STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1887

In the Matter of the Mental Commitment of K.E.K.:

WAUPACA COUNTY,

Petitioner-Respondent,

v.

K.E.K.,

Respondent-Appellant-Petitioner.

ON PETITION TO REVIEW A DECISION OF THE COURT OF APPEALS (DISTRICT IV) AFFIRMING AN ORDER EXTENDING INVOLUNTARY COMMITMENT, ENTERED IN THE CIRCUIT COURT FOR WAUPACA COUNTY, THE HONORABLE VICKI L. CLUSSMAN PRESIDING

NON-PARTY BRIEF OF THE STATE OF WISCONSIN AND THE ATTORNEY GENERAL

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STATEMENT OF INTEREST

Wisconsin Stat. § 806.04(11) entitles the Attorney General to be heard in litigation where a party alleges that a Wisconsin statute is unconstitutional. This office filed a non-party brief in the court of appeals defending the constitutionality of Wis. Stat. § 51.20(1)(am). On October 27, 2020, this Court granted the Attorney General's motion to submit a non-party brief to defend the constitutionality of the statute in this Court.

ISSUES PRESENTED

1. Substantive due process requires proof that an individual is mentally ill and currently dangerous before she may be involuntarily committed. That commitment may be extended if the individual continues to be currently dangerous. Wisconsin Stat. § 51.20(1)(am) allows the County to prove the dangerousness of an individual already committed for treatment by showing a substantial likelihood that she would be a proper subject for commitment (i.e., mentally ill and currently dangerous) if treatment were withdrawn.

The statute comports with substantive due process because it permits the extension of an involuntary commitment only where current dangerousness is proven.

2. The Equal Protection Clause prohibits the unequal treatment of similarly situated classes in mental health statutes unless the difference in treatment is rationally related to a legitimate governmental purpose. Individuals subject to an initial commitment under the so-called "fifth standard" may only be committed if they are found to be currently dangerous. Individuals subject to a recommitment for mental health treatment may only be recommitted if they are found to be currently dangerous.

The treatment of individuals initially committed under the fifth standard and recommitted individuals does not violate equal protection because the two classes are not similarly situated and are not treated differently in any meaningful respect. Moreover, any difference in treatment between the two classes is rationally related to a legitimate governmental purpose.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested.

STANDARD OF REVIEW

This Court reviews constitutional challenges to statutes de novo. *In re Christopher S.*, 2016 WI 1, ¶ 33, 366 Wis. 2d 1, 878 N.W.2d 109. Statutes are presumptively constitutional; the challenger bears the burden of proving unconstitutionality beyond a reasonable doubt. *Id.* This Court regularly reviews federal constitutional challenges to state statutes under this standard. *E.g.*, *id.* ¶¶ 33–35.

ARGUMENT

I. Wisconsin's recommitment statute satisfies substantive due process[1] because it requires proof of current dangerousness.

A. The recommitment statute requires the County to prove and the circuit court to find that the individual is currently dangerous.

To satisfy substantive due process, an involuntary mental health commitment statute must require the

[1] The State does not make a separate Privileges and Immunities argument.

government to prove both that the person to be committed is mentally ill, and that he is dangerous to himself or others. *In re Dennis H.*, 2002 WI 104, ¶¶ 35–38, 255 Wis. 2d 359, 647 N.W.2d 851.

The Wisconsin standard for an initial mental health commitment meets this standard. First, the County must show that "[t]he individual is mentally ill or . . . drug dependent or developmentally disabled."[2] Wis. Stat. § 51.20(1)(a)1. Second, the County must show that the person is dangerous under one of five different standards. Wis. Stat. § 51.20(1)(a)2.a.–e. To satisfy these standards, the County must prove one of several variations of "recent acts or omissions" or "behavior[s]" manifesting evidence of dangerousness. *See id.*

