No. 17-3093

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN R. VAN ORDEN, et al.,
Plaintiffs-Appellants

v.

MARK STRINGER, et al.,
Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Missouri
No. 4:09-CV-971-AGF
Honorable Audrey G. Fleissig

BRIEF OF PLAINTIFFS-APPELLANTS

Anthony E. Rothert
Omri E. Praiss
American Civil Liberties Union
of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63101
314-652-3114

John H. Quinn III
P.O. Box 221497
St. Louis, Missouri 63122
314-780-0691

Thomas E. Wack
7611 Wydown Blvd.
St. Louis, Missouri 63105
314-643-1887

Attorneys for Plaintiffs-Appellants

SUMMARY OF THE CASE

The ultimate issue for this Court to decide is whether criminally convicted sex offenders who have completed their prison terms can then be civilly confined for the remainder of their lives—not on the basis of what they have done in the past but out of fear of what they might do in the future.

Plaintiffs, representing a class of such persons, contend that, when they are no longer likely to re-offend, they are entitled, as a matter of substantive due process, to conditional release into the community. Defendants, state officials who exercise custody and control over the class, have ignored the requirements of the Missouri statute designed to permit conditional release and have thereby committed constitutional violations in their application of that statute. The only way to obtain release in Missouri has been to die. Based upon a "disturbing record," the district court initially ruled for Plaintiffs, but it later reversed itself based on its interpretation of a recent decision from this Court. The district court was right the first time. This Court's decision needs to be re-examined and clarified.

This case is of exceptional importance because it raises issues of fundamental liberty interests of the civilly-committed and what type of governmental conduct, if any, can violate their rights. Each side should be granted thirty minutes of oral argument.

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I. JURISDICTIONAL STATEMENT

On December 22, 2015, the district court entered interlocutory judgment in favor of Plaintiffs on the issue of liability alone (Addendum A hereto ("Add. A"); Joint Appendix [JA], at 451-510). The issue of remedies remained open for decision. On July 6, 2017, before the remedies hearing could occur, the district court, based upon its reading of *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), vacated its December 22, 2015 Liability Opinion to the extent it had granted judgment for Plaintiffs (Addendum B, at 13; JA 597-609) and then entered judgment in favor of Defendants (JA 610).

On August 2, 2017, Plaintiffs timely moved to alter or amend the judgment pursuant to Rule 59(b), F.R.C.P. (JA 611-14). Under Rule 4(a)(4)(A)(iv), F.R.A.P., their time to file an appeal began to run from the entry of the order disposing of that motion. The district court denied Plaintiffs' motion to alter or amend the judgment on September 18, 2017 (JA 615-16). Plaintiffs filed their notice of appeal that same day (JA 617-18). This appeal is from a final judgment that disposes of all parties' claims.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether Plaintiffs' substantive due process claim only requires a showing that Defendants' conduct constitutes deliberate indifference and need not rise to the level of malice or sadism.

County of Sacramento v. Lewis, 523 U.S. 833 (1998)

Davis v. Hall, 375 F.3d 703 (8th Cir. 2004)

Wilson v. Lawrence Cnty., 260 F.3d 946 (8th Cir. 2001)

Kostelec v. State Farm Fire & Cas. Co., 64 F.3d 1220 (8th Cir. 1995)

B. Whether the evidence, taken in its totality was sufficient to demonstrate deliberate indifference.

County of Sacramento v. Lewis, 523 U.S. 833 (1998)

Kansas v. Hendricks, 521 U.S. 346 (1997)

Murrell v. State, 215 S.W.3d 96 (Mo. banc 2007)

Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986)

C. Whether Plaintiffs have a fundamental liberty interest in freedom from unnecessary physical restraint and in avoiding punitive lifetime detention.

O'Connor v. Donaldson, 422 U.S. 563 (1975)

Foucha v. Louisiana, 504 U.S. 71 (1992)

In re Care & Treatment of Coffman, 225 S.W.3d 439 (Mo. banc 2007)

In re Care & Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2003)

D. Whether the shocks-the-conscience standard and the fundamental liberty interest test are disjunctive rather than conjunctive requirements for Plaintiffs' substantive due process claim.

United States v. Salerno, 481 U.S. 739 (1987)

Anderson v. Larson, 327 F.3d 762 (8th Cir. 2003)

Mendoza v. U.S. Immigration & Customs Enf't, 849 F.3d 408 (8th Cir. 2017)

Strutton v. Meade, 668 F.3d 549 (8th Cir. 2012)

E. Whether *Karsjens*, the sole basis for the district court's judgment in favor of Defendants, is distinguishable from this case.

Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017)

Minnesota Stat. Ann. §253D

R.S.Mo. §632.498

R.S.Mo. §632.504

F. Whether Plaintiffs' state law claims should survive.

Morgan v. Rabun, 128 F.3d 694 (8th Cir. 1997)

Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc., 821 F.3d 992 (8th Cir. 2016)

Lee v. Mukasey, 527 F.3d 1103 (10th Cir. 2008)

III. STATEMENT OF THE CASE

(a) The Parties and SORTS

Plaintiffs are civilly-committed residents of the Missouri Department of Mental Health's ("DMH") Sexual Offender Rehabilitation and Treatment Services ("SORTS") program located at facilities in Farmington and Fulton, Missouri. There are 130-140 SORTS residents at Farmington and about 75 at Fulton (Tr. 5:84).[*/] Each facility is considered to be a maximum security institution, with razor wire fences patrolled by armed guards (Add. A, at 8). Defendants are state officials responsible for various operations at SORTS and are sued in their official capacities.

(b) The Statute

Missouri is one of twenty states that has enacted a statute requiring the indefinite confinement of "sexually violent predators" ("SVPs") after they have completed their prison terms (Add. A, at 7; Tr. 5:23). An SVP is one "who suffers from a mental abnormality which makes [him] more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." R.S.Mo. 632.480(5). "More likely than not" means greater than 50% (Tr. 4:46-47). The

[*/] There are eight volumes of trial testimony. The cover page of each provides the volume number. Thus, for example, "(Tr. 5:84)" references Volume 5, page 84 of the trial transcript.

statute contains procedures that must be followed in order to confine a person as an SVP. R.S.Mo. 632.480-.492.

But the SVP Act recognizes that a person so adjudicated may later be conditionally released ("released"). That statute requires annual consideration of an individual's current mental condition and his likelihood to re-commit, and it contemplates the release of a person whose "mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released." R.S.Mo. 632.498.5(4). It contains other provisions designed to facilitate release, including reports to the supervisory courts of the annual examination of mental condition and authorization by the director of DMH of an individual's petition to those courts for his release. R.S.Mo. 632.498.1 and .501. Defendants' treatment procedures, described by the district court (Add. A, at 15-21), are intended to make release and re-integration into the community possible (Tr. 7:68).

(c) Statement of Facts

The district court made extensive findings of fact in its Liability Opinion (Add. A). Those findings led the court to conclude that "[t]he overwhelming evidence at trial—much of which came from Defendants' own experts—did establish that the SORTS civil program suffers from systemic failures regarding risk assessment and release that have resulted in the continued confinement of

individuals who no longer meet the criteria for commitment, in violation of the Due Process Clause" (Add. A, at 6-7).

The district court's fact findings were not altered in any way when it entered final judgment in Defendants' favor, a ruling made as a matter of law based solely upon its reading of this Court's *Karsjens* decision. What follows is a summary of the district court's key findings, supplemented as appropriate by citations to specific evidence.

(i) Annual Reviews

- Annual reviews are required by the SVP Act (Add. A, at 21; Tr. 4:10). There is one annual reviewer for all residents within each of the two SORTS facilities (Add. A, at 21). Annual reviews are the primary tool that supervisory courts use to evaluate whether a civilly committed person continues to satisfy the criteria for commitment, or whether he is entitled to release (Add. A, at 22; Tr. 7:157).

- Witnesses credibly testified that it is nearly impossible to obtain release without an annual review from SORTS recommending such a release (Add. A, at 22; Tr. 1:68).

- Despite the importance of these reviews, the reviewers at the SORTS facilities received no legal training regarding the SVP Act's criteria for release (Add. A, at 23). It is a problem when "a forensic doctor ... writing the annual

reports ... does not completely understand the standard for release" (Schlank depo. at 36).[†/] The Medical Director overseeing the SORTS facilities admitted that annual reviewers do not understand and inconsistently apply the legal standards for risk assessment under the Act (Add. A, at 24). They have been confused about how to apply the statutory standard for risk assessment (*Id*. at 23-24). There was no training to develop a unified clinical interpretation of the Act's risk assessment criteria for them (*Id*.; Tr. 7:152-53).

