CASE NO. A15-1826

STATE OF MINNESOTA
COURT OF APPEALS

FINAL EXIT NETWORK, INC.,
Appellant,

v.
STATE OF MINNESOTA,
Appellee.

BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization of approximately 200 members who routinely represent businesses and individuals that engage in constitutionally protected expression.[1] Founded in the late 1960s, FALA's membership has been involved in many landmark cases involving speech, including the following: *United States v. Stevens*, 559 U.S. 460 (2010); *Ashcroft v. Free Speech Coalition*, 535 US. 234 (2002); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); and *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *rev'd*, 535 U.S. 425 (2002). FALA has a tradition of submitting *amicus* briefs to courts on issues pertaining to constitutionally protected speech. *See, e.g., Pro-Football, Inc. v. Blackhorse*, 2015 WL 6948476 (4th Cir. Nov. 6, 2015); *Susan B. Anthony List v. Driehaus*, 2014 WL 890890 (U.S. Mar. 3, 2014); *United States of America v. Alvarez*, 2012 WL 293711 (U.S. Jan. 27, 2012).

An important aspect of this appeal involves whether the prohibition on speech under Minn. Stat. § 609.215(1) was unconstitutionally vague at the time when appellant was alleged to have assisted Doreen Dunn's suicide. The constitutionality of prohibitions on speech is central to the interests and activities of FALA's membership, many of whom have represented defendants whose speech has been criminally prosecuted. FALA's members have repeatedly witnessed the difficult choices that speakers are required to make when faced with vague laws that restrict or criminalize their expression. Given the

[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 or submission.

specialized nature of their practices, FALA attorneys have both a substantial interest in the subject matter and significant knowledge that the Court should find useful in evaluating whether Section 609.215 is unconstitutional when applied to the speech at issue in this case.

II. INTRODUCTION

"Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (internal quotations marks and citations omitted). This requirement for specificity in criminal statutes is particularly stringent when they affect speech. *Id.* at 568-69 ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine [of void-for vagueness under the Due Process Clause] demands a greater degree of specificity than in other contexts."); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

The prohibition under Minn. Stat. § 609.215(1) on speech that "advises" suicide—as applied to the words of Final Exit Network, Inc. in 2007—falls short of these constitutional requirements. The trial court's instructions allowed jurors to convict Final Exit for "assisting" suicide if Final Exit used words that "enabled" Ms. Dunn to take her own life. The Court further explained that "assisting" required more than "support." Consequently, in order to avoid illegally "assisting" suicide, a person of common

intelligence in 2007 would have had to understand that he could utter words that "supported" someone's suicide but did not "enable" it. That line between criminal and legal speech is anyone's guess. The distinction may hinge upon whether one's words were more or less tangential to the suicide, but the Supreme Court has condemned statutes that criminalize speech based upon "terms of degree" where the individual "has no principle for determining when his remarks pass from the safe harbor … to the forbidden …." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) (striking down statute that required individuals to distinguish between "general" and "elaborat[e]" speech).

To compound the confusion, Section 609.215(1) distinguished among "advising," "encouraging," and "assisting" suicide. Final Exit was convicted only of "assisting" suicide and—given the state of the law at the time of trial—could not have been convicted of "advising" or "encouraging" suicide. Consequently, a key question is how a person of common intelligence in 2007 would have understood the difference among "advising," "encouraging" and "assisting." In determining these meanings, courts look to dictionaries and case law; and these indicate that, in this context, "assist" would have been understood to consist of physical involvement, whereas "advise" and "encourage" focused on speech. In fact, for much of the case, the State had a similar understanding of Section 609.215. After the trial court found unconstitutional the "advise" language in Section 609.215, the State appealed to this Court and acknowledged that:

- "[T]he term 'assists'…was interpreted by the parties to require physical assistance." (Statement of the Case of Appellant, *Minnesota v. Final Exit Network, Inc.*, dated Mar. 29, 2013, at p. 3)

- "[I]f the District Court's ruling were to stand [striking down the prohibition on "advising" suicide in Section 609.216], the State would no longer be able to rely on the fact that one or more Respondents 'advised' Doreen Dunn on the manner and means she chose to commit suicide to establish criminal liability." *Id*. at p. 6.

If, up to 2013, the State understood "assist" to require physical assistance, then how could Final Exit have guessed in 2007 that its words, alone, could result in liability for "assisting" suicide? Section 609.215 did not "define the criminal offense with sufficient definiteness that ordinary people c[ould] understand what conduct [wa]s prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (striking down as overly vague statute that required "credible and reliable" identification).

