No. 16-1394

IN THE

Supreme Court of the United States

KEVIN SCOTT KARSJENS, ET AL.,
Petitioners,

v.

EMILY JOHNSON PIPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS BRIEF FOR CRIMINOLOGY SCHOLARS AND THE FAIR PUNISHMENT PROJECT

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Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparison with Other States*, Washington State Inst. for Pub. Pol. 1 (1996) 9

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INTEREST OF THE AMICUS CURIAE

The Fair Punishment Project ("FPP") is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of the Fair Punishment Project is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that the Minnesota civil commitment statute is a punitive scheme that responds excessively to moral panic rather than in a narrowly tailored way to a compelling government interest. Four Criminology Scholars—Tusty ten Bensel (University of Arkansas at Little Rock), Robert D. Lytle (University of Arkansas at Little Rock), Christina N. Mancini (Virginia Commonwealth University), and Lisa L. Sample (University of Nebraska at Omaha)—join FPP in filing this brief. Each of these scholars believes that the Court has relied on faulty statistics about recidivism as a basis to uphold unduly restrictive limitations on physical liberty.

SUMMARY OF THE ARGUMENT

The right to be free from confinement is "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). It forms the basis of other rights deemed fundamental in this country – the right to earn a living, to have children – and it prevents this nation from devolving into tyranny. The government must tread lightly when it intrudes on that freedom, enacting safeguards to prevent it from overreaching.

That is not what occurred in Minnesota. Rather than carefully develop a sexual civil commitment scheme that confines only "a small segment of particularly dangerous individuals," *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997), Minnesota enacted the broadest scheme in the country after just ninety minutes of discussion. They did so in the midst of a moral panic over one inmate's potential release. Minnesota then failed to provide resources so that those confined could receive treatment, and it did not enact procedures to ensure that those no longer posing a risk are released. The District Court recognized these flaws, holding that Minnesota's civil commitment scheme for sexually violent predators ("SVPs") represents a punitive system that violates the Petitioners' due process rights; *Karsjens v. Jesson*, 109 F. Supp.3d 1139 (D.Minn. 2015); in a cursory, eight page opinion, the Eighth Circuit reversed. *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

This case cries out for judicial intervention. When republican institutions pass laws in response to moral panics and popular passions, with little thought, deliberation, and scrutiny, the rights of the most vulnerable and unpopular suffer. When "prejudice" against unpopular groups curtails "the operation of those political processes ordinarily to be relied upon to protect minorities," "more searching judicial inquiry" is required. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). We ask this Court to grant certiorari on this case, which involves the fundamental right to be free, and review the Petitioners' claims on the merits.

ARGUMENT

I. IT IS THE JUDICIARY'S ROLE TO ENSURE THAT LAWS PASSED IN RESPONSE TO MORAL PANICS DO NOT IMPERMISSIBLY INFRINGE ON FUNDAMENTAL RIGHTS.

A. Laws Passed at the Height of a Moral Panic Threaten to Erode the Fundamental Rights of the Most Vulnerable and Least Powerful Individuals in Our Society.

Forty years of research has showed that "moral panics" can have profound and devastating effects on vulnerable populations. Moral panics are outsized public reactions to "a condition, episode, person or group of persons" that prominent stakeholders in society, and the public at large, view as "a threat to societal values and interests." Stanley Cohen, *Folk Devils & Moral Panics: The Creation of the Mods and Rockers* (3d ed. 2002) 1, available at https://infodocks.files.wordpress.com/2015/01/stanley_cohen_folk_devils_and_moral_panics.pdf. A moral panic often begins with a real and disturbing event which is disseminated through the popular media. David Garland, *On the Concept of Moral Panic*, 4 Crime, Media, Culture 1:11 (2008), available at http://journals.sagepub.com/doi/abs/10.1177/1741659007087270. The precipitating event creates public outrage, often because it represents a flouting of our societal values, and evokes widespread feelings of hostility toward an identifiable group. *Id.* The response is disproportionate, exaggerating "the extent of the conduct, or the threat it poses," and the individual case is portrayed as symptomatic of greater societal woes. *Id.*

Moral panics have recurred in the history of our democratic republic, and they have to led to some of the greatest infringements on fundamental rights and enormous national embarrassments. Most famously, just weeks after Pearl Harbor, public opinion demanded the removal of all Japanese Americans from the west coast, with columnists across the country arguing that "the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots." *See* Peter Irons, *A People's History of the Supreme Court: The Men and Women Whose Cases and Decision Have Shaped Our Constitution*, 349-51 (1999). Japanese internment followed. Fear of Soviet aggression lead to McCarthyism and the Red Scare. *See Dennis v. United States*, 341 U.S. 494 (1951). Fear over same-sex marriage led to the passage of thirteen referenda barring same-sex marriage in 2004. *See* Michael Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, 106 (1st ed. 2012). These laws have led to infringements on the right to physical liberty, the right to free speech and association, and the right to marry.

