UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, Bradley Wayne Foster and Brian K. Hausfeld, Plaintiffs, v. Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Nancy Johnston, Janine Hebert, and Ann Zimmerman, in their individual and official capacities, Defendants.	Court File No. 11-CV-03659 (DWF/JJK) **BRIEF OF AMICI CURIAE ERIC S. JANUS AND ACLU-MN**

I. Introduction

The class claims invoke two distinct constitutional contexts: In the "validity context," the class should be understood as asserting that the stable, two-decade pattern of executive and judicial implementation, combined with the state legislature's knowing failure to act, prove that the MSOP is constitutionally invalid. In the "residual context," the complaint focuses on the class members' rights that survive the massive deprivation of liberty inherent in civil commitment, and assert that these have been violated. Amici argue that the "validity context" is governed by *Foucha v. Louisana*, 504 U.S. 71 (1982), and its antecedents, and is focused on whether the MSOP is a bona fide

civil commitment program, informed by a non-punitive purpose. The "residual context" is governed by *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Strutton*, so heavily relied upon by the State, is irrelevant to the validity context. *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012) cert. denied, 133 S. Ct. 124, 184 L. Ed. 2d 27 (U.S. 2012).

II. The validity of the MSOP program

The essence of a civil commitment scheme is that it imposes a massive deprivation of liberty, totally unconstrained by the host of tight protections governing the criminal "charge and conviction" regime. If for no other reason than to protect the moral legitimacy of the criminal justice system, the boundaries of this "alternate justice system" must be vigilantly patrolled. A civil commitment system that strays outside of those boundaries is constitutionally invalid.

A. Civil Commitment, unconstrained by the limits of the criminal law, invokes the Substantive Due Process protections.

The "charge and conviction" paradigm of criminal law is the primary tool for addressing antisocial behavior and social control. By design, the power of the State to deprive a person of liberty as punishment for a crime is strictly circumscribed by the Constitution. A list of these constraints includes the principle of legality (or *nulla poena sine lege*);[1] the prohibitions against double jeopardy[2] and ex post facto laws;[3] the rights

[1] John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 190 (1985).
[2] *See United States v. Halper*, 490 U.S. 435, 440 (1989).

to juries as fact finders,[4] to witness confrontation,[5] and to the highest standard of proof;[6] the requirement that the crime be manifest in some act (actus reus[7]) with criminal intent (mens rea);[8] the prohibition against criminalizing a status[9] and on basing criminal conviction on predicted, rather than committed, crimes;[10] immunity from self-incrimination;[11] prohibitions on arrest and search in the absence of some cause to believe that a specific crime has been committed;[12] and the requirement that prosecutions be based on written charges specifying the law and the facts constituting the crime.[13]

The grant of power to the State to lock people up in a civil commitment scheme is highly consequential. Minnesota's MSOP scheme of civil commitment eschews each and every one of the traditional protections of the criminal law. See Appendix A. In addition, if the State's legal theories are correct, the circumstances confronting individuals who are committed need not even bear the stamp of professional judgment.

---

[3] The prohibition against ex post facto laws prevents the state from increasing a person's criminal sentence after it was imposed. *See Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-392 (1789)); *Artway v. Attorney Gen. OF New Jersey*, 876 F. Supp. 666 (D. N.J. 1995); *Young v. Weston*, 898 F.Supp. 744 (W.D. Wash. Aug. 25, 1995).

[4] *See generally Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (discussing general nature of right to, and importance of, jury trial).

[5] *See* 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 24.4(b) (2d ed. 1999).

[6] *See In re Winship*, 397 U.S. 358 (1970).

[7] *See* 1 Charles E. Torcia, *Wharton's Criminal Law* § 25 (15th ed. 1993).

[8] *See id.* § 27.

[9] See Paul H. Robinson, *Foreword: The Criminal—Civil Distinction and Dangerous Blameless Offenders*, 83 J. Crim. L. & Criminology 693 (1993).

[10] *See* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 3.2, at 195 (2d ed. 1986) ("[T]he common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined.").

[11] *See* LaFave et al., s*upra* note 5, § 6.5(a).

[12] *See* 4 Barbara E Bergman & Theresa M. Duncan, *Wharton's Criminal Procedure* § 23:6 (14th ed. 2007).

[13] 41 Am. Jur. 2d *Indictments and Informations* § 95 (2008) ("[T]he charge must be set forth with enough particularity to adequately apprise the defendant as to the exact offense being charged.").

On the State's theory, anything goes in MSOP so long as it does not "shock the conscience." And, on the state's theory, a record of over 700 commitments with at most two conditional discharges does not "shock the conscience."

Courts should be extremely wary of opening the door to such unregulated deprivation of liberty. This assumption of executive power is "unprecedented in this country" and "fraught with danger of excesses and injustice." *Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950). Judicial vigilance is required.

B. Determining the constitutional validity of a civil commitment regime: substantive due process and the "forbidden purpose."