- In 2007, the Missouri Supreme Court ruled that SORTS residents are entitled to release when they are no longer likely to commit acts of sexual violence, even if they continue to suffer from the mental abnormality. *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 446 (Mo. banc 2007). In 2014, however, the Fulton examiner still thought he could not recommend a resident for release just because he had significantly lowered his risk for reoffending. In his view, the mental abnormality had to change as well (Tr. 6:48, 53-54; PX 3; Add. C, at 2). In 2015, the Fulton program coordinator believed that the statutory release provisions didn't cover someone with a debilitating disease, like a quadriplegic (Fluger depo. at 181). Because of *Coffman*, this continued focus on mental abnormality at the expense of risk was legally wrong. Defendants' expert testified that, in order to

[†/] Deposition excerpts read into evidence were not included in the transcripts. The parties have agreed upon the excerpts that were read and received, and they have filed them as part of the record on appeal.

move residents into the community, SORTS should have been focusing on reduction of risk without regard to mental abnormality (Tr. 6:27-28, 60).

• A SORTS manual imposed upon treatment providers and annual reviewers a release standard more onerous than the statute demands. It stated: "[t]he individual is … civilly committed to SORTS or DMH until such time that the Court determines that … he … *will not* engage in acts of sexual violence if discharged" (PX 123, p. 4; Tr. 4:151-53) (emphasis added). But the statutory release standard only requires that the person no longer be "likely" to engage in predatory acts of sexual violence. R.S.Mo. §§632.480(5) and 632.498.4, .5(3) and .5(4).

• There was no uniformity to the annual reports (Tr. 4:94, 96). Some were long, and others were short (PX 81, 163). Some were a "cut and paste job" (Tr. 3:169; PX 38). Some included information contrary to the reviewer's recommendation, while others did not (Tr. 4:13). The reviews had no standard format (Tr. 7:24, 94). Reviewers did not even interview their subjects (Tr. 7:227). Different reviewers considered different statutory provisions in their reports (Tr. 7:150-51).

• The annual reviews failed to include important information for the supervisory courts, such as treatment provider opinions regarding residents' lowered risk and potential for release (Add. A, at 24). Lower risks due to age,

infirmity, or successful treatment were not mentioned in the annual reviews (*Id*. at 24-26).

(ii) Director Authorization

- Petitions for release filed without the approval of the DMH director are subject to heightened requirements, including a frivolity review (Add. A, at 12-13; PX-13). If a petition filed without director authorization is found to be frivolous, the court must deny the petition without hearing (Add. A, at 12; R.S.Mo. 632.504). Even if a petition filed over the director's objection survives the frivolity review, the court must hold a preliminary hearing to determine whether the petitioner is entitled to a trial on the merits, and the petitioner bears the burden of proof at that hearing. R.S.Mo. §632.498.4. Petitions for release filed with director approval are not subject to any of these hurdles.

- In sixteen years, the DMH director had not authorized a single SORTS resident to petition for release, even though treatment providers and annual reviewers found residents who met the statutory criteria for release (Add. A, at 27; Gowdy depo. at 161).

- "The evidence established that the process for conditional release petitions is unduly lengthened and laden with unnecessary procedures" (Add. A, at 27). Prior to 2011, there were no guidelines for obtaining director approval (Tr. 7:42). The non-statutory policy for obtaining director authorization that DMH

established in 2011 required three or more levels of internal approval before the director could even consider authorizing a petition (Add. A, at 28; Tr. 7:53-55; Tr. Engelhart Vol. 2, Annex to Tr. 5 ("E2"):87). Only once had any resident gotten past the first step (Add. A, at 28; Tr. E2:88).

- A favorable annual review is not enough for director authorization because the process also requires successfully passing through all the internal steps (Tr. Engelhart Vol. 1, Annex to Tr. 5 ("E1"):36-37).

- When one of the steps is delayed due to the unavailability of someone in the approval chain, the process stops until that person comes back (Tr. E2:88-89).

- If a resident files a petition for release without director approval, Defendants terminate the authorization process altogether and refuse to reinstate that process, even if the petitioner withdraws his petition (Add. A, at 29; Tr. E1:44-46).

- Defendants stalled or blocked director approval even when the request for release was supported by treatment providers and/or annual reviewers (Add. A, at 55-56; Tr. 7:12-16; PX 274, 275). Defendants' internal multi-step process as a condition to director authorization is outside the statute and is "futile in practice" (Add. A, at 56).

(iii) Community Reintegration

A. SORTS Mission

• SORTS has had a vision of "no more victims," meaning that residents were to remain in custody until it was determined they *would not* (rather than the statutory "no longer … more likely than not") engage in acts of sexual violence if discharged (Add. A, at 15; Tr. 4:129-32; Tr. 5:70; Tr. 7:117-19; PX 10, 125). But "statistics tell us that no known sex offender is ever a zero risk" (Tr. 4:43). "No more victims" is inconsistent with the SVP Act and is also unrealistic (Add. A, at 15). Defendants consider the community rather than the SORTS residents to be their primary client (Tr. 2:69-70; PX 10).

• Consistent with the SORTS Mission Statement, Defendant Schmitt (now the COO) observed that "our first customer is the community and our first obligation is community safety. We are overly cautious. We cannot afford to have a new offense from anyone released if there is any way to prevent it" (Tr. 3:160-63; PX 24; Add. C, at 9-10).

B. Treatment Phases

• The last phase of treatment at SORTS is community reintegration (Tr. E2:47-48).

• Different types of treatment are provided at Farmington and at Fulton (Add. A, at 16). Both programs are organized into phases of indeterminate length

(*Id*. at 18). Residents in both programs may move up or down between levels as they progress or regress in treatment (*Id*. at 18-19). There has been no coordination between the Farmington and Fulton treatment programs (Tr. E2:56; Fluger depo. at 65).

- Progression through the various levels of the treatment programs is "tortuously slow" (Add. A, at 20). Treatment phases are vague (Schlank depo. at 54). There are no clear timelines within which residents who consistently demonstrate all behavioral goals can progress to the next phase of treatment (Add. A, at 21; Tr. 7:80, 249; Add. C, at 3). Less than 5% of Fulton residents reached Phase 6 of its seven phase treatment program, and none reached Phase 7 (Tr. 3:186; PX 48, at 2). Some Farmington residents reached the higher stages, but none were released (Add. A, at 20; Tr. E2:28). Someone committing a minor infraction (e.g. keeping a messy room) might have to wait six months before becoming eligible to move to the next level (Stinson depo. at 147-48).

- Defendants' expert testified that the absence of guidelines for treatment completion or projected time frames for phase progression leads to a sense of hopelessness and impedes the motivation of residents to participate meaningfully in treatment. Her report states "it is concerning that in fifteen years no client has been conditionally released into the community. This fact has led to a sense of

hopelessness, not only in clients, but also in staff" (PX 3 at 3, 4; Add. C, at 1; Add. A, at 20-21; Tr. 2:63-65; Tr. 5:66-67, 79, 167-68; Tr. 6:22, 31, 76).

C. "Release Without Discharge"

- The Annex facility at Farmington is supposed to help residents in the last phase and highest levels of treatment develop skills needed to live in the community. The Annex is behind the double strand, concertina wire, motion-detected fence of SORTS Farmington (Add. A, at 29; PX 197).

- When three Annex residents did manage to obtain release orders without director approval, DMH obtained a condition to the order that the release be "without discharge" from SORTS and that the "released" resident continue to live in the Annex (Add. A, at 30).

- As used by Defendants, "conditional release without discharge" means living within the Annex (Tr. 1:76; Tr. 6:58). "Conditional release without discharge" is a concept created by SORTS, not by the statute (Tr. 7:76).

- Experts for both sides agreed that conditional release, in the context of similar SVP civil commitment programs around the country, means release into the community (Add. A, at 30; Tr. 2:47). The SVP Act, at §§632.501 and .505, contemplate that as well (Add. A, at 55; Tr. 1:132).

- The success of a civil commitment program is measured by how many residents are successfully reintegrated into the community (Tr. 5:33, 44-45).

SORTS has not recommended that anyone be released into the community (Gowdy depo. at 161). SORTS has never had anyone released into the community (Tr. 5:36). There are no procedures in place at SORTS for release into the community (Engelhart depo. at 183).

- Defendants' expert declared "[s]ystemic difficulties and some flaws in staff members' efforts have led to a failure for any client to yet obtain a release and changes need to be made" (PX 3, at 8; Add. C, at 4). She added that "the failure [of SORTS] to discharge clients is a significant problem, and there appears to be some systemic difficulties and some characteristics of the program which may contribute to the failure to be released into the community."

- Unlike programs in states that have successfully treated and released many residents into the community, SORTS has no department or staff dedicated to doing so (Add. A, at 30-31; Tr. 5:34, 58; Tr. 6:59).

- SORTS residents who could be safely placed in the community include the aged and infirm, as well as those able to complete all treatment phases (Add. A, at 31).