B. Courts Must Vigorously Protect Against the Erosion of Fundamental Rights That Occurs in The Wake of Moral Panics.

Courts have both the authority and the duty to intervene in cases where popular passions lead legislatures to infringe on the "fundamental rights and liberties" that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 703, 720-21 (1997). The Constitution tolerates few infringements on fundamental rights;

when the government encroaches on them, there must be a "compelling state interest" and the infringement must be "narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 118 (1991). It is the Court's duty to ensure this exacting standard is met by enforcing the Constitution's "broad provisions [designed] to secure individual freedom and preserve human dignity," *Roper v. Simmons*, 543 U.S. 551, 578 (2005), whether through the Eighth or Fourteenth Amendment.

It is difficult for legislatures to infringe on the rights of the majority, but easy for them to do so with the less popular, whose voices are drowned out at the polls. Courts must therefore analyze infringements on the rights of the vulnerable and unpopular with exacting scrutiny, because no one else will. The Founders recognized the importance of this countermajoritarian role in government, emphasizing the need to guard "one part of the society against the injustice of the other part . . . . [because] [i]f a majority be united by a common interest, the rights of the minority will be insecure." The Federalist No. 51 (James Madison). The Supreme Court has as well. "[P]rejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry." *See United States v. Carolene Products, Inc.*, 304 U.S. 144, 153 n.4 (1938); *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the

particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.").

Moral panics do not lead to the curtailment of the majority's rights. They uniformly infringe on the rights of the voiceless -- racial minorities, political minorities, religious minorities, and, as here, sex offenders. When a moral panic produces a restrictive law, again, as it has here, it is incumbent on Courts to intervene. The Court's failure to do so has disastrous effects. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding Japanese internment camps); *Dredd Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (denying citizenship to descendants of enslaved Africans); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of sodomy laws).

There is another important reason for judges to carefully scrutinize laws that are products of moral panics. Ordinarily, legislation is the product of a careful deliberative process, whereby legislators and their staff engage in study, evaluation, and debate over the merits of the bill. "The process of enactment, while perhaps not always perfect, includes deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings." *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995). This is often not the case for legislation that is passed because of a moral panic. *Cf. Yniguez v. Arizonans for Official English*, 69 F.3d 920, 930-31 (9th Cir. 1995) (en banc) (noting that initiative making English the official language of the state lacked legislative findings and was not subjected to extensive hearings or analysis, and finding that provision unconstitutional) (vacated on

mootness grounds). Legislation passed in a response to a moral panic is divorced from data and evidence and is instead tied to emotion that often over-inflates a danger or risk. Japanese Americans, for example, were not running around the United States threatening to overthrow the government. The ordinary reasons for applying deference to legislation and officials' motivations do not exist.

II. LAWS REGULATING SEX OFFENDERS CONSTITUTE BOTH A RESPONSE TO AND A CONTRIBUTING CAUSE OF AN ONGOING MORAL PANIC SURROUNDING SEX OFFENSES.

A. Sex Offender Laws Implicate A Fundamental Right.

There can be little doubt that sex offender civil commitment laws like the one at issue in this case implicate a fundamental right. "[F]reedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause[.]" *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). "A statute permitting indefinite detention" raises serious constitutional problems, because "[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty" that [the Due Process] Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

B. Sex Offender Laws Have Grown Out Of A Moral Panic That Still Persists.

The expansion of sex offender laws derives from a moral panic that is untethered to empirical

evidence about sex offenders. In most places, these laws were passed without meaningful legislative discussion or study.