Under the substantive branch of the due process clause, certain government actions are simply prohibited. *Foucha*, 504 U.S. at 80 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)) ("the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"). The Supreme Court has repeatedly set substantive boundaries on the civil commitment power of the states. *See Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Foucha v. Lousiana*, 504 U.S. 71 (1992). These limits are not explained by a conventional "compelling state interest", "narrow tailoring" analysis. If a civil commitment scheme, narrowly tailored to addressing the admittedly compelling state interest in public safety were, *ipso facto*, constitutional, civil commitment would easily consume the entire

criminal justice system. The State could substitute a pre-crime detention system for our hallowed charge and conviction paradigm. Clearly, narrow tailoring and compelling interest are necessary, but not sufficient, for the constitutional validity of a civil commitment scheme. *Foucha*, 504 U.S. at 83.

Foucha frames the substantive due process question this way: does the MSOP scheme fit within "only narrow exceptions" to the "charge and conviction" paradigm, including "permissible confinements for mental illness?" An analysis of Supreme Court precedent shows that the Court examines whether a scheme is a *bona fide* civil commitment scheme. As the Court concluded in *Kansas v. Hendricks*, "Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme." 521 U.S. 346, 347 (1997) (emphasis added).

Most centrally, in a *bona fide* commitment scheme, the state's purpose may not be the "forbidden purpose" of punishment. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring). In *Hendricks*, the Supreme Court called this the "threshold" matter in determining constitutional validity. Id. at 361-2. And the *Hendricks* court made it clear that the "punitive purpose" inquiry begins with the state's "disavow[al of] any punitive intent," but does not end there. *Id*. at 368.

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible;

> and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Id. at 368-369.

Punitive purpose is central to Justice Kennedy's concurrence in Hendricks: "Confinement of such individuals is permitted … provided there is no object or purpose to punish." *Id.* at 372 (Kennedy, J. concurring). And in *Foucha*, the Court stated this stark syllogism: "As Foucha was not convicted, he may not be punished." *Foucha*, 504 U.S. at 80.

The "forbidden purpose" test is a direct outgrowth of the State's eschewal of the strict protections of the criminal justice system. *Addington* is the prime example of this logic. There, the State of Texas sought to deprive people of their liberty without resort to the "beyond a reasonable doubt" standard of proof. *Addington v. Texas*, 441 U.S. 418 (1979). The Court acquiesced, but only because "In a civil commitment state power is not exercised in a punitive sense. … [A] civil commitment proceeding can in no sense be equated to a criminal prosecution." *Id.* at 428 (footnote omitted). The Court held that the "moral force" of the criminal law arises from the strict constraints that contain the state's exercise of its most awesome power. *Id*. That moral force would dissipate if the constraints could be thrown off at the whim of the state. The legitimacy of the criminal law requires that its distinctive purposes – to punish and deter – be forbidden to the state outside of the criminal law. This is the essence of substantive due process.

Like the U.S. Supreme Court, the Minnesota Supreme Court has placed the forbidden purpose inquiry at the very threshold of constitutional validity, characterizing it as the "initial question" in the determination of constitutionality. *In re Linehan* (hereinafter "*Linehan III*," 557 N.W.2d 171, 187 (Minn. 1996).

There are three key indicia of purpose in a civil commitment scheme

Given the enormity of the threat to individual liberty, it is not constitutionally sufficient for the state simply to disclaim an intent to punish. As Justice Scalia observed, "It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (Scalia, J., dissenting). Rather, the courts have identified three key indicia of proper, non-punitive, purpose.

First, the use of civil commitment must not challenge the primacy of the criminal law as the normal tool for addressing antisocial behavior. The requirement that the State must "explain why its interest would not be vindicated by the ordinary criminal processes . . ., the use of enhanced sentences for recidivists, and other permissible [means]" reflects this principle. *Foucha*, 504 U.S. at 82. The Court continued: "These are the normal means of dealing with persistent criminal conduct." *Id*.

The Minnesota Supreme Court expressed the same limitation on state power, burdening the courts with the ongoing "constitutional duty to intervene before civil

commitment becomes the norm and criminal prosecution the exception.*"* *Linehan III*, 557 N.W.2d at 181. And in *Kansas v. Crane*, the Supreme Court warned that "civil commitment" must not become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment. 534 U.S. 407, 412 (2002) (cittion omitted). See also *Seling v. Young*, 531 U.S. 250, 261 (2001) ("The Act did not implicate retribution or deterrence.")

The primacy pillar is also expressed by the courts in their reliance on the stated intent to apply preventive confinement only to a "limited subclass of dangerous persons." *Hendricks*, 521 U.S. at 357. A commitment statute that casts too broad a net is of doubtful validity. *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 274 (1940).