Nothing in the Minnesota Supreme Court's decision in *State v. Melchert-Dinkel*, 844 N.W. 2d 13 (Minn. 2014), prevents this Court from concluding that Section 609.215 was void for vagueness as applied to Final Exit's words in 2007. The decision in *Melchert-Dinkel* analyzed the overbreadth of Section 609.215 under the First Amendment; it did not analyze the statute's applicability to the defendant under the Due Process Clause. The overbreadth doctrine and void-for-vagueness doctrine are two different doctrines grounded in different constitutional provisions with distinct analyses. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Furthermore, the Minnesota Supreme Court's gloss in 2014 on the meaning of "assist" cannot be applied retroactively to the speech charged in the indictment against Final Exit—which occurred in 2007. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that

neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (internal citations omitted)). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* Section 609.215 failed in 2007 to alert Final Exit that its words, alone, could render it criminally liable for "assisting" suicide—regardless of whether future defendants have adequate notice after the Supreme Court's decision in *Melchert-Dinkel*.

This Court should therefore conclude that the conviction of Final Exit violated due process because the jury was allowed to convict Final Exit under a statute whose interpretation was, at best, unclear to people of common intelligence and, at worst, contrary to the statute's plain meaning. This violation was particularly grave because the statute's vagueness threatened speech protected by the First Amendment.

III. ARGUMENT

A. Final Exit's Conviction for Speech in Violation of Section 609.215(1) Violated Due Process.

The Due Process Clause requires penal statutes to define offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited. *Kolender*, 461 U.S. at 353. *See also Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (explaining that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"). The degree of precision required increases with the gravity of the penalty and the importance of the

rights at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (higher standard applicable for criminal statutes and when speech at stake). Moreover, the due-process requirement of statutory definiteness must be evaluated at the time of the alleged misconduct—it cannot benefit from judicial or legislative glosses that post-date the alleged wrongdoing. *Lanier*, 520 U.S. at 266.

In the case of Final Exit, the precision required by the Constitution is at its zenith because Section 609.215 is a criminal statute with a fifteen-year maximum term of imprisonment for pure speech. The relevant timeframe is 2007 because that is when the alleged wrongdoing (Final Exit's assisting suicide) occurred. At that time, Section 609.215(1) was entitled "Aiding suicide" and stated:

> 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.

Any understanding of the meaning of "assists" must therefore be understood in relation to "advises" and "encourages." *See Van Asperen v. Darling Olds, Inc.*, 93 N.W. 2d 690, 698 (Minn. 1958) ("We apply the fundamental rule of statutory construction that a statute is to be read and construed as a whole so as to harmonize and give effect to all its parts. Moreover, various provisions of the same statute must be interpreted in the light of each other ….").

The need to understand "assist" in relation to "advise" and "encourage" is particularly necessary because Final Exit was not convicted of "encouraging" Ms. Dunn's suicide or of "advising" on Ms. Dunn's suicide—it was only found guilty under the amended indictment of "assisting" her suicide. In its jury instructions, the trial court

made an effort to explain that Final Exit could not be convicted of what the trial court understood as "encouraging" or "advising" suicide. (Order on Jury Instructions, dated Feb. 23, 2015 (Doc. ID # 23), at 2 (explaining that Final Exit could not be guilty of offering "support" or "comfort")) For purposes of the void-for-vagueness analysis, the relevant question is therefore the following: Would an ordinary person in 2007 have understood that Section 609.215's prohibition on "assisting" (as opposed to "advising" or "encouraging") suicide forbade Final Exit's words to Ms. Dunn?

The starting point for determining whether the "assists" language in Section 609.215 is vague is the ordinary meaning of the language. *Melchert-Dinkel*, 844 N.W.2d at 23 ("In the absence of an applicable statutory definition, we generally give statutory terms their common and ordinary meanings."). In determining the ordinary meaning of these words, the Court may look to dictionaries, common law, and statutes. *See, e.g.*, *id.* (using *The New Shorter Oxford English Dictionary* (1993) to interpret Section 609.215); *Jordan v. De George*, 341 U.S. 223, 229–230 (1951) (analyzing phrase "crime of moral turpitude" in context of vagueness challenge by examining meaning of term in case law). Each of these references leads to the conclusion that the interpretation of "assist" in Section 609.215 used by the jury to convict Final Exit violated due process.

1. The Dictionary Definitions of "Assist," "Advise" and "Encourage" Indicate that "Assist" Involves Physical Conduct, Whereas "Advise" and "Encourage" Do Not.

