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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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I. ARGUMENT

A. DEFENDANTS HAVE IGNORED THE FACTS, MISCONSTRUED PLAINTIFFS' CLASS CLAIMS, AND RAISED SPURIOUS ISSUES.

1. Ignoring The Facts

Defendants' Brief ("Br.") ignores both the facts of this case and the lower court's findings in its Liability Opinion. Despite an eight-day trial, seven volumes of testimony, and several hundred documents, Defendants can cite just one exhibit and make only one reference to the transcript (Br. at 63). They make no effort to controvert any of the evidence set forth in fifteen pages of Plaintiffs' Opening Brief ("Op. Br." at 5-20) or the proof cited by the district court that led to its description of Defendants' conduct as conscience-shocking (Add. A, at 57) and of the release phase of the SORTS treatment program as a "sham" (Add. A, at 54). They do not deny that the district court's findings after final judgment are the fact record before this Court. They simply rest on the supposition that, in light of *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), the doctrine of substantive due process is dead in this Circuit (Br. at 17).

2. Misconstruing Plaintiffs' Class Claims

Defendants depict the relief Plaintiffs seek as the release of all SORTS residents (Br. at 30). To the contrary, Plaintiffs have not asked the district court or this Court for the release of any individual, much less all of them. We acknowledge there are SORTS residents who continue to suffer from a mental

abnormality that causes them to be dangerous and who are more likely than not to re-offend. Rather than demand that the federal courts issue release orders and thereby displace the state courts, Plaintiffs seek declaratory and injunctive relief requiring Defendants to fix the broken system they devised so that releases can take place. The district court found that Rule 23(b)(2), F.R.C.P., was satisfied because "by implementing an allegedly unconstitutional program . . . [Defendants] have acted or refused to act on grounds generally applicable to the class." Doc. 197 at 18. The court pointed out "Defendants do not disagree . . . that Rule 23(b)(2) applies to the proposed class." *Id*. at 10.

Because Plaintiffs do not seek release orders from this Court or the court below, Defendants' challenge to class-wide relief is unfounded. *Karsjens* itself rejected a similar argument. The Minnesota defendants contended that plaintiffs lacked standing because they could not identify anyone among them who would be entitled to discharge. This Court responded that plaintiffs' "claim is not that they are all entitled to release but rather that their constitutional rights are being violated because [defendants'] implementation of [the statute] violates the due process clause." 845 F.3d at 405. The same is true here. Besides, class certification is not open for discussion. Defendants did not seek interlocutory review of the class certification order pursuant to Rule 23(f), F.R.C.P., and did not cross-appeal on that issue after final judgment.

3. Raising Spurious Issues

(i) Financial Considerations

Budget constraints cannot excuse constitutional violations. *Liddell v. State*, 731 F.2d 1294, 1308 (8th Cir. 1984) ("If we accepted [such an] argument, violators of the Constitution could avoid their remedial responsibility through manipulation of their budgets …."); *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration."); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.) ("We are not convinced contrarily by any suggestion that the State . . . is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations ….").

In fact, Defendants know that the release of some SORTS residents would alleviate many of their alleged financial concerns. PX-88 ("selecting some 16 aged/infirm consumers from SORTS and developing a community alternative [would be] a strategy for saving about 36% of the costs of a ward and reduce expansion costs for another ward"); PX-80 (savings of $2.47 million to $3.4 million by moving aged, disabled and infirm to skilled nursing facilities). Further, the district court found that "[t]he bulk of the evidence Plaintiffs presented at trial in support of their adequacy-of-treatment claims was evidence of staffing and

funding shortages at SORTS *prior to 2010*." Add. A, at 51 (emphasis added). Defendants have no such excuse for what they did between 2010 and the 2015 trial.

(ii) "Difficult Task"

Defendants complain of their "difficult task" in "balancing the legitimate liberty interests of the class members with the community interest in safety" (Br. at 64). In so stating, they misconceive their role. It is not their duty to balance the public's interest against the individual's. Their task is to provide "care and treatment" to the SORTS residents (R.S.Mo. §632.495.3), to conduct annual reviews consisting of a "current examination of the person's mental condition" (§632.498.1), to provide those reports to the court (*id*.), to authorize release petitions as appropriate (§632.498 and .501), and—implicit in all this—to be honest in their reporting and to impose no obstacles that would turn SORTS into a prison. The "difficulty" they see in their jobs is no justification for the failure to perform their basic legal duties.