Second, the constitutionally required non-punitive purpose is evidenced by the state's promise to provide treatment. The states consistently point to this intention as evidence of the *bona fides* of their non-punitive intent. In response, the courts repeatedly rested conclusions of facial validity upon this ground. In *Foucha*, Justice O'Connor's pivotal concurrence made the centrality of treatment clear, insisting on a "medical justification" for civil commitment. *Foucha*, 504 U.S. at 88 (O'Connor, J., concurring). "I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent." *Id*.

In *Linehan III*, the Minnesota Supreme Court cited the state's intention to provide "comprehensive care and treatment for committed sex offenders" as a central prop of constitutional validity, crediting the state's claim that "commitment was for the purpose of treatment" in turning back a challenge to the validity of the SDP law. *Linehan III*, 557 N.W.2d at 187, 188. The court thought it important to memorialize the claim by the State that "treatment and rehabilitation are essential to" the mission [of the sex offender program], and to recite the promises made by the State that "each of the four phases [of the MSOP treatment program] will last approximately 8 months for model patients…." *Id.* at 188. In *Call*, the Minnesota court identified the "entitlement" to treatment as evidence showing that the psychopathic personality statute "is not for punitive or punishment purposes, but rather is remedial . . .." *Call v. Gomez*, 535 N.W.2d 312, 319–20 (Minn. 1995) (explaining the holding of *State ex rel. Pearson v. Probate Court of Ramsey Cnty.,* 287 N.W. 297, 300 (1939) aff'd sub nom. *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey Cnty.,* 309 U.S. 270 (1940)). The Court characterized the treatment as "intensive," "well-planned" and "well-structured." Id. at 319 n.5. The court relied on the state's promise that treatment would assist patients in "obtaining discharge into the community." *Id*. Believing in the good faith of the State, the court's opinion featured the state's representation that "[a]n average patient is expected to complete the program in a minimum of 24 months." *Id*.

Amici recite these reassuring statements about treatment, made nearly twenty years ago, to illustrate the extent and importance of the treatment promises in the adjudication of constitutional validity. In these cases, the point was not that any particular individual would be cured by treatment, but rather that the State's claim to a non-punitive purpose should be credited as substantive and real: the stated intent to provide treatment is a key piece of circumstantial evidence of a proper state purpose, and hence of a legitimate, *bona fide* civil commitment scheme.

In the case at bar, the plaintiff class claims that these promises are bankrupt—systematically, pervasively, and intentionally. Just as the courts inferred a non-punitive purpose from these fulsome promises, so now should this court infer a punitive purpose from their utter betrayal.

Third, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). A commitment, proper *ab initio*, becomes unconstitutional just as soon as the justifications for confinement cease to obtain. "It [is unconstitutional to] continue [confinement] after that basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (citation omitted).

To be valid, a civil commitment scheme must be designed to release people as soon as they can be appropriately managed in the community. A commitment scheme without such a design is constitutionally invalid. *See Zadvydas v. Davis*, 533 U.S. 678

(2001). The Minnesota Supreme Court approved the schemes "[s]o long as the statutory discharge criteria are applied in such a way that the person subject to commitment as a psychopathic personality is confined only so long as he or she continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to public…." *Call*, 535 N.W.2d at 319.

In sum, it is only the purported absence of a punitive purpose that saves the MSOP's non-charge-and-conviction massive deprivation of liberty. In judging whether the forbidden purpose is present, courts look not only to the espoused purpose of the State, but also to the objective characteristics of the program, in order to assure that states are not using civil commitment as a pretext for punishment, without the constitutional limitations that the criminal law entails. In short, MSOP must be a *bona fide* civil commitment program, not a sham.

C. Substantive due process limits real state practices, not just the text of laws.

The Minnesota MSOP scheme has been upheld, against constitutional challenge, as a valid exercise of state power, based on the statutory language and the assurances of future implementation by state officials. The instant matter provides an entirely different context for this validity examination. No longer limited to evaluating the promises of state officials, this court has before it two decades of executive and judicial implementation, and legislative acquiesce. In this context, the court may examine the true purpose and character of the MSOP scheme to determine whether the MSOP is a

legitimate civil commitment scheme, or is, instead, an elaborate pretext for imposing punishment without the constraints of the criminal justice system.

This case is best understood as a challenge to the constitutionality of the MSOP edifice – a complex, interrelated system grounded on state law, but enormously more than the text of the law. It is only by assessing how this complex system functions in the real world, over an extensive period of time, that a court can truly determine whether MSOP is a bona fide commitment system, or not.

The MSOP should be understood, and evaluated, as a system for long-term preventive detention, comprising extensive bricks and mortar facilities purpose-built over two decades, a large number of state employees, all under the direct supervision of the commissioner of human services with recurrent direct involvement of the state's governor. It also involves ongoing and extensive involvement of the state judiciary, a highly discretionary system of referrals and prosecutorial decisions, and a cohort of private-practice psychologists who routinely provide the highly technical risk-assessment and "mental abnormality" testimony that supports the civil commitment system.

Finally, such a program might have included a comprehensive continuum of supervision and care options for persons subject to commitment. The absence such options speaks as loudly as any other aspect of this system.