D. Release Phase

- As with treatment, the release process at SORTS is a multi-step process. There are eleven steps within the release phase. The program's Director of Treatment testified that, according to the SORTS Treatment Manual, a resident

should be able to progress through all of the steps in twelve to eighteen months (Tr. E2:48-49). But sixteen years into the program, not one "released" SORTS resident had been discharged into the community within that time frame—or at all (Add. A, at 32).

- Defendants expressed concern that their treatment of Plaintiffs was "a disaster waiting to happen" (PX 29). In 2009, Defendant Blake, then the SORTS Chief Operating Officer, feared that a federal court looking at SORTS would make a "serious adverse ruling" (PX 76). Defendants acknowledged that their failure to release anyone would be viewed as a "sham" (PX 89; Add. C, at 5).

- In 2009-2011, SORTS was experiencing a bed shortage (Tr. 5:182-82). There were three possible ways to deal with that problem: (1) add more beds, (2) slow down admissions, (3) begin releasing residents (Tr. 6:110-12). Slowing down admissions was not an option because "admissions was what our facility was all about" (Tr. 6:111). That left options 1 and 3.

- Defendants chose to add more beds rather than to release any residents. Blake exchanged e-mails with other SORTS officials about the possible release of up to 16 residents to cottages outside of SORTS, five of whom could "pass the neighbor test easily" (PX 79; Add. C, at 6) (According to Defendants' expert, the neighbor test means "you release them when you would feel comfortable having them as your neighbor"; Schlank depo. at 143-44). At the same time, however,

Blake submitted annual reports to the courts stating that those on the list continued to suffer a disqualifying mental abnormality and should not be released. Blake recommended that Donaldson remain confined four days after he listed Donaldson at the top of the neighbor list (Add. C, at 6, 7; Tr. 4:125-26; Tr. 4:119-28; Tr. 7:6-9; PX 241-43, 246-47, 250, 273). Those reports should have mentioned that these residents had passed the neighbor test, but they failed to do so (Tr. 7:248; Schmitt depo. at 213). Defendants knew that a number of men had been successfully treated and were safe to be released, but they did nothing about it, failing even to include these findings in the annual reports to the supervisory courts (PX 79, 80, 88, 90).

- Instead of releasing any of these residents into the community, Defendants increased the number of beds at Fulton. As a result, they were able to keep all existing and new residents confined within SORTS (Tr. 6:153). Defendants did projections showing "[t]he rate of death and the rate of admission ought to balance out and no additional [capital improvements] should be necessary" (PX 74; Add. C, at 8). DMH's finance and budget manager responded "Looks good to me" (PX 75).

- Defendants' expert reported that Defendants were holding men for years after they had shown "consistent, positive behavior change" because they did not know how long the good behavior had to be observed (PX 3, at 5; Tr. 6:54, 55).

- SVP programs in other states deal with the same universe of people as Missouri does (Tr. 5:28-29; Tr. 7:216; Fluger depo. at 101, 187). While no one at SORTS has been released, 155 men have been released from the Wisconsin program (where Plaintiffs' expert David Prescott had been employed), and more than 100 have obtained freedom in Virginia (where Defendants' expert Anita Schlank is employed) (Tr. 5:9; Tr. 6:59; Tr. 7:26-27).

E. Aged and Infirm

- Since at least 2009, Defendants have been aware of the aging population within SORTS, including men whose progressive infirmities significantly reduced their risk to the public and made them candidates for release to skilled nursing homes (Add. A, at 37-38; Tr. 3:79-82; Tr. 4:67; Tr. 6:131, 145-50; PX 80, 88, 89). During that year Blake reported more than twenty residents over age 65 and nine medically fragile (Tr. 6:150; PX 93). Even before that, he wrote: "[w]e are a disaster waiting to happen. We have older residents with major physical issues" (Tr. 3:163; PX 29).

- At the time of trial, fourteen SORTS residents had already died in Defendants' care and custody (Tr. 5:157). Despite internal discussions for several years about adopting a procedure to "fast-track" the releases of aged, medically-frail and incapacitated SORTS residents, no such policy or procedure was ever established (Add. A, at 41-42; Tr. 250-51; Tr. 5:186; PX 103).

- Defendants projected a population of forty-one residents at SORTS over age sixty-five five years after trial and ninety-two residents over that age ten years after trial (Add. A, at 42).

F. Specific Examples

The district court also cited specific examples of deliberate indifference:

- The director refused to authorize the release of SORTS resident James Purk, whom Defendants knew to be on his deathbed (Add. A, at 38-39; Tr. 6:96). Purk had been in and out of the hospital with a long series of diseases and infirmities. The Director of Treatment considered him a low risk to offend and had proposed moving him from the hospital to a nursing facility rather than back to SORTS. But the annual reviewer, while aware of Purk's dire condition, still would not recommend his release and did not inform the supervisory court of the Director of Treatment's opinion (Tr. 3:86-96; PX 96, 97, 98, at 4, and 100).

- Tim Donaldson was the first name on the neighbor list (PX 79; Add. C, at 6). In May 2013, he was ordered released "without discharge." SORTS sent him to the Annex and required him to wear leg restraints (Tr. 1:97). Defendants later moved Donaldson out of the Annex and into another SORTS housing unit. All of that was done without a court order. Thereafter, the court ordered SORTS to release Donaldson into the community by a date certain. The court also denied the SORTS petition to revoke his conditional release, yet Donaldson remained

confined within a SORTS unit (Tr. 1:81-108; Tr. E2:19-25; Tr. 5:172; Tr. 7:70; PX 114, 116). Donaldson later committed suicide.

- James Lewis was another of the top five on the neighbor list. Defendants continued to hold Lewis within the Annex for more than three years after he was ordered released (Add. A, at 8, 32-33). In 2015, Lewis still lived there, even though the supervisory court found in January 2012 that he no longer suffered from a mental abnormality that made him likely to re-offend (Tr. 1:78; Tr. 5:173-74; Tr. 7:71, 73-74, 76).

- Marvin Morton had trouble breathing and was confined to a wheelchair, but his annual reports never recommended his release. Even after he could no longer push his wheelchair and was completely bedridden, the director refused to authorize his petition for release. Two SORTS treatment professionals did recommend release at his hearing, but the State opposed his petition anyway and offered testimony from an out-of-state retained expert who had never seen him, literally hours before Mr. Morton died, that he still met the criteria for confinement. Just prior to this hearing, a SORTS representative called the hospital to find out whether Mr. Morton had already died, which would have mooted the hearing. Mr. Morton did die the following day (Add. A, at 39-40; Tr. E1:48-50; Tr. 3:105-48).

(d) Relevant Procedural History

The case was filed on June 22, 2009 (JA 44). On September 30, 2011, the district court certified a class consisting of "persons who are, or will be, during the pendency of this action, residents of SORTS of the State of Missouri as a result of civil commitment" (JA 442-50).

After an eight-day bench trial, the district court entered its findings of fact and conclusions of law. In its December 22, 2015 Liability Opinion, it granted in relevant part Plaintiffs' claim that the Missouri SVP Act is unconstitutional as-applied by Defendants. The Court deferred consideration of the issue of remedies for a later phase of the case (Add. A, at 59).

After this Court's *Karsjens* decision in January 2017 and before the scheduled remedies hearing, the district court *sua sponte* ordered the parties to brief the effect of *Karsjens* upon this case. Subsequently, on July 6, 2017, the district court vacated its Liability Opinion and entered judgment in favor of Defendants (Add. B). It did so based solely on its reading of *Karsjens* (*Id*. at 11-13). The July 6, 2017 decision granting judgment in favor of Defendants is the ruling presented for review.

IV. STANDARD OF REVIEW

The applicable standards of review favor Plaintiffs on each of the issues presented.

Following a bench trial, the Court of Appeals reviews the district court's findings of fact for clear error and its legal conclusions *de novo*. *Lisdahl v. Mayo Found.*, 633 F.3d 712, 717 (8th Cir. 2011). Point A below (whether the shocks-the-conscience standard may be satisfied in this case by a showing of deliberate indifference), Point C (whether Plaintiffs have a fundamental liberty interest in freedom from unnecessary physical restraint and in avoiding punitive lifetime detention), and Point D (whether conscience-shocking conduct and a fundamental liberty interest are alternative rather than cumulative requirements for Plaintiffs' substantive due process claim) are issues of law subject to plenary review by this Court. The district court's legal conclusions in entering judgment for Defendants are entitled to no deference and must be reviewed *de novo*.

Point B (whether Defendants' conduct toward Plaintiffs constituted deliberate indifference) is a question of fact. *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011); *Davis v. Hall*, 375 F.3d 703, 718 (8th Cir. 2004) ("deliberate indifference is a classic issue for the fact-finder"). Its findings are subject to the clearly erroneous standard of review. Fed. R. Civ. P. 52(a)(6). There is a strong

presumption that the district court's factual findings are correct. *Urban Hotel Dev. Co. v. President Dev. Grp., L.C.*, 535 F.3d 874, 879 (8th Cir. 2008).

