No. 16-1394

In the Supreme Court of the United States

KEVIN SCOTT KARSJENS; DAVID LEROY GAMBLE; 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 HEBERT; ANN ZIMMERMAN, IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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Petitioners seek review of whether "Minnesota's indefinite sex offender civil commitment scheme violates the Fourteenth Amendment's substantive due process clause." Although phrased differently, the Parties agree that the question turns on the standard of review to be applied to Petitioners' claims. Because this case implicates the fundamental right of people to be free from involuntary government confinement, it presents an urgent and important case for review.

The facts are largely undisputed[1] and simple. Minnesota has the highest per capita civil commitment rate in the nation because, for over two decades, no sex offender has ever been fully discharged from that commitment. App. 88-89. Being committed as a sex offender in Minnesota is a life sentence; in large part because the statute does not require—and the Respondents do not undertake—regular, periodic assessments to make sure that those already committed continue to satisfy the commitment standards. If Respondents try to transfer or discharge someone, political leaders intervene and stop it.

The record reflects that Respondents admitted that for more than 400 individuals, they simply do not know if these committees continue to satisfy the commitment

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[1] Respondents admitted that the factual record is irrelevant to the dispositive issue of the appropriate standard. Opp. 36. Although the Eighth Circuit reversed the district court's judgment, it did not reverse or vacate any of the findings of fact. Moreover, the Eighth Circuit rejected Respondents' arguments about the pretrial procedures and they have no relevance to the question raised. App. 14-20.

standards because they lack a current assessment of their mental status and risk. App. 115, 128, 140. Respondents also admitted that they know of many other currently committed individuals who could safely be transferred to community settings or discharged. App. 98-99, 126. But when Respondents tried to transfer the first of these individuals in 2013, the Minnesota Governor intervened and ordered Respondents to stop the transfer. App. 99-100. Simply put, Respondents continue to confine hundreds of people that they cannot demonstrate satisfy the constitutional commitment standards and many that they admit, in fact, no longer satisfy the standards.

At trial, Petitioners demonstrated that Minnesota's commitment scheme violates due process because the statute—on its face and as applied—fails to require Minnesota to regularly assess and demonstrate that committed individuals continue to satisfy the constitutional standards for commitment. App. 133-34, c*ompare with Kansas v. Hendricks,* 521 U.S. 346, 364 (1997) (upholding Kansas commitment statute because commitments to be renewed each year).

Thus, Minnesota's statute fails to apply and safeguard the durational limit repeatedly recognized by this Court. *See O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) (holding that "even if [a] commitment was initially permissible, it could not constitutionally continue after that basis no longer existed"); *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 conditions, and to release [when] he no longer presents a danger to himself or others."). In upholding Minnesota's civil

commitment statute more than two decades ago, the Minnesota Supreme Court also recognized that any proper commitment must be durationally safeguarded. *Call v. Gomez,* 535 N.W.2d 312, 319 (Minn. 1995) (upholding statute "[s]o long as the statutory discharge criteria are applied in such a way that the person subject to commitment . . . is confined for only so long as he or she continues to need further inpatient treatment and supervision for his sexual disorder and to pose a danger to the public….").

Because Petitioners' fundamental right to liberty was threatened—the right to be free when the standard for commitment no longer exists—the district court applied strict scrutiny and held the statute unconstitutional facially and as applied. App. 146-47.

The Eighth Circuit reversed after first concluding that civilly committed sex offenders possess no such fundamental liberty right. The Eighth Circuit then relied on this Court's "reasonable relation to the purpose for which the individual is committed" language first propounded in *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), to justify application of a rational basis test to Petitioners' facial challenge. App. 21-22. Not surprisingly, applying that lowest standard, the Eighth Circuit rejected Petitioners' facial challenge. App. 24-27.

Petitioners also brought "as applied" due process claims based on the history of over 20 years of Respondents' operation of the Minnesota statutory scheme. As to Petitioners' as applied claims, the Eighth Circuit held that *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) controlled and therefore Petitioners must overcome a "shocks the conscience"

standard to proceed. App. 22-24. Rejecting the notion that Respondents' conduct was egregious, malicious or sadistic (as the Eighth Circuit described "shocks the conscience" requirements), the Eighth Circuit concluded—as a matter of law—that Petitioners' claims failed. App. 28-29.

This case is presents immediate issues that should be reviewed for three reasons:

First, the Eighth Circuit applied a rational basis test to Petitioners' facial challenge and a "shocks the conscience" standard to Petitioners' as applied challenge. Thus, the Eighth Circuit's opinion openly conflicts with decades of this Court's civil commitment and substantive due process jurisprudence and decisions by state courts of last resort, including the Minnesota Supreme Court.

Second, there are no factual or procedural disputes in this case that threaten to interfere with the central issue in this case: what standard should be applied to Petitioners' due process claims? The Parties agree that answering that question is dispositive.

Third, this cases raises an important and immediate concern that Minnesota is currently detaining sex offenders under its civil commitment statute that they know, or should know, no longer satisfy the constitutional standards for commitment. Because the fundamental liberty rights of these people are at stake, this Court should resolve the dispute about what standard applies to Petitioners' due process claims.

