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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eighth Circuit correctly conclude that Petitioners' substantive due process challenge to Minnesota's law for the civil commitment of dangerous sex offenders is not subject to strict scrutiny review?

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INTRODUCTION

This Court has never applied strict scrutiny to substantive due process claims challenging civil commitment statutes. Rather, on *four* different occasions starting in 1972, the Court stated that the "reasonable relation" standard of review applies. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (requiring "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"); *Jones v. United States*, 463 U.S. 354, 368 (1983) (same) (quoting *Jackson*); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.") (citing *Jones* and *Jackson*); *Seling v. Young*, 531 U.S. 250, 265 (2001) (stating "due process requires that the condition and duration of confinement under [the Washington sex offender commitment act] bear some reasonable relation to the purpose for which persons are committed") (citing *Foucha* and *Jackson*); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quoting *Jackson* and applying "reasonable relation" standard to statute allowing detention of alien).

These cases are entirely consistent with the Court's jurisprudence limiting the application of strict scrutiny to "certain 'fundamental' liberty interests." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Substantive due process only "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of *ordered liberty*,' such that

'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (emphasis added) (citations omitted). "[B]y establishing a threshold requirement – that a challenged state action implicate a fundamental right – before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case." *Id*. at 722.

The Court reaffirmed in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that such a fundamental liberty interest was not infringed by civil commitment legislation. The plaintiff in that case challenged his commitment under the Kansas sex offender commitment statute, in part claiming that the law violated substantive due process. *Id.* at 356. In rejecting the claim, this Court noted that many states have involuntary civil commitment laws and held that "[i]t . . . cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to *our understanding of ordered liberty.*" *Id*. at 357 (emphasis added) (citing *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

As the Court explained in *Hendricks*, the "liberty interest is not absolute. . . . There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Id.* at 356-57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)); *see also Zadvydas*, 533 U.S. at 690 (citing *Hendricks* and noting "special justification" for

detention under the due process clause if "harm-threatening mental illness" is involved).

Based on the longstanding precedent of the Court, the Eighth Circuit correctly concluded that Petitioners' substantive due process claim is not subject to strict scrutiny. Pet. App. 20a-24a. In addition, there is no conflict among circuit courts of appeals or state supreme courts that warrants this Court's review of the issue. *See infra* at pp. 32-36. There is simply no need for the Court to review the question presented by the petition in light of the Court's well-established case law.

Although not challenged by Petitioners, the Eighth Circuit also properly determined that Minnesota's commitment law satisfied the "reasonable relation" standard, Pet. App. 24a-27a, and rejected Petitioners' as-applied claim because they failed to prove conscience-shocking conduct as to "the identified actions of the [Respondents] or arguable shortcomings of [the Minnesota Sex Offender Program]." *Id.* at 29a. In any event, the Eighth Circuit's application of facts to the law does not warrant this Court's review. *See* Sup. Ct. R. 10.

STATEMENT OF THE CASE

A. Minnesota's Program for Civilly Committing Dangerous Sexual Offenders

1. Sex Offender Civil Commitment in Minnesota Under Chapter 253D.

Minnesota law provides that an individual may be civilly committed if a Minnesota state court finds by "clear and convincing evidence" that he is a "sexually dangerous person" or "sexual psychopathic personality." Minn. Stat. §§ 253D.07, subd. 3, 253D.02, subds. 15, 16. Neither the Minnesota Department of Human Services ("DHS") nor Respondents, who are employees of DHS, are involved in the actual commitment proceeding. *See* Minn. Stat. § 253D.09 (authorizing Minnesota county attorneys to file and litigate a petition for commitment in state district court). A person found by a Minnesota district court to meet the demanding statutory standard is committed to a "secure treatment facility" operated by the DHS Commissioner. *See* Minn. Stat. §§ 253D.01, subd. 13, 253D.07, subd. 3.

The Minnesota Sex Offender Program ("MSOP") is part of DHS. It provides treatment and housing to committed sex offenders at an annual cost of about $125,000 per client, which is at least three times the cost of incarcerating an inmate in a Minnesota correctional facility. Doc. 966, p. 20.[1] MSOP's sex offender

[1] "Doc." refers to docket entries in the district court. "Tr." refers to the transcript of the trial that took place from February 9 to March 18, 2015, and "Ex." refers to an exhibit that was admitted at the trial.

treatment is consistent with current research in the field and is rendered by qualified clinicians. Doc. 658, p. 28; Tr. 4601-07. Treatment occurs in a progression of three "phases," and MSOP clients are reviewed on a quarterly basis to determine their progress in treatment and whether they are assigned to the correct treatment phase. Tr. 3915-16, 3943-44. MSOP's 86% treatment participation rate compares favorably with other states' programs. Def. Ex. 17, p. 1; Tr. 682.

2. The MSOP Client Population.

MSOP clients are the most dangerous sex offenders in Minnesota and represent only 4% of all registered sex offenders in the State. Tr. 3210. Approximately 67% of MSOP clients have high psychopathy. Tr. 3220-21. Virtually all of the clients suffer from a paraphilia disorder of some kind, such as pedophilia and sadism, and 48% of those diagnosed with a paraphilia are pedophiles. Doc. 725, p. 5. Fourteen percent of MSOP clients either killed or tried to kill one of their victims, Tr. 3222-23, and 41% used a weapon to perpetrate at least one of their sexual assaults. *Id.* On average, each MSOP client has twelve known[2] victims, totaling at least 8,800 victims. Tr. 3217.

Examples of the individuals who are MSOP clients include the following:

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[2] "It is broadly accepted that sexual violence is one of the most underreported crimes," and "that only 16 percent of these crimes are reported." Tr. 4794-95. *See also infra* at pp. 28-29.

- Petitioner and Class representative Kevin Karsjens was committed after a thirty-year history of forcibly raping and threatening to kill his sister, wives, partners, and other females. Def. Ex. 102, pp. 9-23. Mr. Karsjens denies being a sex offender, having committed any sexual offenses, or needing any sex offender treatment. Tr. 3433-34.