The County may move to extend an initial commitment. Wis. Stat. § 51.20(13)(g)3. A recommitment petition must "establish the same elements with the same quantum of proof" as the initial commitment. *In re J.W.J.*, 2017 WI 57, ¶ 20, 375 Wis. 2d 542, 895 N.W.2d 783. The County must make the "mentally ill" and current dangerousness showings before a commitment may be extended. The court must then find that the individual is "a proper subject for commitment as prescribed in sub. (1) (a) 1.," i.e., that she is mentally ill. Wis. Stat. § 51.20(13)(g)3. The court must also find that she "evidences the conditions under sub. (1) (a) 2. or (am)," i.e., that she is currently dangerous under one of the five standards of dangerousness. *Id.*

Contrary to K.E.K.'s assertion that the statute does not require a showing of current dangerousness, paragraph (am) does include that requirement. For an initial commitment, the

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[2] For brevity, this brief will use the shorthand "mentally ill" instead of the full statutory phrase.

County must prove a recent act, omission, or behavior. *See* Wis. Stat. § 51.20(1)(a)2.a.–e. For a recommitment,

> *If the individual has been the subject of inpatient treatment for mental illness* . . . immediately prior to commencement of the [recommitment] proceedings, . . . *the requirements* of a recent overt act, attempt or threat to act under par. (a) 2. a. or b., pattern of recent acts or omissions under par. (a) 2. c. or e., or recent behavior under par. (a) 2. d. *may be satisfied by a showing that there is a substantial likelihood*, based on the subject individual's treatment record, *that the individual would be a proper subject for commitment if treatment were withdrawn*.

Wis. Stat. § 51.20(1)(am). Thus, paragraph (am) provides an alternative path to prove current dangerousness when an individual has been the subject of a mental health commitment immediately prior to the extension petition. To satisfy paragraph (am), the County must show that the individual would become dangerous "if treatment were withdrawn." *Id.*

This Court has recognized that paragraph (am) provides the County with a different avenue to proving current dangerousness in recommitment cases. *See In re J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509.

The *J.W.K.* court explained the problem animating paragraph (am): "an individual receiving treatment may not have exhibited any recent overt acts or omissions demonstrating dangerousness because the treatment ameliorated such behavior, but if treatment were withdrawn, there may be a substantial likelihood such behavior would recur." 386 Wis. 2d 672, ¶ 19; *accord id.* ¶ 23. "Despite the absence of recent acts demonstrating dangerousness, an individual may nevertheless pose a danger to himself or to others based on a substantial likelihood that he would exhibit those behaviors if treatment were withdrawn." *Id.* ¶ 23. Thus,

"[b]ecause an individual's behavior might change while receiving treatment, Wis. Stat. § 51.20(1)(am) provides a *different avenue* for proving dangerousness if the individual has been the subject of treatment for mental illness immediately prior to commencement of the extension proceedings." 386 Wis. 2d 672, ¶ 19 (emphasis added). Paragraph (am) thus "functions as an *alternative evidentiary path*." *Id.* (emphasis added).

The *J.W.K.* court carefully noted that, under paragraph (am), "dangerousness remains an element to be proven to support both the initial commitment and any extension." *Id.* ¶ 19. "Each order [for recommitment] must independently be based upon *current*, dual findings of mental illness and *dangerousness* . . . ." *Id.* ¶ 21 (emphasis added). "The dangerousness standard is not more or less onerous during an extension proceeding; *the constitutional mandate that the County prove an individual is* both mentally ill and *dangerous* by clear and convincing evidence *remains unaltered*. Each extension hearing requires proof of <u>current</u> dangerousness." *Id.* ¶ 24 (emphasis in italics added). "The *alternate avenue* of <u>showing</u> dangerousness under paragraph (am) does not change the elements or quantum of proof required." *Id.* (emphasis in italics added). Neither the County nor the court may rely on the individual's history of dangerousness: "It is not enough that the individual was at one point a proper subject commitment." *Id.*

Paragraph (am) expressly provides "a different avenue" and "an alternative evidentiary path" for proving *current* dangerousness. That is the only reasonable interpretation of the statute. A showing that "the individual *would* be a proper subject for commitment *if* treatment were withdrawn" is meaningful as a measure of *current* dangerousness. Wis. Stat. § 51.20(1)(am). It cannot possibly be interpreted as measuring the individual's *past* dangerousness. Because the statute

requires a showing of current dangerousness, it comports with due process. *See J.W.K.*, 386 Wis. 2d 672, ¶ 24. This Court's analysis in *J.W.K.* is supported by logic and the statutory text and needn't be revisited.

