Appellate Court File No. 15-3485

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kevin Scott Karsjens; David Leroy Gamble, Jr.; Kevin John DeVillion; Peter Gerard Lonergan; James Matthew Noyer, Sr.; James John Rud; James Allen Barber; Craig Allen Bolte; Dennis Richard Steiner' Kaine Joseph Braun; Christopher John Thuringer; Kenny S. Daywitt; Bradley Wayne Foster; Brian K. Hausfeld, and all others similarly situated,

Plaintiffs-Appellees,

v.

Emily Johnson Piper; Kevin Moser; Peter Puffer; Nancy Johnston; Jannine Hébert; Ann Zimmerman; in their official capacities,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BRIEF OF ERIC JANUS AND THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Civil Liberties Union of Minnesota is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10 percent or more of *amicus*.

Dated: January 28, 2016

s/Teresa J. Nelson
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STATEMENT OF INTEREST OF AMICI CURIAE

Professor Eric Janus and the ACLU-MN submitted briefs of amici curiae in the District Court in this case on the issues of the unconstitutionality of the Minnesota Sex Offender Program and remedies the District Court should consider.[1] Professor Janus is Past President and Dean of the William Mitchell College of Law (now Mitchell | Hamline School of Law). He is a leading national expert on sex offender civil commitment laws and treatment programs whose scholarly work includes three books, book chapters in eight books, and numerous law review and journal articles. He has an extensive background of litigation and amicus curiae participation in cases involving the constitutionality of civil commitment to the Minnesota Sex Offender Program (MSOP). Professor Janus also served on the State of Minnesota, Sex Offender Civil Commitment Advisory Task Force.

The ACLU-MN is the state affiliate of the American Civil Liberties Union and has an extensive background of litigation and amicus curiae participation in matters involving constitutional rights including the constitutionality of civil commitment to MSOP.

[1] Pursuant to Federal Rule of Civil Appellate Procedure 29(c)(5), Amici Curiae Eric Janus and ACLU-MN certify that no party or party's counsel authored this brief in whole or in part and no person other than the amici contributed money intended to fund the brief's preparation or submission.

Amici have received the consent of all parties to their participation in the filing of a brief of Amici Curiae.

STATEMENT OF THE CASE

Amici adopt and incorporate the Statement of the Case presented in Appellees' brief.

INTRODUCTION

The District Court examined, and found wanting, the constitutional validity of the Minnesota Sex Offender Program (MSOP), a complex system of preventive detention authorized by state law; shaped, built, and maintained by a highly discretionary skein of administrative and judicial actions; and ratified through legislative acquiescence. Having examined 25 years of MSOP history, the District Court's decision identifies the Appellants' decades-long abandonment of the safeguards necessary to insure the *bona fides* of a legitimate system of civil commitment, and properly infers that the true purpose of this massive and growing confinement system is the forbidden purpose of punishment.

The Supreme Court permits only "narrow exceptions" from the highly constrained "charge and conviction" paradigm for incarceration. *Foucha v. Louisiana* , 504 U.S. 70, 83 (1992). But the MSOP has grown inexorably over its two-decade life, so that it is now a major component of the state's incarceration of sex offenders. The state has no system for complying with the constitutional

command that commitment shall end when the reasons justifying it no longer obtain, and confines scores of individuals whose circumstances do not justify confinement. Appellants' Appendix at 1012, 1021 ("A.A. __"). The approval of the state courts in over 400 appellate decisions, and the legislative failure to act, together with the sheer persistence of the State's pattern of conduct, well support the District Court's finding that the MSOP's punitive purpose destroys its *bona fides* as a civil commitment program.

ARGUMENT

I. The MSOP violates the constitutional right to substantive due process because it serves the "forbidden purpose" of punishment

In order to protect the moral legitimacy and constitutional integrity of the criminal justice system, the Supreme Court permits only "narrow exceptions" to the tight control of the "charge and conviction" paradigm. The boundaries of an "alternate justice system" for pre-crime detention, like the MSOP, must be vigilantly patrolled. Exempt from the "great safeguards which the law adopts in the punishment of crime and the upholding of justice," *Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (quoting *United States v. Chisolm* , 149 F. 284, 288 (S.D. Ala. 1906)), a *bona fide* civil commitment system must be carefully bounded, no matter how "compelling" its purpose.

