No. A13-0445

STATE OF MINNESOTA
IN SUPREME COURT

Daniel Garcia-Mendoza,
Appellant,

vs.

2003 Chevy Tahoe, et al.
Respondents,

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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Identification and Interest of the Amicus

The American Civil Liberties Union of Minnesota ("ACLU-MN") is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties.[1] It is the statewide affiliate of the American Civil Liberties Union and has more than 10,000 members in the state of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws. ACLU-MN's interest in this matter is public, as the outcome of this case will have a significant impact on the rights of people experiencing civil asset forfeiture throughout the state of Minnesota.

ARGUMENT

I. INTRODUCTION

This Court should apply the exclusionary rule to civil forfeiture proceedings pursuant to the Fourth Amendment of the United States Constitution and Article I, § 10 of the Minnesota Constitution. As a matter of law, both Supreme Court precedent and this Court's precedent require such a conclusion. And as a matter of public policy, the exclusionary rule should apply to civil forfeiture proceedings to counteract the unfortunate perverse incentives that prey on law enforcement when a profit motive is injected into the police seizure of private property.[2] Minnesota's own experience with the

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[1] Other than the identified amicus and its counsel, no person has made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored the brief in whole or in part.

[2] For example, in 1990, the Department of Justice circulated a memo stating that "[e]very effort must be made to increase forfeiture income" and warning that "[w]e must significantly increase production to reach our budget target." Executive Office of the U.S. Attorneys, U.S. Dept. of Justice, 38 U.S.A. Bull. 180 (1990).

Metro Gang Strike Force, which repeatedly abused its forfeiture authority in violation of the constitutional rights of Minnesotans, demonstrates the need to correct these distorted incentives with a strong deterrent to constitutional abuse.[3] The exclusionary rule is that deterrent.

II. THE EXCLUSIONARY RULE APPLIES TO CIVIL ASSET FORFEITURE PROCEEDINGS BECAUSE THEY ARE QUASI-CRIMINAL IN NATURE

Under United States Supreme Court precedent, the exclusionary rule bars the introduction of illegally obtained evidence in the quasi-criminal proceedings of civil forfeiture. This Court's precedents confirm the quasi-criminal nature of civil forfeiture proceedings under Minnesota law. Neither subsequent Supreme Court decisions nor the Court of Appeals decision here justifies a departure from that rule, and this Court should adopt that rule here.

A. The Fourth Amendment Requires the Exclusion of Illegally Obtained Evidence from Civil Forfeiture Proceedings'.

Unconstitutionally seized evidence must be excluded from administrative forfeiture proceedings. This conclusion is mandated by precedent and necessary to effectuate the Fourth Amendment and Article I, section 10: "without the exclusionary rule, the Fourth Amendment essentially grants a right with no remedy." *State v. Jackson*, 742 N.W. 2d 163, 178 (Minn. 2007); *see also id.* at 183 (Anderson, G. Barry, J., dissenting) (noting that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.")

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[3] Andrew Luger *et al*, *Report of the Metro Gang Strike Force Review Panel*, Aug. 20, 2009, *available at* https://dps.mn.gov/divisions/co/about/Documents/final_report_mgsf_review_panel.pdf (hereafter, "*Panel Report*").

Under controlling United States Supreme Court precedent, evidence seized in violation of the Fourth Amendment must be excluded from forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). In *Plymouth Sedan*, Pennsylvania police stopped a car for riding "low in the rear," conducted a warrantless search of the car, and discovered illegal liquor. *Id.* at 694. Based on the presence of the illegal liquor, the state initiated forfeiture proceedings against the car. *Id.* The trial court concluded that the search had lacked probable cause and therefore violated the Fourth Amendment, and dismissed the forfeiture petition on that basis. *Id.* The Pennsylvania Supreme Court rejected the trial court's application of the exclusionary rule, holding that the forfeiture proceeding was "civil in nature" and that the constitutional protections of the Fourth Amendments therefore did not apply. *Id.* at 695.

The Supreme Court reversed, rejecting the Pennsylvania court's conclusion that the forfeiture proceeding was purely "civil" and that the Fourth Amendment did not apply. *Id.* at 696. Citing its prior holding in *Boyd v. United States*,[4] the Supreme Court emphasized that it had long held that the Fourth Amendment applied to "offences [that], though they may be civil in form, are in their nature criminal." *Id.* at 697 (*quoting Boyd*, 116 U.S. at 633). The Court therefore reaffirmed that "a forfeiture proceeding is quasi-criminal in character," and that such quasi-criminal actions are subject to the Fourth Amendment exclusionary rule. *Id.* at 700-02; *see also United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) (reiterating in dicta that "[t]he Fourth

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[4] *Boyd v. United States*. 116 U.S. 616, 622 (1886) (holding that "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Consistution").