B. Contrary to K.E.K.'s arguments, the recommitment statute is consistent with U.S. Supreme Court and Wisconsin Supreme Court precedent.

To support her claim that it violates due process, K.E.K. argues that paragraph (am) is inconsistent with U.S. Supreme Court decisions articulating the constitutional standards for mental health commitments, and decisions from that Court and this Court regarding the constitutional standard for involuntary medication. Additionally, she argues that a 1984 court of appeals opinion led later courts astray because it misinterpreted a law review article. The arguments fail.

1. Paragraph (am) is consistent with the constitutional holdings in *O'Connor*, *Foucha*, and *Zinermon*.

K.E.K. cites three Supreme Court cases to support her claim that paragraph (am) is facially unconstitutional. The effort is wasted because paragraph (am), which requires proof of current dangerousness, is consistent with those cases.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), Donaldson was committed to a state mental hospital. For fifteen years, he sought discharge, claiming he was not dangerous. 422 U.S. at 564–65. He ultimately brought a civil rights action against the hospital's superintendent, who conceded at trial that he had no "knowledge that Donaldson had ever committed a dangerous act." *Id.* at 568. The Court held that, even if "Donaldson's original confinement was founded upon a constitutionally adequate basis," i.e.,

dangerousness, "it could not constitutionally continue after that basis no longer existed." *Id.* at 575.

Consistent with *O'Connor*, paragraph (am) allows recommitment only where the County proves *current dangerousness*. *See supra* at 3–5. Therefore, it is plain that the statute does not violate *O'Connor*. Moreover, *O'Connor* does not suggest that a statute must condition recommitment on proof of recent acts, omissions, or behaviors as K.E.K. insists. Nor does it suggest that a statute may not provide a different avenue or alternative evidentiary path to proving dangerousness as paragraph (am) does. If anything, paragraph (am) effectively takes the *O'Connor* ruling into account by ensuring that recommitment will occur only if current dangerousness is proved.

The other cases KEK cites add nothing to her argument. In *Zinermon v. Burch*, 494 U.S. 113 (1990), the plaintiff challenged the *voluntariness* of his voluntary mental health commitment. The Court noted in passing (citing *O'Connor*) that involuntary confinement of the mentally ill is unconstitutional without a finding of dangerousness. *Id.* at 134. *Foucha v. Louisiana*, 504 U.S. 71 (1992), asked whether Louisiana could continue to confine a dangerous insanity acquittee who was no longer mentally ill. The Court held that once he regained his sanity, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." 504 U.S. at 78 (citing *O'Connor*, 422 U.S.at 574–75). In *Foucha*, dangerousness wasn't the issue. *See id.*

at 74–75.[3] Neither *Zinermon* nor *Foucha* advance the analysis here.

Paragraph (am) is consistent with the federal cases. Like *O'Connor*, the statute requires proof of current dangerousness before a mentally ill person may be recommitted.

2. Section 51.20(1)(am) does not allow involuntary medication without proof of current dangerousness.

K.E.K. argues that paragraph (am) is facially unconstitutional because it allows involuntary medication without proof of dangerousness. She contends that paragraph (am) conflicts with Wis. Stat. § 51.61(1)(g)3. and the decision in *In re C.S.*, 2020 WI 33, 391 Wis. 2d 35, 940 N.W.2d 875. K.E.K. is wrong.

As shown throughout this brief, a person may be recommitted if she is currently dangerous under paragraph (am). Once recommitted, she has the right to refuse medication unless a court finds "that the individual is not competent to refuse medication or treatment *or* unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others." Wis. Stat. § 51.61(1)(g)3. The "serious physical harm" finding under paragraph (g)3. is not a dangerousness requirement; dangerousness will have already been found under paragraph (am).