- Petitioner and Class representative Peter Lonergan was committed for raping his sister-in-law's eight-year-old daughter, repeatedly raping and threatening with weapons his cousin's eight-year-old stepson, raping that child's two sisters, and raping his girlfriend's three-year-old daughter and his own brother. Tr. 3641-56. Mr. Lonergan denies all of these offenses except the first one, and claims he has "never really been sexually attracted to children." Tr. 3642-43, 3647, 3711.

- Petitioner and Class representative James Rud's commitment order identified more than fifty different victims, both male and female, between the ages of two and seventeen. Tr. 3804-06. Mr. Rud used chemicals to obtain victims' compliance to effectuate his assaults and admits to victimizing sixteen children between the ages of six and fifteen. *Id.* Mr. Rud denies multiple findings that he threatened his victims or their families, or used chemicals to obtain his victims' compliance. Tr. 3808-10.

3. The Reduction in Custody Petition Process.

MSOP clients can petition for a "reduction in custody" from their commitment. Minn. Stat. §§ 253D.27-.31.

An MSOP client can request: (1) a transfer to a less secure location, referred to as Community Preparation Services; (2) a provisional discharge; or (3) a full discharge. *Id.* Filing a petition only requires a client to check a box on a simple-to-obtain form and sign his name. Def. Ex. 34. Petitioners and other MSOP clients repeatedly testified that filing a petition is easy. Tr. 1299, 2648-49, 2907-08, 3574, 3754-55, 3856-57, 4978, 5066.

The process includes the appointment of an attorney (paid for by the State) to represent the client and at least two risk assessments, one by MSOP and one by an examiner appointed by a panel of three Minnesota district court judges.[3] Minn. Stat. §§ 253D.20, .27. MSOP risk assessments must be prepared by a doctoral level psychologist and take 40-55 hours to complete. Tr. 4725.

A petition is first reviewed by a three-member Special Review Board (the "Board"), comprised of mental illness experts and at least one attorney. *See* Minn. Stat. § 253B.18, subd. 4c(a). The Board holds an administrative hearing at which the client is represented by his attorney. *Id.* The Board then issues a written recommendation as to whether the petition should be denied or granted. *See* Minn. Stat. § 253D.27, subd. 4.

[3] The three district court judges are appointed by the Minnesota Supreme Court. Minn. Stat. § 253B.19, subd. 1.

If the DHS Commissioner, the county attorney from the county of commitment or financial responsibility, or the client disagrees with the Board's recommendation, they may request rehearing by the state court three-judge panel, which presides over a *de novo* evidentiary hearing. Minn. Stat. § 253D.28, subds. 1-3. The burden is on the party opposing discharge or provisional discharge to prove by clear and convincing evidence that the client is still in need of commitment. Minn. Stat. § 253D.28, subd. 2(d). The three-judge panel issues a written decision, which can be appealed to the Minnesota Court of Appeals and then to the Minnesota Supreme Court. Minn. Stat. § 253D.28, subds. 3, 4.

B. District Court Proceedings

1. Pre-trial Proceedings

Petitioners filed this case in December 2011 as a putative class action challenging the policies and conditions at MSOP and the efficacy of treatment. Doc. 1. Among other things, their original complaint alleged unconstitutional room and pat searches in violation of the Fourth Amendment, unconstitutional media restriction, telephone, and mail policies under the First Amendment, and a Fourteenth Amendment claim that focused on inadequate treatment and dissatisfaction with the food, the vocational work program, and MSOP employee uniforms. Doc. 1, pp. 5-41. Their first amended complaint, filed after Petitioners obtained counsel, retained the same focus and added a vague claim that Chapter 253D is unconstitutional as-applied because

MSOP does not provide "acceptable mental health treatment" and its implementation leads to a "punitive, not therapeutic," environment at MSOP. Doc. 151, ¶¶ 229, 232. Neither their initial complaint nor their first amended complaint asserted a facial challenge to Chapter 253D or challenged the procedure for releasing individuals from MSOP custody. The same is true of their second amended complaint, filed in August 2013. Doc. 301.

In July 2012, the district court certified all MSOP clients as a class under Federal Rule of Civil Procedure 23(b)(2). Doc. 203. Less than a month later, and before any evidence had been heard in the case, the court ordered then-defendant and DHS Commissioner Lucinda Jesson to create a Sex Offender Civil Commitment Advisory Task Force to "provide recommended legislative proposals" regarding the initial commitment process (which also had not been challenged in the case), less-restrictive alternative facilities, and the reduction-in-custody process. Doc. 208, pp. 2-3.

The case proceeded to discovery, during which (in December 2013) the district court appointed four experts under Federal Rule of Evidence 706, Doc. 393, and in March 2014, required Respondents to deposit $1.8 million with the court to pay for all the fees and expenses of the experts. Doc. 434, p. 2. The district court held at least three *ex parte* discussions with those experts.[4] One of them (Robin Wilson) explained at a

[4] Federal Rule of Evidence 706(b) provides that the "court must inform the expert of the expert's duties. The court may do so

later hearing that during the second *ex parte* discussion, the court instructed the experts to find a "bellwether" class member "whose circumstances could be changed." Tr. 558-59; Doc. 569, p. 53. Wilson explained that this meant someone who, in the experts' opinion, should not be committed to MSOP, and should be released. Tr. 558-59; Doc. 569, pp. 75-76.

Wilson also testified that "the Judges [the district court judge and his magistrate] were interested in whether or not there were any individual cases that might *serve as an example*." *Id.* at 76 (emphasis added). He stated that, based on the court's instructions, the Rule 706 experts "put [] aside" files in which no problems were identified after a "cursory review." *Id.* at 79-80. He explained that this process could not possibly result in a positive report for Respondents, such as one identifying all of the correctly placed, properly treated class members. *Id.* The district court rejected Respondents' objections to the court's use of the Rule 706 experts. Doc. 570, pp. 265-72.