Although Defendants are to honestly advise the courts whether the resident is "likely" to engage in acts of sexual violence if released, they do not decide whether to release. The courts to whom they report perform that function. It is the courts' role to weigh the interests of the public and the individual. Defendants are not entitled to usurp the judicial function.

(iii) "Adequate" State Remedies

Defendants urge deference to adequate state court remedies (Br. at 15, 35-37). The operative word is "adequate." The record belies their suggestion that the state court release mechanism, set forth in R.S.Mo. §632.498, is adequate as-applied. The state courts have not issued release orders because Defendants' annual reports never support SORTS residents, and the annual reports never support them because the SORTS examiners don't understand and/or don't apply the correct legal standards for release (Op. Br. at 6-9). Another reason the courts have not ordered releases is that the director refuses to authorize Plaintiffs' petitions (Op. Br. at 9-10). The whole reason for this litigation is that, because of Defendants' conduct, release through the state court system has been impossible. Defendants have rigged the system. If this Court fails to act, Plaintiffs will continue to die in SORTS.

(iv) Release Numbers

Contrary to Defendants' claim, no residents have been "fully released." (Br. at 9). The district court found that Defendants were not involved in the release of the only two residents placed into the community (Add. A, at 9-10). As of the time of trial, the only other "released" residents were those placed inside the Annex "without discharge" and with existing SVPs. Defendants' use of this captive mechanism violates the provisions of the Missouri statute which contemplate

release into the community (R.S. Mo. §632.505.1) and which prohibit confinement of non-SVPs with SVPs (§632.495.1 and .3).

B. THE PROCEDURAL DUE PROCESS AND STATE LAW DEFENSES ARE BASELESS.

1. Procedural Due Process

Because the issues here are conscience-shocking conduct and fundamental rights, substantive due process rather than procedural due process is the core of this case. *See Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002). Indeed, it is procedural due process that is irrelevant here: Substantive due process "bars certain arbitrary, wrongful government actions *regardless of the fairness of the procedures used to implement them*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis added) (internal quotations marks omitted). Defendants agreed with that point in their own briefing. Doc. 450 at 15.

Despite their newly-found focus on procedural due process, Defendants never explain how or why that strand of the Fourteenth Amendment guarantee is an issue here. In describing procedural due process, the Supreme Court has stated that its fundamental requirement is the opportunity to be heard at a meaningful time and in a meaningful manner, *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976), and that notice and hearing must precede any deprivation of life, liberty, or property. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). In fact, Defendants, under the heading "Procedural Due Process" and citing *Loudermill*,

told the district court the same thing: "[t]he United States Supreme Court has made it expressly clear that the essential elements of due process are notice and opportunity to be heard" (Doc. 276 at 15).

But Plaintiffs have never sought any notice or hearing in connection with annual reviews, director authorization, or the release phase of treatment. The statute's descriptions of such "procedures" do not translate into questions of procedural due process.

Defendants' cases are also off target. In each of them, the Court turned to procedural or other grounds only after deciding there was no substantive due process right involved: *Swarthout v. Cooke*, 562 U.S. 216 (2011) (no constitutional right to parole); *Reno v. Flores*, 507 U.S. 292 (1993) (no fundamental right of an orphan to be placed in private custody rather than in government operated institution); *Herrera v. Collins*, 506 U.S. 390 (1993) (no constitutional right to relief based on newly discovered evidence of innocence); *Parratt v. Taylor*, 451 U.S. 527 (1981) (no due process right of inmate to mail lost because of defendants' unauthorized failure to follow established state procedures); *Califano v. Aznavorian*, 439 U.S. 170 (1978) (no constitutional right to international travel).