D. Longstanding patterns of implementation can provide evidence of the true purpose of the MSOP system

Constitutional jurisprudence addresses the validity of state action in many contexts where the key questions of purpose (or other indicia of validity) are examined not simply facially, but also through an examination of the implementation of the state program. *Seling v. Young*, 531 U.S. 250 (2001) is often urged, mistakenly in our judgment, as standing for the proposition that the criminal/civil status of a law should not be judged by the characteristics of the implementation of that law. As we show, *Seling* is inapposite in this case, and does not in any way diminish the long history of implementation-based assessments of constitutional validity.

In *Seling*, the Supreme Court held that a "civil" statute could not be transformed into a "criminal" statute for purposes of Double Jeopardy and Ex Post Facto Analysis, based solely on the "punitive" application of the statute to a single individual. *Seling*, 561 U.S. at 263. *Seling* is inapposite for three reasons. First, the case at bar involves claims under the due process clause, which the *Seling* court explicitly excluded from its analysis. *Id.* at 266. Second, the case at bar involves a system, rather than individual analysis. *Id*. at 264. While legislative intent should not be judged by the potential vagaries of implementation, this case involves long-term, stable patterns from which purpose is properly inferred. Third, *Seling* specifically does not address the question Amici suggest is before the court: whether an admittedly "civil" statutory scheme and the edifice built upon it, partakes of the purpose forbidden to such civil commitment schemes – punishment. Our analysis does not ask the court to change the nature of a

statute from civil to criminal, but rather to determine whether a civil scheme is invalid because it has strayed, as a matter of purpose, into forbidden territory.

The penultimate sentence of the Court's opinion, as well as Justice O'Connor's repeated careful language throughout, emphasize *Seling* limited reach: " An Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses and provide cause for release." *Id*. at 267.

The Ex Post Facto claim, and by the Court's extension, the Double Jeopardy claim —turn on the nature of the statute under consideration. Substantive Due Process claims, in contrast, address state actions, a broader category that includes executive as well as legislative acts. The case at bar involves an assessment of the purpose underlying a complex and interrelated system - legislative, executive, and judicial - that comprises MSOP.

Justice Scalia's concurrence in *Seling* provides strong support for the relevance of systemic-implementation evidence, even in the narrow "statute-centric" Ex Post Facto and Double Jeopardy contexts. *Seling*, 531 U.S. at 267 (Scalia, J., concurring). At first reading, Scalia seems to reject the possibility, left open by the majority, that a "court may look to actual conditions of confinement and implementation of the statute to determine . . . whether a confinement scheme is civil in nature." *Id*. In the Ex Post Facto, Double Jeopardy context, Justice Scalia believes that the resolution of the civil/criminal

question "depends upon the intent of the legislature." *Id*. at 269. But he acknowledges that post-enactment implementation might provide relevant evidence, even where the inquiry is limited to legislative intent and purpose:

> The short of the matter is that, for Double Jeopardy and Ex Post Facto Clause purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature…. When, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive action; if those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal. Such an approach … avoids federal invalidation of state statutes on the basis of executive implementation that the state courts themselves, given the opportunity, would find to be ultra vires.

Seling, 531 U.S. at 269-70 (Scalia, J., concurring) (footnotes and citations omitted, emphasis added).

The scenario envisioned by Justice Scalia describes precisely the MSOP program as it has been implemented over the past two decades. The Minnesota appellate courts have had over 400 opportunities to enforce appropriate limits on the MSOP program. The Minnesota courts have explicitly refused to consider a systemic challenge to the implementation of these laws. *In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. Ct. App. 2009) (refusing to consider systemic challenge to MSOP validity). They have refused to set standards for judging what level of risk is sufficient for commitment. *In re Civil Commitment of Ince*, No. A12-1691, 2013 WL 1092438, at *13-14 (Minn. Ct.

App. Mar. 18, 2013) (Johnson, C.J., concurring specially), rev. granted (May 29, 2013). They have, at almost every turn, removed impediments to commitment.

There can be no question that the as-implemented features of the MSOP program have been created, reviewed – and approved – by the Minnesota courts. If these features are inconsistent with a non-punitive purpose, the 400-plus holdings of the appellate courts should satisfy even Justice Scalia's standard for leaving the authoritative interpretation and implementation of state statutes to state courts. Add to this the explicit statements of Governor Pawlenty and Governor Dayton, and the long-term refusal of the Minnesota Legislature to intervene in the face of clear constitutional concern. A court, in the face of this, would be justified in drawing the conclusion that the patterns of implementation are not random, temporary or rogue, but rather reflect the official purpose of the MSOP system, established by the legislature, ordered, built and operated by the executive, and approved by the courts of the State of Minnesota.

E. Implementation evidence is routinely considered in "forbidden purpose" cases.

For over a century, the Supreme Court has examined patterns of executive implementation in a wide variety of circumstances to determine "purpose" for constitutional purposes.