Various dictionaries offer the following definitions of "assist," "advise" and "encourage":

	"Assist"	**"Advise"**	**"Encourage"**
Oxford American College Dictionary (2001)	"help (someone), typically by doing a share of the work"	"offer suggestions about the best course of action to someone"	"give support, confidence, or hope to (someone)"
Webster's Third New International Dictionary (1993)	"to perform some service for"	"to give information or notice to"	"to spur on"
The New Shorter Oxford English Dictionary (1993)	"help" (Example: "A young man who assisted him with the management of the farm.")	"recommend;" "offer counsel" (Example: "I advised him to put most of the money into an annuity.")	"urge, incite" (Example: "You have … encouraged me when I'd nearly given up.")

These definitions strongly suggest that "assist" is associated with "doing" or "performing some service"—in other words, with physical conduct. In contrast, "advise" and "encourage" generally fall short of physical action.

2. The Common Law and Statutes Indicate that "Assist" Involves Physical Conduct, Whereas "Advise" and "Encourage" Do Not.

The common law echoes the distinction between: (1) "advise" or "encourage" as focused on speech, and (2) "assist" as focused on physical conduct. For example, the following cases make clear the connection between speech and either "advising" or "encouraging":

- In *Commonwealth v. Bowen*, 13 Mass. 356 (1816), the defendant was found guilty of having "advised" another to commit suicide. *Id*. at 359. The defendant was a prisoner who had urged a prisoner in another cell to hang himself. *Id*. The highest court of Massachusetts upheld the conviction for advising suicide because the defendant had "induce[d]…the perpetration of the dreadful deed." *Id*. at 360. The United States Supreme Court has cited *Bowen* as an example of the "well-established common-law view" on assisted suicide. *Washington v. Glucksberg*,

521 U.S. 702, 714 (1997).[2] *Bowen* is also noteworthy because Minnesota's Section 609.215 was based upon the New York Penal Code of 1881.[3] Minn. Stat. Ann. § 609.215 advisory committee's note (1963). The codifiers of the New York Penal Code cited to *Bowen* in explaining the term "advising suicide." N.Y. Penal Code of 1881 § 176.

- In *State v. Webb*, 216 Mo. 378 (1909), the highest court of Missouri explained that "[u]nder the common law, if one counseled another to commit suicide, and the other, by reason of the **encouragement** and **advice**, killed himself, the adviser was guilty of murder as an aider and abettor, provided he was present when his advice was carried out." *Id*. (emphases added)

- In *Williams v. State*, 53 So. 3d 734 (Miss. 2010), the highest court of Mississippi explained that "Williams and Demetria had a suicide pact. By agreeing to commit suicide together, each member of the pact was **encouraged** to commit suicide because they no longer had to face the possibility of committing suicide alone." *Id*. at 745 (emphasis added).

The decisions in *Bowen, Web*, and *Williams* indicate that "advising" on or "encouraging" suicide consists of counseling or inducing via words another to commit suicide.

Additional case law and statutes make clear that "assistance" is commonly understood to require physical conduct. For example:

- In *Gentry v. State*, 625 N.E.2d 1268 (Ind. Ct. App. 1993), an Indiana appellate court explained that "[t]o be subject to prosecution for assisting suicide, a defendant need only provide the physical means or participate in the physical act by which the other person himself commits suicide." *Id*. at 1273.

- Georgia's assisted-suicide statute states that "'Assists' means the act of physically helping or physically providing the means." Ga. Code Ann. § 16-5-5.

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[2] The Supreme Court also cited, as part of "the well-established common-law view," 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 270 (1823), which explains that "[i]f one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." This source also supports the connection between "advising" and speech.

[3] Available at http://www.archive.org/stream/penalcodestaten07stagoog/penalcodestaten07stagoog_djvu.txt.

- In Kansas, "[a]ssisting suicide is…intentionally assisting another person to commit or to attempt to commit suicide by: (A) Providing the physical means by which another person commits or attempts to commit suicide; or (B) participating in a physical act by which another person commits or attempts to commit suicide." Kan. Stat. Ann. § 21-5407.