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

The "charge and conviction" paradigm of criminal law must be the primary tool for addressing antisocial behavior. Punishment for a crime is strictly circumscribed by the Constitution. A list of these constraints includes the principle of legality (or *nulla poena sine lege*);[2] the prohibitions against double jeopardy[3] and ex post facto laws;[4] the rights to juries as fact finders,[5] to witness confrontation,[6] and to the highest standard of proof;[7] the requirement that the crime be manifest in some act (actus reus)[8] with criminal intent (mens rea);[9] the prohibition against criminalizing a status[10] and on basing criminal conviction on

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[2] John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).
[3] *See United States v. Halper*, 490 U.S. 435, 440 (1989).
[4] The prohibition against ex post facto laws prevents the state from increasing a person's criminal sentence after it was imposed. *See Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) citations omitted.
[5] *See generally Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (discussing general nature of right to, and importance of, jury trial).
[6] *See* 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 24.4(b) (2d ed. 1999).
[7] *See In re Winship*, 397 U.S. 358 (1970).
[8] *See* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 25 (15th ed. 1993).
[9] *See id.* § 27.
[10] See Paul H. Robinson, *Foreword: The Criminal—Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993).

predicted, rather than committed, crimes;[11] immunity from self-incrimination;[12] prohibitions on arrest and search in the absence of some cause to believe that a specific crime has been committed;[13] and the requirement that prosecutions be based on written charges specifying the law and the facts constituting the crime.[14]

These are the "great safeguards" of the law, yet the MSOP claims exemption from each and every one.

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

B. The constitution grants exemption from the "great safeguards" only for *bona fide* civil commitment regimes, uninfected with the "forbidden purpose" of punishment.

Under the substantive branch of the due process clause, certain government actions are simply prohibited. *Foucha v. Louisiana*, 504 U.S. at 80. The Supreme Court has repeatedly set substantive boundaries on the civil commitment power of

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[11] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2, at 195 (2d ed. 1986) ("[T]he common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined.").
[12] *See* LAFAVE ET AL., *supra* note 6, § 6.5(a).
[13] *See* 4 BARBARA E BERGMAN & THERESA M. DUNCAN, WHARTON'S CRIMINAL PROCEDURE § 23:6 (14th ed. 2007).
[14] 41 Am. Jur. 2d *Indictments and Informations* § 95 (2008) ("[T]he charge must be set forth with enough particularity to adequately apprise the defendant as to the exact offense being charged.").

the states. *See Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Foucha* 504 U.S. at 83. These limits are not explained by a conventional "compelling state interest", "narrow tailoring" analysis. If a civil commitment scheme, narrowly tailored to addressing the admittedly compelling state interest in public safety were, *ipso facto*, constitutional, civil commitment would easily swallow the entire criminal justice system. The State could substitute a pre-crime detention system for our hallowed charge and conviction paradigm. Clearly, narrow tailoring and compelling interest are necessary, but not sufficient, for the constitutional validity of a civil commitment scheme. *Foucha*, 504 U.S. at 83.

Foucha frames the substantive due process question this way: does the MSOP scheme fit within "only narrow exceptions" to the "charge and conviction" paradigm, including "permissible confinements for mental illness?" *Id.* at 82-3. An analysis of Supreme Court precedent shows that the Court first examines whether a proposed "exception" is a *bona fide* civil commitment scheme. As the Court concluded in *Kansas v. Hendricks*, "Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme." 521 U.S. 346, 347 (1997) (emphasis added).

In a *bona fide* commitment scheme, the state's purpose may not be the "forbidden purpose" of punishment. *Hendricks*, 521 U.S. at 371 (Kennedy, J.,

concurring). In *Hendricks*, the Supreme Court called this the "threshold" matter in determining constitutional validity. *Id*. at 361-2. And the *Hendricks* court made it clear that the "punitive purpose" inquiry begins with the state's "disavow[al of] any punitive intent," but does not end there. *See Id*. at 368.

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Id. at 368-369.