Begin with *Yick Wo v. Hopkins*, 118 U.S. 356, (1886), in which the Court stated that even if "the law itself be fair on its face, and impartial in appearance," if it is "applied and administered by public authority with an evil eye and an unequal hand," it is "still within the prohibition of the constitution." *Id.* at 373–374. The Court went even further and stated that it was "not obliged to reason from the probable to the actual . . . for the cases present the ordinances in actual operation…." *Id*. at 373. The Court concluded that the "the facts shown establish an administration directed so exclusively against a particular class of persons" that "whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration … with a mind so unequal and oppressive as to amount to a practical denial … of that equal protection of the laws which is secured to the petitioners." *Id.*

Justice Stewart's concurrence in *Washington v. Davis*, 426 U.S. 229 (1976) (Stewart, J., concurring) takes the position that impact can be very probative evidence of the government's purpose because "normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Id*. at 253

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court examined wide-ranging circumstantial evidence to determine the purpose of a facially neutral set of ordinances. "Here [in the Free Exercise context], as in

equal protection cases, we may determine the city council's object from both direct and circumstantial evidence." *Id.* at 540 (citation omitted). This circumstantial evidence extended to post-enactment implementation practices, including interpretations by the Attorney General and the state courts. "It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. The Court cites *Fowler v. Rhode Island*, 345 U.S. 67 (1953), stating "we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service." *Lukumi*, 508 U.S. at 533.

Ferguson v. City of Charleston, 532 U.S. 67 (2001), involved a scheme organized by a public hospital, city police, and prosecutors to screen pregnant women for drug use. The women claimed the tests were warrantless and nonconsensual searches, and thus were unconstitutional. The public officials defended by claiming that the searches were reasonable because they were "justified by special non-law-enforcement purposes." *Id*. at 73. The key question was whether the scheme was informed by a forbidden purpose, law enforcement.

The court examined the "purpose actually served" by the policy. *Id*. at 81. "In looking to the programmatic purpose, we consider all the available evidence in order to

determine the relevant primary purpose." *Id*. (Emphasis added). The court emphasized the actual implementation of the policy: "the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy. Police and prosecutors decided who would receive the reports of positive drug screens and what information would be included with those reports." *Id*. at 82.

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Supreme Court examined a program of drug interdiction checkpoints, searching for a forbidden purpose. Recognizing that government programs "driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar," the Court "examine[d] the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." *Id.* at 46-47.

In the First Amendment establishment of religion context, the Court has frequently acknowledged that "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578 (1987). Similarly, in *Wallace v Jaffee*, 472 U.S. 38, 64 (1985), Justices Powell and O'Connor both emphasized that **"**[the state's] secular purpose must be 'sincere'; a law will not pass constitutional

muster if the secular purpose articulated by the legislature is merely a 'sham.'" *Id*. at 586–87 (Powell, J., concurring). Justice O'Connor's concurrence is similar:

> It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the Lemon inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt.

Id. at 75.

In *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), the Eighth Circuit examined post-hoc implementation to determine whether governmental "decisions" had a forbidden discriminatory purpose under the Equal Protection Clause. As with Establishment Clause analysis, the court looked to the impact or effects of the statute as a part of deciding whether the statute was enacted with an unconstitutional purpose. *Id*. at 650.

More recently, in *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court relied heavily on post-enactment circumstances to invalidate Section 4(b) of the Voting Rights Act, which contains the coverage formula used to determine the jurisdictions subjected to preclearance based on their history of discrimination. The 1966 formula in *Katzenbach* "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both." *Id*. at 2627. This coverage is based on "decades-old data and eradicated practices." *Id*. The Court points to facts outside of the face of the

statute to show that racial disparity once existed in these jurisdictions, making this test appropriate, but now, "There is no longer such a disparity". *Id*. at 2628. The Court invalidates part of the Act based on this theory. Referring to the "purpose" of the Constitution and the legislation, the Court states, "To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 2629.

F. *Strutton*, by its own terms, governs the "residual" rights context, and is inapposite in the "validity" context.

The instant case poses a question that differs in kind from the issue in *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012) cert. denied, 133 S. Ct. 124, 184 L. Ed. 2d 27 (U.S. 2012). Here, two decades of persistent executive and judicial implementation, and clear legislative acquiescence, call into question the constitutional validity of the entire scheme. *Strutton*, in contrast, dealt only with the individual's constitutional rights while subject to an admittedly valid civil commitment.

Strutton has its roots in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In both *Youngberg* and *Strutton*, the plaintiffs did not challenge the legitimacy of their initial commitments. The question, as framed by the courts, was which constitutional rights "survive" the imposition of a legitimate civil commitment. As the *Youngberg* court put it: "The mere fact that Romeo has been committed under proper procedures does not

deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg*, 457 U.S. at 315. The Court's conclusion: "a right to freedom from bodily restraint … survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id*. at 316 (Emphasis added).