In February 2014, the district court denied most of Respondents' motion to dismiss. Doc. 427, p. 2. The court's order – issued almost a year before trial – stated that MSOP is "clearly broken," and that "the program's systemic problems will only worsen." *Id.* at 69. The court added that "irrespective of the Court's ultimate rulings on any constitutional questions with

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in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate."

which it is presented, the interests of justice require that substantial changes be made to Minnesota's sex offender civil commitment scheme." *Id.* at 68. The court warned that "[w]hether or not the system is constitutionally infirm, . . . [t]he politicians of this great State must now ask themselves if they will act to revise a system that is clearly broken, or stand idly by and do nothing, simply awaiting Court intervention." *Id.* at 68-69.

Three more noteworthy developments preceded the trial. First, although all parties had requested a jury trial, *see* Doc. 301, p. 82; Doc. 437, the court proposed that the "first phase" of trial be a bench trial. Doc. 591-1, pp. 2, 5-6. The court dismissed Respondents' objection that the Seventh Amendment entitles them to a jury trial, ruling that although Petitioners were seeking damages, their claims were "predominantly equitable." Doc. 598, p. 6. *But see Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962) (holding that jury trial right may not be denied merely because legal issues are characterized as "'incidental' to equitable issues"). After Respondents filed a mandamus petition with the Eighth Circuit regarding their right to a jury trial, Doc. 615, Petitioners moved to amend their complaint to remove the damages claims *without prejudice*. Doc. 622. The district court granted the motion, which mooted the mandamus petition. Doc. 637.

Second, in September 2014, the district court issued an order proposing that the first phase of the bench trial address the facial constitutionality of the civil commitment statute. Doc. 598, pp. 1-2. It also

identified several "non-exhaustive . . . sub-issues" to be considered in determining whether the statute is unconstitutional on its face or as-applied, including the nature and adequacy of MSOP's reviews of clients' progress and "whether the reduction in custody and discharge procedure is constitutionally infirm." *Id.* As discussed above, however, the first three iterations of Petitioners' complaint did not contain a facial statutory challenge and asserted only a vague as-applied claim that did not include the "sub-issues" identified by the court. In fact, Petitioners had previously admitted in their opposition to Respondents' motion to dismiss that they "are not challenging the facial aspects of the relevant statutes." Doc. 389, p. 16. Not surprisingly, Petitioners followed the district court's request and moved to amend their complaint to add a facial challenge and a greatly expanded as-applied claim that tracked the court's order. Doc. 622; 625-1, pp. 60-65. The court then granted the motion over Respondents' objections. Doc. 633, pp. 6-10; 637.

Third, seven days before the bench trial, the court issued an order denying Respondents' summary judgment motion and stating that "the executive and legislative branches in Minnesota have let politics, rather than the rule of law and the rights of 'all' of their citizens guide their decisions." Doc. 828, p. 42. The court repeated its earlier warning that, "irrespective of the Court's ultimate rulings on any Constitutional questions with which it is presented, the interests of justice require that substantial changes be made to Minnesota's sex offender civil commitment scheme." *Id.*

2. The Bench Trial.

The "first phase" trial took place from February 9 to March 18, 2015. The Rule 706 experts, who led off the trial, opined that MSOP treatment was "consistent with general thinking in the literature and practice," Doc. 658, p. 28; most MSOP clients were "generally well-served by the MSOP treatment and institutional management framework," *id.* at 54; MSOP's treatment manuals are "well-written and include a wealth of information for program staff and those reviewing the program," *id.* at 28; and MSOP clinicians exercised their professional judgment in delivering treatment to MSOP clients. Tr. 597-99, 640-53, 1178-79, 330-31, 848. They also testified that MSOP policies are "reasonable" and consistent with the policies of other states' facilities, Tr. 307-29; Doc. 658, p. 57, and that MSOP fosters a therapeutic environment, given the challenges of treating this population of clients in a secure facility. Doc. 658, p. 57 (noting that balancing safety with the promotion of a therapeutic environment was a "difficult challenge," but that MSOP "does a fairly good job of this, while striving for continuous improvements").

Respondents' case-in-chief lasted more than two weeks, and set forth in detail information regarding MSOP's facilities, treatment program, and the reduction in custody process. Tr. 3201-5229. The evidence established that MSOP clinicians regularly review clients' treatment phase placement and exercise their professional judgment. *See, e.g.*, Tr. 369-70, 597, 610. MSOP employees testified that the program's quarterly reviews task each client's treatment team with

evaluating phase placement and treatment goals. *See, e.g.*, Tr. 1359-60, 1416, 1422-36. Making these decisions as a team helps to ensure consistency in treatment progress decisions. Tr. 1570-74, 4099. MSOP staff also testified about a number of other safeguards in place to ensure consistent decisionmaking with regard to treatment. Tr. 4248, 4251-52.

In addition, Respondents testified that they operate a less restrictive alternative facility, Community Preparation Services ("CPS"), to which many class members had been transferred through the reduction-in-custody process. Tr. 3301-02, 3308. The Rule 706 experts described this facility as "outstanding" and noted that "[t]he residential and program areas for clients in CPS are pleasant and as home-like as most community-based residential facilities or group homes," and said the program has "community-based opportunities . . . superior to any sex offender civil commitment program" of which they were aware. Doc. 658, p. 45.

3. The District Court's Merits and Remedial Orders.

a. The court issued an order on June 17, 2015, holding that Chapter 253D violates substantive due process facially and as-applied.[5] Pet. App. 135a, 140a. The court used a "strict scrutiny" standard of review

[5] The court ruled only on the new facial constitutional challenge and the extensively revised as-applied claim, even though it had asked the parties to try eight of Petitioners' thirteen claims as a part of the Phase One trial. Pet. App. 145a-46a.