I. THE EIGHTH CIRCUIT'S RATIONAL BASIS TEST CONFLICTS WITH THIS COURT'S DECISIONS ABOUT DUE PROCESS PROTECTIONS AGAINST INVOLUNTARY DETENTION.

This Court has repeatedly held that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause …." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Although this Court has certainly repeated the "reasonable relation" language first articulated in *Jackson,* 406 U.S. at 738, in civil commitment cases, it has never equated that language with a "rational basis" test as the Eighth Circuit did here. App. 22. Instead, for more than forty years, this Court consistently required that civil commitment laws be narrow and carefully limited because of the fundamental liberty rights implicated by involuntary civil commitment. *Hendricks,* 521 U.S. at 356, 357-58.

For example, *Foucha*, made clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" and that the Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." 504 U.S. at 80 (citing *Jones v. U.S.,* 463 U.S. 354 at 361 (1983); *U.S. v. Salerno,* 481 U.S. 739, 750 (1987)). And although *Foucha* repeats the "reasonable relation" language from *Jackson*, it clearly holds that only "in certain ***narrow circumstances*** persons who pose a danger to others or to the community may be subject to ***limited confinement***…." *Id.* at 80 (emphasis added). The Eighth Circuit's

holding that persons who "pose a significant danger to themselves or others" do not possess "fundamental liberty interests," App. 21, openly conflicts with the Court's prior rulings and repeated finding of the basic constitutional principle that "[i]n our society liberty is the norm." *Salerno*, 481 U.S. at 755.

Respondents' reliance on *Jackson* to apply the rational basis test to Petitioners' facial challenge is misplaced. Opp. 21. In *Jackson*, this Court found that Indiana's procedure for pretrial commitment of incompetent criminal defendants violated due process. 406 U.S. at 731. After observing that "it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." *Id.* at 737-38, the Court concluded that it did not need to answer the broader question of the appropriate standard of review because Jackson's commitment failed to be relevant to any of the bases for exercising the Indiana's power of indefinite commitment. *Id.* Foreshadowing cases to come, the Court then cautioned that "[a]t the least, due process requires the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

Nor does *Addington v. Texas,* 441 U.S. 418 (1979), support the application of a rational basis test. The *Addington* Court faced the question of whether the "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process. *Id*. Although *Addington* addressed a different question than this case, it does offer another strut in support of

heightened scrutiny of civil commitments, recognizing that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* at 425 (*citing Jackson*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967)).

In requiring clear and convincing proof to support civil commitment, this Court recognized an important risk-sharing concept:

> "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."

Addington, 441 U.S. at 427.

Finally, Respondents incorrectly suggest *Kansas v. Hendricks* supports the determination that already committed individuals no longer have a fundamental liberty right. Opp. 22. *Hendricks* made clear that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Hendricks*, 51 U.S. at 357. Because this Court had previously held unequivocally that a committed individual is "entitled to release when he has recovered his sanity or is no

longer dangerous," *Jones,* 463 U.S. at 368; *Foucha,* 504 U.S. at 77, *Hendricks* recognized the critical fact that the Kansas statute required an annual review by the committing court. Thus, it was clear that under the Kansas statute, the state did not intend to keep an individual committed if he no longer satisfied the criteria. *Hendricks*, 51 U.S. at 364.

The Minnesota statute, as written and as applied, fails to require such periodic reviews thus relieving Respondents of the burden to demonstrate continued commitment is proper. Without such reviews, the State cannot and does not know whether hundreds of committed individuals are entitled to release because they no longer are dangerous or in need of further inpatient treatment and supervision for a sexual disorder. App.135-36; 140-41. For this reason alone, the statute fails to satisfy the constitutional requirements set forth in *Jones, Foucha* and *Hendricks*.

II. THE EIGHTH CIRCUIT'S OPINION EXPANDS THE "SHOCKS THE CONSCIENCE" TEST BEYOND THIS COURT'S PARAMETERS FOR IT.

Respondents, as the Eighth Circuit did, rely on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), to support the broad conclusion that Petitioners' as-applied substantive due process claim is a challenge to executive action that is subject to a "shocks the conscience" standard of review. Opp. 29; App. 22-23. This reading broadly expands *Lewis* and ignores many fundamental rights cases. *E.g. Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

Lewis presents a completely different due process claim than the one Petitioners allege here. *Lewis* involved section 1983 claims against a single executive actor who caused the death of a motorist during a high-speed chase. 523 U.S. at 833. There was no discussion of fundamental rights or the proper application of due process to a statutory scheme implemented over more than two decades. Rather, because of the specific claims alleged in *Lewis,* the Court adopted a "shocks the conscience" standard to impose a higher burden of proof for such constitutional claims against government officials than those found in common law torts. *Id.* at 848-49. There is nothing in *Lewis* to suggest that the Court meant to abrogate its long-standing fundamental rights analysis for cases where a plaintiff challenges legislation and demonstrates that the government has infringed on "fundamental rights" that are "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721. In those situations, the government must show that the legislative scheme is narrowly tailored to a compelling state interest. *Id.* at 721; *see also Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (finding a Washington nonparental visitation statute unconstitutional because it involved fundamental rights and did not meet a "heightened" protection test); *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (noting that fundamental liberty interests cannot be infringed without narrow tailoring); *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) (finding that fundamental rights are subject to strict scrutiny).