Strutton, too, dealt with the conditions of confinement, not with the validity of the confinement itself. Similarly, in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1990), cited by *Strutton*, which also addresses the nature of the constitutional rights remaining for a person who was civilly committed for purposes of safe-keeping, "the legitimacy of [the civil] commitment is not in doubt." *Id*. at 1154.

Strutton's "shocks the conscience" standard is the Eighth Circuit's assessment of the rights that survive a valid civil commitment. As such, the standard has no direct applicability to the question of validity. The inapplicability of *Strutton* is further highlighted by the fact that the Eighth Circuit took pains to distinguish between claims that amount to a violation of state law (and therefore not actionable under Federal constitutional law) and claims that establish that a particular state action is sufficiently egregious (and therefore actionable as a violation of the constitutional right to substantive due process). *Strutton*, 668 F.3d at 557. Concluding that Strutton's due process claim was based on an alleged violation of the state statutory mandate to provide treatment, the claim was based on a violation of state law which required a showing that the state action was "truly egregious and extraordinary" (i.e. "shocks the

conscience") in order to succeed. *Id*. (*See Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104–05 (8th Cir.1992)). In the case at bar, plaintiffs' forbidden purpose claim is based on Federal Constitutional law, and not on state law.

Unlike *Strutton*, the case at bar raises a broader question as to the fundamental constitutional validity of Minnesota's entire sex offender civil commitment program. In the context of this class action lawsuit, the court should reject the *Strutton* "shocks the conscience" standard as inapposite, and instead hold that the totality of the state's actions in creating and implementing the Minnesota Sex Offender Program – the statute passed by the Legislative branch, the program implemented by the state Executive branch, and the judicial blessing of commitment decisions made by the state Judiciary, and the active and knowing acquiescence in the scheme's implementation by the state legislature – does not pass muster under the federal Constitution, because those actions reveal that the true purpose of the MSOP is a forbidden purpose.

G. Systemic, persistent evidence of implementation provides a basis for the Court's inference that the MSOP scheme is infected by the forbidden purpose of punishment.

The Plaintiff class has detailed the evidence of implementation, in particular the glaring absence of any discharge from the program. Here, we simply emphasize several aspects of the implementation. The courts of the State of Minnesota have been deeply

involved in the creation and implementation of the MSOP system as it exists today. There can be no question that the program is the result of both executive implementation and judicial approval. And, as Plaintiffs have argued, the legislature's knowing inaction in the face of explicit and clear evidence of the need for reform provides strong support that the pattern of implementation has the blessing of the legislature.

1. The Minnesota Judiciary has actively approved, or refused to review, the implantation of MSOP.

We begin by noting that the Minnesota appellate courts have addressed the MSOP system in more than 400 decisions. Of these, only six have reversed judgments of commitment on the merits[14] (six more have reversed an individual's SPP commitment while affirming his SDP commitment).[15] Of the six commitment reversals, five were in 1994 or 1993. In the past 20 years, only one SDP commitment has been reversed on the

[14] *See In re Civil Commitment of Lingl*, A12-0738, 2012 WL 5188139 (Minn. Ct. App. Oct. 22, 2012), review denied (Jan. 15, 2013); *Matter of Linehan*, 518 N.W.2d 609, 614 (Minn. 1994); *In Matter of Hince*, C9-94-1366, 1994 WL 637755 (Minn. Ct. App. Nov. 15, 1994); *Matter of Rickmyer* 519 N.W.2d 188, 189 (Minn. 1994); *Matter of Schweninge*r, 520 N.W.2d 446 (Minn. Ct. App. 1994); *In re Rodriguez*, 506 N.W.2d 660, 663 (Minn. Ct. App. 1993). See also, *In re Civil Commitment of Giem*, 742 N.W.2d 422, 433 (Minn. 2007) (reversing "without prejudice" on procedural grounds).

[15] *See* In re *Civil Commitment of Johnson*, A10-1701, 2011 WL 1546559 (Minn. Ct. App. Apr. 26, 2011); *In re Civil Commitment of Buckner*, A09-1420, 2009 WL 4574169 (Minn. Ct. App. Dec. 8, 2009; *In re Civil Commitment of White*, A05-1474, 2005 WL 3112024 (Minn. Ct. App. Nov. 22, 2005); *In re Robb*, 622 N.W.2d 564, 572 (Minn. Ct. App. 2001*); Matter of Lindberg*, CX-97-855, 1997 WL 600584 (Minn. Ct. App. Sept. 30, 1997) (reversing finding of Mentally Ill and Dangerous while affirming SDP commitment); *In re Mentzos*, C3-95-2331, 1996 WL 81721 (Minn. Ct. App. Feb. 27, 1996).

merits. In contrast, during the same period, the appellate courts have reversed lower-court decisions dismissing petitions in six cases.[16]

The appellate courts have played almost no role in assuring that only the "most dangerous" would be committed. In *In re Civil Commitment of Ince,* A12-1691, 2013 WL 1092438 (Minn. Ct. App. Mar. 18, 2013) Chief Judge Johnson's analysis in his concurrence describes the failure of the Minnesota courts over nearly two decades to give any meaningful content to the standards for commitment. "The lack of a clear and definite legal standard is in tension with fundamental notions of the rule of law. A statute that may deprive a person of his or her liberty should have 'an understandable meaning with legal standards that courts must enforce.'" Id. at *14 (Johnson, J., concurring) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966)). He observed that the Minnesota courts had failed to set such standards: "Seventeen years after *Linehan III*, however, the precedential case-by-case determinations on this issue are too few in number and too general in their discussion." *Id*. at *15.