- In South Carolina, "[i]t is unlawful for a person to assist another person in committing suicide. A person assists another person in committing suicide if the person: … (2) has knowledge that the other person intends to commit or attempt to commit suicide and intentionally … (b) participates in a physical act by which the other person commits or attempts to commit suicide." S.C. Code Ann. § 16-3-1090-(B)

- Rhode Island's statute, entitled "Prevention of Assisted Suicide," forbids: "(1) Provid[ing] the physical means by which another person commits or attempts to commit suicide; or (2) Participat[ing] in a physical act by which another person commits or attempts to commit suicide." R.I. Gen. Laws Ann. § 11-60-3. *See also* Va. Code Ann. § 8.01-622.1 (similar); Ky. Rev. Stat. Ann. § 216.302 (similar); Okla. Stat. Ann. tit. 63, § 3141.3 (similar); Ind. Code Ann. § 35-42-1-2.5 (similar); Idaho Code Ann. § 18-4017 (similar).

Although the decision of the United States Supreme Court in *Holder v. Humanitarian Law Project* did not involve assisted suicide, it is instructive because the Court interpreted the phrase "expert advice or assistance" in the context of a void-for-vagueness challenge. 561 U.S. 1, 21-23 (2010).[4] While holding that the phrase, as a whole, was not vague, the Court touched upon the separate meanings of "advice" and "assistance."[5] It explained that "[a] reasonable person would recognize that teaching the

[4] Although the Supreme Court issued its opinion in 2010, the underlying litigation had begun in 1998. *Id*. at 10. The Supreme Court's discussion of "assist" and "advise" is therefore relevant to the 2007 timeframe that was the focus of the final indictment against Final Exit.

[5] In contrast to the case of Final Exit which was convicted of "assisting" but not "advising" (and, in light of the decision in *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), could not have been convicted of "advising"), the Supreme Court in *Humanitarian Law Project* addressed whether the entire phrase "expert advice or assistance" provided adequate notice.

PKK [the Kurdistan Workers' Party] how to petition for humanitarian relief before the United Nations involves advice …." *Id*. at 22. It referred to "assistance that takes the form of fungible donations of money or goods." *Id*. at 59. *Humanitarian Law Project* further supports an understanding of "assisting" that involves physical conduct and of "advice" and "encouragement" limited to words.

The cases and statutes that explicitly define "assist," "advise," and "encourage" make clear that in 2007, an ordinary person would have understood that speaking about suicide with someone—including discussing methods of committing suicide—may have amounted to "advising" on suicide, but would *not* have amounted to "assisting" suicide because it did not consist of physical involvement in the act of suicide.

3. Tenets of Statutory Interpretation and the State's Arguments in This Case Indicate that "Assist" Involves Physical Conduct, Whereas "Advise" and "Encourage" Do Not.

This distinction in the dictionaries, common law, and statutes between words and action squares with the language of Section 609.215. To interpret "assist" to cover both speech and action risks rendering the term, "advise," superfluous, in violation of a basic tenet of statutory interpretation. *See Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) ("A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." (citation and internal quotation marks omitted)).

In addition, the common understandings of "advise," "assist," and "encourage" were reflected in this case. The State told the grand jury:

> [Y]ou [the defendant] could have just advised, you could have just encouraged, you could have assisted, or you could have done all three of them together. And for instance, if you **advised** them [the person attempting to commit suicide] on the means by which they could have taken their own life, that could possibly be sufficient grounds for it [an indictment].

(Motion to Dismiss Counts of the Indictment, *Minnesota v. Final Exit Network, Inc.*, dated Nov. 6, 2012, at p. 6 (quoting transcript at 528:15-529:4 (emphasis added)) In appealing the district court's decision striking down the language regarding "advising" suicide in Section 609.215, the State argued: "[I]f the District Court's ruling were to stand, the State would no longer be able to rely on the fact that one or more Respondents 'advised' Doreen Dunn on the manner and means she chose to commit suicide to establish criminal liability." (Statement of the Case of Appellant, *Minnesota v. Final Exit Network, Inc.*, dated Mar. 29, 2013, at p. 6) Furthermore, the State acknowledged that "the term 'assists'…was interpreted by the parties to require physical assistance." *Id.* at p. 3. The State understood—as one of common intelligence would have—that "advise" included talking to someone about specific methods of committing suicide. As long as one did not cross the line into physical action, one remained on the side of "advising" as opposed to "assisting."

4. No Reasonable Person Could Have Navigated the Distinction Between Legal and Illegal Speech Reflected in the Trial Court's Jury Instructions.

A person of common intelligence could not have discerned the distinction among "advising," "encouraging," and "assisting" that was reflected in the jury instructions used to convict Final Exit. The trial court's instructions allowed the jury to convict Final Exit for "assisting" if Final Exit used words that "enabled" Ms. Dunn to take her own life.