Finally, while Defendants assert that Plaintiffs have waived any procedural due process claim (Br. at 21-27, 30-34), the only waiver has been their own. Waiver is an affirmative defense that must be pleaded. Rule 8(c)(1), F.R.C.P. In

the various iterations of their Answer, Defendants referenced "the doctrine of waiver" but only as a "time-bar[ ]," along with laches and the statute of limitations (Docs. 77 at 26; 104 at 34; 125 at 36; and 344 at 50). Nor did Defendants raise any "waiver" defense in their key filings below. *See*, *e.g.*, Doc. 276, 352, 415, 450, 451. To the contrary, Defendants acknowledged that Plaintiffs did assert a procedural due process claim: "Plaintiffs allege [in their Fifth Amended Complaint] that Defendants have violated . . . the United States and Missouri's Constitutional guarantees of 'procedural due process.'" (Doc. 273 at 2, ¶9).

2. State Law

A liberty interest may arise from an expectation or interest created by state law. *Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974). A due process right arises when a state creates a right to greater freedom. *Hake v. Clarke*, 91 F.3d 1129, 1132 (8th Cir. 1996). "State law may recognize liberty interests *more extensive* than those independently created 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). *See Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997). That is precisely what the Missouri SVP statute does.

It goes without saying that the Federal Constitution is silent about the state-created liberty interest for those who are civilly-committed—i.e. annual reviews,

director approval, and the release phase of treatment. The Missouri statute is far "more extensive" in that regard than the U.S. Constitution in that it specifically provides for those protections at R.S.Mo. §§632.495.1, .495.4 and .501, and is thus central to any substantive due process analysis.

C. DELIBERATE INDIFFERENCE IS THE CONSCIENCE-SHOCKING STANDARD FOR THIS CASE.

It is true that not every case of deliberate indifference will shock the judicial conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) so states. But the prototypes of non-actionable deliberate indifference that *Lewis* identifies—high speed police chases and prison officials facing a riot—are time-constrained emergency situations. *Id*. at 852-53. *Lewis* never suggests that intent-to-harm is the standard when Defendants have had sufficient time to reflect and deliberate, much less sixteen years.

Defendants contend that *Karsjens* found an absence not only of malice but also of deliberate indifference (Br. at 55-56). Yet *Karsjens* does not even mention deliberate indifference. Defendants would infer that this Court's use of the word "egregious" immediately preceding "malicious or sadistic" (845 F.3d at 411) is code for deliberate indifference. But this Court does not speak obliquely. It knows how to use the right words (especially those with a precise legal meaning) to express its intent. Of course, words that appear as part of a single phrase should be

construed together and in harmony with each other. Properly construed, "egregious" was part of a single phrase signifying intent-to-harm.

That was precisely what Defendants told the district court: "Under *Karsjens*, an as-applied due process claim can proceed only if the state's actions involve *intentionally 'egregious, malicious, or sadistic behavior*.'" Doc. 765 at 14 (emphasis added). And "'[e]gregious' and 'outrageous' have a similar connotation as the other adjectives used by the Eighth Circuit [in *Karsjens*]—'brutal,' 'inhumane,' 'malicious,' and 'sadistic.'" Doc. 773 at 6.

Nor does the so-called "pulls of competing obligations" justify a malice standard in this case. *Lewis* used that phrase only in the emergency context of a prison official facing a riot or a police officer pursuing a fleeing suspect. 523 U.S. at 853. Competing obligations is merely a factor that exacerbates the difficulty of an emergency decision. *Lewis* precisely states when deliberate indifference shocks the conscience, and it does so only in the non-emergency setting that describes this case: "*When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking*." *Id*. (emphasis added). *Lewis* also held, in the analogous "custodial situation of a prison" where "forethought about an inmate's welfare is not only feasible but obligatory," deliberate indifference "is sensibly employed." *Id*. at 851.

There is no basis to deviate from *Lewis*. This Circuit has never suggested that "competing obligations" justify an intent-to-harm standard in non-emergency circumstances. In *Schieber v. City of Philadelphia*, 320 F.3d 409, 420 (3d Cir. 2003), relied on by Defendants, police officers were again faced with an emergency setting requiring them to make "a decision without delay" with only limited information.