And Judge Stauber, in dissent, points out that dangerousness testimony and district court findings are couched within "credibility assessments insulated from appellate review. Given this standard of review, it will continue to be almost impossible to overturn even borderline cases . . . ." *Id.* at *24 (Stauber, J., dissenting).

[16] *See In re Civil Commitment of Stone*, A09-0574, 2009 WL 2998131 (Minn. Ct. App. Sept. 22, 2009); *In re Civil Commitment of Baker*, A08-2160, 2009 WL 1182556 (Minn. Ct. App. May 5, 2009); *In re Commitment of Tolbert*, A08-0395, 2008 WL 3898457 (Minn. Ct. App. Aug. 26, 2008); *In re Commitment of Beaulieu*, 737 N.W.2d 231, 234 (Minn. Ct. App. 2007); *In re Civil Commitment of Martin*, 661 N.W.2d 632, 634 (Minn. Ct. App. 2003); *In re Ashman*, C8-98-2078, 1999 WL 262147 (Minn. Ct. App. May 4, 1999) aff'd, 608 N.W.2d 853 (Minn. 2000).

When the appellate courts have weighed in, they have with some uniformity approved lax, rather than strict, interpretations of the criteria for commitment. For example, with regard to future prediction of sexually dangerous behavior, the predicted behavior need not be violent or especially severe. *In re Robb*, 622 N.W.2d 564, 573 (Minn. Ct. App. 2001). Individuals with ratings on actuarial risk assessment instruments indicating moderate and even low risk have been civilly committed. *See, e.g.*, *In re Commitment of Schmidt*, No. A10-1588, 2011 WL 781343, at *3 (Minn. Ct. App. Mar. 08, 2011) (approving commitment of an individual whose risk on the MnSOST-R was below 50%); *In re Lueck*, No. A10-18, 2010 WL 3744394, at *3 (Minn. Ct. App. Sept. 28, 2010) (approving commitment of individual with re-offense risk of 19% on the STATIC-99 risk assessment tool); *In re Civil Commitment of Cermak*, No. A09-1080, 2009 WL 3736196, at *2 (Minn. Ct. App. Nov. 10, 2009) (approving commitment of person with score of 9 on MnSOST-R); *In re Commitment of Garza*, No. A08-0288, 2008 WL 2889700, at *4 (Minn. Ct. App. Jul. 29, 2008) (approving commitment of person with MnSOST-R score of 2); *In re Holden*, 2001 WL 683004, at *4 (approving commitment of person whose MnSOST-R score indicated a "low" risk of re-offense). Indeed, risk predictions need not be based on state-of-the-art science, such as actuarial risk assessment instruments. *See Linehan IV*, 557 N.W.2d at 191 ("[D]angerousness prediction under the SDP Act is not simply a matter for statisticians."). The courts have never subjected risk assessment testimony to any form of searching reliability review normally applied to expert or

scientific testimony. *See, e.g.*, *In re Schultz*, No. CX-99-1296, 1999 WL 1100941, at *5 (Minn. Ct. App. Nov. 30, 1999); *In Matter of Martinelli*, No. C6-98-569, 1998 WL 613845, at *6 (Minn. Ct. App. Sept. 15, 1998); *Matter of Clements*, 440 N.W.2d 133, 135-36 (Minn. Ct. App. 1989) (all characterizing questions about expert's testimony as determinative of "weight" and "credibility," not admissibility). And the courts have never insisted that risk assessment testimony be presented in quantified form with information about error rates and confidence intervals. Thus, risk assessment decisions are largely subjective, relying on idiosyncratic judicial and expert definitions of "highly likely."

The persistent failure of the courts to police the "most dangerous" aspect of MSOP has had consequences in the profile of the people actually subjected to commitment. A recently published study by Minnesota Department of Corrections researcher Grant Duwe endeavored to determine the profile of individuals who have been chosen for civil commitment in Minnesota.[17] The study found that the four-year recidivism rate for the 105 individuals civilly committed between 2004 and 2006 would have been somewhere between 5.2 percent and 15.6 percent within four years had they not been civilly committed. *Id*. at 6. While this number was slightly higher than the likely recidivism rate for offenders who were not civilly committed, the study concluded that civilly committing those 105 offenders resulted in a reduction of the state's overall

[17] Duwe, G., To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota, *Journal of Criminal Justice* (2013), available at http://dx.doi.org/10.1016/j.jcrimjus.2013.06.009 . Nelson Affidavit, Exhibit 1.

four-year sexual recidivism rate of less than half of one percent (reduction from 3.2% to 2.8%). *Id*. This result suggests that Minnesota's civil commitment program, has only has a negligible impact on overall public safety. While every reduction in sexual violence is desirable, a reduction in sexual recidivism of 0.4% can hardly support the conclusion that only a narrow group of the "most dangerous" is being civilly committed.