III. CONTRARY TO RESPONDENTS' CLAIM, THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF THE MINNESOTA SUPREME COURT AND OTHER COURTS OF LAST RESORT.

Respondents incorrectly maintain that the Minnesota Supreme Court did not apply strict scrutiny to review Minnesota's civil commitment statute. Opp. 35 (stating that "*Blodgett* did not apply strict scrutiny…."). *Blodgett*, however, recognized that "[d]eprivation or infringement of a fundamental right triggers strict scrutiny by a reviewing court, a level of scrutiny which requires the state to prove the existence of a 'compelling governmental interest' and to demonstrate that no alternative means are available that involve a lesser deprivation of liberty." *In re Blodgett,* 510 N.W. 2d 910, 915, fn 8 (Minn. 1994). If there was any doubt about the Minnesota Supreme Court's view on this matter, *In re Linehan* made it crystal clear. 557 N.W.2d 171, 181, 82 (Minn. 1996) (holding that "Under strict scrutiny, challenged legislation must be narrowly tailored to serve a compelling state interest…. We therefore consider whether the SDP Act is sufficiently narrow, as applied to a person suffering from APD to satisfy strict scrutiny []" and that "*Foucha*'s application of strict scrutiny to the continued commitment of a sane insanity acquittee did demand sound reasons for departing from the criminal justice system in the name of public protection.").

The same is true for other state court decisions. Although many of the courts reiterate the "reasonable relation" language from *Jackson*, they also find that a

fundamental liberty is at stake and strict scrutiny should apply *See Commonwealth v. Knapp*, 441 Mass. 157, 164 (Mass. 2004) (explaining that the right to be free from physical restraint is a fundamental right that must be narrowly tailored to further a legitimate and compelling governmental interest); *In re Treatment and Care of Luckabaugh*, 568 S.E.2d 338, 347 (S.C. 2002) (finding freedom from bodily restraint is at the core of the liberty protected by the Due Process Clause and applying strict scrutiny); *State v. Post*, 541 N.W.2d 115, 122 (Wis. 1995) (finding that freedom from physical restraint is a fundamental right and applying strict scrutiny); *In re Young*, 857 P.2d 989, 1000 (Wash. 1993), *superseded by statute as recognized in In re Detention of Thorell*, 72 P.3d 708, 713 (Wash. 2003) (finding civil commitment impinges on fundamental rights and triggers due process protections); *Atwood v. Vilsack*, 725 N.W.2d 641, 648 (Iowa 2006) (analyzing under strict scrutiny a substantive due process challenge to pretrial detention under sex offender civil commitment scheme).

To the extent lower courts have confused or conflated the language from *Jackson* and the "strict scrutiny" test, this Court needs to resolve that ambiguity to provide important clarification. It is critical that this Court resolve the conflict between the Eighth Circuit's holding that the Petitioners have no fundamental liberty interest and the decisions from other courts across the country.

IV. THIS CASE IS PERFECTLY POSITIONED FOR IMMEDIATE SUPREME COURT REVIEW.

As this Court has previously recognized, state and federal courts "remain competent to adjudicate and remedy challenges to civil confinement schemes arising under the Federal Constitution." *Seling v. Young*, 531 U.S. 250, 265 (2001). This is just such a case.

Petitioners' claim rest on more than twenty years of conduct, much of which is not disputed. Respondents admit that the factual record does not matter to determining the question of the appropriate standard of review in this case. Opp. 36. The only question is whether civilly committed sex offenders possess a fundamental liberty right that requires heightened scrutiny of Minnesota's civil commitment scheme.

This Court should resolve this question before the issues presented here arise again. *See* Petition at 23 (citing several cases that are pending in courts below raising similar challenges to sex offender commitment statutes). The Eighth Circuit's opinion in this case is already being relied upon by lower courts with adverse results for the plaintiffs in those cases. *See Van Orden v. Stringer,* No. 09-CV-00971, 2017 WL 2880348 at *5-6 (E.D. Mo, July 6, 2017) (finding that reconsideration was required in light of *Karsjens* and noting that the holdings "raise troubling questions as to whether civil commitment statutes can ever be challenged on as-applied substantive due process grounds" because, according to *Karsjens*, without a fundamental liberty interest, Plaintiffs' as-applied claim fails no matter how shocking the state defendants' conduct, including continued confinement of individuals who no longer

meet the criteria for commitment). This case presents a straightforward avenue to clarify the appropriate standard to apply in challenges to indefinite civil commitment statutes. *Id.,* at *6 (noting that the *Karsjens* opinion is controlling until overruled by the Eighth Circuit en banc, by the Supreme Court, or by Congress) (citations and internal punctuations omitted)).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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