No. 16-1394

IN THE

Supreme Court of the United States

KEVIN SCOTT KARSJENS; DAVID LEROY GAMBLE; KEVIN JOHN DEVILLION; PETER GERARD LONERGAN; JAMES MATTHEW NOYER, SR.; JAMES JOHN RUD; JAMES ALLEN BARBER; CRAIG ALLEN BOLTE; DENNIS RICHARD STEINER; KAINE JOSEPH BRAUN; CHRISTOPHER JOHN THURINGER; KENNY S. DAYWITT; BRADLEY WAYNE FOSTER; BRIAN K. HAUSFELD, AND ALL OTHERS SIMILARLY SITUATED,

PETITIONERS,

V.

EMILY JOHNSON PIPER; KEVIN MOSER; PETER PUFFER; NANCY JOHNSTON; JANNINE HERBERT; ANN ZIMMERMAN, IN THEIR OFFICIAL CAPACITIES,

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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June 22, 2017

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QUESTION PRESENTED

Does Minnesota's indefinite sex-offender civil-commitment scheme violate the Fourteenth Amendment's Substantive Due Process Clause?

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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This case interests *amici* because Minnesota's sex-offender civil-commitment scheme indefinitely incarcerates individuals who have already served their sentences. This practice violates the fundamental right to be free from physical restraint without due process and represents a troubling erosion of liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1994, Minnesota passed what has become arguably the most aggressive and restrictive sex-offender

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioners filed a blanket consent; Respondent's consent letter has been lodged with the Clerk. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

civil commitment statute in the country. The Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA), administered as the Minnesota Sex Offender Program (MSOP), provides for the indefinite civil commitment of "sexually dangerous" individuals, in addition to whatever criminal punishment may have been imposed. Minn. Stat. § 253D. While the statute includes procedures by which a committed individual may file a petition for discharge, whereupon a special review board will assess the individual's status and determine whether he meets the statutory requirements for discharge or loosening of restrictions, the statute does not provide for any sort of periodic assessment system. In fact, by the state's own admission, hundreds of civilly committed individuals have never received an assessment of their risk to the public, and hundreds more have received assessments only sporadically. The MSOP is aware that at least some of the people in its custody satisfy statutory discharge criteria, yet has taken no steps to determine who they are, let alone begin discharge proceedings.

The Petitioners here brought a *pro se* class action under 42 U.S.C. § 1983 against the state in 2011. Specifically, they claim that the MSOP violates their substantive due process right to freedom from bodily restriction since the program is not reasonably related or narrowly tailored to the admittedly compelling state interest of protecting the public from sexual violence. The lack of periodic risk assessment and the punitive nature of the state's policies represent an unconstitutional attempt to exact effectively criminal penalties on individuals who have not been provided the full procedural protections of criminal law.

The district court found in the Petitioners' favor, holding that the indefinite-detention program violates the "fundamental right to live free of physical restraint," as protected by the Fourteenth Amendment's Due Process Clause. The Eighth Circuit reversed, stating that Petitioners have no liberty interest in freedom from physical restraint—not that their liberty interest must be balanced against the state's interest in protecting the public from violence, but that for sex offenders, that liberty interest *simply does not exist*.

Sex-offender laws have bored a hole in the nation's constitutional fabric. As state and federal governments expand that hole—threatening to swallow other rights and others' rights—this Court should intervene. This case presents an important opportunity to repair the damage done by the unfettered civil commitment of sex offenders. The opinion below calls on the Court to acknowledge the punitive purpose to which civil commitment has been deployed and to restore the appropriate level of constitutional scrutiny to serious deprivations of individual liberty.