"because [Petitioners'] fundamental right to live free of physical restraint is constrained by the curtailment of their liberty." *Id.* at 133a; *see also id.* at 139a. The court then concluded that Chapter 253D was not "narrowly tailored" to serve a "compelling state interest" essentially based on the concerns reflected in the "sub-issues" the court *sua sponte* proposed in its September 2014 Order. Doc. 598; Pet. App. 146a-47a.

b. The court's order listed sixteen proposed remedies, Pet. App. 153a-56a, and stated that "[t]he Court is hopeful that the stakeholders will fashion suitable remedies so that the Court need not consider closing the MSOP facilities or releasing a number of individuals from the MSOP with or without conditions." *Id.* at 156a. The order scheduled a "Remedies Phase pre-hearing conference," which various Minnesota public officials – including Minnesota's Governor and the leadership of the Minnesota Legislature – were asked to and did attend, to "discuss the relief [the court] find[s] appropriate." *Id.* at 157a-58a. After that conference failed to produce an agreement on remedies, *see* Doc. 1035, p. 9, the court warned State officials that if they failed to begin implementing some of the court's sixteen "specific measures" it would impose "a more forceful solution." Doc. 1006 at 3; *see also id*. ("Any delay by the state to prepare for the inevitable relief to be imposed by the Court in light of the previously determined constitutional violations would only increase the risk to public safety.").

Shortly thereafter, the court issued a "First Interim Relief Order" that imposed sweeping system-wide

remedies regarding both the administration of MSOP and the review and placement of every committed sex offender at MSOP. Pet. App. 30a-76a. For example, the Order required Respondents to provide "independent" review of all MSOP clients and "immediately move any individual who is determined to be in an improper treatment phase into the proper treatment phase." *Id.* at 56a-57a. If Respondents contest the change, a Special Master appointed by the court would resolve the dispute. *Id.* The Order also "contemplates that the [c]ourt will order further specific relief against [Respondents]," *id.* at 75a, and states that "more remedies orders are likely to follow." *Id.* at 71a. The contemplated subsequent orders would include "directions as to MSOP's treatment structure and discharge process, training for MSOP employees, periodic evaluation of MSOP by external experts, and the development of a statewide public education campaign." *Id.* at 13a.

C. Court of Appeals Proceedings

a. Respondents appealed to the Eighth Circuit and sought a stay from the district court pending appeal, which was denied. Doc. 1055, p. 1. The court's order denying the stay summarily stated in a footnote that Respondents' conduct "shocks the conscience" without any analysis or application of the shocks-the-conscience standard, *id.* at 13 n.5, and even though Petitioners had not briefed the issue to the district court. Respondents then moved for a stay pending appeal from the Eighth Circuit, which was granted. Doc. 1058.

Respondents' appeal raised a variety of challenges to the district court's actions and rulings. Apart from the merits, Respondents asserted a judicial-bias claim, CA8 Br. at 39-50, asserted that many of the district court's procedural rulings were an abuse of discretion, *id.* at 49 n.14, objected to the district court's jurisdiction, and contended that the court's remedial order exceeded its authority. *Id.* at 50-59, 73-78. On the merits, Respondents contested many of the district court's factual findings, *id.* at 32-36, 48, and argued that the court applied the wrong level of scrutiny to Petitioners' substantive due process challenge. *Id.* at 60-73.

Among the district court's factual findings to which Respondents objected was its conclusion that some unidentified MSOP clients are entitled to discharge. *See* Pet. App. 33a, 81a, 149a. As Respondents explained, the record contained *no* evidence for that proposition, and Petitioners cited none. Indeed, neither Petitioners nor the Rule 706 experts could identify *any* class member who was unlawfully confined, CA8 Br. at 33, and class counsel admitted at trial that there was no evidence of a specific class member who was entitled to release. *Id*. at 25 (class counsel stating that "[Respondents] continue to complain to this Court that [Petitioners] will not prove that any specific person is entitled to release. That's true, judge." (citing Tr. 16)). The court's conclusion is also contrary to the many decisions of the state district court panel that denied various Petitioners' and other class members' discharge petitions after holding evidentiary hearings, and the

Minnesota appellate court opinions affirming those rulings. *Id.* at 33 (citing illustrative cases).

Respondents also contested the district court's findings about clients being in the wrong treatment phase, including that "the MSOP has not reassessed all committed individuals to determine if they are in the proper phase of treatment." Pet. App. 104a. They pointed out that the court did not mention testimony by numerous MSOP witnesses describing how each MSOP client's treatment team reviews treatment progress and phase placement quarterly, producing a detailed report summarizing progress on treatment goals. *See* CA8 Br. at 34-35. And they explained that a report upon which the district court relied found that 88% of reviewed clients were in the proper treatment phase, and that MSOP had followed its phase placement policies overall. *Id.* at 35.

In addition, Respondents contended that the district court's (and Petitioners') comparison of state commitment rates was misleading in light of the substantial differences among the states in the prison sentences imposed for sex offenses. The district court compared Minnesota's commitment rate per capita to Wisconsin as "demographically similar," Doc. 966, p. 12, but without considering differences in each state's sentencing laws. These differences resulted in Wisconsin having more than three times the number of sex offenders in prison than Minnesota. CA8 Rep. Br. at 34-36.

b. The Eighth Circuit (Judges Murphy, Colloton and Shepherd) reversed the district court's finding of a

constitutional violation and vacated the injunctive order. Pet. App. 1a-29a. It first considered Respondents' claim that the district court had pre-judged the case. The Eighth Circuit stated there was "some cause for concern," but it did not find that "the evidence of bias was overwhelming." *Id.* at 16a.

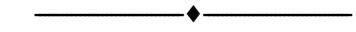
Turning to the merits, the Eighth Circuit concluded that the district court applied the wrong legal standard and that application of the correct standards established that Petitioners' constitutional claims had no merit. Based on longstanding precedent of this Court, the Eighth Circuit held that Petitioners' facial claim was not subject to strict scrutiny because it did not involve a "fundamental" liberty interest. Pet. App. 21a-22a (citing *Hendricks*, 521 U.S. at 356; *Foucha*, 504 U.S. at 80; *id.* at 116 (Thomas, J., dissenting); *Addington*, 441 U.S. at 425; *Jackson*, 406 U.S. at 738). The court found that the challenged statute clearly satisfied the applicable standard, which asks whether the law was reasonably related to the purpose of commitment, and therefore concluded that the law was "facially constitutional." Pet. App. 25a-27a.