Amendment does place restrictions on seizures conducted for purposes of civil forfeiture," and citing *Plymouth Sedan* approvingly).

The *Plymouth Sedan* holding applies here. As this Court has repeatedly recognized, civil forfeitures under Minnesota law are quasi-criminal in nature. *See, e.g., Torgelson v. Real Property Known as 17138 880th Ave*, 749 N.W.2d 24, 26 (Minn. 2008) ("civil in rem forfeiture is at least in part a penalty, and accordingly it should be disfavored and strictly construed"); *Jacobson v. $ 55,900 in U.S. Currency*, 728 N.W.2d 510, 521 (Minn. 2007) ("civil forfeiture is disfavored because it is quasi-penal in nature"); *Riley v. 1987 Station Wagon*, 650 N.W.2d 441, 443 (Minn. 2002); *see also Prideaux v. State Dept. of Public Safety*, 247 N.W. 2d 385, 389 (Minn. 1976) (stating, in a case involving license revocation, that "[w]e cannot allow a 'civil' label to obscure the quasi-criminal consequences"). Even the Court of Appeals in the instant case recognized that "a forfeiture action is punitive in nature." *Garcia-Mendoza v. 2003 Chevy Tahoe*, No. A13-0445, 2013 WL 6152304 at *2 (Minn. App. Nov. 25, 2013).

The majority of state and federal courts across the country agree that civil forfeitures are quasi-criminal and that the exclusionary rule applies. *E.g., United States v. $291,828.00 in U.S. Currency*, 536 F.3d 1234, 1237 (11th Cir. 2008) ("The Fourth Amendment exclusionary rule applies to civil forfeiture actions."); *United States v. $493,850.00 in U.S. Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008) ("The exclusionary rule applies in civil forfeiture cases."); *Wren v. Towe,* 130 F.3d 1154, 1158 (5th Cir. 1997) ("[T]he exclusionary rule applies in forfeiture proceedings."); *State v. Nunez*, 129 N.M. 63, 74 (1999) ("In New Mexico, this "quasi-criminal" characterization of civil forfeitures was adopted from *1958 Plymouth*, and has become a fixture of our jurisprudence . . . the exclusionary rule applies to forfeiture proceedings.");

People ex rel. Towne v. Rease, No. 3-12-0984, 2013 Ill. App. 3d 120984-U at *P15 (Ill. App. Sept. 20, 2013) (""[E]xisting case law, including *One 1958 Plymouth Sedan*, makes it clear the Fourth Amendment applies to a forfeiture proceeding, such as this."); *see also Miller v. Toler*, 729 S.E. 2d 137, 149 (W. Va. 2012) (Benjamin, J., dissenting) ("Eleven of the thirteen federal Circuit Courts of Appeals have interpreted *Plymouth Sedan* to stand for the proposition that the exclusionary rule applies to civil *in rem* forfeiture proceedings [and] [c]ourts in thirty-four states agree.").

B. Subsequent Supreme Court cases have not abrogated *Plymouth Sedan*.

Although the Supreme Court has declined to extend the exclusionary rule to certain other civil proceedings, those cases have not challenged the holding in *Plymouth Sedan:* none of those cases altered the nature of forfeiture proceedings as "quasi-criminal in character," and they do not undercut the conclusion that "the exclusionary rule applies" to such proceedings. *See United States v. $7,850.00 in US Currency*, 7 F.3d 1355, 1357 (8th Cir. 1993).

For example, in *United States v. Janis*, the Supreme Court held that evidence wrongfully obtained by a state law enforcement officer would not be excluded from a federal tax proceeding. *United States v. Janis*, 428 U.S. 433 (1976). The Court held that the exclusionary rule was not useful in that context—in large part because a *state* law enforcement officer would not be expected to govern his or her actions by reference to admissible evidence in *federal* tax proceedings. *Id.* at 448. In addition, the Court emphasized that a law enforcement officer would not be deterred from unlawfully seizing evidence by applying the exclusionary rule to federal tax proceedings, since he or she is "already 'punished' by the exclusion of the evidence in the state criminal trial." *Id.* at 448. The Court therefore concluded that "the additional marginal deterrence provided by

forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation." *Id.* at 453-54.