The State's two other cases are of no consequence here. *Matican v. City of New York*, 524 F.3d 151, 159 (2d Cir. 2008) and *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 545 (6th Cir. 2008) were both "state created danger" cases. In *Matican*, the police officers' competing concern was a powerful self-interest—their own personal safety. In *Hunt*, the competing interest was to comply with the Constitution and federal statute, a factor that works in favor of (not against) Plaintiffs herein. Defendants have no such competing obligations. Again, their legal duties include provision for care and treatment, preparation and submission of honest and complete annual reviews to the courts, and authorization of release petitions in proper circumstances. Their duties do not include making the release decisions. Any pull of competing obligations between the community and the SORTS residents falls on the courts, not the Defendants.

In any event, Defendants have never been concerned with *competing* obligations. Their sense of obligation has always been a one-way street in favor of

the public and against the residents locked inside SORTS. As Defendant Schmitt stated:

> "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. Are we over-inclusive? Yes. We choose to err on the side of protecting the community. Is it fair? No. Unless you are the next victim of someone released." (PX-24).

This unyielding predisposition explains why Defendants decided not to tell the courts that residents they were recommending for continued confinement could pass the "neighbor test." (Op. Br. at 15-16, 18-19; Add. A, at 24-26). It accounts for the "Yawn" response of the current director to a publication critical of SORTS practices (Tr. 3:211; PX-68, 69). It reveals why annual reviewers continued to misapply the release standard in a manner prejudicial to Plaintiffs long after the Missouri Supreme Court clarified that standard in 2007. *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 446 (Mo. banc 2007) (Op. Br. at 7). This attitude explains why no one has been released into the community. In Missouri, once an SVP, always an SVP.

D. THE TOTALITY OF THE EVIDENCE DEMONSTRATES DELIBERATE INDIFFERENCE.

Defendants assert that "[n]othing in the record shocks-the-conscience" (Br. at 38). While no amount of evidence shocks Defendants, an unbiased third party

such as the district court could easily find that the evidence previously summarized (Op. Br. at 5-20) satisfied that standard. And there is more:

- The description of SORTS residents as "prisoners rather than patients" in PX-104 was not a chance remark. In response to a petition for habeas corpus, Defendants told one court the resident "is currently *imprisoned* in the Missouri Sex Offender Treatment Center in Farmington." (PX-105) (emphasis added).

- Defendants have released no one despite the low recidivism rate for Plaintiffs' crimes. Based on published data from the Missouri Sentencing Advisory Commission, the Missouri Supreme Court found that, of the five categories of felony offenders in Missouri's correctional population, sex offenders have the lowest rate of recidivism—5.3%, compared to 9.6% for violent offenders, 14.9% for non-violent offenders, 11.7% for drug offenders and 11.4% for felony DUI offenders. *F.R. v. St. Charles Cty. Sheriff's Dep't*, 301 S.W.3d 56, 65 n.14 (Mo. banc 2010). Further, an outside expert advised SORTS personnel that "community perspectives on sexual offending are based more on media interpretations than scientific reality. The media tends to over-report sexual re-offending by a factor of almost 14 times over actual rates. There are definitely some dangerous people out there, but they are surprisingly rare." PX-20 at 048078.

- In addition to those who could pass the "neighbor test," Defendants knew about residents who could have been but were not discharged from SORTS. PX-93 ("We are estimating 1/3 of our folks are [developmentally disabled] or have cognitive impairments. Many of these might fit in group home settings"); PX-67 ("There have been public discussions about moving some of the medically frail residents to skilled nursing facilities. In lieu of that, a medically frail unit was established in FY 2013 at the SORTS facility [in Farmington].").

- The SORTS Director of Treatment wrote fifteen years into the program: "Unfortunately, we do not have a good comprehensive risk assessment and needs analysis on each patient which summarizes the goals of their treatment *and* their individual traits which lead to risk." (PX-87) (emphasis in original).

- Only in January 2015, just a few months prior to trial, did SORTS annual reviewers consistently begin to conduct face-to-face interviews of those they were evaluating (Tr. 7:227).