Point E (whether *Karsjens* is distinguishable from this case) presents a mixed question of law and fact because it requires the consideration of legal concepts and the exercise of judgment about the values underlying legal principles. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995). Such questions are reviewed *de novo*. *Id*. This Court owes no deference to the district court's conclusion that *Karsjens* mandated judgment for Defendants.

Point F (whether the district court erred in denying Plaintiffs' motion to alter or amend the judgment) is reviewed for abuse of discretion. *Sipp v. Astrue*, 641 F.3d 975, 980-81 (8th Cir. 2011). The district court did abuse its discretion because, in concluding that Plaintiffs had "abandoned" their state law claims, it committed an error of law. *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016).

V. SUMMARY OF ARGUMENT

Underlying the reluctance to release sex offenders is the common societal perception that these people are incorrigible. Yet scientific evidence now demonstrates that the recidivism rate for sex offenders who have been treated is low and that the aging process accelerates the decline in recidivism. In addition, the statute itself contains a broad series of protections against recidivism. The whole premise of Missouri's civil commitment program for SVPs is that these people *can be* rehabilitated. If they can't, then the statute is punitive and has no constitutional basis.

One strand of substantive due process analysis is conscience-shocking conduct. In *Karsjens*, this Court concluded, probably because the issue was never directly presented, that a defendant's conduct must be inspired by malice or sadism in order to be conscience-shocking. But the U.S. Supreme Court has drawn with a finer brush, depending on whether or not the defendant has the opportunity to deliberate before taking action. When circumstances provide adequate time for reflection, the defendant can be liable if he acted with deliberate indifference.

Here Defendants have had *years* to reflect upon their policies and practices in connection with the statutory release provisions, and during those years they feared that federal courts would find the SORTS program to be a "sham"—as the district court later did in its Liability Opinion. In circumstances of adequate time

for reflection, the Supreme Court has held that substantive due process is violated when the totality of the evidence is sufficient to demonstrate deliberate indifference. The Supreme Court's paradigmatic example of deliberate indifference is "the custodial situation of a prison" in which the inmate's interests are ignored. Civil commitment in a maximum security facility is indistinguishable from that situation. In its Liability Opinion, the district court found that Defendants' conduct constituted deliberate indifference and was conscience-shocking: "Defendants' nearly complete failure to protect [Plaintiffs] … is so arbitrary and egregious as to shock the conscience" (Add. A, at 57). This finding, like all the others, was never eliminated or even changed.

The *Karsjens* malice/sadism requirement must also be rejected in this case as inconsistent with the many decisions of this Court that utilize the deliberate indifference standard when defendants have ample opportunity to reflect on their decisions. These other Eighth Circuit decisions recognize and apply the Supreme Court's shocks-the-conscience test, while *Karsjens* does not.

The facts demonstrate a classic case of deliberate indifference. The reason for Defendants' failure to support anyone's release for sixteen years flows from their disregard for the Missouri SVP statute. It should go without saying that any individual who no longer meets the statutory criteria for commitment must be released from custody. But that basic premise has eluded the Defendants.

Due process requires periodic reviews of the continuing need for institutionalization. The U.S. and Missouri Supreme Courts have held that the statutory annual review mechanism ensures that an initially permissible involuntary commitment cannot continue once the basis for it no longer exists. But the annual reviews Defendants submitted to the supervisory courts have systematically omitted critical information, excluding, for example, any mention of professional opinions that some Plaintiffs (in the language of the statute) are no longer "likely" to re-offend and are thus entitled to release. Critically, Defendants failed to train their annual reviewers on the proper legal test for continued confinement and allowed them to apply erroneous legal standards. Annual reviewers thus failed to follow the explicit directive of the Missouri Supreme Court to recommend release for anyone no longer likely to re-commit if released, even if he continues to suffer a mental abnormality.

Defendants corrupted other statutory requirements. A petition for release filed with director approval proceeds directly to trial, where the State has the burden of clear and convincing evidence in order to prevent release. But a petition for release filed without director approval makes it extremely difficult for the SORTS resident to even obtain a trial, much less release. Over sixteen years, the DMH director never authorized a single petition for release, thereby imposing the heightened release requirements on the SORTS resident in every case. Instead,

Defendants created a tiered, bureaucratic and extra-statutory process that thwarted any chance to obtain director approval. To prevent releases into the community, they unilaterally erected a non-statutory release "without discharge" program, whereby anyone ordered released by a supervisory court nevertheless remained confined inside the facility's razor-wire fence. In addition, Defendants continued to confine the aged, infirm, and dying—those who no longer pose a threat to anyone.

Karsjens did not hold that the civilly committed, such as Plaintiffs, lack a fundamental liberty interest, and the district court erred in ruling to the contrary. The Supreme Court has consistently held that freedom from unnecessary physical restraint is a fundamental right. This right precludes punitive lifetime detention for those who are civilly committed after they have already completed their prison terms. Moreover, state-created liberty interests are entitled to protection under the Fourteenth Amendment's Due Process Clause, and the Missouri Supreme Court has held that unlimited civil commitment of persons classified as sexually violent predators impinges on their fundamental right of liberty. Society's interest in committing an individual with a mental abnormality that causes him to be dangerous is overridden by the individual's liberty interest when he is no longer "likely" to engage in predatory acts of sexual violence.

The fact findings in the district court's Liability Opinion demonstrate that Defendants' abuse of the statute's requirements for annual evaluations to the supervisory courts, for director approval of petitions for release, and for community reintegration have thwarted the release of many SORTS residents. The Missouri statute and the decisions construing it explicitly recognize that Plaintiffs' liberty interest is fundamental.

This Court need not consider the *Karsjens* dual demand for conscience-shocking conduct *and* a fundamental liberty interest because Plaintiffs have established both. But if for any reason this Court were to decide that one or the other is lacking here, it would then need to address the inconsistency between *Karsjens* and the majority rule in other Circuits and, more importantly, in several decisions of this Circuit itself. The decision upon which *Karsjens* rests its conjunctive requirement is unclear and is the product of a fractured court. If necessary, the disjunctive/conjunctive issue should be reconsidered en banc.

Karsjens is also readily distinguishable from this case on both the issues and the facts. Two of the three statutory elements at issue in this case were not even present in the Minnesota litigation. The six summary grounds supporting the Minnesota district court's ruling are either absent from or inapplicable to this case. Small wonder the collective conscience of the *Karsjens* panel was not shocked.

VI. ARGUMENT

We acknowledge at the outset the public fear and animosity toward sex offenders. Some believe that anyone who commits such crimes is bound to repeat them and that no sex offender should ever see the light of day. Sixteen years ago, even the U.S. Supreme Court characterized sexual recidivism as "frightening and high," *McKune v. Lile*, 536 U.S. 24, 34 (2002). The Court cited a manual from the Department of Justice, Nat. Institute of Corrections, A Practitioner's Guide To Treating the Incarcerated Male Sex Offenders xiii (1988), stating "[t]he rate of recidivism of treated sex offenders is fairly estimated to be around 15%." *Id*. at 33.

Yet the scientific evidence developed since then demonstrates that the recidivism rate for treated sex offenders is neither frightening nor high. The Sixth Circuit recently relied on an empirical study concluding that sex offenders are less likely to repeat than other criminals. *Doe v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (citing a later DOJ report: Lawrence A. Greenfield, *Recidivism of Sex Offenders Released From Prison In 1994* (2003)). *See* Ira Mark Ellman, Tara Ellman (2015), *Frightening And High: The Supreme Court's Crucial Mistake About Sex Crime Statistics*, University of Minnesota Digital Conservancy, http://hdl.handle.net/11299/188087.

Based on the "credibl[e]" evidence of record, the district court concluded that "recidivism rates for sex offenders generally may be overstated" (Add. A, at

10). The recidivism rate in Florida for those treated and released is 3.2%, and in Canada is 5.5% (Tr. 2:52; PX 131)—far less than the 15% rate stated in the old DOJ study. The district court pointed to evidence demonstrating that sex offenders have the lowest rates of recidivism among five categories of felony offenders in Missouri and that the rate of recidivism "drops dramatically as sex offenders age beyond 60 years" (Add. A. at 10, n.3).

Further, as an individual ages, the risk of sexual re-offense decreases. R. Karl Hanson, *Recidivism and Age, Follow-Up Data From 4,673 Sexual Offenders*, 17 Journal of Interpersonal Violence No. 10, October 2003 (recidivism declines based on age of sex offenders, and there is a very low recidivism rate past age 60 even for those released without statutory conditions); H.E. Barbaree & R. Blanchard (2008), *Sexual Deviance Over The Lifespan: Reduction In Deviant Sexual Behavior In the Aging Sex Offender*, in D.R. Laws & W.T. O'Donohue (Eds.), *Sexual Deviance: Theory, Assessment, and Treatment* at 45-49 New York: Guilford Press (the expression or performance of sexually deviant behavior decreases with age).