Beginning in the 1990s, this country developed an intense fear about the dangers posed by sex offenders. The mass media repeatedly reinforced the message that sexual predators posed threats that were both real and prevalent, and that no one and no place was safe. Heather Ellis Cucolo and Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. Denv. Crim. L. Rev. 185, 191-200 (2013). Media coverage highlighted shocking sex crimes against child victims, and public attention focused on a purported epidemic of sexual predators, men who lurked our streets, ready to kidnap, sexually assault, and emotionally and physically disfigure children. *Id.*

The sex offender panic has shown marked longevity, "a constant in American culture for decades." Bela August Walker, *Essay: Deciphering Risk: Sex Offender Statutes and Moral Panic in A Risk Society*, 40 U. Balt. L. Rev. 183, 199 (2010). There has been "an endless supply of new laws intended to control or punish sex offenders in new and harsher ways." Michael M. O'Hear, *Perpetual Panic*, 21 Fed. Sent'g Rep. 69, available at http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1114&context=facpub. The net result of decades of public furor and resulting legislation is the creation of a pariah class. The "sex offender" is a true outcast: "People hate and despise them and think they should be locked up for life. Other criminals consider them too abominable to associate with. They are seen as dangerous sexual predators for whom treatment won't work and who are at a

high risk to reoffend." Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?,* 1 J. of Sexual Offender Civ. Commitment: Sci. and the L. 141 (2006), available at http://www.ipt-forensics.com/ library/jsocc_sl01.htm. Public disdain and outrage has led to increasingly harsh laws designed to punish, contain, and track sexual offenders. *Id.* As a result, today, "no other population is more despised, more vilified, more subject to media representation, and more likely to be denied basic human rights." Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 Temp. Pol. & Civ. Rts. L. Rev. 1, 2 (2012).

Like most laws arising out of moral panics, laws governing sex offenders have not been the product of traditional legislative deliberation. Rather than responding to empirical evidence suggesting that a chosen approach is appropriate, lawmakers develop legislation because of widespread fear. In 1990, Washington State passed the nation's first sex offender registration and notification requirements, along with the first modern era sex offender civil commitment scheme, after a seven-year-old boy was raped and sexually mutilated by an intellectually disabled man committing his third offense. *See* Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparison with Other States*, Washington State Inst. for Pub. Pol. 1 (1996), http://www.wsipp.wa.gov/ReportFile/1244/Wsipp_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States_Full-Report.pdf; *see also* Barry Siegel, *Locking Up 'Sexual Predators': A public outcry in*

Washington state targeted repeat violent criminals. A new preventative law would keep them in jail indefinitely, N.Y. Times (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual -predator.[1] In California, the violent murders of two girls in 1993 and 1994 respectively "pushed sex offender laws onto the national sc[ene]." Walker, *Deciphering Risk*, 191. The New Jersey assembly approved of "Megan's Law" requiring community notification and sex offender registration after the rape and death of a young woman by a sex offender just released. N.J.S.A. 2C:7-1-19. Six of seven measures passed the New Jersey House unanimously. *See* Kimbery J. McLarin, *Trenton Races to Pass Bills on Sex Abuse*, N.Y. Times (Aug. 30, 1994), http://www.nytimes.com/1994/08/30/nyregion/trenton-races-to-pass-bills-on-sex-abuse.html?mcubz=0.

These laws are largely premised on the assumption that sex offenders cannot rehabilitate and are a lingering threat. But there is no empirical support for such assumptions. A core myth is that SVP laws prevent a vast number of sex crimes by incapacitating individuals who have an abnormally high risk of recidivism -- as high as 80%. Indeed, this Court has accepted such a number. *McKune v. Lile*, 536 U.S. 24, 33 (2002) (Kennedy, J., opinion for the Court).[2] But studies show that this high-recidivism

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[1] The Community Protection Act passed through the Washington legislature unanimously. *See* Norm Maleng, *The Community Protection Act and the Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 821, 822 (1992).

[2] *See also* Adam Liptak, *Did Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES, Mar. 6, 2017, https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html?mcubz=0 ("there is vanishingly little

claim is false. A 2003 Department of Justice study of nearly 10,000 released sex offenders found that only 5.3% were arrested for a sex crime within three years of release. *See* Patrick A. Langan, PhD et al., Bureau of Just. Stat., *Recidivism of Sex Offenders Released from Prison in 1994* (2003), https://www.bjs.gov/ content/pub/pdf/rsorp94.pdf. In the absolute, this is a low rate of recidivism, and it is a far cry from the hysteria that recidivism rates are "as high as 80%." *McKune v. Lile*, 536 U.S. 24, 33 (2002) (Kennedy, J., opinion for the Court). Other studies have echoed the results of the DOJ study. *See, e.g.*, Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. Pa. J. Const. L. 391, 395-98 (2011) (reviewing studies); *Locked Up On A Hunch*, N.Y. Times, (Aug. 15, 2015), available at https://www.nytimes.com/2015/08/16/opinion/sunday/sex-offenders-locked-up-on-a-hunch.html?mcubz=0&_r=1.[3]

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evidence for the Supreme Court's assertion that convicted sex offenders commit new offenses at very high rates").

