No. 16-1394

In The
Supreme Court of the United States

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,

Petitioners,

v.

EMILY JOHNSON PIPER; KEVIN MOSER; PETER PUFFER; NANCY JOHNSTON; JANNINE HÉBERT and ANN ZIMMERMAN, in their official capacities,

Respondents.

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

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state civil commitment scheme, as implemented over a 20-year period, that systematically thwarts the release of non-dangerous detainees, loses its bona fides and thus partakes of the forbidden purpose of punishment, casting it outside of the limited exceptions to the charge and conviction paradigm central to the fundamental right to freedom from restraint.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are 26 professors of law or related subjects who specialize in constitutional law, substantive criminal law, criminal procedure, sex offender policy, and/or the law focused on persons with mental illness. Amici have an interest in helping the Court to ensure that the Due Process Clause of the United States Constitution is enforced in a manner consistent with its core goals and principles. A full list of amici is attached as Appendix A.

SUMMARY OF ARGUMENT

Two decades ago, this Court upheld the Kansas Sexually Violent Predator Act against a facial challenge. *Kansas v. Hendricks*, 521 U.S. 346 (1997). This petition does not ask the Court to revisit that decision but rather to reaffirm – and enforce – its underlying principle that preventive detention is a limited exception to the charge and conviction paradigm central to our constitutional system of limited government, and as such, requires heightened scrutiny and judicial vigilance to ensure compliance with basic constitutional

[1] Pursuant to Rule 37.6, amici curiae certify that no party or party's counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae and their counsel made a monetary contribution. Amici curiae provided timely notice to all counsel of record of their intention to file this brief and received consent from all counsel of record.

limitations. In a sharp departure from four decades of this Court's jurisprudence, the Court of Appeals' decision in this case disavowed any meaningful constitutional accountability for civil commitment confinement schemes.

In *Hendricks*, the Court adopted an optimistic view of Kansas's then newly-enacted Sexually Violent Predator (SVP) pre-crime detention scheme, crediting the State's avowals that the vaguely-worded law would be implemented as a bona fide civil commitment law. Here, after a careful six-week trial, the District Court found that Minnesota's SVP scheme, the Minnesota Sex Offender Program (MSOP), betrayed similar promises to generate a bona fide civil commitment system. What was touted as a genuine civil commitment program is, in fact, extended punishment. Two decades of implementation in Minnesota – shaped intentionally and persistently by the executive, approved repeatedly by the state courts, and acquiesced in by the state legislature – has wrung the vagueness from the MSOP statute's language. The District Court found that the Minnesota Sex Offender Program is a punitive scheme, because it eschews the fundamental limits necessary for a bona fide civil commitment program. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139 (D. Minn. 2015), *rev'd sub nom. Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

The Court of Appeals did not question the District Court's findings that the State systematically thwarted the principle that non-dangerous individuals must be released from secure confinement. Yet, because it judged this detention not "egregious, malicious or

sadistic," *id.* at 411, the Court of Appeals absolved the State from any responsibility to correct this constitutional defect.

This case should be reviewed by the Court for three reasons:

First, the Court of Appeals' decision sharply departs from 40 years of this Court's civil commitment jurisprudence and decisions by multiple state courts of last resort applying strict scrutiny analysis.

Second, the MSOP systematically thwarts the liberty interests of over 700 detained people in Minnesota; more than 5,000 people are deprived of their liberty under these laws nationwide. *See* The Editorial Board, SEX OFFENDERS LOCKED UP ON A HUNCH, New York Times, August 15, 2015.[2] If the Court of Appeals' rule stands, there is no remedy when States systematically abuse their civil commitment programs.

Third, the rule adopted by the Court of Appeals undercuts the checks and balances to restrain governmental overreach of fundamental individual liberty.

Civil commitment entails a massive curtailment of liberty. As Justice Kennedy noted, "incarceration of persons is . . . one of the most feared instruments of state oppression and . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments." *Foucha v. Louisiana*,

[2] Available at https://www.nytimes.com/2015/08/16/opinion/sunday/sex-offenders-locked-up-on-a-hunch.html?mcubz=0&_r=1.

