IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 17-3332

DAVID TAFT, JR., PAUL HUSTON, DANIEL J. ROE, STUART SCHUMAN, RYAN PETERSON, DONALD E. PHILLIPS, CHRISTOPHER PRUDEN, ARTHUR TRIPLETT, EDDIE C. RISDAL, MICHAEL MILLSAP, AND FRANK N. HOBMEIER,
Appellants

vs.

JERRY FOXHOVEN AND BRAD WITTROCK,
Appellees.

Appeal from a Decision of the United States District Court for the Northern District of Iowa, the Hon. Chief Judge Leonard Strand Presiding

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APPELLEES' BRIEF

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SUMMARY OF THE CASE

Appellants are civilly committed as sexually violent predators. They raised several claims initially, only one of which is advanced on appeal. Appellants contend the fact that only men have been committed to CCUSO is evidence of gender discrimination and thus they should be released as a result. Notably, Appellants did not sue the prosecutor or anyone actually connected with the commitment process. Defendants operate the CCUSO program; they are not involved in the commitment process. The district court granted Defendants' summary judgment, finding that qualified immunity applies. Appellants appealed.

The Appellees do not seek oral argument in the first instance, but request the opportunity to respond orally if Appellant is granted oral argument.

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SUMMARY OF THE ARGUMENT

This appeal follows grant of summary judgment to Defendants. Appellants complain that they are subject to gender discrimination because only men have been committed to Iowa's SVP program, not women. Appellants complain that the actuarial instruments used are not equal because they relate to men. But Appellants did not sue the prosecutor. Appellants have not demonstrated that any similarly situated woman was not prosecuted. Although Appellants have complained that women are deprived of the benefits of SVP treatment, Appellants do not have standing to raise this concern. Appellants want to be released because no women have been committed, but that is not an appropriate remedy.

ARGUMENT

I. WHETHER DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT.

The Court reviews *de novo* the district court's grant of summary judgment. *Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012); *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002). The Court reviews the record in the light most favorable to Plaintiff. *Id.* All reasonable inferences may be resolved in Plaintiff's favor, but the court may not resort to speculation. *Brown v. Fortner*, 518 F.3d 552, 558 (8th Cir. 2008). Further, the facts are to be viewed "in a light most favorable to the non-

moving party as long as the facts are not so 'blatantly contradicted by the record . . . that no reasonable jury could believe them.'" *O'Neil v. City of Iowa City*, 496 F.3d 915, 917 (8th Cir. 2007) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). The court may use summary judgment to ensure factually unsupported claims are not permitted to proceed to trial. *Drewitt v. Pratt*, 999 F.3d 774, 778-79 (4th Cir. 1993) (citing *Felty v. Graves-Humpreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)). In order to survive a motion for summary judgment under § 1983, the plaintiff must raise a genuine issue of material fact as to whether (1) the defendant acted under color of state law, and (2) the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right. *Naucke*, 284 F.3d at 927 (citing *Wade v. Goodwin,* 843 F.2d 1150, 1151–52 (8th Cir. 1988)).

A. Chapter 229A is Facially Nondiscriminatory.

Chapter 229A does not reference gender. It is neutral on its face. In rejecting a similar claim at the Initial Review Order stage, the district court opined:

> The Plaintiffs specifically allege that Iowa's Sexually Violent Predators Act of 1998 (the "Act") "seeks Retribution against only males for their sexual crimes, & not females who commit the same type of crimes . . . ." Docket No. 1-1, 2. This allegation/legal conclusion, in terms of the wording of the statute, is simply false. The Act itself does not target "men," but rather sexually violent "persons." I.C.A. § 229A.1 - 229A.16. Sexually violent persons are not a protected class under 14th