The court noted that the "district court expressed concerns about the lack of periodic risk assessments, the availability of less restrictive alternatives, and the processes for seeking a custody reduction or release." *Id.* at 26a. However, the court held that the commitment law "'provides proper procedures and evidentiary standards' for a committed person to petition for

a reduction in his custody or his release from confinement." *Id.* at 26a-27a (quoting *Hendricks*, 521 U.S. at 357).

The Eighth Circuit next turned to Petitioners' as-applied claim, which maintained that "the state defendants' actions" – as opposed to the statute itself – "violated the plaintiffs' substantive due process rights." Pet. App. 23a. As such, the court concluded that the claim required a showing of "conscience-shocking" conduct by Respondents. *Id.* at 23a-24a (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)). Based on its review of the record, the court decided that "[n]one of the six grounds upon which the district court determined the state defendants violated the class plaintiffs' substantive due process rights in an as-applied context satisfy the conscience-shocking standard." Pet. App. 29a. It further held that Petitioners "failed to demonstrate that any of the identified actions of the state defendants or arguable shortcomings in the MSOP" satisfy the conscience-shocking standard. *Id.* The court had no need to, and therefore did not, address Respondents' challenge to the district court's factual findings.

Petitioners sought *en banc* review by the Eighth Circuit, which was denied with no judges voting to hear the case. *Id.* at 160a.



REASONS FOR DENYING THE PETITION

I. The Eighth Circuit Correctly Concluded Based on This Court's Precedent That Petitioners' Claims Are Not Subject to Strict Scrutiny and Are Without Merit.

A. Strict Scrutiny Does Not Apply.

As discussed *supra* at p. 1, this Court has repeatedly applied a "reasonable relation" standard of review to a substantive due process claim challenging a civil commitment statute. *See Jackson*, 406 U.S. at 738 (requiring commitment legislation to "bear some reasonable relation to the purpose for which the individual is committed"); *Jones*, 463 U.S. at 368 (same) (quoting *Jackson*); *Foucha*, 504 U.S. at 79 (same) (citing *Jones* and *Jackson*); *Seling*, 531 U.S. at 265 (requiring "that the condition and duration of confinement under [Washington's sex offender commitment law] bear some reasonable relation to the purpose for which persons are committed") (citing *Foucha* and *Jackson*). Consequently, as the Eighth Circuit recognized, the Court does not apply strict scrutiny when evaluating substantive due process challenges to civil commitment statutes. Pet. App. 20a-22a.

Only certain liberty interests invoke strict scrutiny. As the Court explained in *Glucksberg*, the "Due Process Clause 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" 521 U.S. at 720. A very limited number of liberty interests are "specially protected by the Due Process Clause," and they must be,

among other things, "implicit in the concept of ordered liberty." *Id.* at 720-21 (citations omitted). In *Hendricks*, the Court stated that the Due Process Clause does not "import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint." 521 U.S. at 356-57 (quoting *Jacobson*, 197 U.S. at 26). It then clearly determined that a specially protected fundamental liberty interest was not implicated by a sex offender commitment statute, reasoning in part that it "cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to *our understanding of ordered liberty.*" 521 U.S. at 357 (emphasis added) (citing *Addington*); *see also supra* at pp. 2-3. In this case, the limited subclass of committed dangerous persons consists of only 4% of all the registered sex offenders in Minnesota. Tr. 3210.

Petitioners' claim that this Court has never addressed "whether the liberty impaired by civil commitment is a fundamental liberty interest" requiring strict scrutiny, Pet. 10, simply ignores the Court's repeated holdings on this issue, including *Hendricks*. In fact, the Court's analysis in *Hendricks* applies with even greater force to this case. *Hendricks* involved a challenge to the initial commitment of the plaintiff in that case, 521 U.S. at 355-56, whereas here Petitioners do not challenge their initial commitment. As such, Petitioners, who were all committed by courts based on clear and convincing evidence, *see supra* at p. 4, have a liberty interest that is less than the plaintiff in *Hendricks*. *See, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307,

315-19 (1982) (stating that committed individual has reduced liberty interests); *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006) (stating that "[s]ince [plaintiff] has been civilly committed to state custody as a dangerous person, his liberty interests are considerably less than those held by members of free society" (citations omitted)).

The inapplicability of strict scrutiny is also supported by the Court's opinion in *Addington*, which recognized that a state legislature has latitude to, for example, select a process for determining whether a committed individual no longer poses a sufficient danger to the public. 441 U.S. at 431. *Addington* elaborated that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." *Id.*; *see also Vitek v. Jones*, 445 U.S. 480, 495 (1980) ("It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." (quoting *Addington*)).

Petitioners' erroneous concept of liberty improperly results in a court imposing its own "policy preferences" and usurping "public debate and legislative action," *Glucksberg*, 521 U.S. at 720, regarding Minnesota's commitment law, which is precisely what occurred at the district court in this case. For this very reason, the Court has "always been reluctant to expand

the concept of substantive due process," and "exercise[d] the utmost care whenever [it is] asked to break new ground in this field." *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also Marshall v. United States*, 414 U.S. 417, 427 (1974) (stating "in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation").

Contrary to Petitioners' argument, this Court's opinion in *Zadvydas* also supports Respondents' position. That case involved a federal statute that allowed the detention of aliens subject to a removal order. 533 U.S. at 682. Citing *Hendricks*, the Court noted the "special justification" under the due process clause for detention based on "harm-threatening mental illness." *Id.* at 690. The Court then quoted *Jackson* and applied the "reasonable relation" standard in upholding the detention permitted by the statute. *Id.*

Petitioners state that "[t]he dispositive issue is the appropriate standard of scrutiny to apply." Pet. 25. As discussed above, this Court's civil commitment opinions and its longstanding jurisprudence for determining whether strict scrutiny applies, clearly establish that a substantive due process claim challenging a civil commitment law is not subject to strict scrutiny.