504 U.S. 71, 90 (1992) (Kennedy, J., dissenting).[3] Pre-crime commitment schemes require careful attention from the courts lest they circumvent 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)). *See* Tamara Lave, THROWING AWAY THE KEY: HAS THE ADAM WALSH ACT LOWERED THE THRESHOLD FOR SEXUALLY VIOLENT PREDATOR COMMITMENTS TOO FAR? 14 U. Pa. J. Const. L. 391 (2011); Corey Rayburn Yung, SEX OFFENDER EXCEPTIONALISM AND PREVENTIVE DETENTION, 101 J. Crim. L. & Criminology 969, 994-1002 (2011) (detailing absence of constitutional protections in SVP laws). Allowing the states to lock thousands of people in secure, long-term confinement, based on a fear of future crimes, these laws directly threaten the integrity of the "charge and conviction" paradigm that epitomizes the social contract limiting the power of the government to curtail individual freedom. Yet the rule announced by the Court of Appeals obliterates any constitutional oversight, allowing states almost at will to establish and implement alternative systems of justice, abandoning the hard-fought "great safeguards" surrounding the criminal law.

The Court of Appeals' hands-off approach is insensitive to the warning of Justice Scalia that "incarceration without a criminal charge [is considered] 'an act of despotism' that is 'so gross and notorious . . . as must

[3] Unless otherwise noted, all emphasis is added and all internal citations omitted.

at once convey the alarm of tyranny.' " *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting) (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 132-33 (1765)). The Court of Appeals' decision abandons the judicial vigilance required to prevent civil commitment becoming a covert convenience for punishment.

Courts should be extremely wary of facilitating such unregulated deprivation of liberty. Justice Jackson, sitting as a circuit court justice, warned: "Imprisonment to protect society from predicted but unconsummated offenses 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).

The Court of Appeals' decision abandons the judicial vigilance that is required, and should be reversed.

ARGUMENT

A. The MSOP Violates the Constitutional Right to Substantive Due Process Because It Falls Outside of the "Narrow Exceptions" to the Charge and Conviction Paradigm.

To protect the integrity of the criminal justice system, this Court has persistently articulated – and enforced – narrow limits on state civil commitment schemes. *See Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Foucha*,

504 U.S. at 83; *Hendricks*, 521 U.S. at 357-58. Sex offender civil commitment (SOCC) laws push hard on these limits. Under *Foucha*, the substantive due process question is framed as: Does the MSOP scheme fit within "only narrow exceptions" to the "charge and conviction" paradigm, including "permissible confinements for mental illness"? 504 U.S. at 82-83. This Court's decision 20 years ago in *Hendricks* expressed the expectation that the states would adhere to the constitutional limits on civil commitment. But the careful, evidence-based decision by the District Court in this case shows that, at least in Minnesota, that hope is unrealized. "The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system." (Pet.App. 80.)

The key marker of the narrow constitutional limits is the forbidden purpose of punishment. A state demonstrates that its SOCC program is free of the forbidden taint when it operates its program of secure confinement with full fidelity to the characteristics of a bona fide civil commitment program. *See* Eric S. Janus and Wayne Logan, SUBSTANTIVE DUE PROCESS AND THE INVOLUNTARY CONFINEMENT OF SEXUALLY VIOLENT PREDATORS, 35 Conn. L. Rev. 319 (2003).

In turn, there is one characteristic that always marks a genuine civil commitment scheme: the durational limit. Confinement ends just as soon as its justification ends: "[E]ven if his involuntary confinement

was initially permissible, it could not constitutionally continue after that basis no longer existed." *Donaldson*, 422 U.S. at 575. *See Addington v. Texas*, 441 U.S. 418, 433 n.4 (1979) ("The 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.") (quoting *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977)). The Minnesota Supreme Court approved MSOP's scheme "[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 the public. . . . " *Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

This duration limitation is a marker of constitutional dimensions, the *sine qua non* of a genuine civil commitment scheme. If it is present, courts may say that the punishment purpose is absent, despite the double razor wire and sally-port doors that mark both a prison and the MSOP facility. But when the duration limitation is absent, the confinement falls outside of the category of permitted civil confinement, and the inference of a forbidden punishment purpose necessarily follows. Justice Thomas's decision in *Hendricks* places this principle at its center, repeatedly rejecting the punitive label by pointing out that the Kansas scheme "permit[s] immediate release upon a showing that the individual is no longer dangerous or mentally impaired." *Hendricks*, 521 U.S. at 369.

B. The MSOP's Scheme, as Implemented Over a Two-Decade Period, Thwarts the Fundamental Durational Limit that is the S*ine Qua Non* of a Bona Fide Civil Commitment System.