The reasoning of *Janis* does not undermine the application of the exclusionary rule in the forfeiture context. To begin with, the *Janis* decision rests primarily on the peculiar *inter*sovereign circumstance of a state law enforcement officer and a federal proceeding—the Court was clear that it "need not consider" *intra*sovereign cases, like the situation presented here and in *Plymouth Sedan*. *See id.* at 456. Furthermore, the *Janis* Court did not believe that federal tax proceedings were "important enough" to state law enforcement officials to prompt those officials to alter their behavior—i.e., to have a deterrent effect. *See id.* at 458 n.35. In contrast, and as discussed in detail below, civil forfeiture proceedings are directly relevant to the bottom line of state law enforcement and are an extremely important factor in the behavior of law enforcement in this state and others. Finally, because civil forfeiture is sometimes used in situations where there is no criminal trial envisioned at all,[5] the argument that law enforcement is "already punished" does not uniformly apply in the civil forfeiture context as it does in the tax context.

Similarly, in *Immigration and Naturalization Services v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court declined to extend the exclusionary rule to deportation proceedings due to their unique structure. Immigration hearings are held before an

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[5] This point also distinguishes civil forfeiture proceedings from the (admittedly criminal) grand jury proceedings at issue in *United States v. Calandra*, 414 U.S. 338 (1974). *In Calandra,* the Supreme Court refused to extend the exclusionary rule to grand jury proceedings, expressing skepticism that the rule would result in meaningful additional deterrence because it "would deter only police investigation consciously directed toward the discovery of evidence *solely* for use in a grand jury investigation," and discounting the likelihood of evidence collected solely for that use. *Id.* at 351 (emphasis added). In contrast, civil forfeiture *is* sometimes the sole use of unconstitutionally obtained evidence.

immigration judge whose "sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime." *Id.* at 1038. In addition, because identity and alienage are "the sole matters necessary for the Government to establish," "deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation." *Id.* at 1043 (citations omitted).

The infrequency of the exclusion issue in immigration proceedings also affected the *Lopez-Mendoza* Court's analysis. Due to structural factors in immigration proceedings, only three immigration cases since 1899 have even addressed the exclusionary rule. *See id.* at 1044. At the same time, "[a]pplying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to *ongoing* violations of the law." *See id.* at 1046 (emphasis added). Based on these and similar factors, the Court held that there would be little deterrent effect, but high costs, to applying the exclusionary rule to deportation proceedings. *See id.* at 1038-50.

In sum: far from eroding the application of the exclusionary rule to civil forfeitures, these cases have reemphasized that the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect," *Calandra*, 414 U.S. at 348, and that this deterrence remains a vital part of the overall civil forfeiture scheme.

C. The Court of Appeals Erred in Relying on *Rife*.

The Court of Appeals decision below relied on that court's earlier decision in *Rife v. One 1987 Chevrolet Cavalier*, 485 N.W.2d 318, 322 (Minn. App. 1992),

review denied (Minn. June 30, 1992). The *Rife* decision carries little weight here for several reasons. Most obviously, *Rife* was a Court of Appeals decision that is not binding on this court. Second, *Rife* did not address or even mention the Supreme Court decision in *Plymouth Sedan*. Finally, the Court of Appeals analysis in *Rife* is inconsistent with this court's holdings and is not nearly so broad as it appears to be.

In *Rife*, police seized a vehicle in connection with a drug investigation and the state initiated administrative forfeiture proceedings. Among other defenses, the car's putative owner asserted that the warrant underlying the search that led to the seizure of the vehicle was unsigned and therefore unlawful, and that the forfeiture must therefore fail. *Id.* at 322. The Minnesota Court of Appeals rejected this argument, stating without citation to authority that "forfeiture is a civil proceeding, and there is no exclusionary rule whereby an unlawful seizure impairs the state's ability to demonstrate its case." *Id.* In making this assertion, the *Rife* court did not address either *Plymouth Sedan* or any of this court's caselaw (detailed above) holding that forfeiture proceedings are in fact quasi-criminal proceedings. Moreover, the *Rife* court emphasized the narrowness of its decision in noting that it "need not decide here whether an unlawful seizure might preclude administrative forfeiture premised on the seizure," because "[e]ven if the seizure was flawed, the cause for forfeiture was duly proven." *Id.* at 322. In other words, *even without the supposedly unlawfully seized evidence*, there was sufficient *lawful* evidence in *Rife* to sustain the forfeiture. As a result, at most, *Rife* stands for the position that wrongfully seized property may be subject to forfeiture so long as the government can "show *with untainted evidence* that probable cause to forfeit exists." *See United States v. $7,850.00 in US Currency*, 7 F.3d 1355, 1357 (8th Cir. 1993) (emphasis added).