To argue that the State may permanently confine these persons because sex offenders can't really be cured is both wrong and self-defeating. SVP laws pass constitutional muster only if they are based on rehabilitation rather than punishment or deterrence. To the extent Defendants would justify their conduct on

the grounds that the effects of treatment are uncertain, then the statute as-applied cannot withstand scrutiny.

Equally important, the Missouri SVP Act contains numerous conditions that operate as safeguards to prevent repeated offenses. First, a supervisory court can order release only when the evidence demonstrates that the individual is no longer likely to re-offend. R.S.Mo. §632.498.5(3). Second, the statute sets forth no less than twenty *mandatory* conditions to any release (Tr. 7:148)—including state supervision; prohibitions against any "activity that involves contact with children" without DMH approval; possession of pornographic material; association with anyone convicted of a felony; and so on. R.S.Mo. §632.505.3. Under subsection 21, the supervisory court is free to impose any number of additional conditions. *See* R.S.Mo. §632.505.3.

A. CONSCIENCE-SHOCKING CONDUCT IN THIS CASE IS MEASURED BY A STANDARD OF DELIBERATE INDIFFERENCE RATHER THAN OF MALICE OR SADISM.

As the district court pointed out (Add. A, at 8), *Karsjens* stated that "the alleged substantive due process violations must involve conduct 'so severe[], so disproportionate to the need presented, and so inspired by malice or sadism … that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" 845 F.3d at 408. But the district court observed that, in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court distinguished

between cases in which "actual deliberation is practical," such as the "custodial prison situation," and those in which "decisions [are] necessarily made in haste, under pressure, and frequently without the luxury of a second chance" (Add. B, at 12-13). The court below correctly observed that *Karsjens* "did not discuss this distinction when determining that the Minnesota defendants' conduct did not shock the conscience," but it nevertheless believed it was bound by *Karsjens* rather than by *Lewis*. *Id* at 13.

In *Lewis*, the Supreme Court articulated a bright line distinction between settings in which the defendant has ample opportunity to reflect and those where a split-second decision is necessary. 523 U.S. at 851-53. The difference is one of time and pressure. In a high speed police chase such as in *Lewis*, the officer must make a hasty decision and thus should not be held liable unless he intended to injure the plaintiff. But when defendants have ample time to make unhurried judgments, their "deliberate indifference" shocks the conscience. *Id*. at 851, 853. *Lewis's* example of deliberate indifference—the custodial prison situation where the State fails to adequately provide care for its inmates—is analogous to this case. *Id*. at 851-52. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id*. at 853. This case concerns a textbook custodial prison situation with full opportunity to deliberate. There is not a shred of evidence that any of Defendants' conduct

occurred under time pressure or in a moment of stress, with concomitant potential for error.

It is unclear why, in light of *Lewis*, the *Karsjens* panel applied an actual malice test to a situation in which the Minnesota defendants had years to reflect and deliberate on its policies and practices. That probably happened because the plaintiffs there failed to argue the *Lewis* distinction until *after* the panel's decision—in their Petition for Rehearing. Prior to the panel's decision, the Minnesota plaintiffs consistently refused to apply the conscience-shocking standard which would have triggered such an analysis. *See Karsjens v. Piper*, No. 15-3485 (8th Cir. 2016), Brief of Appellees at 60-62. It is not the appellate court's role to rule upon issues never properly presented.

When the issue has been clearly litigated, however, this Court has followed the *Lewis* deliberate indifference standard. *See, e.g.*, *Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016); *Wilson v. Lawrence Cnty.*, 260 F.3d 946, 957 (8th Cir. 2001); *Putnam v. Keller*, 332 F.3d 541, 548 (8th Cir. 2003).

At least one decision of this Court mandates the deliberate indifference test for this case. In *Davis v. Hall*, 375 F.3d 703 (8th Cir. 2004), defendants held the plaintiff for 57 days after he was ordered released. In sustaining plaintiff's §1983 claim, this Court cited *Lewis* for the proposition that "prison is the quintessential setting for the deliberately indifferent standard because 'in the custodial situation

of a prison, forethought about an inmate's welfare is not only feasible but obligatory.'" *Id.* at 718.

The "prior panel rule" does not support the application of *Karsjens* on this issue. That rule states that "[o]ne panel of this Court is not at liberty to disregard a precedent handed down by another panel." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir. 1987). But it does not say what to do when there are *two conflicting* prior decisions—on the one hand, *Karsjens* (malice or sadism even when time to deliberate) and on the other, cases like *Davis* and *Wilson* (deliberate indifference whenever time to deliberate).

When prior panel decisions of this Court conflict, a subsequent panel is free to follow that decision which is more persuasive and faithful to the law. *Eggleton v. Plasser & Theurer Export*, 495 F.3d 582, 588 (8th Cir. 2007); *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000); *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995). The decisions of this Circuit that follow *Lewis* are clearly more persuasive and faithful to the law. We acknowledge that some members of this Court would prefer a rule that would make the first panel decision controlling. *See Williams v. NFL*, 598 F.3d 932 (8th Cir. 2009). But because *Karsjens* was decided *after* the decisions adopting the deliberate indifference standard, Plaintiffs would prevail under that approach as well.

B. THE EVIDENCE, TAKEN IN ITS TOTALITY, WAS MORE THAN SUFFICIENT TO DEMONSTRATE DELIBERATE INDIFFERENCE.

To reiterate, the district court's Final Judgment decision did not eliminate or even modify any of the fact findings made in its pre-*Karsjens* Liability Opinion. In fact the district court told Defendants' counsel post-*Karsjens* "I have found the facts and you will have to live with them for now" (6/23/17 Tr. at 7). "In finding Defendants' conduct conscience-shocking in its Liability Opinion, [this] Court, under *Lewis*, 523 U.S. at 580, did not assume the standard required malice or intent to harm" (Add. B, at 12, n.7). The only reason the district court reversed itself was its belief that *Karsjens* demanded that result whenever Defendants' conduct did not amount to malice or sadism.

Lewis analyzed three categories of conduct—first, *negligently* inflicted harm is never actionable because it is "beneath the threshold of constitutional due process," 523 U.S. at 849; second, intent-to-harm is conscience-shocking conduct only when the defendant lacks time to reflect, *id*. at 855; and third, in the intermediate range of deliberate indifference, inaction can be conscience-shocking when the defendant has had adequate time to make unhurried judgments, *id*. at 851, 853.

The district court's Liability Opinion was clearly not predicated on mere negligence. Based on "the disturbing record presented at trial," the court found that "Defendants' nearly complete failure to protect [Plaintiffs] … is so arbitrary

and egregious as to shock the conscience" (Add. A, at 57). This language reflects conduct far more serious than a mere failure to exercise reasonable care. So does its description of the release phase of Defendants' treatment program as a "sham" (*Id*. at 54); its use of the phrase "punitive lifetime detention" to define Defendants' failure to implement any community reintegration program (*Id*. at 55); and its choice of the term "unconstitutional punishment" to portray the director's abdication of his duty to authorize petitions for release to those no longer likely to re-offend (*Id*. at 56).

At the same time, the district court's Final Judgment decision necessarily means that, in its view, the "inaction" it already found to be "arbitrary and egregious" (*Id*. at 57) did not rise to the level of malice or sadism. Because the court eliminated both negligence and malice/sadism, the only possible conclusion is that the court found Defendants' conduct demonstrated the intermediate level of deliberate indifference.

Lewis demands "an appraisal of the totality of facts" (523 U.S. at 850, quoting *Betts v. Brady*, 316 U.S. at 462), but *Karsjens* looked at Defendants' misdeeds separately rather than holistically: "None of the six grounds upon which the district court determined [plaintiffs' as-applied claims were violated] satisfy the conscience-shocking standard." 845 F.3d at 410. Taken in its totality, however,

the evidence set forth in the Statement of Facts above does reflect the deliberate indifference *Lewis* holds is sufficient for a case like this.

Plaintiffs do not rest solely on the dearth of releases over a sixteen-year period. This case focuses on Defendants' rejection of the very statutory mechanisms designed to make Missouri's SVP Act constitutional by providing for release of those no longer likely to re-offend. The first of these is the requirement for annual reviews to the supervisory courts. Due process requires periodic reviews of the continuing need for institutionalization. *Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir. 1986). If the basis for commitment ceases to exist, continued confinement violates the substantive liberty interest in freedom from unnecessary restraint. *Id*. A key reason the Supreme Court upheld the facial validity of the SVP Act in *Kansas v. Hendricks*, 521 U.S. 346 (1997), was the statute's periodic review requirement. It showed that "Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." *Id.* at 364. In *Murrell v. State*, 215 S.W.3d 96, 105 (Mo. banc 2007), the Missouri Supreme Court concluded that "[t]he annual review mechanism ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exist."