The beginning point of this constitutional analysis is whether the statute sets out the proper durational limits on civil confinement. But that is only the beginning: the MSOP is a complex of statutory law, executive implementation, and state judicial rulings. If the promise to run a bona fide civil commitment program is belied by this complex implementation system, the asserted non-punitive purpose is a sham that does not justify the program's massive deprivation of liberty. The District Court's findings show that this system has, over a period of two decades, thwarted the constitutionally required duration limit.

The District Court took six weeks of testimony about the operation of the MSOP. Its findings are detailed. Amici curiae recite in summary some of the relevant details below. These details resolve into a simple and straightforward truth: that Minnesota has constructed and operated a program of long-term confinement that thwarts, in a systematic way, the duration-limiting principle of constitutional civil commitment.

The State's failure to implement an appropriate durational limitation is systemic. It begins with the statute's failure to require regular assessments of the need for continued confinement. (Finding 108 (Pet.App. 114).) On that is layered the State's failure

regularly to re-assess the risk of its detained wards. (Findings 115, 116 (Pet.App. 115-16).) The District Court found, unsurprisingly, that the State therefore lacks systematic knowledge of which of its 700-plus wards could be appropriately placed outside of the double razor wires. (Findings 110, 111, 112 (Pet.App. 114-15).) The State ignored the plain recommendation of its own Task Force: "The need for continued commitment and the propriety of placement must be reviewed on a regular basis, without demand or request by the committed individual." Sex Offender Civil Commitment Advisory Task Force Report (Task Force Report) at 3. Worse, the District Court found, on the basis of the testimony of no fewer than nine State and MSOP employees, including the Executive Director, Clinical Supervisor, Executive Clinical Director and the Deputy Commissioner, that "It is undisputed that there are civilly committed individuals at the MSOP who could be safely placed in the community or in less restrictive facilities." (Finding 54 (Pet.App. 98-99). "The MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP." (Finding 164 (Pet.App. 126).)

The State has actively and intentionally thwarted the duration-limitation principle. It has placed bottlenecks and obstacles in the path to regaining liberty. (Finding 47 (Pet.App. 95).) Efforts to provide the services needed to move non-dangerous people out of secure confinement have been systematically thwarted by State officials. (Finding 56 (Pet.App. 99-100).) The

State refuses to affirmatively plan for and marshal supervisory and treatment resources in the community, even though "providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety." (Finding 58 (Pet.App. 101).) Except in rare instances, it does not affirmatively initiate the process for reducing the deprivation of liberty even for those individuals whom it knows meet the criteria for discharge. (Findings 162, 164-67, 173 (Pet.App. 125-27).) It does not provide housing and supervision and services to allow the deprivation of liberty to be reduced. (Findings 47, 53 (Pet.App. 95-96, 98).) The process for adjudicating the reduction in liberty deprivation "can take years," "is unduly lengthy and is bogged down with difficult procedures; the process denies individuals the services necessary to navigate the process." (Findings 152, 156 (Pet.App. 123-24).) There is a "lack of clear guidelines for treatment completion." (Finding 93 (Pet.App. 109).) "Clinical staffing shortages and turnover at the MSOP have hindered the ability of the MSOP to provide treatment as designed and have impeded treatment progression of committed individuals at the MSOP." (Finding 104 (Pet.App. 112-13).)

The State ignored repeated findings and recommendations of its own investigative bodies over the years, as the Task Force Report concludes:

> However, the Task Force was also acutely aware that one of the most striking features of the MSOP as it has operated over time is

> the negligible number of releases from the program. Significant modifications of the process by which the need for continued commitment is determined and the standards for evaluating that need will address the serious issues of duration of commitment and the absence of meaningful release from commitment.

The short of the matter is that Minnesota has allowed politics, rather than the durational principle, to determine whether the liberty deprivation will continue or diminish. (Pet.App. 148, n.7.) Rejecting fixes that would have facilitated the restoration of liberty "without compromising public safety" (Finding 58 (Pet.App. 101)), Minnesota has permitted its decisions to fall under "the influence of public opinion and political pressure on all levels of the commitment process." (Pet.App. 148, n.7 (quoting Task Force Report).)

If these defects are complex and interrelated, their cumulative effect is simple and clear: Minnesota has systematically and intentionally created a confinement system, detaining more than 700 individuals, that ignores and thwarts the constitutionally required duration limitations of a bona fide civil commitment system.

