does define the term.[130] To violate the Assisted Suicide Prevention Act, a person must, with the purpose of assisting another in committing suicide, either (1) provide the "physical means by which another person commits or attempts to commit suicide"; or (2) participate in "a physical act by which another person commits or attempts to commit suicide."[131] As a civil statute, the Assisted Suicide Prevention Act does not impose criminal penalties on those who violate it. Instead, it allows individuals to bring an action for damages or injunctive relief.[132] It also provides that licensed health care professionals who violate the Act will have their licenses revoked.[133]

Due to the existence of the Assisted Suicide Prevention Act and its requirement of a physical act in order to assist a suicide, a court would most likely interpret the criminal statute in a similar manner. Therefore, the "assists" provision of the statute will probably not encounter a First Amendment challenge. It would be unwise for the state to prosecute someone for "assisting" a suicide through speech alone when the Assisted Suicide Prevention Act indicates that assistance requires a physical act. If the state were to prosecute someone under such circumstances, the court could resolve the issue through statutory interpretation—thus avoiding the issue of the statute's constitutionality.

130. 63 OKLA. STAT. § 3141.1 (2011).
131. *Id.* § 3141.3.
132. *Id.* § 3141.5–6.
133. *Id.* § 3141.8.

Though no case has yet arisen, there is a strong risk that Oklahoma's ban on aiding a suicide could be struck down, in whole or in part, if someone brought a First Amendment challenge against it. There are several courses of action that the state could take so as to prevent the law from being ruled unconstitutional. First, prosecutors could choose only to charge individuals with assisting a suicide, rather than advising or encouraging one. Also, they could do so only when the individuals physically assisted the suicide. In those instances, the defendants would not be able to use the First Amendment as a defense, because no speech would be involved. Of course, this option relies on the discretion of prosecutors and the idea that they will be wise in their decision-making.

A second method of remedying the situation is to amend the statute. The legislature could remove the "advises" and "encourages" provisions so that the statute no longer covers pure speech. Moreover, eliminating the phrase "in any manner" would be essential to maintaining the constitutionality of the law. Even if the amended statute prohibited only assisting a suicide, "in any manner" is vague enough that a court could interpret "assisting" as including pure speech. The presence of that phrase makes it more likely that the statute would be overbroad and therefore facially unconstitutional. The legislature could also clarify the definition of "assists" so that it requires physical assistance. Even if the legislature did not define "assists" within the criminal statute, the courts could avoid free speech concerns by interpreting the word in that same manner.

Of course, it is possible that the Oklahoma legislators would want the assisted-suicide ban to cover more than physical assistance. They may wish to prevent groups like Final Exit Network from evading assisted-suicide laws by merely providing verbal advice to individuals who wish to end their lives. A law criminalizing pure speech that assists a suicide might be able to withstand strict scrutiny under the First Amendment. However, such an interpretation of the word "assists" should not come from the courts. Instead, the legislature should make that decision. Since the United States Supreme Court has indicated that there may be a compelling interest in preserving human life, a statute that restricts speech based on content must be narrowly tailored. In order to survive a First Amendment challenge, the statute would specifically need to provide how someone "assists" a suicide through speech alone. For example, it could require that the speech be directed at a certain person and that it directly cause that person to commit suicide—similar to how the Minnesota Supreme Court interpreted "assists" in *Melchert-Dinkel*. There is no guarantee that the United States Supreme

Court would uphold this statute, but it would only be possible if the statute were narrow and specific.

2. Other States

For most states that criminalize assisting a suicide, there will be no First Amendment problems. There are a few states other than Oklahoma that also prohibit encouraging or advising a suicide "in any manner."[134] But many states are not so broad as to criminalize anything other than assisting a suicide. Also, the statutes often clearly indicate that "assists" means physical assistance. For example, Georgia's statute against assisting a suicide defines "assists" as "the act of physically helping or physically providing the means."[135] Other states that require a physical act include Idaho,[136] Illinois,[137] Indiana,[138] Kansas,[139] Kentucky,[140] Maryland,[141] Ohio,[142] Rhode Island,[143] and South Carolina.[144] By specifically defining "assists" so as not to include speech alone, these states will probably not face any legal challenges to the law, at least not based on the First Amendment.

Not every state has explicitly indicated that assisting a suicide must include a physical act. Some statutes simply use the word "assist" without actually defining it.[145] For most of these states, no cases have emerged that examine the statute in the context of free speech. Whether any such cases arise will depend on whether prosecutors in those states choose to charge someone under the statute simply for pure speech that enables another

134. *See, e.g.*, MISS. CODE ANN. § 97-3-49 (2017); S.D. CODIFIED LAWS § 22-16-37 (2017).

135. GA. CODE ANN. § 16-5-5 (2017). The statute had previously made it illegal to advertise or offer to assist another person in committing suicide, but the Supreme Court of Georgia struck down that provision as violating the First Amendment. Final Exit Network v. State, 722 S.E.2d 722, 723 (Ga. 2012).

136. IDAHO CODE § 18-4017 (2018).

137. 720 ILL. COMP. STAT. § 5/12-34.5(a)(2) (2016).

138. IND. CODE § 35-42-1-2.5(b) (2018).

139. KAN. STAT. ANN. § 21-5407(a)(2) (2014).

140. KY. REV. STAT. ANN. § 216.302(2) (West 2015).

141. MD. CODE ANN., CRIM. LAW § 3-102 (West 2012).

142. OHIO REV. CODE ANN. § 3795.04 (West, Westlaw through 2017 State Issue 1).

143. 11 R.I. GEN. LAWS ANN. § 11-60-3 (2006).

144. S.C. CODE ANN. § 16-3-1090(B)(2) (2016).

145. *See, e.g.*, FLA. STAT. ANN. § 782.08 (West 2017); MO. REV. STAT. § 565.023 (2016); WIS. STAT. ANN. § 940.12 (West 2016); *see also* N.M. STAT. ANN. § 30-2-4 (2003) (defining "assisting suicide" as "aiding another in the taking of his own life," without further defining "aiding").

person to commit suicide. If that should happen, the outcome may hinge on the court's interpretation of the word "assists," without delving into any First Amendment concerns.

V. Conclusion

Assisted suicide will likely remain a contested issue within the states for quite some time. Although it may be constitutional to criminalize mere speech that enables a suicide (as long as the statute is sufficiently worded so that it is narrowly tailored), doing so creates the risk that the entire statute will be struck down under the First Amendment. Many states have criminalized assisting a suicide, but they have established that someone can violate the law only by physically assisting a suicide. Such a decision by the legislature is wise, as it avoids murky issues regarding free speech that Minnesota courts have faced in recent years.

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