> Amendment equal protection. When a statutory scheme does not specifically classify based on a suspect class, such as persons of a certain race, alienage, religion, gender, or national origin, "uneven effects upon" suspected classes "are ordinarily of no constitutional concern." *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). The 14th Amendment "guarantees equal laws, not equal results." *Id.* at 274. Still, "when a neutral law has a disparate impact" on a suspect class "an unconstitutional purpose may still be at work," and there is no doubt that the Act in question here has almost exclusively affected men. Id. In order to make a disparate impact claim, a claimant must prove the intention of the law was to discriminate against a suspect class. *M.L.B. v. S.L.J.*, 519 U.S. 102, 135 (1996). If the impact of a law "could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Id.* at 275. In this case, the Act's primary purposes are to protect the public and treat sexually violent predators. I.C.A. § 229A.1. This Court is convinced these purposes are entirely plausible and rationally related to a legitimate state interest. An assertion that the Act seeks to hinder the male gender with respect to anything other than the proclivity of some males to be sexually violent predators is untenable. I.C.A. §§ 229A.1 - 229A.16. If a woman were to be deemed a sexually violent predator, the clear terms of the Act would apply to her. *Id*. To imply that the Iowa Legislature passed this Act in order to fulfill a discriminatory animus they harbor against men is pure speculation and highly implausible. Furthermore, given the gender neutral language of the Act, Plaintiffs' complaint rests on a legal conclusion, i.e. the Act "seeks Retribution against only males," and provides no facts in support thereof.

Blaise v. Branstad, 11-cv-4011, Initial Review Order, (N.D. Iowa, August 26, 2011). The law is facially neutral. Appellants concede as much on page 7 of their brief.

Appellants also complain that even though the law is facially neutral, that it is unconstitutional as applied because it is administered with an evil eye and unequal hand. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Despite acknowledging a deficit in evidence in the record before the district court, Appellants contend there is a fact issue in whether gender bias affects the admissions, treatment, or discharge decisions of the Defendants. Appellants, however, do not point out the facts that support their assertion of a factual issue for trial, or explain how this alleged bias works to the detriment of Appellants. The facts as presented by Dr. Thomas indicate that there are few women who sexually offend, who sexually offend violently, and who would qualify for commitment. None of these assertions explain how the men confined at CCUSO are somehow the victim of evil motive. The Appellants concede "[w]hether gender stereotypes or inadequate research explain the absence of any female SVPs in Iowa cannot be determined on this record." Applt Br. at 11. Appellants point to no evidence demonstrating a factual question to be resolved on remand. The purpose of appeal is to assure the case that was before the court was properly decided, not to "remand so Plaintiffs can amend to focus this lawsuit properly." This case proceeded through discovery, including

depositions, interrogatories, and expert reports. Appellants had a full and fair opportunity to develop their case.

B. Defendants are Not Responsible for Prosecutions.

A Plaintiff may bring a section 1983 claim only against those individuals actually responsible for the constitutional deprivation. *Doyle v. Camelot Care Centers*, 305 F.3d 605, 614-15 (7th Cir. 2002); *Delefont v. Beckelman*, 264 F. Supp. 650, 656 (N.D. Ill 2003). Defendants are only liable for actions for which each is directly responsible. *Madewell v. Roberts,* 909 F.2d 1203, 1208 (8th Cir. 1990). A general responsibility for supervising operations is insufficient to establish the personal involvement necessary to support liability. *Keeper v. King*, 130 F.3d 1309, 1314 (8th Cir. 1997). In bringing a § 1983 claim a Plaintiff may not rely on the doctrine of respondeat superior, but must allege personal involvement in the wrongdoing.

Neither DHS Director Palmer (now DHS Director Foxhoven) nor Mr. Wittrock have any role in determining who should be prosecuted as a sexually violent predator. They are not proper defendants for the gender discrimination claim. The Iowa Code sets out a process for evaluating and selecting cases on which to file. Once filed, there is full due process provided and adjudication as an SVP following a trial. Neither Mr.

Wittrock, nor the DHS Director, nor anyone at DHS has any role in selecting who is prosecuted as an SVP. There is no contrary evidence in the record to suggest otherwise.

C. Appellants Have Not Shown Similarly Situated Women Who Have Avoided Prosecution.

Even if Appellants had sued the proper person, there is no evidence of selective prosecution.

> The Equal Protection Clause generally requires the government to treat similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Dissimilar treatment of dissimilarly situated persons does not violate equal protection. *See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.,* 21 F.3d 237, 242 (8th Cir.1994). Thus, the first step in an equal protection case is determining whether the [Plaintiffs have] demonstrated that [they were] treated differently than others who were similarly situated to [them]. *See, e.g., Samaad v. City of Dallas,* 940 F.2d 925, 940–41 (5th Cir.1991).

Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994). Absent a threshold showing that Appellants are similarly situated to those to allegedly receive favorable treatment, the claim is not viable. *Id.* Defendants assert men are not similarly situated to women in their likelihood to be committed as sexually violent predators for the four reasons articulated by Dr. Tracy Thomas. There are actual differences between men and women in terms of criminal offenses, and those differences result in differences in prisons, prison programs, and SVP facilities.

Before the district court, DHS Defendants relied on *Roubideaux v. N. Dakota Dep't of Corr. & Rehab.*, 570 F.3d 966, 976 (8th Cir. 2009), specifically because the persons running the institution were sued, not the prosecutor. In resolving the litigation directed at differences in security classification, the court found, "Any attempt to compare programs between and among different prisons where all of these varying factors are present 'is like the proverbial comparison of apples to oranges.'" *Id.* The Eighth Circuit concluded differences in the number of men and women inmates, and the difference in level of custody (two thirds of women inmates were considered minimum custody with the remainder medium custody) did not state a claim for violation of equal protection. *Roubideaux,* 570 F.3d at 976. Women are even less likely to be an SVP then they are to be a prison inmate.

At footnote 6, the district court notes Defendants do not adopt the analogy that this case is similar to selective prosecution cases. As explained above, that is because the prosecutor was not sued. The district court then concludes that Defendants are arguing "the Eighth Circuit would also approve of an entire classification of prosecution directed solely at one gender." To clarify, Defendants do not suggest this. Defendants' position is that the law is facially neutral and not biased in application. There is no

evidence in the record that the prosecution is "directed" at one gender over another; Defendants do not concede or suggest or argue that prosecution is "directed" at one gender or another. The fact that only men are currently committed in Iowa's SVP program is a reflection of the exceedingly low occurrence of violent, recidivist female sex offenders, not of any gender-based animus in the law or its application.

To draw any conclusions about selective prosecution, there must be some information of the pool of candidates for such prosecution. In this record, the only evidence on base rates (the pool of females eligible for SVP prosecution) comes from Dr. Thomas's report. Dr. Thomas opines that women comprise only 5% of the sex offender population. App. 138. Less than 3% of that 5% sexually recidivate. App. 139. "The very low recidivism rate for female sexual offenders is relevant to the issue of SVP commitment, being as risk for future sexual offending is one "prong" of the SVP definition." App. 139. Women also are less likely to have paraphilic disorders or antisocial personality disorder, which relates to the requirement of having a "mental abnormality." App. 139.

To state an actionable claim, Appellants must show clear evidence they were discriminated against – intentional decisions with discriminatory purpose. *United States v. Patterson*, 258 F.3d 788, 790 (8th Cir. 2001)

(stating standard for selective prosecution claim) (citing *United States v. Armstrong,* 517 U.S. 456, 465 (1996)). Appellants must also show that enforcement of the law had a discriminatory effect and was motivated by a discriminatory purpose. *Id.; see also Wayte v. United States,* 470 U.S. 598, 608 (1985). As the district court pointed out, Appellants have not identified any similarly situated "female offender who was not subjected to an attempted civil commitment based solely on her gender." App. 336. Statistics alone, without proof of discrimination in an individual case, are not sufficient. *McCleskey v. Kemp*, 481 U.S. 279, 312-14 (1987). Appellants have no proof of discrimination. Several Appellants conceded lack of being damaged by the discrimination claim. Without an injury in fact, Plaintiff has no standing to pursue a claim. *Strutton v. Meade*, 668 F.3d 549, 555 (8th Cir. 2012) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

D. Appellants Lack Standing to Claim Women are Deprived of CCUSO's Benefits.

On appeal, Appellants for the first time assert that Chapter 229A is discriminatory because women are deprived of the benefit of CCUSO's treatment. Applt Br. at 7. Issues may not be raised for the first time on appeal. *United States v. Partee,* 546 F.2d 1322, 1323 (8th Cir. 1976).