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

The "forbidden purpose" test is the natural consequence of the State's eschewal of the "great safeguards" of the criminal justice system. *Addington* is the prime example of this imperative. There, the State of Texas sought to deprive people of their liberty without resort to the "beyond a reasonable doubt" standard of proof. *Addington v. Texas*, 441 U.S. 418 (1979). The Court acquiesced, but only because "In a civil commitment state power is not exercised in a punitive sense. …

[A] civil commitment proceeding can in no sense be equated to a criminal prosecution." *Id.* at 428 (footnote omitted). The Court held that the "moral force" of the criminal law arises from the strict constraints that contain the state's exercise of its most awesome power. *Id*. That moral force would dissipate if the constraints could be thrown off at the whim of the state. The legitimacy of the criminal law requires that its distinctive purposes – to punish and deter – be forbidden to the state outside of the criminal law. This is the essence of substantive due process.

C. There are three key indicia of non-punitive purpose in a *bona fide* civil commitment scheme

Given the enormity of the threat to individual liberty, it is not constitutionally sufficient for the state simply to disclaim an intent to punish. As Justice Scalia observed, "[i]t is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). Rather, the courts have identified three necessary indicia of a *bona fide* civil commitment program, and thus of a proper, non-punitive, purpose.

First, the use of civil commitment must not challenge the primacy of the criminal law as the normal tool for addressing antisocial behavior. The requirement that the state must "explain why its interest would not be vindicated by the

ordinary criminal processes . . ., the use of enhanced sentences for recidivists, and other permissible [means]" reflects this principle. "These are the normal means of dealing with persistent criminal conduct." *Foucha*, 504 U.S. at 82. The primacy pillar is also expressed by the courts in their reliance on the stated intent to apply preventive confinement only to a "limited subclass of dangerous persons." *Hendricks*, 521 U.S. at 357.

Second, the constitutionally required non-punitive purpose must be evidenced by the state's promise to provide treatment. In *In re Linehan III*, the Minnesota Supreme Court cited the state's intention to provide "comprehensive care and treatment for committed sex offenders" as a central prop of constitutional validity, crediting the state's claim that "commitment was for the purpose of treatment" in turning back a challenge to the validity of the SDP law. *In re Linehan III*, 557 N.W.2d 171, 187, 188 (Minn. 1996). The court relied on the State's representation that "each of the four phases [of the MSOP treatment program] will last approximately 8 months for model patients…." *Id.* at 188.

Third, to be *bona fide*, a civil commitment scheme must be structured and operated so that the duration of confinement lasts no longer than the justification for confinement: "It [is unconstitutional to] continue [confinement] after that basis no longer existed." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (citation omitted).

In *Addington*, the Court made clear that the central non-punitive intent was to be inferred from the following facts: "'[t]he involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others.'" 441 U.S. at 433 n.4.

To be valid, a civil commitment scheme must be designed and operated to release people as soon as they can be appropriately managed in the community. A commitment scheme without such a design is constitutionally invalid. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). The Minnesota Supreme Court approved the schemes "[s]o long as the statutory discharge criteria are applied in such a way that the person subject to commitment … is confined only so long as he or she continues both to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to public…." *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

In sum, it is only the purported absence of a punitive purpose that saves the MSOP's non-charge-and-conviction massive deprivation of liberty from constitutional invalidity.

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

In judging whether the forbidden purpose is present, courts look not only to the purpose espoused by the State, but also to the objective characteristics of the

program, in order to assure that states are not using civil commitment as a pretext for punishment. In short, MSOP must be a *bona fide* civil commitment program, not a "sham or mere pretext". (Justice Kennedy, Concurring, Hendricks, at 371, 2087).

In multiple contexts, constitutional validity is dependent on the purpose of a governmental program, and this purpose is characteristically determined by an examination of the program's actual implementation. As early as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court stated that even if "the law itself be fair on its face, and impartial in appearance," if it is "applied and administered by public authority with an evil eye and an unequal hand," it is "still within the prohibition of the constitution." *Id.* at 373–374. The Court went even further and stated that it was "not obliged to reason from the probable to the actual . . . for the cases present the ordinances in actual operation…." *Id*. at 373.

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

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court examined wide-ranging circumstantial evidence to determine the purpose of a facially neutral set of ordinances. "Here [in the Free Exercise context], as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence." *Id.* at 540 (citation omitted). This circumstantial evidence extended to post-enactment implementation practices, including interpretations by the Attorney General and the state courts. "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535.