The law on this issue is clear, and this Court should reverse the Court of Appeals decision and reaffirm the principle that the exclusionary rule applies to civil forfeiture proceedings in Minnesota.

III. THE EXCLUSIONARY RULE IS A NECESSARY DETERRENT TO UNLAWFUL POLICE CONDUCT

Not only is application of the exclusionary rule to forfeiture proceedings mandated by *Plymouth Sedan*, that application is also necessary to fulfil the underlying purpose of the exclusionary rule: to deter unlawful conduct by law enforcement.

A. The exclusionary rule's "prime purpose" is to deter unlawful police conduct.

Since *Plymouth Sedan*, both Fourth Amendment jurisprudence in the United States Supreme Court and Article I, Section 10 jurisprudence in Minnesota have increasingly recognized that "[t]he primary purpose, if not the sole purpose, of the exclusionary rule is to deter future unlawful police conduct." *State Patrol v. State, DPS*, 437 NW 2d 670, 676 (Minn. App. 1989) (*citing United States v. Janis*, 428 U.S. 433, 446, (1976)).[6] Therefore, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. To make this determination, the Supreme Court has increasingly turned to a balancing test in which courts "weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs." *Lopez-Mendoza*, 468 U.S. at 1041 (1984).

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[6] This Court has recognized that the Fourth Amendment to the United States Constitution and Article I, section 10 of the Minnesota constitution are "nearly identical." *See State v. Mohs*, 743 N.W. 2d 607, 610-11 (Minn. 2008); *Johnson v. State*, 673 N.W. 2d 144, 150 (Minn. 2004) (referring to "the goal of preventing police misconduct").

In light of this new emphasis on balancing, a few courts have questioned the continued application of the exclusionary rule to civil forfeiture cases under *Plymouth Sedan*. *See, e.g., United States v. $304,980 in United States Currency*, Case No. 12-cv-0044, 2013 U.S. Dist. LEXIS 650 (S.D. Ill. January 3, 2013) ("courts have voiced uncertainty about the use of suppression motions in civil forfeiture actions"). But even if the court were to consider the merits of *Plymouth Sedan* under a modern balancing test, the result is still the same. To see why, it is helpful to consider some abuses of the civil forfeiture scheme.

B. There is a history of unlawful police conduct in connection with civil forfeiture.

One of Minnesota's most shocking instances of law enforcement misconduct—the "Metro Gang Strike Force" fiasco—was largely the result of civil forfeiture abuse. *See Panel Report* at 31. The Strike Force was created by the legislature in 2005 and ultimately abolished in 2009 after serious forfeiture-related misconduct came to light. The group reviewing the misdeeds concluded that this misconduct was in large part a result of two things: (1) an emphasis on forfeiture driven by a "perceived need for forfeiture funds," and (2) a "lack of external supervision" over the forfeiture process. *See id.* Thus, the story of the Strike Force demonstrates (1) the need for a strong deterrent to wrongful use of civil forfeiture, and (2) the need for external (judicial) oversight of the means of deterrence.

The perceived need for funds, and the availability of civil forfeiture to obtain them, led to a perverse environment at the Strike Force. This environment and the resulting attitude toward forfeiture is best explained by the Commander of the Strike Force himself:

> If something is pertinent to the charge, we got a gun and we're charging he guy with an assault with a gun, that would go under the, you know, evidence, cause that would be used in court. . . [but] some mope, he's a dope dealer, he's never had a job and he's got this whole array of stuff that's really neat, that's better than the stuff the copper's got in his house, and *they have this thing that they don't deserve so we're going to take it, we're going to forfeit it. You know. That's just the mentality of the coppers. So you almost have to tell 'em, quit taking stuff*, you know, just take the, you know.

Id. at 15 (emphasis added).

This attitude, combined with the lack of an effective deterrent, led to a plethora of wrongful forfeitures. "[S]worn officers repeatedly took property obtained during searches for their own personal use [including] televisions, laptops and other computer equipment, electronics, jewelry and recreational items." *Id.* at 4. Even after the inquiry was over, large quantities of evidence remained "missing," including thousands of dollars in cash, power tools, home appliances, laptops, and jewelry. *Id.* at 20-21.