Moreover, the Duwe study found that the lifetime recidivism rate for the 105 individuals was at most 36 percent. Conversely, "…nearly two-thirds of these offenders would be unlikely to be rearrested for another sex offense in their lifetime if they were released to the community. In other words, for every true positive, there are likely two false positives." *Id.* at 8. Applying this "false positive" rate to the 700-plus people who have been committed, we can conclude that in its twenty-year history the Minnesota courts have likely committed over 462 human beings who, had they been released, would not have been arrested for a new sex crime. In exchange, the program has likely reduced the overall rate of recidivism in Minnesota by 0.4%.

In *In re Civil Commitment of Travis*, 767 N.W.2d 52 (Minn. Ct. App. 2009), the Minnesota Court of Appeals had the opportunity to address a systemic investigation of the MSOP program and definitively rejected the opportunity. The district court had indicated its intention to examine the *bona fides* of the MSOP scheme:

> It is alarming when one compares the current near zero "success" rates of the program with the fact that at least some of the earlier laws had eventually released as many as 50 percent of those committed. As a result, rather than

> being a "step away" from confinements for dangerousness alone, the actual implementation of the SDP/SPP laws suggest a regime of [preventive] detention itself, heretofore anathema to due process.

Id. at 56 (quoting the district court's order).

The court of appeals framed the issue this way: "Can the district court examine substantive due process in a challenge to the constitutional purpose of civil commitment statutes by investigating treatment in practice and thus by studying the experiences of others?" *Id*. at 56-57. The Court of Appeals unambiguously and authoritatively prohibited the district court from undertaking the very same examination that is now before this court.

2. The Legislature has knowingly acquiesced in an unconstitutional implementation of the MSOP program.

Despite mounting evidence that the MSOP suffered significant defects, the Legislature has done nothing to correct the problems. Indeed, the legislature has addressed the MSOP program, but the changes have been largely cosmetic. *See* 2013 Laws of Minnesota, Ch. 49 §9 (recodifying and combining SPP and SDP sections). This in spite of overwhelming red flags that were identified by its own Legislative Auditor including that:

- Minnesota has the highest per-capita population of civilly committed Sex Offenders in the nation;

- There is significant variance (34-64%) among judicial districts in the rate of commitments;
- Minnesota has no less restrictive alternatives to commitment in a high security facility despite the law's provision allowing consideration of less restrictive alternatives;
- MSOP struggles to provide adequate treatment and maintain a therapeutic environment; and
- In the nearly twenty years that the program has been in operation, no civilly committed sex offender has ever been discharged, likely due to problems in the treatment program over the years, an executive order discouraging discharges, the abasecne of any meaningful community-based services suitable for supervising released offenders, and a release standard that is stricter than most other states which allow for discharge when an offender no longer meets the commitment criteria.

See Office of the Legislative Auditor, State of Minnesota, *Evaluation Report: Civil Commitment of Sex Offenders* (March 2011), *available at* http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf

The OLA report laid bare the significant problems that have existed within Minnesota's program. Far from being a civil law with the purpose of providing treatment, the main goal of MSOP appears instead to be punitive preventive detention.

In spite of the OLA report and comprehensive recommendations, the Legislature has failed to implement the lion's share of recommendations.

Most recently, in its last session, the Legislature ignored the unequivocal recommendation of the Task Force appointed by this Court.

III. Remedy

The Court, after reviewing the clear and stable patterns of implementation of the MSOP over the past two decades, should conclude that the program rests on the forbidden purpose of punishment, and is thus constitutionally invalid. The remedy for such invalidity need not be the immediate shut-down of the program. Rather, in our view, the appropriate remedy would be to afford the State a reasonable opportunity to reshape the program by ridding it of its punitive purpose. With two decades of circumstantial evidence of a punitive purpose, it is long past time for the State to rely on espousals and promises. Rather, the Court should require the State to take the concrete steps that are required to transform the MSOP from a sham, to a *bona fide* civil commitment program.

Respectfully submitted,

DATED: December 27, 2013

s/ Eric S. Janus
Eric S. Janus (ID #49700)
875 Summit Avenue
St. Paul, MN 55105
651-290-6310

Teresa Nelson #269736
American Civil Liberties Union of Minnesota
2300 Myrtle Ave, Suite 180
St Paul, MN 55114-1879
651 645-4097

Attorneys for Amici Curiae