[3] *See also* Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 Bost. C. L. Rev. 34, 39 (2017).

C. Like Most Sex Offender Schemes, Minnesota's Civil Commitment Scheme for Sexually Violent Predators is an Outgrowth of Moral Panic

1. The Passage of the Minnesota SVP Scheme Conformed to the Pattern of Legislating in Response to a Particularly High-Profile and Disturbing Situation

Minnesota's passage of its current SVP scheme shares a similar history to corresponding laws in other jurisdictions. Dennis Linehan—a man with a long history of violent sex crimes, including the murder and sexual assault of a 14-year-old girl—was paroled in 1992. Although the State tried to commit him, a court found that it did not establish that Linehan had an "utter lack of power to control his sexual impulses" as required under the prevailing test. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (finding that the district court had failed to provide clear and convincing evidence that Linehan was utterly unable to control his sexual impulses).The legislature quickly moved to enact a civil commitment law that lessened the State's burden.

Just eight days before the state's primaries, the Governor called for a special session. In just 97 minutes, the legislature passed the SDP Act. Notably, the bill's drafters told their colleagues not to talk about the Linehan case, warning that: "Whatever we say on the floor will be used against us . . . . It's going to be used to challenge the bill." *In re Linehan*, 557 N.W.2d 171, 198 (Minn. 1996) (Tomjanovich, J., dissenting).

Moral panic also drove the program's dramatic expansion. In 2003, Alfonso Rodriguez, Jr., a repeat sex offender, kidnapped, raped, and murdered a female college student named Dru Sjodin. *See* Stephen J. Lee, *10 Years Later, Dru Sjodin's Kidnapping, Murder Changed Law and Society*, St. Paul Pioneer Press (Nov. 21, 2013), available at http://www.twincities.com/localnews/ci_24575871/10-years-later-dru-sjodins-kidnapping-murder-changed. The case ignited public outrage in the region. One attorney who helped prosecute Rodriguez explained that there was "a rapid shift after Sjodin's murder in public and official sentiment over how to deal with high-risk sex offenders." *Id.*[4] Before the crime, there was an annual average of 26 referrals to the MSOP. In 2003, Minnesota's DOC made 236 additional referrals. *See* Briana Bierschbach & Andy Mannix, *How One Case—and Geography—Dramatically Affected Commitments to the Minnesota Sex Offender Program*, Minn. Post (Aug. 7, 2015), available at https://www.minnpost.com/politics-policy/2015/08/how-one-case-and-geography-dramatically-affected-commitments-minnesota-sex-o. The District Court here recognized this link, finding that "the MSOP experienced a 'tremendous growth' in early 2004 following the Dru Sjodin tragedy, which caused the treatment program to expand 'at an enormous rate.'" *Karsjens v. Jesson*, 109 F. Supp.

[4] If there was any doubt, Ms. Sjodin's death also struck such a powerful chord around the country that it also prompted federal legislative action. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-91 (2006)). This law included a provision creating the Dru Sjodin National Sex Offender Public Website. *See id.*, 120 Stat. at 597 (codified at 42 U.S.C. § 16920 (2006).

3d 1139, 1148 (D. Minn. 2015), *motion to certify appeal denied*, CIV. 11-3659 DWF, 2015 WL 4478972 (D. Minn. July 22, 2015), and *rev'd sub nom*, *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

Minnesota's SVP scheme is now "arguably the broadest sex offender civil commitment scheme in the country."[5] Fact upon fact underscores how restrictive the regime is:

- In over 20 years, not a single individual committed had been discharged although more than 700 people had been admitted.

- The number of individuals committed exploded after Sjodin's death, and is expected to reach 1,215 in five years.

- Both the statute and its administration fail to provide regular reviews to ensure that committed individuals continue to meet the standards for commitment.

- Hundreds of individuals committed have never received a risk assessment.[6]

Karsjens, 109 F. Supp. 3d at 148, 159, 167.

The Minnesota scheme demands this Court's intervention. It permits indefinite detention, with

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[5] Petition for Certiorari at 2, *Karsjens v. Piper* (No. 16-1394).

[6] *See also id.* at 6.

those committed never released, and there is no empirical justification for its breathtaking scope. And because this country remains trapped in its disbelief over whether sex offenders can reintegrate into society, there is no realistic possibility of legislative reform. This Court should intervene.

CONCLUSION

For the foregoing reasons, amicus Fair Punishment Project urges this Court to grant certiorari in this case and to hold that Minnesota's panic-fueled civil commitment law violates the Eighth and Fourteenth Amendments.

Respectfully submitted,

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