Ferguson v. City of Charleston, 532 U.S. 67 (2001), involved a scheme organized by a public hospital, city police, and prosecutors to screen pregnant women for drug use. The key question was whether the scheme was informed by a forbidden purpose - law enforcement - or was "justified by special non-law-enforcement purposes." *Id*. at 73. The court examined the "purpose actually served" by the policy. *Id*. at 81. "In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose." *Id*. (Emphasis added). The court emphasized the actual implementation of the policy, finding that "prosecutors and police were extensively involved in the day-to-day administration of the policy." *Id*. at 82.

In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Supreme Court examined a program of drug interdiction checkpoints, searching for a forbidden purpose. The Court "examine[d] the available evidence to determine the primary purpose of the checkpoint program," and noted that "courts routinely engage in this [purpose inquiry] in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful." *Id.* at 46-47.

In the First Amendment establishment of religion context, the Court has frequently acknowledged that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578 (1987). Similarly, in *Wallace v Jaffee*, 472 U.S. 38 (1985), Justices Powell and O'Connor both emphasized that **"**[the state's] secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'" *Id*. at 64 (Powell, J., concurring). Justice O'Connor's concurrence is similar, noting the possibility a legislature would put forth a "sham secular purpose" and recognizing the court's ability to distinguish a sham purpose from a legitimate one. *Id.* at 75 (O'Connor, J., concurring).

In *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), the Eighth Circuit examined post-hoc implementation to determine whether governmental "decisions" had a forbidden purpose under the Equal Protection Clause. As with

Establishment Clause analysis, the court's inquiry included examination of the impact or effects of the statute. *Id*. at 650.

More recently, in *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court relied heavily on post-enactment circumstances to invalidate Section 4(b) of the Voting Rights Act, which contains the coverage formula used to determine the jurisdictions subjected to preclearance based on their history of discrimination. The 1966 formula in *Katzenbach* "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both." *Id*. at 2627. This coverage is based on "decades-old data and eradicated practices." *Id*. The Court pointed to facts outside of the face of the statute to show that racial disparity once existed in these jurisdictions, making this test appropriate, but now, "[t]here is no longer such a disparity." *Id*. at 2628. The Court invalidated part of the Act based on this theory. Referring to the "purpose" of the Constitution and the legislation, the Court stated, "[t]o serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 2629.

Appellants rely heavily on *Seling v. Young*, 531 U.S. 250 (2001), to avoid scrutiny of whether MSOP is a *bona fide* civil commitment program, but it is inapposite here. *Seling* held that a "civil" statute could not be transformed into a

"criminal" statute for purposes of Double Jeopardy and Ex Post Facto Analysis, based solely on the "punitive" application of the statute to a single individual. *Seling*, 531 U.S. at 263. *Seling* is inapposite for three reasons. First, the case at bar involves claims under the due process clause, which the *Seling* court explicitly excluded from its analysis. *Id.* at 266. Second, the case at bar involves a system, rather than individual analysis. *Id*. at 264. This relates directly to the third reason: *Seling* does not address the central question informing the District Court's decision, whether the persistent, two-decade pattern of implementation demonstrate that an ostensibly civil scheme has been infected with the forbidden purpose of punishment.

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

Justice Scalia's concurrence in *Seling* provides strong support for the relevance of systemic-implementation evidence of purpose, even in the narrow "statute-centric" Ex Post Facto and Double Jeopardy contexts. *Seling*, 531 U.S. at 267 (Scalia, J., concurring). In the Ex Post Facto, Double Jeopardy context, Justice

Scalia believes that the resolution of the civil/criminal question "depends upon the intent of the legislature." *Id*. at 269. But he acknowledges that post-enactment implementation might provide determinative evidence, even where the inquiry is limited to legislative purpose:

> When, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive action; if those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal. Such an approach … avoids federal invalidation of state statutes on the basis of executive implementation that the state courts themselves, given the opportunity, would find to be ultra vires.