(Order on Jury Instructions, dated Feb. 23, 2015 (Doc. ID# 23), at 2) The Court explained that "assisting" did not involve mere "support." *Id.* In order to avoid running afoul of the prohibition on "assisting" suicide, Final Exit would have had to understand that it could "support" via words another's suicide but not "enable" it. Where a person of ordinary intelligence would draw the line is anyone's guess, particularly given that "supporting" (which is permissible according to the jury instructions) is commonly understood in terms of "assisting" (which is prohibited). *See New Shorter Oxford English Dictionary* (1993) (defining "support" as to "[s]trengthen the position of (a person or community) by one's assistance or backing").

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Dictionaries, the common law, tenets of statutory interpretation, and the State's own arguments in this case make clear that Final Exit was convicted under an interpretation of Section 609.215 that defied the ordinary meaning of the words and that posited an incomprehensible distinction between legal and criminal speech. Where, as here, the collective meaning of a statute's words is so muddled as to leave would-be speakers uncertain about what is forbidden, the statute is void for vagueness. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-71 (1997) ("[E]ach of the two parts of the CDA [Communications Decency Act] uses a different linguistic form…. Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content-based regulation, coupled with its increased

deterrent effect as a criminal statute, raise special First Amendment concerns because of its obvious chilling effect on free speech." (internal citations omitted)).

The Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), is on point. In that case, a rule of the Nevada Supreme Court prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id*. at 1033. The rule provided a safe harbor that allowed a lawyer to "state without elaboration … the general nature of the … defense." *Id*. at 1048. The State Bar of Nevada filed a complaint against an attorney based on statements that he had made during a press conference. *Id*. at 1033. In concluding that the statute was too vague, the Supreme Court explained:

> The right to explain the 'general' nature of the defense without 'elaboration' provides insufficient guidance because 'general' and 'elaboration' are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Id. at 1048-49.

Similarly, in the case of Final Exit, the dividing line between "assisting" and not "assisting" indicated by the jury instructions is one of degree—whether one's words aiding suicide are more or less tangential to the act (*e.g.*, they "enable" instead of "support"). *See Melchert-Dinkel*, 844 N.W.2d at 23 (interpreting speech that "assists" to be limited to "the most direct, causal links between speech and the suicide"). In 2007, a

person of common intelligence could not reasonably have guessed at what point his words crossed the line into the impermissible.

Also relevant to this case is the U.S. Supreme Court's decision in *Baggett v. Bullitt*, in which a statute forbade, among other activities, "any act intended to … assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States … by revolution, force, or violence." 377 U.S. 360, 362 (1964). The Court wrote:

> Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require forswearing of an undefined variety of 'guiltless knowing behavior' is what the Court condemned in *Cramp* [*v. Board of Public Instruction of Orange County, Fla.* 368 U.S. 278, 367 (1961)]. This statute . . . is unconstitutionally vague.

Id. at 367. Like the statute at issue in *Baggett*, the interpretation of Section 609.215(1) reflected in the jury instructions impermissibly required foreswearing of an undefined variety of guiltless knowing behavior.[6]

[6] If the Court concludes—contrary to the arguments above—that Section 609.215 was not so vague as to violate due process, then the Court should apply the rule of lenity in interpreting any ambiguity as to whether "assists" could be understood in 2007 to encompass only speech. The rule of lenity is the second of the three "related manifestations of the fair warning requirement" of due process. *Lanier*, 520 U.S. at 266. "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id*. (describing rule of lenity as "a sort of junior version of the vagueness doctrine"). *See also Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the

B. The Decision by the Supreme Court of Minnesota in *Melchert-Dinkel* under the First Amendment Does Not Foreclose a Ruling that Section 609.215 Violates the Due Process Clause.

In *State v. Melchert-Dinkel*, 844 N.W.2d 13 (Minn. 2014), the Supreme Court of Minnesota analyzed Section 609.215(1) under the First Amendment's overbreadth doctrine. *Id*. at 19-25. It did not analyze Section 609.215(1) under the void-for-vagueness doctrine of the Due Process Clause. This is not surprising as—according to the Court of Appeals—defendant Melchert-Dinkel "seem[ed] to merge the separate constitutional theories of overbreadth (a First Amendment doctrine) and vagueness (a Fifth Amendment doctrine)." *State v. Melchert-Dinkel*, 816 N.W.2d 703, 717 (Minn. Ct. App. 2012).