This is a case like *Wilson v. Lawrence County*, 260 F.3d 946, 957 (8th Cir. 2001), in which the totality of facts "could easily be described as reckless or intentional."

Critically, the district court's shocks-the-conscience finding involved a mixed question of law and fact, of the type that "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility

judgments, and otherwise address what we have . . . called multifarious, fleeting, special, narrow facts that utterly resist generalization." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (Mar. 5, 2018) (internal quotations marks omitted). "[W]hen that is so, appellate courts should usually review a decision with deference." *Id*.

The Liability Opinion was intensely fact-driven. The district court's Findings of Fact were detailed, extensive and uncontroverted. The court evaluated the testimony of many witnesses and made credibility determinations. *See, e.g.*, Add. A, at 10, 15 ("credibly presented"), 22 ("credibly testified"). Whether conduct shocks-the-conscience depends on the specific facts and how the fact-finder evaluates them. For this reason, this Court should give deference to the district court's resolution of this question and employ the clear error standard.

But deference or not, a shocks-the-conscience determination cannot depend upon subjective evaluations or upon different calibrations of judicial sensitivity. This problem of judicial subjectivity, recognized in two of the *Lewis* concurrences (523 U.S. at 857, 861), is compounded by "[t]he subtleties and nuances of psychiatric diagnosis [that] render certainties virtually beyond reach in most situations." *Addington v. Texas*, 441 U.S. 418, 430 (1979).

Thus, in *Lewis*, Justice Kennedy pointed to "objective considerations, including history and precedent, [as] the controlling principle." 523 U.S. at 858.

This Court has likewise been "guided by Justice Kennedy's concurring opinion in *Lewis*." *Moran*, 296 F.3d at 646. *See Armstrong v. Squadrito*, 152 F.3d 564, 571 (7th Cir. 1998).

Here is some of what history and precedent tell us:

1. Civil commitment cannot be punitive. *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (The criminal/civil distinction "is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment.").

While the Missouri SVP Act has been upheld as *facially* constitutional, Defendants operate SORTS as a prison. Residents are forced to reside in secure facilities with armed guards and a razor wire fence. They are sometimes handcuffed or put in leg irons. They are not free to leave and are subject to limitations regarding diet, visitors, and activities. Again, Defendants call them "prisoners" rather than "patients" (PX-104, 105). As Defendants themselves predicted (PX-89), the district court ultimately concluded that the release phase of the treatment program was a "sham" (Add. A, at 54)—principally because no one had been allowed to reach the final steps of that phase. Without a meaningful release phase, SORTS was not only a prison, it was a prison where everyone had a life sentence.

2. A majority of states (thirty out of fifty) have no SVP law (Add. A, at 7). In those jurisdictions, once a sex offender completes his term of incarceration, he is released into the community. Having chosen to promulgate an SVP Act, Missouri cannot deny the constitutional requirements that go with it. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

3. The Supreme Court has held that the liberty interest protected by the Due Process Clause extends to rights: to marry, *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015); to refuse unwanted lifesaving medical treatment, *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to abortion, *Roe v. Wade*, 410 U.S. 113 (1973); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923). Since there is a protected liberty interest in these cases not involving any restriction on movement, it would be strange indeed to deny such a right to one deprived of the most fundamental liberty—freedom from undue physical restraint.

4. *O'Connor v. Donaldson*, 422 U.S. 563 (1975), clearly established that a state may not civilly confine an individual when he is no longer both mentally ill and dangerous (Op. Br. at 44-46). As a matter of history, *O'Connor* has now been the law in this country for more than four decades.

5. Even if SORTS were not operated as a prison, it is a form of that highly disfavored practice known as preventive detention. *United States v. Melendez-Carrion*, 790 F.2d 984, 1002 (2d Cir. 1986) ("The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes."). Preventive detention is intended to protect society, but that interest must yield once the individual is no longer "likely" to re-commit. *See* R.S.Mo. §632.505.1.

E. PLAINTIFFS HAVE A FUNDAMENTAL LIBERTY INTEREST.

Defendants necessarily concede "the correct standard holds that persons should not remain committed after their future dangerousness ceases, even if their mental abnormalities persist" (Br. at 8). They also acknowledge the "legitimate liberty interests of Plaintiffs" (Br. at 18). Remarkably, however, they continue to deny that Plaintiffs' liberty interests are fundamental.