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

E. *Strutton* is not applicable in determining whether MSOP is a valid civil commitment system.

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

Strutton has its roots in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In both *Youngberg* and *Strutton*, the plaintiffs did not challenge the legitimacy of their

initial commitments. The question, as framed by the courts, was which constitutional rights "survive" the imposition of a legitimate civil commitment. As the *Youngberg* court put it: "The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg*, 457 U.S. at 315. The Court's conclusion: "a right to freedom from bodily restraint … survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id*. at 316 (Emphasis added). *Strutton*, too, dealt with the conditions of confinement, not with the validity of the confinement itself. Similarly, in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1990), cited by *Strutton*, this Court addressed the nature of the constitutional rights remaining for a person where "the legitimacy of [the civil] commitment is not in doubt." *Id*. at 1154.

Strutton's "shocks the conscience" standard is this Court's assessment of the rights that survive a valid civil commitment. As such, the standard has no direct applicability to the question of validity of the MSOP. The inapplicability of *Strutton* is further highlighted by the fact that the Eighth Circuit took pains to distinguish between claims that amount to a violation of state law (and therefore not actionable under Federal constitutional law) and claims that establish that a particular state action is sufficiently egregious (and therefore actionable as a violation of the constitutional right to substantive due process). *Strutton*, 668 F.3d

at 557. Concluding that Strutton's due process claim was based on an alleged violation of the state statutory mandate to provide treatment, the claim was based on a violation of state law which required a showing that the state action was "truly egregious and extraordinary" (i.e. "shocks the conscience") in order to succeed. *Id*. (*See Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104–05 (8th Cir.1992)). In the case at bar, plaintiffs' forbidden purpose claim is based on Federal Constitutional law, and not on state law.

Unlike *Strutton*, the case at bar raises a broader question as to the fundamental constitutional validity of Minnesota's entire sex offender civil commitment program. In the context of this class action lawsuit, the *Strutton* "shocks the conscience" standard is inapposite. The totality of the state's actions in creating and implementing the Minnesota Sex Offender Program – the statute passed by the Legislative branch, the program implemented by the state Executive branch, the judicial blessing of commitment decisions made by the state Judiciary, and the active and knowing acquiescence in the scheme's implementation by the state legislature – does not pass muster under the federal Constitution, because those actions reveal that the true purpose of the MSOP is punishment, forbidden no matter how compelling the state's goal.

II. Two decades of executive implementation, state court approval, and legislative acquiescence, demonstrate that MSOP has the forbidden purpose of punishment.

A. MSOP's implementation fails to meet the objective indicia of a *bona fide* civil commitment scheme.

The District Court found that the State's actions (and failures to act) have created a program that fails one of the key indicia of civil commitment *bona fides*: insuring that the duration of confinement is related to the legitimate purposes of the civil commitment program. The State's failure to monitor the changing risk posed by its confined clients, and its systematic failure to provide for suitable facilities and planning for community reentry for those whose risk warrants less restrictive settings, have fatally impaired the functioning of this constitutional duration-limiting requirement. A.A. 1043-4.

There is additional evidence that strengthens the court's finding. Minnesota has the highest per capita commitment rate in the nation. Jennifer E. Schneider, et al., *SOCCPN Annual Survey of Sex Offender Civil Commitment Programs 2014*, at 6, available at http://soccpn.org/images/SOCCPN_Annual_Survey_2014_revised.pdf, *accessed* January 21, 2016). The dysfunctional nature of the MSOP system for policing duration of confinement is clear when compared to similar programs in Wisconsin and New York State. Both programs have smaller populations of clients confined, but community placement numbers that far exceed the almost negligible

provisional discharge record of MSOP. *Id.* at 5, 8. Other states, as well, have succeeded in placing committed clients in the community including NJ (47) VA (116), IL (29). (*Id*. at 8). MSOP's poor performance is aberrational.

Second, the scientific consensus is that risk of sexual recidivism decreases with age. *See*, ROBERT A. PRENTKY, HOWARD E. BARBAREE AND ERIC S. JANUS, SEXUAL PREDATORS: SOCIETY, RISK AND THE LAW (ROUTLEDGE, 2015) at 106-113 (citing studies showing that age-related "reductions in recidivism among sex offenders are consistent across studies and are very similar to reductions in recidivism (both violent and nonviolent) in the aging non-sexual criminal population," and describing the "aging effect" as "one of the most robust findings in the field of criminology.") Even assuming, for argument, that each and every individual committed over the past 25 years met constitutionally adequate standards for "dangerousness," this research raises the strong presumption that, as a statistical matter, the risk posed by those individuals has decreased over time. If nothing else, this science would put the State on notice that it must monitor and periodically assess the risk posed by its aging dependents, in order to assure itself – and the court – that not one person is confined beyond the constitutionally permissible period. The fact, as discussed above, that other states with more careful systems in place have released clients at rates that exceed Minnesota's rate by orders of magnitude further bolsters this point.