These are not constitutionally insignificant "rounding errors" that are the unfortunate consequence of any human endeavor. There are strong reasons to conclude that there are hundreds of people held unconstitutionally because of the design of the MSOP. The Task Force Report found that MSOP "captures too many

people and keeps many of them too long." The District Court found that MSOP has the highest per-capita population, and the lowest rate of discharge in the nation. (Findings 26, 28 (Pet.App. 89).) Other state SOCC programs, dealing with similar (but smaller) populations, have discharged (fully or conditionally) hundreds, yet Minnesota had fully discharged no one, and provisionally discharged only three out of a population that exceeds 700. (Finding 25 (Pet.App. 88-89).) A study by Minnesota Department of Corrections Director of Research Grant Duwe concluded that "nearly two-thirds of these offenders [detained at MSOP] would be unlikely to be rearrested for another sex offense in their lifetime if they were released to the community."[4] Applying this "false positive" rate to the 700-plus people who are committed, we can conclude that over 400 human beings are being held unconstitutionally because of the MSOP's intentional thwarting of the duration limits.

MSOP's failure to adhere to the duration limits is not simply a sign that the program is not working properly. It is an intentional design feature of MSOP that other states have eschewed. It represents an intentional rejection of the core constitutional marker of

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[4] Grant Duwe, To What Extent Does Civil Commitment Reduce Sexual Recidivism? Estimating the Selective Incapacitation Effects in Minnesota, 42 J. Crim. Justice 193, 201 (2013). (Doc. No. 427 (February 20, 2014 Order) at 67 n.48 (citing Doc. No. 410 ¶ 2, Ex. 1, at 8).)

a genuine civil commitment scheme. The Court of Appeals' ruling allows no remedy for this misuse of civil confinement.

C. Constitutional Scrutiny of Civil Commitment Pays Heightened Attention to the "Purpose and Duration" of Confinement Schemes; It Includes, But Goes Beyond, Traditional "Strict Scrutiny."

1. Strict scrutiny is triggered by civil commitment.

Civil commitment entails a massive curtailment of physical liberty, implicating the "freedom from physical restraint" that the Court has held to be a "fundamental right." *Foucha*, 504 U.S. at 86. This deprivation requires the use of heightened scrutiny by the courts. Surveying the Court's civil commitment jurisprudence, Justice Kennedy observed that the Court has "often subjected to heightened due process scrutiny, with regard to both purpose and duration," deprivations of physical liberty that are outside of the criminal justice paradigm. *Id*. at 93 (Kennedy, J., dissenting).

Amici join wholeheartedly in supporting Petitioners' argument that the proper analysis of the constitutional claims presented here entails strict scrutiny. There can be no doubt that this Court's civil commitment scrutiny has had a bite that is characteristic of "strict scrutiny," imposing, for over 40 years, decisions that "will override a State's substantive policy choices, as reflected in its laws." *Foucha*, 504 U.S. at 116

(Thomas, J. dissenting). The scrutiny is also strict in the sense that the Court fittingly has imposed on states the burden of justification. *Foucha*, 504 U.S. at 119. Amici echo Petitioners' arguments pointing out that numerous state courts of final jurisdiction and federal courts have endorsed a strict scrutiny test for assessing civil commitment schemes. (Pet. at 17-18.)

2. Exemptions from the "great safeguards" are narrow and categorical; judicial scrutiny examines "purpose and duration."

The scrutiny the Court has used in civil commitment cases is more complicated than the straightforward interest balancing in other areas of constitutional law. While the compelling interest/narrow tailoring rubric describes the method at a general level, it should be considered a necessary, but not complete, description of civil commitment jurisprudence.

There are three key aspects:

First, the central question the Court has asked in its civil commitment cases goes beyond compelling interest/narrow tailoring. The question is not simply whether a liberty-deprivation scheme narrowly meets a compelling state interest. Rather, the Court has framed the question more precisely: whether the state has an interest that justifies the deprivation of liberty *outside of the charge and conviction paradigm of the criminal law*. This is a more demanding test for the state: it must show not simply that it has a compelling reason for taking away someone's fundamental right

to liberty – but also that it has appropriate grounds for doing so *outside* of the criminal justice rules.