In doing so they make scant mention of the controlling cases, starting with *Foucha v. Louisiana*, 504 U.S. 71 (1992) and *O'Connor*. Defendants do contend that *Foucha* is not binding because the concurring Justice failed to join in Part III of the opinion, leaving only a four-judge plurality to support the statement that "[f]reedom from physical restraint is a fundamental right." (Br. at 47). Yet they fail to note that the same concurring Justice did join in Part II, which states

"[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." 504 U.S. at 80.

Defendants completely ignore decisions like *Jones v. United States*, 463 U.S. 354, 361 (1983) ("commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection") (citation omitted), *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (indefinite involuntary civil commitment to a locked mental institution constitutes a "massive curtailment of liberty"), and *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982) ("[R]espondent's liberty interests require the State to provide . . . freedom from undue restraint.").

In a slightly different context, this Circuit too has recognized that those subjected to excessive confinement have a fundamental liberty interest. In *United States v. Neal*, 679 F.3d 737, 740 (8th Cir. 2012), *Davis v. Hall*, 375 F.3d 703, 718 (8th Cir. 2004), and *Young v. City of Little Rock*, 249 F.3d 730, 736 (8th Cir. 2001), this Court held that *criminal* defendants who become entitled to release but thereafter remain confined have a protected due process liberty interest.

Because a criminal defendant has a fundamental liberty interest in release without delay, it simply cannot be that the civilly-committed, who have already completed their prison terms, lack the same fundamental liberty interest and can be arbitrarily confined until death. As *Youngberg* declared, "[i]f it is cruel and

unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." 457 U.S. at 315-16. That reasoning equally applies here.

The State raises the specter that, if Plaintiffs are held to have a fundamental interest in freedom from physical restraint, "legitimate government activity would scrape to a standstill" and every traffic stop would form the basis for a constitutional challenge (Br. at 48-49). But Defendants simply fail to recognize that a right can be fundamental while not absolute. In *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997), the Supreme Court declared that the civilly-committed person's "liberty interest is not absolute." "'*There are manifold restraints to which every person is necessarily subject for the common good*.'" *Id.* at 357 (emphasis added). Indeed, fundamental rights are rarely, if ever, absolute. The right to free speech is fundamental, yet no one is entitled to yell fire in a crowded theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.).

Defendants' concerns about a flood of substantive due process litigation evaporate when the fundamental right is described a little differently. Instead of characterizing it as the right to avoid undue physical restraint, the district court described the fundamental interest as the right of the civilly-committed to avoid "punitive lifetime detention" (Add. A, at 55). That is the right described by Justice

Kennedy in his swing vote in *Hendricks*, 521 U.S. at 373. It is what the Court majority decried in *Crane*, 534 U.S. at 412. It is the essence of the *O'Connor/Foucha* line of cases. The civilly-committed cannot continue to be confined when they no longer suffer from a mental abnormality or are no longer likely to re-offend. When they are so confined, their continued detention becomes punishment violative of the Fourteenth Amendment.

The entire calculus changes once the fundamental right is framed in this way. Defendants, citing *Reno v. Flores*, 507 U.S. 292, 302 (1993), insist that a substantive due process right is one that government can't infringe "at all." We agree. Plaintiffs at all times have the right to avoid punitive, lifetime detention. Because the right is fundamental but not absolute, it becomes exercisable once the resident no longer meets the definition of an SVP. R.S.Mo. §632.480(5).

Defendants imply that recognition of a fundamental liberty interest triggers the strict scrutiny standard that was rejected in *Karsjens* (Br. at 45, 46, 49). But Plaintiffs do not argue for strict scrutiny. That standard is proper for a facial statutory challenge, but it makes no sense in an as-applied setting. In that context, it is unclear exactly what the court would be strictly scrutinizing.