Third, the evidence shows that the MSOP has violated another of the central indicia of a *bona fide* civil commitment system: that it must not impinge on the primacy of the criminal justice system as the state's tool for managing antisocial behavior. Far from being a rare and exceptional tool, a "narrow exception" to the charge and conviction paradigm, a "limited subclass of dangerous persons," MSOP has been intentionally shaped as a tool that rivals the scale of the criminal justice system. *Hendricks*, 521 U.S. at 357. While the population of MSOP was, in 1996 less than 10% the size of the sex offenders in prison, Eric S. Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 356 (2000), MSOP has now become a competitor to the correctional system, confining a population exceeding 40% of the number of sex offenders imprisoned: In 2015, there were 1688 sex offenders imprisoned (Minnesota Department of Corrections, *Adult Inmate Profile as of 7/1/2015,* available at http://www.doc.state.mn.us/pages/files/6914/3826/9238/Minnesota_Department_of_Corrections_Adult_Inmate_Profile_07-01-2015.pdf *accessed* Jan. 19, 2016), and 726 committed to MSOP. Minnesota Department of Human Services, *Minnesota Sex Offender Program* Statistics, available at http://mn.gov/dhs/people-we-serve/adults/services/sex-offender-treatment/statistics.jsp, *accessed* Jan. 19, 2016. p. 6. Civil commitment of sex offenders is not exceptional; under the MSOP

regime, it has become a routine and major component of the state's arsenal for addressing sexual violence.

B. The Minnesota Judiciary has overseen nearly every detail in the decades-long patterns of implementation.

There is hardly a detail of the decades-long implementation of MSOP that could escape state court supervision. If, as the District Court has found, MSOP has been persistently operated in a punitive manner, the state courts have, in over 400 instances, blessed these practices as perfectly consistent with the statutory commands of state law. The persistent pattern of implementation, and the punitive purpose it reflects, are not rogue, random or temporary, but rather enjoy the authoritative imprimatur of the state courts.

Despite hundreds of opportunities, the Minnesota courts have explicitly refused to address the systemic, implementation-based claims that are at the core of the District Court's findings of improper, punitive purpose. The Minnesota appellate courts' decisions on MSOP can be classified into four main categories. Category one: Immediately following enactment of the MSOP laws, the courts opined on their constitutionality. These early cases necessarily examined the laws' constitutionality *ex ante*, relying on the legislative and executive espousals of proper purpose to assess the *bona fides* of the purported civil commitment scheme. *In re Blodgett,* 510 N.W.2d 910 (1994), *Linehan III*, 557 N.W.2d at 187 (Minn. 1996), *Call,* 535 N.W.2d at 319–20.

In the second category of cases, the state courts summarily dismissed claims of unconstitutionality on the basis of *stare decisis*. Typical of these cases is *In re Deloach*, 2005 WL 2496010 (Minn. Ct. App 2005). More than a decade into the implementation of MSOP, the court of appeals brushed aside the claim of unconstitutionality with the summary statement that "each of these challenges has been rejected by this court and the supreme court in previous decisions," and that the court of appeals "is not in a position to overturn established supreme court precedent." *Id.* At *3. Citing decade-old precedents, the court did not examine any claim that intervening patterns of implementation revealed an improper purpose. *Id*. *See also In re Thompson*, 2007 WL 2993851 (Minn. Ct. App. 2007) (citing 13-year-old precedent in summarily dismissing constitutional challenge). In a similar vein, the Minnesota Supreme Court, ignoring a pointed plea from the Chief Judge of the Court of Appeals, *In re Civil Commitment of Ince*, A12-1691, 2013 WL 1092438 (Minn. Ct. App. Mar. 18, 2013) (Johnson, CJ, concurring) ("The lack of a clear and definite legal standard is in tension with fundamental notions of the rule of law. A statute that may deprive a person of his or her liberty should have 'an understandable meaning with legal standards that courts must enforce.'") refused to set or clarify the risk-threshold standards for MSOP commitments. *In re Civil Commitment of Ince*, 847 N.W.2d 13 (Minn. 2014).