Of course, the duty to provide periodic assessments to the supervisory courts carries with it a duty to do so accurately and completely. Yet here the district court found those reports to be constitutionally defective. Defendants:

(a) failed to train annual reviewers on the proper legal standard for release under the SVP Act, long after the 2007 Missouri Supreme Court *Coffman* decision explained it; and thus the reviewers applied a false legal standard, prejudicial to Plaintiffs, in their annual reports (Add. A, at 23-24);

(b) excluded from those reports the opinions of treatment providers regarding some residents' lowered risk and their potential to be released (*Id*. at 24);

(c) said nothing about the dramatically lowered risk of the aged, infirm, and dying (*Id*. at 26); and

(d) failed in their reports to identify those residents who passed the "neighbor test" for living in the community (*Id*. at 24-26).

Director authorization is another significant element in Missouri's statutory release process. A petition for release filed without director approval is subject to a "frivolity" review that may lead to dismissal of the petition without a hearing. R.S.Mo. §632.504. Even if the petitioner survives this frivolity review, the supervisory court must hold a preliminary hearing to determine whether he has the right to a trial. At this hearing, the plaintiff bears the burden of proving he no longer suffers from a mental abnormality making him likely to engage in acts of

sexual violence if released. R.S.Mo. §632.498.4. In light of these heightened requirements, supervisory courts have generally rejected petitions for release filed without director authorization. With director approval, however, the threshold requirements do not apply, and the case proceeds directly to trial, where the State must prove by "clear and convincing evidence" that the Plaintiff is likely to commit predatory acts of sexual violence if at large. R.S.Mo. §632.498.5(3).

The DMH director has refused to authorize *any* petition for release, even though treatment providers and annual reviewers identified Plaintiffs who met the statutory criteria for release (Add. A, at 27-28). Defendants also erected a non-statutory, multi-step process conditional to obtaining director approval, in which only one plaintiff in sixteen years progressed beyond the first step (*Id*. at 28). Defendants terminated the director authorization process for any plaintiff who became tired of waiting and filed a petition on his own (*Id*. at 29). For all these reasons, the district court ruled that the director "has effectively abdicated his duty to authorize petitions … for persons not likely to re-offend" (*Id*. at 55). The director did so in a systemic pattern over sixteen years.

The court's findings on community reintegration are equally telling. Defendants considered but then rejected as candidates for release those whom they believed suitable for living in off-premises cottages or skilled nursing facilities (*Id*. at 24-25). They decided to expand Fulton rather than to support those entitled to

release (*Id*. at 26). They established and used another extra-statutory program, i.e. "release without discharge," that indefinitely keeps those who obtained court ordered releases within the maximum security facility (*Id*. at 29-30, 32). Defendants never dedicated any staff for release into the community (*Id*. at 31). Nor did they ever contract for housing or other services within the community (*Id*. at 20, 33).

Defendants were aware of scientific research concluding that "[l]ike other criminals, sex offenders tend to age out of criminality by their forties, making endless incarceration both pointless and wasteful" (PX 16; Tr. 1:135). Defendants' annual reviewer acknowledged that the risk to reoffend goes down with age (Tr. 7:84, 170).

In 2014, a SORTS representative sent the current DMH director a newspaper article entitled "Is Missouri's sex crime program a ticking time bomb?" to which he responded: "Yep, saw it. Yawn" (Tr. 3:211; PX 68, 69; Add. C, at 11-12).

Taken in its totality, the evidence is far more than sufficient to support a finding of deliberate indifference.

C. PLAINTIFFS HAVE A FUNDAMENTAL LIBERTY INTEREST IN FREEDOM FROM UNNECESSARY PHYSICAL RESTRAINT AND IN AVOIDING PUNITIVE LIFETIME DETENTION.

Ever since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), courts have considered as-applied challenges to the constitutionality of legislative enactments. The

overriding reason why the Missouri SVP Act is unconstitutional as-applied is that Defendants have failed to implement its provisions for securing Plaintiffs' fundamental liberty interests, the annual review process, the director authorization procedure, and the release protocol.

The district court erroneously construed *Karsjens* to mean that "claims substantially similar to the ones alleged here do not implicate a fundamental liberty interest" (Add. B, at 11-12). While recognizing that such an interpretation raised "troubling questions as to whether civil commitment statutes can ever be challenged on as-applied substantive due process grounds," the court nonetheless adhered to its reading of *Karsjens*.

Karsjens addressed the issue of fundamental interest in two places—Sections II D ii and II C i of the opinion. Neither is concerned with the kind of interest at stake here. The opening paragraph of Section II D ii deals with whether the civilly committed have a fundamental right to a *treatment* program that would end their indefinite confinement. Stating that the U.S. Supreme Court had never recognized a fundamental right to such treatment, the *Karsjens* panel declined to do so itself. It used the term "treatment" no less than four times within that paragraph, but never considered the issue of a fundamental liberty interest anywhere in that discussion.

In Section II C i, the panel focused upon Minnesota's right to commit those who are unable to control their behavior and who pose a threat to public health and safety. 845 F.3d at 407. In considering the facial (but not as-applied) challenge to the statute, the panel declared the absence of any fundamental right at the *commitment stage*. But this litigation has nothing to do with commitment and everything to do with release. This case is concerned with the nature and duration of confinement *after* the individual is no longer "likely" to re-commit. R.S.Mo. §§632.498.4 and .5(4).

The *Karsjens* panel was not required to reach the question of plaintiffs' fundamental liberty interest, and it did not do so. Because it concluded that conscience-shocking conduct was required for a substantive due process violation and that Defendants' conduct was not conscience-shocking, the panel did not have to consider the fundamental liberty interest issue at all.

1. Rulings by the U.S. Supreme Court

Defendants maintain that the SORTS residents have no fundamental right to liberty, even when the state actors know they no longer meet the criteria for confinement. Their position is wrong as a matter of law.

The Supreme Court has repeatedly affirmed the fundamental liberty interest at stake in this litigation, the freedom from unnecessary physical restraint. "Freedom from imprisonment—from government custody, detention, or other

forms of physical restraint—lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "Freedom from physical restraint [is] a fundamental right." *Foucha v. Louisiana*, 504 U.S. 71, 80, 86 (1992). The term "liberty" in the Due Process Clause "without doubt" entails "freedom from bodily restraint." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

This freedom exists in the civil commitment context. *In re Gault*, 387 U.S. 1, 50 (1967) ("[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'"); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty which requires due process protection"); *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) ("We have recognized that, for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment' of liberty … and in consequence 'requires due process protection'") (quoting *Addington*).

Plaintiffs retain a fundamental liberty interest because the whole basis for their commitment is rehabilitative, not punitive. Punishment is the exclusive province of the criminal justice system. In *Hendricks*, 521 U.S. at 373, Justice Kennedy, whose concurring opinion was the swing vote, wrote: "[w]hile incapacitation is a goal common to both the criminal and civil system of confinement, retribution and general deterrence are reserved for the criminal

system alone. … If civil confinement were to become a mechanism for retribution or general deterrence, … our precedents would not suffice to invalidate it."

That rationale is especially compelling here because these Plaintiffs have already served their criminal sentences but were placed in confinement again based on fear of what they might do in the future rather than on what they have done in the past. "[J]ailing of persons by the courts because of anticipated but as yet uncommitted crimes" cannot be reconciled with traditional American law. *Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., sitting as Circuit Judge), *aff'd on other grounds sub nom. Dennis v. United States*, 341 U.S. 494 (1951). "Incarceration for a mere propensity is punishment not for acts, but for status." *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969).

Yet SORTS sees its role as punishment rather than rehabilitation. SORTS expressed concern that its certifying body would see that "is not run as a medical facility and therefore does not qualify for Medicare funding" (PX 206; see Schmitt depo. at 68). Another official spoke more directly: "I believe that one of the issues [with Medicare funding] is that **in our correspondence we have referenced the SVP clients as prisoners rather than patients**" (Tr. 4:77-81; PX 104; Add. C, at 13) (emphasis added).

The Supreme Court has repeatedly invalidated state laws that allow for the continued confinement of persons whose civil commitment is no longer justified.

Jackson v. Indiana, 406 U.S. 715 (1972) (indefinite pre-trial commitment of incompetent criminal defendant violates due process); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental patient deprived of his right to liberty when held as mentally ill but not dangerous); *Foucha*, 504 U.S. at 73-75 (violation of due process to continue to confine person found not guilty by reason of insanity but who has regained his sanity, even though he may remain dangerous).