ARGUMENT

I. WHETHER CIVIL OR CRIMINAL, MINNESTOTA'S SEX OFFENDER PROGRAM CONFINEMENT SHARES CORE QUALITIES WITH PUNITIVE SENTENCES

A. Individuals Deemed to Be Sexually Violent Predators Face Indefinite Detention with No Hope of Release

"[T]he only way to get out is to die." *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1151 (D. Minn. 2015), *rev'd sub nom. Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017). So testified Craig Bolte, one person committed

in the Minnesota Sex Offender Program. While Bolte spoke to his own perception about the odds of eventual release, the numbers back him up. The district court found that "Minnesota presently has the lowest rate of release from commitment in the nation." *Id.* at 1147. The court explained that the MSOP is a true outlier: "This case is distinguishable from other[s] . . . where it was represented to the court that the program's anticipated duration of completion was a few years or only *potentially* indefinite; here, not one offender has been released from the MSOP program after over twenty years." *Id.* at 1167 (emphasis in original).[2]

Indeed, some people have been confined under the MSOP for more than 20 years. *See id.* at 1157, 1158. Given this nearly universal failure on the part of the assessment committees to grant even provisional discharges to committed individuals, a sense of hopelessness prevails inside the institutions. According to the district court, "[t]he evidence clearly establishes that hopelessness pervades the environment at the MSOP, and that there is an emotional climate of despair among the facilities' residents." *Id.* at 1151. Experts appointed by the district court discovered that individuals committed commonly "perceive their confinement to be a 'life sentence.'" Expert Report and Recommendations by Naomi J. Freeman et al. at 52, *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, No. 0:11-cv-03659-DWF-JJK (D. Minn. 2015), ECF No. 658, *available at* http://strib.mn/2rRT61E [hereinafter Expert Report]. In a climate "characterized by high levels of learned

[2] Since the district court ruled, one individual (committed for offenses committed as a minor) has been discharged. In addition, four people have been provisionally discharged, though they continue to live under significant restrictions.

helplessness and hopelessness . . . . [t]here is a ubiquitous belief that clients cannot achieve release." *Id.* at 1151. In short, the MSOP is a regime of indefinite detention that provides no hope of release. *See Karsjens*, 109 F. Supp. at 1144 ("The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.").

B. The Absence of Meaningful Treatment Plans and Regular Risk Assessments Distinguishes this Regime from Constitutionally Compliant Civil Commitment

The MSOP's complete failure to release any civilly committed sex offender is not simply a back-end political problem; it is a design flaw baked into the system. Minnesota's laws and its implementation of those laws reveal that the MSOP is uniquely retrograde. The MSOP approach to both treatment and assessments of committed individuals distinguishes it from comparable schemes that—unlike the MSOP—may comply with the Constitution.

When individuals first enter a civil commitment program purportedly constructed to deliver treatment, one might expect the state to devise an informed and individualized treatment plan. Indeed, "[t]he majority of SOCC [Sex Offender Civil Commitment] programs conduct a formal pre-treatment evaluation of each client in order to ascertain treatment goals and targets." Joanna Woolman & Jennifer K. Anderson, *Going Against the Grain of the Status Quo: Hopeful Reformations to Sex Offender Civil Commitment in Minnesota*—Karsjens v. Jesson, 42 Mitchell Hamline L. Rev.

1363, 1392 (2016); *see also id.* ("Those SOCC programs have different treatment tracks for clients based on a number of factors, including individual intellect, personality, mental health status, and behavioral issues."). In short, other SOCC programs identify individual needs and provide tailored treatment according to those needs. *See id.*; *see also* Expert Report, *supra*, at 10. Yet, "Minnesota does no such thing." Woolman & Anderson, *supra*, at 1392. Instead, "[p]sychological assessments are conducted sporadically and have little to no effect on identifying an individualized treatment program based on key factors such as individual intellect. The MSOP is a one-size-fits-all treatment program for all clients regardless of age, cognitive ability, sex, mental illness, or other physical disabilities." *Id.*; *see also* Expert Report, *supra*, at 26.