Second, the Court has made clear that the departure from the conventional charge and conviction paradigm is not a free-form exercise of interest balancing, but rather a categorical analysis to determine whether the state program falls into one of the traditional categorical exceptions. In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Court identified the "carefully limited exceptions permitted by the Due Process Clause." *Foucha* frames the substantive due process question this way: Does the SOCC scheme fit within "only narrow exceptions" to the "charge and conviction" paradigm, including "permissible confinements for mental illness?" 504 U.S. at 82-83. Justice Thomas, in *Hendricks*, employed this categorical approach to uphold the Kansas SVP law. It was not simply that Kansas had an important interest in preventing sexual violence, but that the "mental abnormality" element in the law made an individual a "proper[] subject" for civil commitment. 521 U.S. at 539.

Third, the Court has consistently identified the key indicia for scrutiny of bona fide civil commitment as "purpose and duration." There are two purposes required for constitutional legitimacy, and one forbidden purpose. The two required purposes are safety (*see, e.g*., *Donaldson*) and mental health or medical treatment (*see, e.g*., *Foucha*). The forbidden purpose is punishment. *See Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring) (describing the "forbidden purpose" of punishment). Duration, as has been discussed, must

be calibrated to correspond to the existence of a proper purpose.

These topics for heightened scrutiny are interrelated: because civil commitment and imprisonment are both total deprivations of liberty, the key to establishing the absence of a forbidden punishment purpose is the presence of both the treatment/mental-health purpose and the durational limit. In other words, the way in which the state demonstrates that the prison-like curtailment of liberty is not unconstitutional punishment is by adhering both to the treatment purpose and to the durational limit.

Foucha clarified that the way to frame the interest analysis in the civil commitment context is to focus specifically on the nature of a state's interest in abandoning the great safeguards of the charge and conviction paradigm, and adopting an alternative confinement system. *Foucha* put the burden of justification squarely on the state:

> The State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.

Foucha, 504 U.S. at 82.

The cornerstone of a state's proof is its use of the civil commitment form for confinement. Bona fide civil

commitment accomplishes goals that the charge and conviction system does not, and its traditional legitimacy dispels the inference of a punitive purpose. But if the label "civil commitment" is just a sham, then the inference is justified that the state's alternative system of justice is really just a watered-down criminal justice system, and the state has not met its constitutional burden.

What is at stake is not simply the individual's fundamental right to be free of physical restraint. No less than the legitimacy of the criminal justice system is at stake; a failure to enforce constitutional limits could lead to the demise of "our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Foucha*, 504 U.S. at 83.

The gravity of this interest is reflected in the Court's universal assertion that punishment is a "forbidden purpose," taking the Court's scrutiny beyond the traditional notions of strict scrutiny. Punitive intent is a bright line invalidating even a scheme narrowly tailored to meet non-punitive purposes, no matter how compelling. In other words, strict scrutiny is, in this sense, necessary but not sufficient. As Justice Kennedy concurred in *Hendricks*:

> We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

521 U.S. at 373. Even if the scrutiny is not "strict," punitive purpose disqualifies the scheme. For Justice Thomas, who expressed skepticism about the level of scrutiny involved, *Foucha*, 504 U.S. at 94, punishment is not a legitimate purpose for confinement outside of the charge and conviction paradigm. *Hendricks*, 521 U.S. at 373.

In the Court's civil commitment jurisprudence, the forbidden purpose of punishment and the bona fides of a civil commitment system are opposite sides of the same coin. While a bona fide civil commitment program negates an inference of punitive intent, a sham civil commitment program compels the inference of punitive intent.

As discussed, the most persistent marker of bona fides is the durational limit. This is the core of Justice Thomas's reasoning in *Hendricks*:

> Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.

521 U.S. at 363.

Justice Kennedy's concurrence in *Hendricks* elaborates. For him, as well, the bona fides of the civil commitment form are directly tied to the forbidden purpose determination:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.

Id. at 371.

3. The forbidden purpose of punishment is ascertained from patterns of implementation.

In this case, the District Court examined 20 years of implementation of the MSOP and found that the persistent, intentional and official implementation of the program belied the State's promises that it would construct and operate a real civil commitment program. From this, the District Court concluded that the MSOP is systemically infected with the forbidden purpose of punishment. In looking beyond the optimism of legislative labels and litigation promises, the District Court followed this Court's well-established method for ascertaining the presence of forbidden purposes in diverse state-action contexts.

Given the enormity of the threat to individual liberty, it is not constitutionally sufficient for the State merely to disclaim intent to punish. As Justice Scalia observed: "It is unthinkable that the Executive could

render otherwise criminal grounds for detention non-criminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). Justice Kennedy, too, has warned about the need for continued vigilance to evaluate abusive implementation: "If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring). Continuing vigilance is required:

> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Id. Aware of the vast opportunity for abuse, Justice Kennedy warned:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.