B. The Eighth Circuit Correctly Determined That Petitioners' Claims Fail Under the Applicable Standards of Review.

1. Petitioners' Facial Claim Is Without Merit.

Petitioners did not brief, in the lower courts or in their petition, that their facial challenge prevails under the reasonable relation standard and for good reason. The Eighth Circuit correctly agreed with prior decisions of the Minnesota Supreme Court which concluded that Minnesota's commitment law on its face did not violate due process. *See, e.g.*, *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994); *Call v. Gomez*, 535 N.W.2d 312 (Minn. 1995); Pet. App. 26a.

Blodgett recognized the State's "compelling governmental interest in the protection of members of the public from persons who have an uncontrollable impulse to sexually assault." 510 N.W.2d at 914. The court then considered the statutory reduction in custody process and held that:

> [E]ven when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling. So long as civil commitment is programmed to provide treatment and periodic review, due process is provided. Minnesota's commitment system *provides for periodic review and re-evaluation of the need for continued confinement*.

Id. at 916 (emphasis added); *see also Hendricks*, 521 U.S. at 357 (citing *Foucha* and stating that "[w]e have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards"). In *Call*, the court reaffirmed *Blodgett* and concluded that the "procedural safeguards" in the law, including the petition process, complied with the "reasonable relation" standard. 535 N.W.2d at 318-19 (citing *Foucha* and *Jackson*).

Indeed, MSOP clients receive quarterly review of their treatment progress, Tr. 3916-17, and they can easily fill out a simple form to petition for a reduction in custody.[6] Def. Ex. 34; Tr. 1299. They are entitled to appointed legal counsel (paid for by the State), and receive at least two risk assessments during the petition process, one from MSOP and another from an outside expert appointed by the three-judge panel. Tr. 5191; Minn. Stat. § 253D.28, subd. 2(c). If the DHS Commissioner, or the committing or financially responsible county, oppose a petition for provisional discharge or discharge, they must prove by clear and convincing evidence at a *de novo* evidentiary hearing before a panel of three state court judges that the petition should be denied. Minn. Stat. §§ 253D.28, subd. 3, 253D.30-.31. If a petition is denied, the client can petition again in six months, Minn. Stat. § 253D.27, subd. 2, and the denial

[6] *Blodgett* referred to the statutory petition process as "provid[ing] an opportunity (and an incentive) for the committed person to demonstrate that he has mastered his sexual impulses and is ready to take his place in society." 510 N.W.2d at 916.

of a petition by the state court three-judge panel can be appealed to Minnesota appellate courts. Minn. Stat. § 253D.28, subd. 4.

The Eighth Circuit properly decided that this "extensive process and the protections" for committed individuals are reasonably related to the State's "legitimate interest of protecting its citizens from sexually dangerous persons or persons who have a sexually psychopathic personality." Pet. App. 27a. Therefore, as the Eighth Circuit held, Minnesota's commitment law is "facially constitutional." *Id.*

To prove their facial claim, Petitioners must also show that Minnesota's commitment law is unconstitutional in every conceivable application. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). It is undisputed – even by the district court – that "there are some sex offenders [at MSOP] who are truly dangerous and who should not be released." Doc. 966, p. 5; *see also id.* at p. 70. For these class members, there is no dispute that their continued commitment is constitutional.

It is also important to reiterate the State's compelling interest in protecting the public from dangerous sex offenders who cannot control their "impulse to sexually assault." *Blodgett*, 510 N.W.2d at 914. "[T]he sexual predator poses a danger that is unlike any other,"

id. at 917, and the treatment of those individuals is often "problematic." *Id.* at 916; *see also*, *e.g.*, *McKune v. Lile*, 536 U.S. 24, 32, 34 (2002) (referring to risk of recidivism by sex offenders as "frightening and high" and stating "the victims of sexual assault are most often juveniles" (citing U.S. Dep't of Justice Report)); *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune* and referring to the "grave concerns over the high rates of recidivism among convicted sex offenders and their dangerousness as a class"); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1739 (2017) (Alito, J., concurring and joined by Roberts, C.J. and Thomas, J.) (quoting *McKune* and citing *Doe*); *Hendricks*, 521 U.S. at 366 (acknowledging that "many forms of mental illness" are either incurable or the "rates of 'cure' are generally low"); Doc. 658, p. 23 (Rule 706 Experts stating that "differences of opinion remain as to the true effectiveness of treatment").

Amici suggest that the general rates of rearrest or reconviction are lower than indicated in prior cases. ATSA Br. at 5-8; Fair Punishment Project Br. at 10-11; Janus Br. at 12. However, they ignore that "accurate information about [rape and sexual assault] is difficult to obtain because they are seriously underreported to law enforcement." Candace Kruttschnitt, et al., *Estimating the Incidence of Rape and Sexual Assault, Nat'l Research Council of the Nat'l Academies* at 1 (2014); *see also id*. at 36-38 (citing three studies that find non-reporting of rape and sexual assault of 65%, 81%, and 84%, respectively). The unrebutted testimony in this

case also supports the substantial underreporting of sexual offenses. *See supra* at p. 5 note 2.

Amici's reference to rearrest and reconviction statistics is therefore misleading. They also ignore that the 4% of registered sex offenders in Minnesota who are civilly committed are the most dangerous; greatly understate the risk that this small sub-group of sex offenders pose to public safety; and disregard the many decisions of the state court three-judge panel which determined after evidentiary hearings that numerous class members should not be released from their commitment.

2. Petitioners' As-Applied Claim Is Without Merit.

The Eighth Circuit properly treated Petitioners' as-applied substantive due process claim to be a challenge to executive action that is subject to a shocks-the-conscience standard of review under *Lewis*. Pet. App. 28a-29a. *Lewis* expressly held that the "cognizable level of executive abuse of power" to support a substantive due process claim is "that which shocks the conscience." 523 U.S. at 847. Petitioners' contention (Pet. 15-17) that the shocks-the-conscience standard is inapplicable to their claim because it involves implementation of a statute is groundless.