The correct standard for cases like this is the one utilized by the district court: the standard of *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (Add. A, at 45). The *Jackson* standard, repeatedly used to adjudicate claims of excessive

confinement, asks whether "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *See Jones v. United States*, 463 U.S. at 368; *Foucha*, 504 U.S. at 79; *Seling v. Young*, 531 U.S. 250, 265 (2001); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Here the nature and duration of commitment (i.e. for life) bears no reasonable relationship to the purpose for which the individual is committed (rehabilitation, and release when no longer meeting the SVP criteria).

F. SHOCKS-THE-CONSCIENCE AND FUNDAMENTAL INTEREST ARE DISJUNCTIVES.

There is not a single word in the text of *Lewis* about any substantive due process requirement other than conscience-shocking conduct. Nor is there anything "imprecise" about *Salerno's* use of the disjunctive (Br. at 51). As Defendants acknowledge, "*Lewis* cited *Salerno* and quoted its disjunctive test." (*Id*.). It would be truly extraordinary if a footnote were used to overrule by implication a case cited in the opinion's own text, and footnote 8 of *Lewis* certainly does not do so. It merely states that the conscience-shocking standard "*may* be informed by a history of liberty protection" and only after meeting that standard "*might* there be a debate about the sufficiency of historical examples of enforcement of the right claimed . . . . *In none of our prior cases have we considered the necessity for such examples, and no such question is raised in this case*." 523 U.S. at 847 n.8 (emphasis added).

Thus, courts applying *Lewis* can look to history and precedent for whatever they may reveal about traditional practices in order to establish context for deciding whether conduct is conscience-shocking. Footnote 8 does not mandate any inquiry into fundamental rights, and it cannot be read *sub silentio* to overrule *Salerno*. Satisfying the shocks-the-conscience standard is enough.

Establishing a fundamental right is also enough. *O'Connor* sustained a civilly-committed person's §1983 claim solely on the basis of his fundamental liberty interest—without any mention of a shocks-the-conscience requirement. *Foucha* likewise says nothing about a need for conscience-shocking conduct. The imposition of a conjunctive requirement would mean that *O'Connor* and *Foucha* are no longer the law, something not even Defendants have suggested. Under a conjunctive standard, no one could be released from civil commitment based on the deprivation of his fundamental liberty interest. That deprivation would have to be combined with something like torture or abuse during confinement.

G. *KARSJENS* IS NOT CONTROLLING.

1. *Karsjens* Is Distinguishable

There are major differences between the respective district courts in their consideration of the issues before them:

a - The Minnesota district court found the defendants liable for inadequate treatment. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1174 (D. Minn.

2015). The district court here held that Plaintiffs had no fundamental right to effective treatment and that Defendants were not liable on that claim (Add. A, at 48-52).

b – The Karsjens district court shifted the burden to the Defendants. 109 F. Supp. 3d at 1170. The court below kept the burden of proof upon Plaintiffs (Add. A, at 53).

c – The Minnesota court found that state's law to be facially unconstitutional. 109 F. Supp. 3d at 1173. The court below found the Missouri SVP Act to be facially constitutional (Add. A, at 43-48).

d – In evaluating the as-applied challenge, the Minnesota court utilized strict scrutiny instead of shocks-the-conscience. 109 F. Supp. 3d at 1169. The district court here accepted and utilized the conscience-shocking standard that Defendants proposed (Add. A, at 57).

These last two points are especially important.

In connection with the facial challenge, the Minnesota district court purported to invalidate the law itself. The district court here said that the law itself is just fine; the problem is that Defendants chose to disregard the law.

In connection with the as-applied challenge, the district court in *Karsjens* mentioned the shocks-the-conscience standard but then rejected it in favor of strict scrutiny. 109 F. Supp. 3d at 1173. As a result, the *Karsjens* panel was required to

apply the conscience-shocking test *de novo*. By contrast, the district court here made very specific fact findings and ultimately found Defendants' conduct did shock the conscience (Add. A, at 57). Pursuant to *Village at Lakeridge*, this Court should give deference to the court below on that determination because it was a very specific fact-driven analysis. 138 S. Ct. at 967. Since the district court's factual determinations are more than plausible, this Court should affirm that decision, even if it might disagree. *Kaplan v. Mayo Clinic*, 847 F.3d 988, 992 (8th Cir. 2017).