Despite its stated goals, Minnesota's treatment approach falls flat and falls hard. *Karsjens*, 109 F. Supp. 3d at 1153 (The goal, "observed in theory but not in practice, is to treat and safely reintegrate committed individuals at the MSOP back into the community."). Not only has the treatment program's content been in regular flux—"there have been four or five clinical directors during [one individual's] commitment at the MSOP, and that the MSOP's treatment program changed four or five times with each change in clinical leadership," *id.*—but the current three-phase incarnation also provides little to no evidence of progression. *See id.* at 1153–57. The program's Matrix scoring method fundamentally lacks consistency. *See id.* at 1156. Indeed, the MSOP did not even bother to train its staff on what factors matter under the Matrix until nearly four years into the model's use. *Id.* at 1155–56 (noting that the MSOP began using the Goal Matrix in 2009 and began training on factors in 2013). Another

year passed before the MSOP trained staff on scoring specifically. *Id.* at 1156. The lack of urgency surrounding the treatment approach corresponds to its lack of rigor and, ultimately, to its lack of purpose.

The most powerful proof that the MSOP's treatment approach is not meaningful is the fact that some individuals who successfully completed treatment never earned release and were never discharged. According to the district court, "[t]here are committed individuals at the MSOP who have reached the maximum benefit and effect of treatment [there]. Dr. Elsen identified individuals who had reached 'maximum treatment effect' . . . who could not receive any further benefit from sex offender treatment." *Id.* at 1158. As if the entire program was a manifestation of Escher's impossible stairs, the MSOP did not even contemplate a classification to reflect that an individual completed treatment. *See* Woolman & Anderson, *supra*, at 1399. One commentator has made this sobering observation: "More offenders exit Moose Lake as a result of illness or death than through successful application of the facility's treatment plan." Cynthia A. Frezzo, Note, *Treatment Under Razor Wire: Conditions of Confinement at the Moose Lake Sex Offender Treatment Facility*, 52 Am. Crim. L. Rev. 653, 666 (2015).

With SOCC programs, it should go without saying that an individual who no longer meets the statutory criteria for commitment must be released from custody. Yet, that basic premise eludes the MSOP. "The MSOP knows that there are Class Members who meet the reduction in custody criteria or who no longer meet the commitment criteria but who continue to be confined at the MSOP." *Karsjens*, 109 F. Supp. 3d at 1164.

A central reason for this wrongful continued confinement is that Minnesota's civil-confinement law does not require regular risk assessments. *Id.* at 1159 ("Defendants are not required under the MCTA to conduct periodic risk assessments after the initial commitment to determine if individuals meet the statutory requirements for continued commitment or for discharge."). In practice, the MSOP fails to complete risk assessments at regular intervals. The district court's panel of experts observed that "it is unusual and of great concern . . . that assessments of this sort are only completed at MSOP when a client is actually petitioning for release or movement to [a less restrictive level]. Expert Report, *supra*, at 33. In this respect, Minnesota again is an outlier among the states with SOCC programs. *See* Woolman & Anderson, *supra*, at 1394 ("The vast majority of states with SOCC programs require regular risk assessments of their clients.").

To recap, the MSOP: (1) does not treat the people committed based on their individual needs; (2) utilizes a treatment model that staff received no training about for several years; (3) fails to progress individuals through the phases of treatment in a reliable and meaningful way; (4) does not discharge or release individuals who have successfully completed treatment or no longer meet the commitment requirement; and (5) fails to conduct regular risk assessments to ensure individuals continue to meet the test for civil commitment. Seeing what it fails to do, one might reasonably ask what the MSOP actually does.

C. The MSOP Represents an Unrestrained Expansion of Government Power that Converts a Civil Commitment into an Additional Criminal Sentence

Given the district court's undisputed findings of fact regarding the provision of "treatment," the absence of assessments, and the atmospheric suffusion of hopelessness, it is functionally impossible to distinguish between Minnesota's civil commitment for sex offenders and imprisonment. *See, e.g.*, Rachel Aviv, *The Science of Sex Abuse*, New Yorker, Jan. 14, 2013, http://bit.ly/2rRWFF3 ("During the past fifteen years, the American Psychiatric Association has repeatedly objected to the civil commitment of sex offenders. In 1999, a task force created by the organization wrote that 'confinement without a reasonable prospect of beneficial treatment of the underlying disorder is nothing more than preventative detention.'"). When the government uses a civil commitment scheme to restrain an individual's physical liberty, provides no articulable or accessible path to release, and continues detention even when an individual no longer meets the requirement for a commitment, the system should be understood as pretextual. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring) ("A law enacted after commission of the offense and which punishes the offense by extending the term of confinement is a textbook example of an *ex post facto* law. If the object or purpose of the [SOCC] law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish."). This Court reiterated that concern just this past week. *Packingham v. North* Carolina, No. 15-1194, slip op. at 8 (June 19, 2017) (noting "the

troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system"). Every significant indicator supports the claim that Minnesota uses its SOCC program to prolong indefinitely the detention of civilly committed sex offenders. *See id.* at 383 (Breyer, J., dissenting) ("[A] statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose.").

The MSOP is so riddled with systemic flaws that a reasonable outsider would see the inefficiencies as the product of design, not ineptitude. Consider, for example, that it sometimes takes over five years for a petition for a reduction in custody or discharge to be decided. *See Karsjens*, 109 F. Supp. 3d at 1163. Five years. It is no wonder why the experts concluded that "the current release process in Minnesota is also overly burdensome and inefficient." Expert Report, *supra*, at 76. In practice, the MSOP represents an expansion of the government's power to punish offenders, but one that circumvents an individual's constitutional and statutory rights. *See, e.g.*, Bill Mears, *Can sex offenders be held after serving criminal sentences?*, CNN, Jan. 12, 2010, http://cnn.it/2rRWppE ("The main danger of civil commitment of sex offenders is that it provides a precedent for doing an end run around those governmental protections.") (quoting expert Professor Eric Janus). The MSOP is exactly the end-run this Court has cautioned against. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("If the civil system is used simply to impose punishment after the State makes [a decision it regrets] on the criminal side, then it is not performing its proper function.").

II. THIS CASE PRESENTS PRESSING QUESTIONS ABOUT WHETHER A SEX-OFFENDER CIVIL-COMMITMENT SCHEME CAN EVER BE DEEMED PUNITIVE

A. This Court Has Repeatedly Suggested that It Is Possible for a Court to Determine that a Confinement Scheme Labeled "Civil" Is Actually Punitive

On a number of occasions, this Court has held that even though a legislature's labeling is a weighty factor in determining whether a penalty is "civil" instead of "criminal" or punitive, it is possible for a court to override that characterization based on a number of factors that may reveal a reality at odds with the lawmaking body's claims.[3] The test used to determine whether a penalty is civil is "a matter of statutory construction," and it proceeds "on two levels." *United States v. Ward*, 448 U.S. 242, 248 (1980). First, the court must determine whether the legislative body expressed a preference for a particular label (of "civil" or "criminal"), *see id.*, though these labels "are not of paramount importance." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994) (internal quotations and citations omitted). When there is no "conclusive evidence" that the legislature sought to punish criminally through its enactment, the court must then consider a range of factors to decide whether the penalty

[3] Although the state legislature labelled this a "civil commitment" scheme, circumstances surrounding the introduction and passage of the legislation suggest that at least some of the bill's proponents sought to use commitment to prolong punishment. *See, e.g.*, Brief for Seattle-King County Defender Association et al. as Amici Curiae Supporting Respondent at 18–19, State v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649), 1996 WL 473574.

really is a criminal punishment. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) ("Absent conclusive evidence of congressional intent as to the penal nature of a statute, these [other] factors must be considered in relation to the statute on its face."). This Court identified some of these factors in *Mendoza-Martinez*:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

Id. at 168–69. These factors—"neither exhaustive nor dispositive"—enable the Court to determine "whether the statutory scheme was so punitive either in purpose or effect as to negate" the legislature's intention to create a civil penalty. *Ward*, 448 U.S. at 248–49.