Lewis clearly distinguished between legislative and executive actions in evaluating a substantive due process claim: "While due process protection in the substantive sense limits what the government may do

in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." 523 U.S. at 847; *see also id.* at 847 n.8 (stating that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may be fairly said to shock the contemporary conscience"). Here, Petitioners' as-applied claim challenges the "state defendants' actions," not the commitment statute itself. *See* Pet. App. 28a.[7]

Based on its review of the factual record, the Eighth Circuit correctly concluded that the evidence did not establish the requisite conscience-shocking conduct. *Id.* at 29a. Petitioners do not challenge that factual determination in their petition; nor did they brief to the district court or the court of appeals the argument that Respondents' actions in administering MSOP shock the conscience. And in any event, the

[7] Petitioners mistakenly appear to assert that a challenge to policy-level decisions of MSOP's executive officials somehow transforms their as-applied claim into a challenge to legislation. Pet. 16-17. That argument cannot be reconciled, for example, with *Collins*, 503 U.S. at 117, 128, where the Court applied the shocks-the-conscience test to a substantive due process claim challenging a city's alleged "custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at jobsites, and not providing safety warnings."

court's application of facts to the pertinent law does not warrant this Court's review. *See* Sup. Ct. R. 10.[8]

Petitioners also erroneously assert that the Eighth Circuit did not address "the district court's conclusion that the statute has an impermissibly punitive effect." Pet. 9. The Eighth Circuit referenced the district court's characterization of Minnesota's civil commitment program as a "punitive system," Pet. App. 10a, but determined that the record did not contain proof of conscience-shocking conduct with respect to the "identified actions of the [Respondents] or arguable shortcomings in MSOP." *Id.* at 29a.

Moreover, the Minnesota Supreme Court has determined that Minnesota's sex offender commitment legislation is not punitive in rejecting claims made under the double jeopardy and *ex post facto* clauses of the United States Constitution. *See, e.g.*, *In re Linehan*, 594 N.W.2d 867, 870-72 (Minn. 1999) (finding Minnesota's sex offender civil commitment statute was not punitive); *Matter of Linehan*, 557 N.W.2d 171, 187

[8] Petitioners' as-applied claim would fail even assuming it is a challenge to legislation and even if the shocks-the-conscience standard were met here. If Petitioners' claim is treated as a challenge to legislation, it would be subject (for the reasons discussed in § I(A), *supra*) to the "reasonable relation" standard of review. That standard is clearly satisfied in this case. *See* Pet. App. 24a-27a; *supra* at pp. 25-27. And as the Eighth Circuit recognized, Pet. App. 28a-29a, *Lewis* held that a plaintiff asserting a substantive due process challenge to executive action must additionally show the infringement of a qualifying "fundamental" liberty interest. 523 U.S. at 847 n.8 (citing *Glucksberg*). As discussed *supra* at pp. 1-3, 21-23, Petitioners cannot show the infringement of such a liberty interest.

(Minn. 1996) (same); *Call*, 535 N.W.2d at 320 ("[C]ommitment under the psychopathic personality statute is remedial and does not constitute double jeopardy because it is for treatment purposes and is not for purposes of preventive detention."). Substantial deference is afforded a state's determination that its sex offender commitment law is not punitive. *Hendricks*, 521 U.S. at 361; *Seling*, 531 U.S. at 264.

In addition, Petitioners did not even assert a double jeopardy or *ex post facto* claim and therefore such claims are not a subject of this case. *See also Graham v. Connor*, 490 U.S. 386, 395 (1989) (stating that the "more generalized notion of 'substantive due process'" does not apply where another constitutional amendment "provides an explicit source of constitutional protection against" particular government action); *Hendricks*, 521 U.S. at 356-71 (applying punitive analysis to double jeopardy and *ex post facto* claims, but not with respect to substantive due process).

II. There Is No Conflict with Other Cases That Warrants Review by This Court.

A. There Is No Conflict Among the Circuit Courts That Strict Scrutiny Does Not Apply to Substantive Due Process Challenges to Civil Commitment Statutes.

Every federal circuit court which analyzed a substantive due process challenge to civil commitment legislation has applied the "reasonable relation" standard. *See J.R. v. Hansen*, 803 F.3d 1315, 1321 (11th Cir.

2015); *Williams v. Meyer*, 254 Fed. App'x 459, 463-65 (6th Cir. 2007); *Charles W. v. Maul*, 214 F.3d 350, 358-59 (2d Cir. 2000); *United States v. Budell*, 187 F.3d 1137, 1141-42 (9th Cir. 1999); *Clark v. Cohen*, 794 F.2d 79, 86-87 (3d Cir. 1986); *Glatz v. Kort*, 807 F.2d 1514, 1518-19 (10th Cir. 1986).

Petitioners erroneously maintain that *Williams v. Meyer*, 346 F.3d 607 (6th Cir. 2003), conflicts with the Eighth Circuit opinion in this case. *See* Pet. 20. *Williams* involved equal protection and due process challenges to an individual's civil commitment under Michigan's Criminal Sexual Psychopath Act. 346 F.3d at 608-10. Although the Sixth Circuit initially suggested strict scrutiny might apply to the equal protection claim, *see id.* at 616, when the case returned to the Sixth Circuit, the court expressly held that rational basis was the proper level of review. *Williams*, 254 Fed. App'x at 462-63 & n.1. The Sixth Circuit then rejected the substantive due process claim, citing the "reasonable relation" standard. *Id.* at 463-65 (quoting *Jackson*). There is no circuit split or confusion on this issue.

B. There Is No Conflict Between the Eighth Circuit and State Supreme Courts.

Two of the state cases cited by Petitioners actually applied the "reasonable relation" standard in upholding sex offender commitment laws against substantive due process challenges. *See State v. Post*, 541 N.W.2d 115, 126 (Wis. 1995) (citing *Jackson*); *In re Young*, 857

P.2d 989, 1004-05 (Wash. 1993) (citing *Jackson*). Two other state cases cited by Petitioners do not involve challenges to an individual's continued civil commitment. Instead, they involved whether a state law can allow the temporary detention of a sex offender without bail before his civil commitment trial is held. *See Atwood v. Vilsack*, 725 N.W.2d 641, 647-48 (Iowa 2006); *Commonwealth v. Knapp*, 804 N.E.2d 885, 891 (Mass. 2004). In addition, the statute in *Knapp* survived strict scrutiny, 804 N.E.2d at 891-92, and the *Atwood* court simply assumed for the purposes of argument that strict scrutiny applied and concluded that the challenged statute would survive strict scrutiny. 725 N.W.2d at 648 ("[W]e conclude it is unnecessary for us to resolve the question whether the petitioners' claimed interest is fundamental.").