Then there are the key statutory differences. At an earlier stage of this case, Defendants conceded "[t]here are major differences between the Minnesota statute and the Missouri statute," including the definition of sexually violent predator, commitment and release standards, and annual review. Doc. 462 at 4. Another such difference is with the pre-approval steps in seeking release. Defendants acknowledge that the Minnesota statute has no preliminary steps, such as director authorization, to filing a release petition. They claim, however, that director authorization in Missouri is no big deal because the sole consequence of an unauthorized petition is a frivolity review (Br. at 44). Not so. 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 even 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 these hurdles. Director approval is an integral part of the release process established in Missouri law because, without it, release into the community is extraordinarily difficult.

Defendants concede that Missouri has an annual review requirement while Minnesota does not. But they maintain this difference is unimportant because *Karsjens* found the Minnesota statute constitutional despite the absence of any provision for periodic risk assessments. Defendants miss the point. Because Missouri law requires annual reviews, it is "more extensive" than the protection provided by both the Federal constitution and the Minnesota statute. Thus, under *Mills*, 457 U.S. at 299-300, annual reviews are a protection that must be afforded in Missouri. While Minnesota did not have a statutory periodic risk assessment requirement, Missouri does—and Defendants have failed to apply it properly.

There are also the key factual differences. Minnesota had no "release without discharge" program, and *Karsjens* had no issue with regard to the release of the aged, infirm, and incapacitated. The Minnesota plaintiffs failed to identify anyone who was entitled to release (Op. Br. at 54-55), but the punitive treatment of various SORTS residents was central to the decision below (Add. A, at 29-42). The Minnesota district court's findings largely consisted of broad conclusory facts with virtually no mention of particularized conduct or specific incidents; this is

another reason why, under *Village at Lakeridge*, the district court findings in *Karsjens* were not entitled to deference.

2. To The Extent *Karsjens* Is Deemed To Be Inconsistent With Supreme Court And Eighth Circuit Precedent, It Should Be Overruled.

If this Court nonetheless concludes that *Karsjens* controls, it may need to decide whether that case should be overruled in part, particularly in its application of the shocks-the-conscience standard and its use of the conjunctive rather than the disjunctive.

This Court has been willing to reject its own decisions when they are clearly wrong. *See, e.g., Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1288 (8th Cir. 1998) (reversing decision that was "clearly erroneous and would work a manifest injustice"). As we have demonstrated, the prior panel rule is no bar because there are already *conflicting* panel decisions in this Court on application of the conscience-shocking standard and the disjunctive/conjunctive issue. That leaves this Court free to follow those decisions that are more persuasive and faithful to the law (Op. Br. at 32-33). Defendants contend that this Court should follow *Karsjens* as the closest case on the facts (Br. at 58), but the choice between panel decisions rests on the law rather than the facts. *See Eggleton v. Plasser & Theurer Export*, 495 F.3d 582, 588 (8th Cir. 2007) (panel decision followed that was closest to prevailing law in sister

circuits); *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000) (panel decision selected that was "more faithful to Supreme Court precedent").

Finally, this Court must follow Supreme Court decisions like *Lewis*, *O'Connor*, *Foucha*, and *Village at Lakeridge*. Only the Supreme Court can overrule its own precedents. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997).

H. PLAINTIFFS' STATE LAW CLAIMS SHOULD SURVIVE.

Even if this Court believes we are wrong on every other point raised, Plaintiffs' state law claims should survive. Plaintiffs have expressly raised this issue on appeal. As a result, the authorities Defendants cite to support the black letter principle that issues not raised on appeal are deemed abandoned are inapposite. Defendants wholly fail to answer Plaintiffs' argument that they did not abandon their state law claims because they never took any affirmative steps to relinquish them. The district court's "abandonment" ruling was an error of law and, therefore, its denial of the motion to alter or amend was an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, that this Reply Brief of Plaintiffs-Appellants complies with the type-volume limitation because it contains 6,366 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the Microsoft Word word-counting system.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in size 14 font and in Time New Roman.

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

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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*