But the overbreadth doctrine and void-for-vagueness doctrine are "two different doctrines." *Morales*, 527 U.S. at 52. As the United State Supreme Court explained:

> First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612–615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

Morales, 527 U.S. at 52. *See also Humanitarian Law Project*, 561 U.S. at 20 ("[A] plaintiff may have a valid overbreadth claim under the First Amendment, but our

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legislature, the prosecutor, and the court in defining criminal liability."). Consistent with the rule of lenity, this Court should adopt the narrower of two interpretations of a statute. *State v. Rick*, 835 N.W.2d 478, 486 (Minn. 2013). The rule of lenity therefore favors interpreting "assist" in 2007 to be limited to physical conduct and not to encompass speech.

precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression."). Consequently, the ruling in *Melchert-Dinkel*, which was grounded in the First Amendment, does not foreclose a holding by this Court that Final Exit's conviction under Section 609.215(1) violated due process.

It is true that, in *Melchert-Dinkel*, the Minnesota Supreme Court indicated that "assists" requires words or acts with "a direct causal connection to a suicide," whereas "advise" or "encourage" "is more tangential to the act of suicide" and involves "general discussions of suicide." *Melchert-Dinkel*, 844 N.W.2d at 23. Regardless of whether that narrowing definition in 2014 is enough for "assist" to survive an overbreadth challenge (or to survive void-for-vagueness challenges relating to speech that post-dates the decision in *Melchert-Dinkel*), such a distinction between "assist" and "advise" or "encourage" was not clear enough in 2007 to satisfy due process. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope…." *Lanier*, 520 U.S. at 266. "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[7] *Id*. The "relevant time" is "the time of the charged conduct." *Id*. A

[7] The question is not whether Final Exit understood in 2007 that its behavior ran afoul of any of the following: "advising," "encouraging," or "assisting." In the end, Final Exit was only charged and convicted of "assisting" suicide and could not have been convicted of "advising" or "encouraging" pursuant to the Minnesota Supreme Court's decision in *Melchert-Dinkel*. Consequently, the relevant question is whether Final Exit understood

court must take "special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Marks v. United States*, 430 U.S. 188, 196 (1977) (reversing conviction based on jury instruction that applied obscenity standard that post-dated conduct at issue).

Thus, even if one assumes that the Minnesota Supreme Court's interpretation in *Melchert-Dinkel* of Section 609.215 cured any vagueness, that interpretation was too late to cure the constitutional issue in the case of Final Exit:

> Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot be cured in a given case by a construction in that very case placing valid limits on the statute, for the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.

Bouie v. City of Columbia, 378 U.S. 347, 352-53 (1964) (internal quotation marks and citations omitted).

Here, there is a striking contrast between: (1) the common understanding of "advise" and "assist," and (2) the narrowing definition adopted by the Minnesota Supreme Court in *Melchert-Dinkel*. *Compare Melchert-Dinkel*, 844 N.W.2d at 23 ("[S]peech instructing another on suicide methods falls within the ambit of constitutional limitations on speech that **assists** another in committing suicide." (emphasis added)) *with* Statement of the Case of Appellant, *Minnesota v. Final Exit Network, Inc.*, dated Mar. 29, 2013, at p. 3 (the State's acknowledgement that "the term 'assists'…was interpreted by

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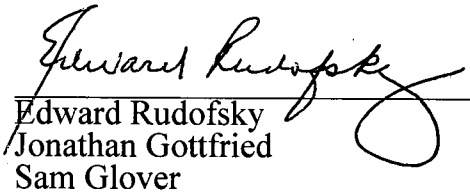
in 2007 that its behavior ran afoul of "advising," as distinguished from "encouraging" and "assisting."

the parties to require physical assistance"). Final Exit cannot be guilty of failing to guess a meaning of "advising" that the State, itself, did not understand.

IV. CONCLUSION

It violated due process to convict Final Exit under Section 609.215(1) for words uttered in 2007. Final Exit was convicted under an interpretation of a criminal statute that defied the common understanding of words—as evidenced in dictionaries, common law, and the State's own explanation of these words—and rested upon vague terms of degree that left Final Exit without guidance as to the line between legal and illegal speech.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In compliance with Minn. R. Civ. App. P. 132.01, subd. 3(c) (word-count applicable to amicus briefs), this brief contains 5,439 words, not including the words in the table of contents, table of authorities, and this Certificate, as computed by the word processing program used to prepare this brief, Microsoft Word 2010, and it complies with the typeface provisions of Minn. R. Civ. App. P. 132.01.

/s/ Jonathan Gottfried

Jonathan Gottfried