In the third category of constitutional cases, the state courts explicitly refused to take cognizance of the very implementation-based systemic challenge that forms the basis for the instant case. In *In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. Ct. App. 2009) the Minnesota Court of Appeals explicitly refused to recognize a systemic, as-implemented challenge to MSOP's validity in the context of a petition for commitment. Symmetrically, Minnesota law prohibits as-applied constitutional challenges in the narrowly prescribed statutory proceedings for reduction of custody. *See* Minn. Stat. § 253B.18 Subd. 4c (2016), and Minn. Stat. §253D.27 (2016). *See also In re Civil Commitment of Moen*, 837 N.W.2d 40 (2013), *rev denied* Oct. 15, 2013 (refusing to recognize claim that commitment invalid because of failure to provide treatment), *In re Civil Commitment of Lindsey*, 2011 WL 1938288 (Minn. Ct. App. May 23, 2011) (refusing to consider as-implemented evidence of unconstitutionality as grounds for discharge from commitment).

In *Travis*, 767 N.W.2d at 56, the Minnesota Court of Appeals had the opportunity to approve a systemic investigation of the MSOP program and definitively rejected the opportunity. The state trial court had indicated its intention to examine the *bona fides* of the MSOP scheme by taking evidence about the patterns of implementation. The trial court intended to take evidence to determine whether "the actual implementation of the SDP/SPP laws suggest a regime of

[preventive] detention itself, heretofore anathema to due process." *Id*. at 56 (quoting the district court's order).

The Court of Appeals unambiguously and authoritatively prohibited the district court from undertaking this examination of "actual implementation," the very same inquiry that is now before this court:

> The district court's investigation of constitutional violations under a substantive-due-process standard focusing on the treatment of others is precluded by governing cases. We reverse the district court's decision to hold an evidentiary hearing and conduct related discovery to determine the constitutionality of the SDP and SPP statutes, and we remand for further proceedings.

Id. at 67. *See also*, *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 651 (Minn. Ct. App. 2011) ("The treatment of committed individuals is the province of the commissioner of human services, not the district court.").

The Minnesota courts have extended this refusal to address the patterns of implementation to the reduction in custody and discharge phases of commitment, as well. In *Lonergan*, Judge (now Justice) Hudson of the Court of appeals clarified that the tribunals statutorily authorized to consider reductions in custody could not consider the implementation of the law in determining the legitimacy of confinement:

> We note that the Commitment Act, chapter 253B, provides a patient with a right to treatment, Minn.Stat. § 253B.03, subd. 7 (2010), but that act does not explicitly grant either the special review board or the judicial appeal panel authority to review a denial of treatment.

In re Lonergan, 2012 WL 4773877 (Minn. Ct. App., October 9, 2012, *review denied* December 18, 2012). And in *Moen*, the Court of Appeals refused to provide a forum for a committed individual to raise a right to treatment claim as a means of invalidating his ongoing commitment. *Moen*, 837 N.W.2d at 49.

Fourth, the Minnesota appellate courts have prohibited commitment courts from addressing the lack of availability of less restrictive alternatives, even those that are necessary to enable individuals to move from the total confinement of MSOP into a less restrictive community setting. Prosecutor Kirwin's summary of the law puts it this way:

> In order for a less restrictive alternative to be appropriate, it must be presently available. The court cannot order that a community placement be developed, where none exists. A trial court did not err in rejecting an otherwise-available alternative placement, where there was no funding mechanism to pay for it.

John L. Kirwin, *Civil Sex Offender Laws*, Minn. Attorney Gen. Office, Continuing Legal Education Seminars p. 37 (2005) (available at http://www.mcaa-mn.org/docs/2005/SexCaselawOutline5-2005.pdf, accessed January 19, 2016) (footnotes and citations omitted).