Id. at 371.

How else than to examine actual implementation could a court make such a judgment about the sincerity of the espoused state purpose? Justice Scalia recognized that systematic and authoritative implementation could provide evidence negating seemingly conclusive legislative intent to create a civil scheme. In the context of a commitment statute deemed civil in the Double Jeopardy and Ex Post Facto context, where constitutionality turns on the nature of a "law," Justice Scalia wrote:

> 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 v. Young, 531 U.S. 250, 269-70 (2001) (Scalia, J., concurring).

There is hardly a detail of the decades-long implementation of MSOP that has escaped state court supervision. If, as the District Court has found, MSOP has been persistently operated in a punitive manner,

the state appellate courts have, in hundreds of 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, the legislature and the executive.

In multiple contexts, constitutional validity is dependent on the absence of a forbidden purpose, and existence or absence of that purpose is characteristically determined by an examination of the program's actual implementation. As early as *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (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." The Court went 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) 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 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. This circumstantial evidence extends 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*. 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. *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000) (noting "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."); *Edwards v.*

Aguillard, 482 U.S. 578 (1987) (State's articulation of purpose must be "sincere, not a sham."); *Wallace v. Jaffee*, 472 U.S. 38, 64, 75 (1985) (Powell, J., and O'Connor, J., concurring) (recognizing Court's ability to distinguish a sham purpose from a legitimate one).

4. The Court of Appeals' rule undercuts judicial oversight of the boundaries of civil commitment.

Civil commitment – involving as it does the sometimes opaque intersection of law and psychiatry – presents nuanced questions of law intersecting with complex systems for treatment and adjudication. But the complexity does not mean that the Constitution imposes no standards or that courts are helpless in enforcing boundaries around the limited and special confinement that mental health commitment permits. The Court of Appeals expanded the flexibility that states might have *within* those boundaries into a hands-off approach to defining and enforcing the boundaries themselves. That error calls for correction by this Court because it permits states to abandon, at their will, the constitutional limits on pre-crime confinement.

There is no doubt that states have areas of discretion in choosing the details *within* the bounds of a valid civil commitment scheme, but judicial deference to that discretion should not be confused with impotence in enforcing the boundaries *around* these systems. For

example, the Court has said that states have some discretion in defining the mental disorder element for their civil commitment schemes. *Kansas v. Crane*, 534 U.S. 407, 413 (2002). But there is no doubt about the enforceability of the constitutional prohibition from mounting a civil commitment scheme based on dangerousness alone. *Foucha*, 504 U.S. at 85. States may have some leeway in defining what level of dangerousness is sufficient, but the Constitution has no tolerance for a civil system that confines the non-dangerous. *Donaldson*, 422 U.S. at 575.

The Court has repeatedly said that a key characteristic of civil commitment is that it ends "immediately" when its justification no longer obtains. *Hendricks*, 521 U.S. at 368. True, the Court has framed this requirement in terms of the need for a "reasonable relationship" between the duration and the purpose of commitment. *Seling*, 531 U.S. at 265. That relationship might allow for some leeway in setting the precise standard for the conditions and duration of confinement, but it does not allow for a system that intentionally or systematically thwarts the implementation of the duration limits required by the Constitution. In short, the District Court properly condemned a system that tolerates and indeed facilitates the refusal to even exercise sound discretion about custody reduction and duration.

The core of the District Court's decision is its examination of the system established by the State pursuant to the Minnesota Civil Commitment and Treatment Act. Since the decision is a systemic

evaluation, it looked beyond the exercise of judgment in each individual case to determine whether the system as a complex whole is functioning as a bona fide civil commitment scheme. The findings of the District Court, which were not disturbed on appeal, show a long-standing and consistent pattern of disregard for the durational-limitation principle.

CONCLUSION

The Court of Appeals attributed no error to the District Court's detailed findings. It did not contest the fact that Minnesota has systematically thwarted the restoration to liberty of its wards who are not dangerous, and who can live safely in the community. Yet because the Court of Appeals judged this deprivation not "egregious, malicious or sadistic," it reversed the District Court's order to fix the problem and implement a practical durational-limitation system.

The Court of Appeals' decision renders meaningless the lodestar principle of this Court's civil commitment jurisprudence. It should be reversed.

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