Promises of protection against punishments legislated in the guise of civil regulation have not been well-kept. Although the *Mendoza-Martinez* factors have been on the books for over 50 years now, "to this day, the Court has yet to brand a nominally civil sanction as criminal" when relying on them. Wayne A. Logan, *The* Ex Post Facto *Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1282 (1998). The doctrine is not yet a dead letter in the lower courts;

some have struck down purportedly civil enactments under *Mendoza-Martinez*. *See, e.g.*, *Mikaloff v. Walsh*, 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio 2007) (holding residency-restriction law passed and imposed on plaintiff after he finished his criminal sentence was punitive); *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009) (holding that residency restrictions violated the *ex post facto* clause where five of the seven *Mendoza-Martinez* factors revealed the law's punitive effects); *Commonwealth v. Baker*, 295 S.W.3d 437, 445–46 (Ky. 2009) (holding that residency restrictions violated the *ex post facto* clause in light of the law's punitive effects). Nonetheless, opinions like that below threaten to undermine this Court's jurisprudence and foreclose judicial scrutiny of laws that legislatures label "civil."

B. Left Undisturbed, the Opinion Below Will Undermine this Court's Promise and Continue to Justify Sweeping Exercises of Governmental Power

While this Court's case law holds out the possibility that a SOCC scheme could in theory qualify as punitive or criminal rather than civil, this case puts that principle to the test. Despite assurances that the judiciary will not deem laws "civil" simply because legislatures so characterize them, the extent of deference now offered to legislatures—particularly in light of *Hendricks*—saps judicial authority and presages further sweeping exercises of governmental power. The Eighth Circuit's opinion below, which simply ignores the district court's finding that the MSOP is punitive, clinches legislative free rein. *See* Logan, *supra*, at 1268 ("American legislatures today are pressing the envelope of the criminal-civil distinction like never before—enacting post-confinement sanctions that betray a

shrewd awareness of the importance of the 'criminal' label."); Alan M. Dershowitz, *Preventative Confinement: A Suggested Framework for Constitutional Analysis*, 51 Tex. L. Rev. 1277, 1296 (1973) ("By attaching this label [of the term civil], the state has successfully denied defendants almost every important safeguard required in criminal trials. Invocation of this talismanic word has erased a veritable bill of rights."). If any SOCC scheme is punitive, Minnesota's is.

A brief review of facts makes clear that the punitive effects of the Minnesota SOCC law warrant its treatment as a punishment rather than merely civil confinement. When this case was litigated, in over 20 years of operation, the MSOP had never fully discharged any individual committed. That number reached one in August of 2016. *See* Chris Serres, *Appellate Court Affirms Constitutionality of Minnesota's Sex-Offender Program*, Star Tribune, Jan. 4, 2017, http://strib.mn/2rRXIVF ("Only one person, a 26-year-old confined for sexual acts he committed as a juvenile, has been fully discharged from MSOP, and that did not occur until August of this year."). The State has retained continuous custody of several individuals who no longer meet the commitment requirements. *See Karsjens*, 109 F. Supp. 3d at 1164. Indeed, some of the Petitioners have completed treatment but have had no success in obtaining release or a reduction in custody. *See id.* at 1158. The district court also found that the MSOP fails to provide "less restrictive alternatives" to the confinement at secure facilities even though there are civilly committed individuals who could be "safely placed" in such locations. *Id.* at 1172, 1152. It also expressed deep concerns about the role "public opinion" and "political pressure" plays in the determinations to deny release. *Id.* at 1174 n. 7.

The last point—that politics have affected the MSOP's operations—is a testament to the wisdom of the *Mendoza-Martinez* test to identify punitive effects. The Court's openness to considering a range of factors entails openness to a breadth of evidence. In Minnesota, the evidence strongly suggests that the MSOP became even *more* punitive after the tragic death of Dru Sjodin in 2003. Indeed, the district court found that civil commitment referral rates grew exponentially in the wake of Ms. Sjodin's murder. *Karsjens*, 109 F. Supp. 3d at 1148. These developments help contextualize the thick "politics" that surround Minnesota's program. And these are the types of facts that courts must consider when deciding whether a law's punitive effects override its stated "civil" purpose.