The import of paragraph (g)3. is this: even a person who has been involuntarily committed for mental health

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[3] Although *Foucha* concerned the mental illness aspect of involuntary commitment, K.E.K. mistakenly believes it was a dangerousness case. (K.E.K.'s Br. 19–20.)

treatment because she is mentally ill and dangerous has a presumptive right to refuse medication. However, this presumption can be overcome if the committing court finds either that she is incompetent to refuse medication or that she is not simply dangerous but dangerous enough to threaten "*serious physical harm* to [herself] or others." Wis. Stat. § 51.61(1)(g)3.

K.E.K. concludes that paragraph (am) allows the involuntary medication of a mentally ill person "without any evidence that a situation 'exists' where medication or treatment is necessary to prevent 'serious physical harm' to the person or others." (K.E.K.'s Br. 22.) She doesn't understand the statute. Under paragraph (am), a person may be recommitted if she is found to be currently dangerous as provided by that statute. Once recommitted, she may—*like persons initially committed under section 51.20*—refuse medication unless she is incompetent to do so or poses a threat of "serious physical harm" to herself or others.

C.S. does not help K.E.K.'s argument. That case analyzed the interplay between Wis. Stat. § 51.20(1)(ar) and § 51.61(1)(g)3. *C.S.*, 391 Wis. 2d 35, ¶ 2. Section 51.20(1)(ar) governs the involuntary commitment of mentally ill prisoners. In contrast to a non-prisoner, a mentally ill inmate may be involuntarily committed without proof of dangerousness. This Court declared that categorical exception constitutional in *Christopher S.*, 366 Wis. 2d 1, ¶ 47. Meanwhile, because a non-dangerous prisoner may be involuntarily committed, section 51.61(1)(g)3. then allows the non-dangerous prisoner to be involuntarily medicated if he is found to be incompetent. That is a consequence of the statutory structure. In *C.S.*, this Court declared that consequence unconstitutional. A mentally ill prisoner involuntarily committed for mental health treatment can be

involuntarily medicated, the Court held, only if he is also dangerous. 391 Wis. 2d 35, ¶ 46.

Paragraph (am) is not inconsistent with *C.S.* *C.S.* requires a dangerousness finding before an involuntarily committed mentally ill inmate is involuntarily medicated. Paragraph (am) requires a dangerousness finding before a committed person may be recommitted and subject to possible involuntary medication. There is no inconsistency between paragraph (am), section 51.61(1)(g)3., and *C.S.*

3. K.E.K.'s criticism of *M.J.* does not advance her due process argument.

Finally, K.E.K. argues that, in *M.J. v. Milwaukee County Combined Community Service Board*, 122 Wis. 2d 525, 362 N.W.2d 190 (Ct. App. 1984), the court of appeals misinterpreted a law review article and failed to cite any legislative history to support its interpretation of the recommitment statute. *M.J.* was the first case to explain that the recommitment statute was enacted to address the so-called "revolving door" problem of involuntary mental health commitments. *See* 122 Wis. 2d at 534.

A law review article is not binding legal authority. Assuming that *M.J.* did misinterpret a law review article 35 years ago, so what? The important thing is that *M.J.*'s "revolving door" analysis is logical and coherent. That is why its reasoning is still followed 35 years later—not because it cited (or miscited) a law review article. *See J.W.K.*, 386 Wis. 2d 672, ¶¶ 19, 23. Indeed, based on the statute's plain language, *M.J.*'s legislative intent analysis seems correct. What is the purpose of paragraph (am) if not to provide a different avenue to proving current dangerousness in an effort to counteract the revolving door phenomenon? K.E.K. doesn't say. Also, while she complains that *M.J.* fails to cite any legislative history, she doesn't reveal whether its

conclusions are inconsistent with legislative history. Finally, K.E.K. never explains how *M.J.*'s purported inadequacies affect paragraph (am)'s constitutionality.

Without using the phrase "revolving door," this Court in *J.W.K.* interpreted paragraph (am) similarly to the *M.J.* court. *See supra* at 3–4. That analysis is logical, cogent, and persuasive. What's more, it is binding authority. And, contrary to K.E.K.'s assertion, the Court did make a constitutional finding in *J.W.K.*, stating that "the *constitutional mandate* that the County prove an individual is both mentally ill and dangerous by clear and convincing evidence remains unaltered" in the recommitment statute." 386 Wis. 2d 672, ¶ 24 (emphasis added).