Petitioners also rely on *Blodgett* and *Matter of Linehan* to assert a conflict. Pet. 18. But *Matter of Linehan* involved the constitutionality of the criteria and medical bases used by the State to support an *initial* civil commitment determination. 557 N.W.2d at 180-86. Here, Petitioners challenge the *duration* of their commitments to which the "reasonable relation" standard undoubtedly applies. *See Jackson*, 406 U.S. at 738 (applying "reasonable relation" standard with respect to "duration" of commitment); *Jones*, 463 U.S. at 468 (same); *Seling*, 521 U.S. at 265 (same). In any event, *Matter of Linehan* upheld the constitutionality of the very statute Petitioners challenge in this case. 557 N.W.2d at 184; *see also In re Linehan*, 594 N.W.2d at 878 (reaffirming constitutionality of statute).

In *Blodgett*, the Minnesota Supreme Court merely cited the truism acknowledged in *Foucha* and *Jones* – two cases that apply the "reasonable relation" test – that "curtailment of a person's liberty is entitled to substantive due process protection." 510 N.W.2d at 914 (citing *Foucha* and *Jones*). *Blodgett* did not apply strict scrutiny and, as discussed above, upheld Minnesota's commitment law against a substantive due process challenge. *Id.* at 916.

As also discussed above, a year after *Blodgett* was decided the Minnesota Supreme Court again upheld the sex offender commitment law applying the "reasonable relation" standard. *See Call*, 535 N.W.2d at 319 (citing *Foucha* and *Jackson*); *see also Lidberg v. Steffen*, 514 N.W.2d 779, 783 (Minn. 1994) (quoting *Jackson* and holding that Minnesota's mentally ill and dangerous commitment statute did not violate substantive due process because "the [statutory] discharge provisions . . . bear some reasonable relation to the purpose for which respondent was committed.").

Petitioners' reliance on *In re Treatment & Care of Luckabaugh*, 568 S.E.2d 338, 347-49 (S.C. 2002), is also misplaced. In that case, the South Carolina Supreme Court considered a substantive due process challenge to a civil commitment law. In so doing, the court acknowledged that a specially protected liberty interest was not involved. *Id.* at 348 (stating "it cannot be said 'the involuntary civil commitment of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty' " (quoting *Hendricks*)); *see also S.C. Dep't of Mental Health v. State*, 390 S.E.2d

185, 187 (S.C. 1990) (applying "reasonable relation" standard to substantive due process challenge to state commitment law (citing *Jackson*)).

There similarly is no conflict with other appellate courts regarding the meaning and application of *Lewis*, which applied the shocks-the-conscience standard to executive action. *See supra* at pp. 29-30. Petitioners can point to no case holding that substantive due process challenges to executive action are subject to some other standard. Rather, they cite only to fleeting dicta in a Fourth Circuit opinion and to a law review article whose core contention is that this Court erred when it held in *Lewis* that the shocks-the-conscience standard applies to executive action. Pet. 17.

No conflict exists among the courts, federal or state, that warrants this Court's review of the Eighth Circuit's decision in this case.

III. Petitioners Mistakenly Assert That This Case Is an Ideal Vehicle for the Court's Review.

Petitioners maintain that "[t]his case is the ideal vehicle" to address the issue presented because "[t]he factual record was well-developed through a nearly six-week bench trial" and the district court issued "clear factual findings." Pet. 25. But the factual record is irrelevant to the "dispositive issue of the appropriate standard of scrutiny to apply," *id.*, and any request that this Court go beyond that issue and dive into the disputed facts of this case is misplaced.

As explained above, the Court's precedents have established that strict scrutiny does not apply to substantive due process challenges to civil commitment laws. There is no reason for this Court to revisit that settled issue. Nor does resolution of the dispositive issue of the correct standard of review depend on the factual record. Rather, the standard of scrutiny applies *to* the facts, not as a consequence *of* the facts found by the district court.

In any event, contrary to Petitioners' contention, Pet. 25, the district court's factual findings are not "well-supported by the record" or by a "vast amount of undisputed evidence." Respondents vigorously disputed many of the findings on appeal. *See supra* at pp. 16-18. The Eighth Circuit did not need to consider, and therefore did not address, the many factual disputes.

These factual disputes include, for example, that the district court stated without evidence that some unidentified MSOP clients are entitled to discharge; determined that MSOP fails to review treatment progress and phase placement despite unrebutted testimony to the contrary by numerous MSOP witnesses; and criticized MSOP's treatment without mentioning its own Rule 706 Experts' testimony stating that the program is "consistent with general thinking in the literature and practice regarding treatment for people who have sexually offended," MSOP clients are "generally well served by the MSOP treatment and institutional management framework," and MSOP policies

are "reasonable" and "consistent" with other states' facilities. *See supra* at pp. 13-14, 17-18; Doc. 658, pp. 28, 54, 57.

There is every reason to believe that the Eighth Circuit, if it had the need, would have rejected many of the district court's findings. Its review of the record established that there was no conscience-shocking conduct, Pet. App. 29a, even though the district court in its order denying a stay pending appeal summarily stated that Respondents' conduct shocked the conscience. *See supra* at p. 16. Further, the Eighth Circuit stated that the district court's pre-trial comments "do give some cause for concern; if they are not premature remarks on the merits of the litigation, then they could in some instances be construed as policy pronouncements that risk straying beyond the judicial role." Pet. App. 16a. To the extent it would be necessary for the Court to consider the district court's disputed factual findings, this case would be anything but an ideal vehicle for the Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

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