The Eighth Circuit's total failure to grapple with more than 20 years of evidence of punitive effect abdicates the judiciary's crucial role in detecting civil penalties that operate as punishments rather than remedies. Abdication entails far-reaching implications. However reviled sex offenders are in our society—and however terrible the crimes for which they have already been punished were—this Court must maintain a check to prevent the government from punishing people without the protections the Constitution provides to those facing criminal sanction. This case is important because it is too easy to overlook constitutional violations when they are perpetrated against those the public despises. *See, e.g.*, Bela August Walker, *Essay: Deciphering Risk: Sex Offender Statutes and Moral Panic in a Risk Society*, 40 U. Balt. L. Rev. 183, 187 (2010) ("The fact that sex offenders seem to be a defined, controllable risk justifies ever-increasing surveillance and governmental intrusion."). But when it comes to the loss of individual freedom, we should not

look back and recall that "first, they came for the sex offenders." Perry Grossman, *First, They Came for the Sex Offenders . . . .* , Slate, Mar. 1, 2017, http://slate.me/2rROLvi.

III. THE EIGHTH CIRCUIT'S JUSTIFICATION FOR ABANDONING STRICT SCRUTINY DEVALUES A FUNDAMENTAL LIBERTY INTEREST

The lower court dismissed the principle that all individuals have a fundamental interest in physical liberty. According to the opinion below, the liberty interest of individuals confined at the MSOP is somehow less than fundamental: "Although the Supreme Court has characterized civil commitment as a 'significant deprivation of liberty,' it has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint." *Karsjens v. Piper*, 845 F.3d 394, 407 (8th Cir. 2017). By characterizing the interest as less than fundamental, the Eighth Circuit justified a departure from the traditional strict scrutiny test, which applies when a government seeks to deprive an individual of a fundamental right. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("the Fourteenth Amendment forbids the government to infringe . . . 'fundamental' liberty interest *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (internal citations and quotations omitted). Instead, the court held that "the proper standard of scrutiny to be applied . . . is whether [the law] bears a rational relationship to a legitimate government purpose." *Karsjens*, 845 F.3d at 407–08.

The Eighth Circuit's opinion debases the central interest individuals have in maintaining physical freedom. Although the court acknowledged this Court's language in *Foucha* that "[i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," it overlooked the concomitant recognition that the "[f]reedom from physical restraint [is] a fundamental right." *Foucha v. Louisiana*, 504 U.S. 71, 80, 86 (1992). Indeed, this Court has long recognized that the term "liberty" in the Due Process Clause "[w]ithout doubt" entails "freedom from bodily restraint." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Cooper v. Oklahoma*, 517 U.S. 348, 368–69 (1996) ("The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty.").

The court below decided instead that the right to be free from bodily restraint was not fundamental because committed individuals have been deemed dangerous. Yet the facts developed in the district court expose a major flaw in this line of reasoning, particularly with respect to Petitioners' as-applied challenge. Here, several of the individuals confined in the MSOP no longer meet the requirements for commitment and the Respondents agree that they can be safely released into society. To overlook this reality is to ignore this Court's command that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

The Eighth Circuit's approach subverts the Constitution even more broadly. Rather than condition the

fundamentality of the right on the status of the individual, the better approach is to recognize that the individual's status may influence the downstream judicial determination of whether the government's interest in curtailing that right is compelling. In other words, it is constitutionally coherent to acknowledge that sex offenders—like all people—have a fundamental right to be free form bodily restraint. That the right is fundamental, however, does not render the government helpless to overcome it. Instead, the government is required to articulate a compelling interest to which the state's infringement of liberty is narrowly tailored to meet. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993). The strict-scrutiny test strikes the right balance, and it prevents courts from bypassing genuine engagement with governmental intrusions on fundamental individual rights. On the other hand, the Eighth Circuit's duplicitous approach enables governments to strip peoples' rights without pause, downgrading the liberty interest of a particular class of disfavored individuals. Such an approach devalues both the concepts of liberty and restraint.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioners, the Court should grant the petition for a writ of certiorari and reverse a ruling that would otherwise allow Minnesota's indefinite-civil-commitment program to continue unreformed.

Respectfully submitted,

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June 22, 2017