* * * * *

Section 51.20(13)(g)3. allows the extension of a mental health commitment only where the person is mentally ill ("a proper subject for commitment as prescribed in sub. (1) (a) 1.") and dangerous ("evidences the conditions under sub. (1) (a) 2. or (am)"). Paragraph (am) provides an alternative evidentiary path for proving dangerousness when an individual is already committed for treatment. The statute satisfies due process.

II. The recommitment statute does not violate the Equal Protection Clause.

K.E.K. claims that paragraph (am) violates the Equal Protection Clause. Mental health commitments are reviewed under the rational basis standard. *See*, *e.g.*, *Dennis H.*, 255 Wis. 2d 359, ¶ 31. Paragraph (am) survives rational basis review.

The first step in equal protection analysis is to identify classes that are similarly situated but differently treated. *Id.* ¶ 29. The second step is to determine whether the classification is rationally related to a legitimate

governmental purpose. *Id.* ¶ 31. K.E.K.'s claim first fails because she fail to identify two similarly situated classes. Second, even if the classes she identifies are similarly situated, K.E.K. fails under the second step because they aren't treated differently in any meaningful way. Finally, any difference in treatment is rationally related to a legitimate governmental purpose.

The classes K.E.K. compares are individuals subject to initial commitment under the "fifth standard" (*see* Wis. Stat. § 51.20(1)(a)2.e.)[4] and individuals subject to recommitment. These classes are not similarly situated. Simply put, individuals facing commitment under the fifth standard are similarly situated to individuals facing commitment under the other four standards (*see* Wis. Stat. § 51.20(1)(a)2.a.–d.). Under all five standards, individuals subject to an initial commitment are similarly situated because they are mentally ill, dangerous, and not currently subject to involuntary mental health treatment. In contrast, an individual facing recommitment is, by definition, already subject to involuntary mental health treatment. Those facing an initial commitment are at a different point in their treatment from those facing recommitment. They are differently situated.

Even if the fifth standard and recommitment groups were similarly situated, they are not treated differently. K.E.K. states correctly that a person may be committed under the fifth standard only if he is currently dangerous. In contrast, K.E.K. insists, a person facing recommitment does not have to be proved currently dangerous. This a false premise. Recommitment does require a showing of current

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[4] An individual is "dangerous" under the fifth standard if he is incompetent to made treatment decisions and his mental illness, left untreated, is likely to cause disabling deterioration to his health. *Dennis H.*, 255 Wis. 2d 359, ¶¶ 20–25.

dangerousness. *See supra* at 3–5. Paragraph (am) provides a different avenue for proving current dangerousness; it does not provide an exemption from that requirement. *J.W.K.*, 386 Wis. 2d 672, ¶ 24.

The recommitment statute's alternative evidentiary path for proving current dangerousness is rationally related to a legitimate governmental purpose, i.e., providing treatment to the mentally ill. *See Christopher S.*, 366 Wis. 2d 1, ¶ 44. Except for inmates, mentally ill individuals may be involuntarily committed only if they are dangerous. But, because individuals who have been effectively treated may not manifest the evidence of dangerousness seen in persons who haven't been in treatment, the government needs a different avenue for proving current dangerousness. *See J.W.K.*, 386 Wis. 2d 672, ¶¶ 19, 23. Paragraph (am) provides that alternate route and is thus rationally related to the legitimate governmental purpose of providing treatment to the mentally ill.

Paragraph (am) does not violate the Equal Protection Clause.

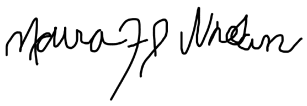
CONCLUSION

The State of Wisconsin and the Attorney General respectfully request that this Court affirm the lower courts' decisions.

Dated this 3rd day of November 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

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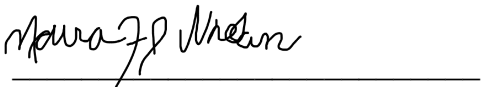

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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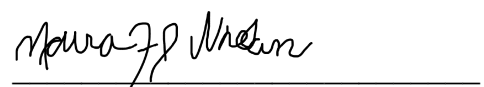

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