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

Despite mounting evidence that the MSOP suffered significant defects, the Legislature has done nothing to correct the problems. Indeed, the legislature has

addressed the MSOP program, but the changes have been largely cosmetic. *See* 2013 Laws of Minnesota, Ch. 49 §9 (recodifying and combining SPP and SDP sections). This in spite of overwhelming red flags that were identified by its own Legislative Auditor including:

- The highest per-capita population of civilly committed Sex Offenders in the nation;
- Significant variance (34-64%) among judicial districts in the rate of commitments;
- No less restrictive alternatives to commitment in a high security facility;
- MSOP struggles to provide adequate treatment and maintain a therapeutic environment; and
- In the nearly twenty years that the program has been in operation, no civilly committed sex offender has ever been discharged, likely due to problems in the treatment program, an executive order discouraging discharges, the absence of any meaningful community-based services suitable for supervising released offenders, and a release standard that is stricter than most other states which allow for discharge when an offender no longer meets the commitment criteria.

Office of the Legislative Auditor, State of Minnesota, *Evaluation Report: Civil Commitment of Sex Offenders* (March 2011), *available at*

http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf (*accessed* January 19, 2016) [hereinafter, OLA Report].

The OLA Report laid bare the significant problems that have existed within Minnesota's program. Far from being a civil law with the purpose of providing treatment, the main goal of MSOP appears instead to be punitive preventive detention. In spite of the OLA Report and comprehensive recommendations, the Legislature has failed to implement the lion's share of recommendations.

The Legislature ignored the unequivocal recommendation of the Task Force appointed by the District Court. A.A. 993-4.

III. Members of the Plaintiff class suffer a concrete, actual injury and therefore have standing to bring this lawsuit.

A sham civil commitment scheme – one infected by the forbidden purpose of punishment – may not constitutionally confine anyone, even those who could be confined under a constitutional scheme. Thus appellants' standing argument, premised on the incorrect assertion that plaintiffs suffer no harm from confinement under an unconstitutional scheme – must be rejected.

The District Court has found that the MSOP is infected with the forbidden purpose of punishment. It is not a *bona fide* civil commitment scheme, and therefore does not qualify for exemption from the "great safeguards" the law

imposes on the normal charge and conviction paradigm for depriving citizens of their liberty. It is a constitutionally invalid system of confinement.

As the District Court acknowledged, there are, without doubt, some members of the class who could properly be confined pursuant to a *bona fide* civil commitment program, uninfected by the forbidden purpose of punishment. It is likely, as well, that the State could purge itself of the improper purpose, and bestow constitutional legitimacy on this program through careful compliance with the duration-limitations of the constitution.

It is a commonplace that governmental schemes infected by improper purposes may not be applied even to behavior that is otherwise plainly subject to regulation. *See* Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (discussing laws struck down by the Supreme Court based on forbidden purpose despite general governmental authority to regulate underlying conduct). Take one clear example: In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the Supreme Court struck down an ordinance that banned cross-burning because it had an improper purpose. Yet it is clear that a municipality could regulate open fires and prohibit "fighting words." Justice Scalia explained:

> Assuming, *arguendo,* that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

R.A.V., 505 U.S. at 381.

The same analysis could be described for each of the "forbidden purpose" cases discussed above. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the court struck down an ordinance banning animal sacrifices; regulation of animal slaughter was not problematic, but the state's purpose was forbidden. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the screening of pregnant mothers for drug use would not have been forbidden, but for the improper "law enforcement" purpose of the municipal scheme. And in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court recognized that government programs "driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Id*. at 46-47.

Appellants simply have their argument about facial invalidity upside down. Appellants claim that MSOP cannot be "facially" invalid because there are some individuals, currently committed, whose confinement might not be constitutionally improper. Therefore, they argue, the Minnesota law is not invalid under all circumstances. But, as we have shown, the forbidden purpose, the lack of *bona fides* as a civil commitment scheme, make the MSOP constitutionally invalid, and an invalid program cannot be applied even to circumstances which are properly reachable by a valid law.

CONCLUSION

The District Court, weighing the evidence of persistent, decades-long practices, found that MSOP suffers from a punitive purpose that is forbidden in a civil commitment scheme. No matter how important the goal of prevention, the very integrity of the "great safeguards" limiting the awesome power of our government demands that this pretext be curtailed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as it has been prepared in a 14-point, proportionally spaced typeface, Times New Roman, by using Microsoft Word 2013.

The pdf versions of this brief and accompanying addendum have been scanned for viruses and are virus-free pursuant to Eighth Circuit Local Rule 28A(h)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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