O'Connor is strikingly similar to this case. There a civilly-committed patient sued a state hospital and its superintendent under §1983, alleging they had deprived him of his constitutional right to liberty by rejecting his requests for release, even though he was not dangerous to himself or others. The *O'Connor* Court recognized the difference between a constitutionally adequate basis for initial commitment and for continued involuntary confinement. It found Florida law and the record unclear as to the precise basis for plaintiff's initial commitment, but it saw that as irrelevant because he only challenged the constitutional basis for his continued confinement. 422 U.S. at 565-67 and n.2. **"Nor is it enough that [plaintiff's] original confinement was founded upon a constitutionally adequate basis if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after the basis for it no longer existed."** *Id*. at 574-75 (emphasis added). As the Chief Justice stated in his concurrence, "[t]here can be no doubt that involuntary commitment to

a mental hospital, like involuntary commitment of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *Id*. at 580. And "confinement *must cease* when those reasons no longer exist." *Id*. (emphasis added). *See Riehm v. Engelking*, 538 F.3d 952, 968 (8th Cir. 2008) ("*O'Connor* … held that an involuntary psychiatric confinement becomes unconstitutional once the lawful basis for confinement no longer exists.").

Later Supreme Court decisions describe *O'Connor* as a due process case. *Foucha*, 504 U.S. at 77 ("We relied on *O'Connor*, which held as a matter of due process that it was unconstitutional for a State to confine a harmless, mentally ill person."); *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) ("[O]ur decision in *O'Connor* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of surviving safely in prison."). And *Jackson*, decided prior to *O'Connor*, squarely holds: "At the least, due process requires that the nature and duration of commitment bears some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738.

Foucha is the converse of *O'Connor*. It involved a committed person who was dangerous but not mentally ill. Yet the Court reached the same result, rejecting Louisiana's argument that one who had "committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a

disorder for which there is no effective treatment, … may be held indefinitely." 504 U.S. at 82. *Karsjens*, however, failed to consider the *Foucha* majority's discussion of fundamental liberty interest and instead relied on its dissent. 845 F.3d at 407.

Cases like *O'Connor* and *Foucha* teach that neither mental illness alone nor dangerousness alone is enough to justify unrestricted civil confinement. Only the continued linkage of both factors can justify ongoing civil commitment. The present case fits hand in glove with these decisions. In its Liability Opinion, the district court concluded, after extensive fact-finding, that Defendants' application of the Missouri SVP Act "has been to turn civil confinement into punitive, lifetime detention of SORTS residents in violation of the Due Process Clause" (Add. A, at 55). The Supreme Court decisions confirm that Plaintiffs have a fundamental liberty interest that prohibits punitive lifetime detention. As a matter of substantive due process, Defendants cannot continue to warehouse Plaintiffs at SORTS until they die.

2. Missouri Law

State law is critical to the determination of Fourteenth Amendment substantive rights. Indeed, the U.S. Supreme Court has held that "[w]ithin our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than

those independently protected by the Federal Constitution. … If so, the broader state protections would define the actual substantive rights possessed by a person living within that state." *Mills v. Rogers*, 457 U.S. 291, 299-300 (1982). This Court has cited *Mills* for the proposition that "state-created liberty interests are entitled to protection under the Fourteenth Amendment's Due Process Clause." *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997). Like the thirty states that have not enacted any SVP law, Missouri was free to reject such legislation. But once it chose to promulgate that statute, its operation and application had to meet minimum constitutional standards. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

The fundamental liberty interest involved here is embedded both in the Missouri statute itself and the decisions that have construed it. The district court observed that the wording of the Missouri SVP Act is "nearly identical" to that of the Kansas statute considered in *Hendricks* (Add. A, at 44, n.7). *Hendricks* pointed out that the Kansas statute contemplates that an SVP can be committed only while he suffers from a mental abnormality that renders him unable to control his dangerousness. 521 U.S. at 364.

In conformity with *Hendricks*, the Missouri SVP Act is supposed to be rehabilitative rather than punitive. The State has a statutory obligation to provide "care and treatment" for persons committed under the Act. R.S.Mo. §632.495.2

("If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care, and *treatment* until such time as the person's mental abnormality has so changed that the person is safe to be at large").

Again, in *Care & Treatment of Coffman*, 225 S.W.3d at 446, the Missouri Supreme Court established that SORTS residents are entitled to prevail on their as-applied claims relating to risk assessment and release when they are no longer likely to commit acts of sexual violence, even though they may continue to suffer from a mental abnormality. *Coffman* declared that "[t]his court has previously determined that the sexually violent predator law … affects the fundamental right of liberty." *Id*. at 445.

In re Care & Treatment of Norton, 123 S.W.3d 170, 173 (Mo. banc 2003). also unequivocally states that "civil commitment of persons … classified [as sexually violent predators] impinges on the fundamental right of liberty." *See also id.* at n.10 ("Freedom from physical restraint is a fundamental right."); *Bernat v. State*, 194 S.W.3d 863, 868 (Mo. banc 2006) ("*Norton* held, and the Court here reaffirms … 'civil commitment of persons … classified [as SVPs] impinges on the fundamental right of liberty' ….").

In his *Norton* concurrence, Judge Wolff presciently stated:

> "For those labeled as … sexually violent predators, the question is whether this [civil] confinement is likely to be a life sentence, without

> meaningful treatment, and without an attempt to tailor the infringement on liberty to that needed to effect treatment and to protect society. … There is no doubt that the crimes these men have been convicted of are horrible. But after they have served their sentences for their reprehensible acts, they face indefinite confinement—not for their acts, but for what mental health experts think may be in their thoughts; not for what they have done, but for what we are afraid they might do."

Norton, 123 S.W.3d at 176-77.

And in discussing the annual examination component of the statute, the Missouri Supreme Court concluded that mechanism "ensures involuntary confinement that was initially permissible will not continue after the basis for it no longer exists." *Murrell*, 215 S.W.3d at 105.

D. THE SHOCKS-THE-CONSCIENCE STANDARD AND THE FUNDAMENTAL LIBERTY INTEREST TEST ARE DISJUNCTIVE RATHER THAN CONJUNCTIVE REQUIREMENTS FOR PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiffs have demonstrated both conscience-shocking conduct and a fundamental liberty interest. If, however, this Court were to determine that they have established only one of the two, then it must address *Karsjens'* mandate for a conjunctive standard.

In *United States v. Salerno*, 481 U.S. 739, 746 (1987), the Supreme Court held that substantive due process prevents the government from engaging in conduct that shocks the conscience *or* interferes with rights implicit in the concept of ordered liberty (emphasis added). Despite the Supreme Court's use of the

disjunctive, this Court in *Karsjens* concluded that both elements were necessary for a substantive due process violation. It did so based upon Judge Bye's concurring opinion in *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002), which in turn relied upon a footnote from *Lewis*, 523 U.S. at 847 n.8. The *Karsjens* panel stated that Judge Bye had rejected *Salerno* as "a pre-*Lewis* decision." 845 F.3d at 408.

But footnote 8 of *Lewis* does not mention *Salerno*, much less reject it. It does not address whether the shocks-the-conscience standard replaces the fundamental rights analysis set forth in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), or whether it supplements the historical inquiry into the nature of the asserted liberty interest. *See Hawkins v. Freeman*, 195 F.3d 732, 738 n.1, 739 (4th Cir. en banc 1999).

There is an inter-Circuit split on this conjunctive/disjunctive issue, and *Karsjens* is in a distinct minority. At least six Circuits continue to follow *Salerno's* disjunctive test. *Robinson v. District of Columbia*, 686 F. App'x 1 (D.C. Cir. 2017); *United States v. Rich*, 708 F.3d 1135, 1139 (10th Cir. 2013); *B & G Constr. Co. v. Director, Office of Workers' Comp. Programs*, 662 F.3d 233, 255 (3d Cir. 2011); *United States v. Green*, 654 F.3d 637, 652 (6th Cir. 2011); *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009). Some cases have done so without any express reference to *Salerno*. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008); *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640

F.3d 716, 728 (6th Cir. 2011). *But see Najas Realty LLC v. Seekonk Water Dist.*, 821 F.3d 134, 145 (1st Cir. 2016); *Hawkins*, 195 F.3d at 738.

Here the majority view is the better view. *Lewis* does not purport to overrule *Salerno*. Indeed, the text (not the footnote) in *Lewis* cites *Salerno* and quotes its disjunctive test. 523 U.S. at 847. It would be decidedly strange for the Supreme Court to quote the disjunctive standard in the text and then implicitly (rather than explicitly) overrule it in a footnote.

Salerno rests upon solid legal footing. It states:

> "This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience.' *Rochin v. California*, 342 U.S. 165, 172 (1995) or interferes with rights 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1936)."