Appellants are men who are committed as SVPs. They lack standing to assert the interests of any women who hypothetically satisfy commitment

criteria and are deprived of the benefits of treatment. Even if it is a violation, the fact of the violation does not necessarily give Appellants standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Appellants must have some concrete interest affected by the alleged deprivation sufficient to support standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). The injury must also be particularized – it must affect Appellants in a personal and individual way. *Id.* As an additional defect of standing, any decision of this court would not redress any complaints of Appellants. The injury claimed is not fairly redressible. *Id.; see also Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, No. 15-1222, 2016 WL 690849 (8th Cir. Feb. 22, 2016). Appellants are not injured even if women who should be committed as SVPs are not. Those hypothetical injuries belong to those hypothetically eligible women to raise and adjudicate.

Appellants claim that the use of gender biased testing and assessments deprive women of the opportunity to be committed to and served by Iowa's SVP program. Appellants have not pointed to evidence in the record that the tests are gender biased or that there is some tangible harm to the Appellants from the use of these assessment tools. Appellants have also not indicated how this alleged gender bias in testing disadvantages men. In their Answer, Defendants report they do not perform research on psychological tests

geared for either gender. App. 61. Defendants treat sexually violent predators; they are not in the business of developing assessment tools for predicting risk. Besides, the use of assessment tools developed for men with men would not be an inappropriate use of the tool and would infer no injury or harm to the men assessed.

In re Coffel, 117 S.W.3d 116 (Mo. App. E.D. 2003) aptly describes the state of the science with respect to assessing women who present with sexual offending behavior. In the *Coffel* case, several expert witnesses assessed the woman in question, reaching various conclusions on whether she was more likely than not to reoffend. These experts cite to the same rare re-offense rate of women sex offenders that Dr. Thomas describes. "All of the experts who testified in this case agreed that, based on what little research has been performed to date on the likelihood of reoffense by female sexual offenders, reoffense is extremely rare. From the published studies he was able to find on the subject, Dr. Scott noted a recidivism rate of less than two percent." The record in *Coffel* describes the assessment processes and findings of the experts with respect to the individual in question. The court reversed the commitment based not on gender-biased research, but on the weight of the evidence. *Id.*

At least some of the Appellants were straightforward with what they want out of this lawsuit – to be discharged from CCUSO. But that remedy is *Heck* barred. *Heck v. Humphrey*, 512 U.S. 477 (1994). A plaintiff cannot bring a non-habeas civil action that would call into question the lawfulness of his detention. *Sheldon v. Hundley*, 83 F.3d 231, 233 (8th Cir. 1996). Appellants cannot use § 1983 to challenge the fact of or duration of confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

Appellants' section on Remedy at pages 15-16 of their brief is speculation. Appellants' speculate that "the same defective testing is used repeatedly in making on-going treatment decisions and in considering release decisions." There is no evidence in the record on this point nor do the Appellants complain in their Complaint, Amended Complaint, or their depositions about this issue. The time to amend the complaint and clarify a new or different theory of the case has passed. This case was filed in 2014 – four years ago. The question before the court on appeal is whether the district court's decision was proper based on the record and arguments before the court. Defendants' assert it was correctly decided below.

CONCLUSION

Appellants are men who are civilly committed under Iowa's sexually violent predator law. They complain they are the victims of gender based

discrimination because no women are also committed to Iowa's SVP program. The evidence in the district court record shows that Iowa has attempted a civil commitment of one woman, another was under review, and that there are significant differences in the base rates of men and women who sexually offend, and who recidivate. Appellants did not sue the prosecutors, but rather sued individuals responsible for running the facility at which Appellants are placed for secure treatment following commitment. The law is facially neutral. There is no evidence in the record of discriminatory application or of any similarly situated woman who was not civilly committed solely because of her gender. Although Appellants raise concerns that these women cannot benefit from CCUSO's treatment program, this is a new argument raised for the first time on appeal. And Appellants lack standing to raise concerns on behalf of these hypothetical violent, recidivist, female sex offenders. The district court correctly granted summary judgment. Defendants ask that the district court's order be affirmed.

WHEREFORE, the Defendants pray this Honorable Court AFFIRM the decision of the district court and to order any further relief appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gretchen W. Kraemer, Special Assistant Attorney General for the State of Iowa, hereby certify that I electronically filed this brief on March 8, 2018; and hard copies were mailed on March 8, 2018.

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