A key lesson from the Metro Gang Strike Force is that *only the threat of judicial oversight* was sufficient to correct such unlawful law enforcement behavior. This was borne out by the investigation itself. For example, the Review Board reported an instance involving an ice auger—used for ice fishing—that was seized and went missing during ice fishing season. It was "widely discussed at the Strike Force that a particular officer had taken the auger" and that taking it violated clear department policy. *Id.* at 16-19. Nevertheless, the auger remained missing until "[t]he officer in charge of the case threatened to obtain a search warrant for the home of the officer who took the auger." *Id.* at 19. Only then, *after the threat of judicial intervention*, was the auger "quietly and anonymously returned to Strike Force offices." *Id.* at 19.

Another, related lesson from the Strike Force incident is that internal rules and policies alone do not prevent constitutional violations in the civil forfeiture context. The Strike Force had rules in place to deter Fourth Amendment violations, but, as noted

above, those rules were violated or simply ignored. *Id.* at 16 ("this conduct directly violated the policies and procedures governing the Strike Force"). And when the Commander of the strike force was interviewed and confronted with misconduct, he did not mention internal rules or regulations at all; instead, he tried to deflect responsibility by stating that "the final review for this process rests with the court." *Id.* at 36.

The Strike Force scandal was not an isolated incident. Journalists, think tanks, academics, and others have catalogued forfeiture abuses around the country. *See, e.g.,* Cato Institute, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, March 2010 (detailing abuses in Texas, Nebraska, Pennsylvania, and Georgia, and concluding that "[p]rivate property . . . is a principle under assault by modern civil forfeiture law")[7]; Sarah Stillman, *Taken: The Use and Abuse of Civil Forfeiture*, THE NEW YORKER, August 12, 2013 (describing a litany of abuses around the country including a case in Texas in which law enforcement threatened "felony charges. . . [unless the accused would] sign over their cash to the city of Tenaha")[8]; David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1 (2012). A federal judge in Nevada recently described a criminal forfeiture action against the salary of a wrongly convicted "victim" as "the most egregious miscarriage of justice I have experienced in more than twenty years on the bench." *United States v. Depue*, Case No. 10-cr-00109, 2013 U.S. Dist. LEXIS 4072 at *20 (D. Nev. Jan. 10, 2013). In light of this litany of abuses, the minimal costs of the extending the exclusionary rule to civil forfeitures is clearly outweighed by the need for additional deterrence of unlawful acts.

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[7] *Available at* http://www.cato.org/events/policing-profit-abuse-civil-asset-forfeiture.

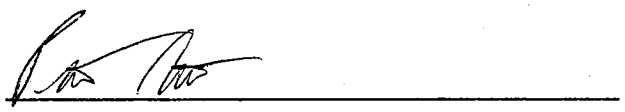
[8] *Available at* http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman.

The application of the exclusionary rule is vital to the fairness of the civil forfeiture regime. Commentators have noted that law enforcement officers "have great difficulty believing that standards can have any real meaning if the government can profit from violating them" Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980). And the proper source of meaning is application, *by an independent judiciary*, of the exclusionary rule. "[G]iven the general disfavor of forfeiture statutes, the wisdom of vesting the right to possession of a forfeited vehicle in the law enforcement agency responsible for the arrest of a defendant and the forfeiture of a defendant's vehicle is not immediately evident." *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 440 (Minn. 2009) (Anderson, G. Barry, J., concurring).

CONCLUSION

For the reasons set forth above, the ACLU of Minnesota urges this Court to hold that the Fourth Amendment and Article I, section 10 of the Minnesota Constitution require the exclusion in civil forfeiture proceedings of unconstitutionally seized evidence.

Dated: March 7, 2014



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Appellate Court File No. A13-0445

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Kate A. Swanson, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on March 7, 2014, she served the attached

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

upon the following attorneys in this action, by placing a copy thereof in an envelope and arranging for the deposit of same, postage prepaid, in the United States Mail, at Minneapolis, Minnesota, directed to said attorney(s) at the following address(es):

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Kate A. Swanson

Subscribed and sworn to before
me on March 7, 2014

Notary Public

GINGER PLAUCK
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March 7, 2014

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Re: *Daniel Garcia-Mendoza v. 2003 Chevy Tahoe, et al.*, No. A13-0445

Dear Clerk:

On behalf of the American Civil Liberties Union of Minnesota, I have enclosed for filing our Brief of Amicus Curiae. I have also enclosed our Affidavit of Service by U.S. Mail.

Please contact me if you have any questions about the filing.

Sincerely,

Peter M. Routhier

cc: Counsel of Record

Enclosure.