481 U.S. at 746.

The decisions *Salerno* cites support its use of the disjunctive. *Rochin* held that the stomach pumping of a criminal suspect was conscience-shocking, and that alone was sufficient for a violation of substantive due process—without any need to establish a fundamental liberty interest. Likewise, without any reference to a conscience-shocking requirement, Justice Cardozo pointed out in *Palko* that a state's infringement of free speech or the right to trial would violate the Due Process Clause because they are "fundamental" to liberty. 302 U.S. at 326-27. Significantly too, the plaintiff in *O'Connor* prevailed on his §1983 claim based on

excessive civil detention without having to show that defendants' conduct was conscience-shocking or otherwise subject to any heightened standard of scrutiny.

Finally, the effect of Judge Bye's concurrence in *Moran* is by no means clear. *Moran* was the product of a badly-fractured Court. The Opinion of the Court opted for the disjunctive standard. 296 F.3d at 643. In favoring the conjunctive, Judge Bye was joined by one other concurring judge and by the four dissenters. Whereas one panel of this Court declared Judge Bye's *Moran* concurrence to be "the law of this Circuit," *Slusarchuk v. Hoff*, 346 F.3d 1178, 1182 n.2 (8th Cir. 2003), other post-*Moran* panels have adopted *Salerno's* disjunctive approach. *Mendoza v. U.S. Immigration & Customs Enf't*, 849 F.3d 408, 421 (8th Cir. 2017); *Sheets v. Butera*, 389 F.3d 772, 778 (8th Cir. 2004). So has the author of the *Karsjens* decision. *See Strutton v. Meade*, 668 F.3d 549, 558 (8th Cir. 2012). And so has Judge Bye. *Anderson v. Larson*, 327 F.3d 762, 769 (8th Cir. 2003). If this Court sees a need to reach the disjunctive/conjunctive issue and then to follow *Karsjens*, it should recommend this case for en banc consideration.

E. *KARSJENS*, THE SOLE BASIS FOR THE DISTRICT COURT'S JUDGMENT, IS DISTINGUISHABLE FROM THIS CASE ON BOTH THE ISSUES AND THE FACTS.

Defendants concede "[t]here are major differences between the Minnesota statute and the Missouri statute" (Doc. 462, at 4). Indeed, *Karsjens* didn't deal at all with two of the three statutory issues that the district court addressed here. As

Defendants stated, "[t]he Minnesota statute fails to provide for periodic assessments of the committed individuals" (*Id*. at 7). The panel thus concluded there could be no basis for any as-applied challenge to the Minnesota statute on that issue. 845 F.3d at 410. By contrast, annual risk assessment reviews and reports to the court on each individual's current mental condition are mandated in Missouri by R.S.Mo. §632.498.1. So annual risk assessments are an appropriate subject for an as-applied challenge in this case but were not in *Karsjens*.

Another difference is the issue of director authorization. Minnesota §253D has no provision for pre-screening of release petitions. That statute allows any confined person to petition at any time without any consequence such as frivolity reviews and preliminary hearings. 845 F.3d at 399. But the Missouri statute establishes specific provisions for director authorization and, in its absence, imposes heightened requirements on the petitioner. R.S.Mo. §632.501 and .504. Thus, director authorization, like annual reviews, was not the proper subject for an as-applied challenge in Minnesota, but is in Missouri.

That leaves the matter of community reintegration. Here again there are critical differences. There is no indication in the *Karsjens* district court or Circuit rulings of any "release without discharge" practice in Minnesota. But it is a practice the Defendants in this case regularly use in order to continue to confine men who no longer are SVPs and who have been ordered released. Defendants

fabricated it as a means to continue the confinement of those found no longer likely to offend.

Likewise, *Karsjens* does not deal in any way with state actor misconduct directed against the aged and infirm, which is another key element of the district court's Liability Opinion (Add. A, at 31, 37-42). Minnesota entered into fifteen contracts for housing and treatment services outside of its facilities, and it made reintegration services available to those in the final phase of its treatment program. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1152-53 (D. Minn. 2015). Missouri has done nothing in that area.

Equally telling are the differences in the evidence. For good reason, the *Karsjens* panel was not shocked by the six summary grounds stated to be the basis for the district court's findings of as-applied violations. Those grounds are recited at 845 F.3d at 402-03. The first two deal with the risk assessment not required by Minnesota statute and thus not the proper basis for an as-applied challenge there. The sixth involves sufficiency of treatment, which this Court ruled was not a fundamental right and therefore also outside the proper bounds of analysis, 845 F.3d at 410, and the district court here found no constitutional violation in the treatment of Plaintiffs (Add. A, at 51-52).

As to the third ground, counsel for the Minnesota plaintiffs admitted that they could not prove that any specific person was entitled to release (6/23/17 Tr. at

34-35; Add. C, at 14). That meant there was no basis in the record for Judge Frank's determination that "individuals have remained confined at the MSOP even though they have completed treatment or sufficiently reduced their risk." By contrast, there was overwhelming proof here, derived from Defendants' own records, that specific residents should have been but were not released, including (1) those ordered released but placed indefinitely in the Annex instead; (2) those who passed the neighbor test; and (3) those otherwise thought suitable for release to cottages and skilled nursing facilities.

The fourth ground—that "discharge procedures are not working properly at the MSOP"—is a far cry from declaring, as the district court did in this case, that the SORTS release procedures are a "sham" (Add. A, at 54). The Minnesota district court's fifth ground included the absence of less restrictive alternatives for initial commitment, but that is not an issue here.

In view of these differences and the uncontroverted evidence of Defendants' conduct, it is small wonder that the conscience of the *Karsjens* panel was not shocked, while the district court's in this case was. Two different cases that dictate two different outcomes. The Minnesota defendants were largely applying that state's law and procedures, while the Defendants in this case have been completely indifferent to the Missouri statute.

F. PLAINTIFFS' STATE LAW CLAIMS SHOULD SURVIVE.

If but only if all five points raised above are rejected as meritless, should this Court consider and rule on this final point.

In both its Liability Opinion and its Final Judgment Opinion, the district court failed to address Plaintiffs' state law substantive due process claims. Again, "[t]he Federal Due Process Clause defines only the minimum protections required. State law, however, may recognize more extensive liberty interests than the Federal Constitution." *Morgan*, 128 F.3d at 697. But, as with the federal claims, the court dismissed Plaintiffs' state law claims *with* prejudice.

Shortly after the court entered final judgment, Plaintiffs moved to alter or amend the judgment (JA 611-14) on the grounds that the court's failure to address their state law substantive due process claims and its dismissal of them with prejudice was error. Plaintiffs had asked in their motion that those claims be dismissed *without* prejudice so that they could pursue them in state court. In denying the motion, the court ruled that Plaintiffs had "abandoned" their state law claims because they failed to timely address them (JA 615, at 161).

In *Lee v. Mukasey*, 527 F.3d 1103, 1107 (10th Cir. 2008), the Tenth Circuit noted that "abandon" means "to act, not to be acted upon." It held that Lee, an alien, did not abandon her studies in violation of her visa status; she no longer

attended the school because it ceased operating. She "took no affirmative action" and did not "abandon" her studies. *Id.*

Similarly here, Plaintiffs never took any affirmative steps to relinquish their state law claims. Counts I and II of their Fifth Amended Complaint include substantive due process claims under the Missouri Constitution (JA 123, at 211, subsection (f); at 122, subsection (g)). In opposing Defendants' motion to dismiss, Plaintiffs pointed out that the "Missouri Supreme Court has interpreted the Missouri constitution's guarantee of due process to provide greater protection than afforded by the federal Constitution" (Doc. 296, at 12 and n.6). Plaintiffs did not ask the district court to amend its Liability Opinion to address Missouri law because the court had ruled in their favor! Likewise, when the district court later told the parties it would revisit its Liability Opinion, Plaintiffs did not brief Missouri law because *Karsjens*, the sole basis for *sua sponte* reconsideration, had nothing to do with Missouri law. When the court did reverse itself based on *Karsjens*, Plaintiffs promptly moved for a carve out of the Missouri claim (JA 611-14).

The district court's "abandonment" ruling was an error of law and thus its denial of the motion to alter or amend was an abuse of discretion. *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016);

Simmons Foods, Inc. v. Industrial Risk Insurers, 863 F.3d 792, 800 n.10 (8th Cir. 2017).

VII. CONCLUSION

The judgment below should be reversed and the case remanded with instructions to the district court to reinstate its prior judgment in Plaintiffs' favor on the issue of liability.

Respectfully submitted,

/s/ *Thomas E. Wack*

Thomas E. Wack
7611 Wydown Boulevard
St. Louis, Missouri 63105
314-643-1887

Anthony E. Rothert
Omri E. Praiss
American Civil Liberties Union
of Missouri Foundation
906 Olive Street, Suite 1130
St. Louis, Missouri 63101
314-652-3114

John H. Quinn III
P.O. Box 221497
St. Louis, Missouri 63122
314-780-0691

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, that this Brief of Appellant complies with the type-volume limitation because it contains 12,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the Microsoft Word word-counting system.

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/s/ *Thomas E. Wack*
Thomas E. Wack

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Thomas E. Wack*