No. _____

IN THE

Supreme Court of the United States

KEVIN SCOTT KARSJENS; DAVID LEROY GAMBLE, JR.; 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.

TONY LOUREY; KEVIN MOSER; PETER PUFFER; NANCY JOHNSTON; JANNINE HEBERT; ANN ZIMMERMAN, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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July 22, 2021

QUESTION PRESENTED

Whether an involuntarily committed individual whose continued commitment depends on treatment progression has a constitutional right to treatment?

PARTIES TO THE PROCEEDING

Petitioners Kevin Karsjens, David Gamble, Jr., Kevin DeVillion, Peter Lonergan, James Noyer, Sr., James Rud, James Barber, Craig Bolte, Dennis Steiner, Kaine Braun, Christopher Thuringer, Kenny Daywitt, Bradley Foster, and Brian Hausfeld are plaintiffs in the district court and appellees in the Eighth Circuit.

Respondents Tony Lourey, Kevin Moser, Peter Puffer, Nancy Johnston, Jannine Hebert, and Ann Zimmerman are defendants in the district court and appellants in the Eighth Circuit.

STATEMENT OF RELATED PROCEEDINGS

Karsjens v. Jesson, No. 11-3659-DWF/JJK (D. Minn. Jun. 17, 2015).

Karsjens v. Jesson, No. 15-3485 (8th Cir. Jan. 3, 2017).

Karsjens v. Piper, No. 11-3659-DWF/TNL (D. Minn. May 3, 2017).

Karsjens v. Lourey, No. 17-3343 (8th Cir. Feb. 24, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kevin Karsjens, David Gamble, Jr., Kevin DeVillion, Peter Lonergan, James Noyer, Sr., James Rud, James Barber, Craig Bolte, Dennis Steiner, Kaine Braun, Christopher Thuringer, Kenny Daywitt, Bradley Foster, and Brian Hausfeld respectfully petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Karsjens v. Lourey*, No. 18-3343.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Order of the United States District Court of Minnesota are reported at 109 F.Supp.3d 1139 (D. Minn. 2015) and reproduced in the appendix hereto ("Pet. App.") at Pet App. 53. The Opinion of the United States Court of Appeal for the Eighth Circuit is reported at 845 F.3d 394 (8th Cir. 2017) and reproduced at Pet. App. 129. The Opinion of the United States District Court for the District of Minnesota granting defendants' motion for summary judgment after remand is reported at 336 F.Supp.3d 974 (D. Minn. 2018) and reproduced in the appendix hereto at Pet. App. 10. The Judgment in a Civil Case in the United States District Court of Minnesota is not reported and is reproduced at Pet. App. 52. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 988 F.3d 1047 (8th Cir. 2021) and reproduced in the appendix hereto at Pet. App. 1.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on February 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Minn. Stat. §253D, "Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities."

INTRODUCTION

This case offers the Court an opportunity to answer a fundamental constitution question regarding the right to treatment left unresolved in the wake of *Youngberg v. Romeo,* 457 U.S. 307 (1982); *Kansas v. Hendricks,* 521 U.S. 346 (1997); and *O'Connor v. Donaldson*, 422 U.S. 563 (1975): Whether individuals involuntarily committed by a state have a constitutional right to treatment when treatment progression controls their potential discharge from commitment.

Since the decisions in *Youngberg, Hendricks,* and *Donaldson*, states have dramatically increased the number of individuals committed for past sexual crimes. Because treatment progression – in Minnesota and many other states – governs release decisions, the Circuit courts disagree on whether those individuals possess a

constitutional right to treatment. The conflict between (and within) the circuits is clear and irreconcilable without guidance from this Court. The Circuit split deals with the right to be free "from imprisonment – government custody, detention, or other forms of physical restraint," which "lies at the heart of the liberty that [due process] . . . protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

The Supreme Court in *Youngberg* held under the Fourteenth Amendment, civilly committed persons "enjoy constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests," and that the state is obligated to provide "such training as an appropriate professional would consider reasonable to ensure [the committed's] safety and to facilitate his ability to function free from bodily restraints." *Youngberg*, 457 U.S. 307 at 324.

Since *Youngberg*, several Circuits have concluded that due process requires states to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released." *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (Citing *Ohlinger v. Watson*, 652 F.2d 755, 778 (9th Cir. 1980; *see also Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974)). Other circuits agree that involuntarily committed individuals are entitled to minimally adequate treatment as a matter of substantive due process.

The Eighth Circuit adopted a contrary conclusion that this Court has never recognized a constitutional right to treatment for a civilly committed individual, even though treatment is the alleged purpose of their commitment and treatment

progression is required for their release. *See, e.g., Strutton v. Meade,* 668 F.3d 549, 557 (8th Cir. 2012), *cert denied,* 568 U.S. 816 (2012) (recognizing the circuit split on this issues); *Bailey v. Gardebring*, 940 F.2d 1150, 1154 (8th Cir. 1991), *cert denied,* 503 U.S. 952 (1992); The Eighth Circuit has again reiterated its view, in the present case, that the Supreme Court has not recognized a "due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." *Karsjens II*, 988 F.3d at 1051 (quoting *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012)).

This departure is disturbing not only in that it offends our fundamental understanding of liberty, due process, and fairness, but also in its sheer scope: Minnesota has the highest per capita population of civilly committed sex offenders and the lowest rate of release from commitment in the nation. Pet. App. 63-65. The unresolved question of whether civilly committed individuals have a right to treatment – and the resulting ability for the courts to craft their own view of this bedrock constitutional principle — has thus disproportionately impacted civilly committed individuals in the Eighth Circuit.

This is also a uniquely compelling case for this Court's intervention. The Petitioners are all individuals who have been indefinitely and involuntarily civilly committed to the Minnesota Sexual Offender Program ("MSOP"), the vast majority of whom have completed prison sentences for offenses that prompted their commitment. Considering the miniscule release rate because of the inadequate

treatment progression, absent intervention from this Court, it is almost guaranteed that most of the Petitioners will die in custody.

STATEMENT OF THE CASE

This *pro se* case was filed on December 21, 2011, alleging constitutional and state law violations regarding Minnesota's civil commitment pursuant to Minn. Stat. § 253D.[1] In their amended pleadings, Petitioners alleged that Minn. Stat. § 253D is unconstitutional on its face and as-applied because the nature and duration of Minnesota's indefinite civil commitment scheme is not reasonably related or narrowly tailored to the purpose of commitment.

Relevant to this petition, Petitioners also alleged a separate claim that MSOP procedures failed to provide for minimal adequate treatment, including but not limited to the failure to provide periodic reviews to assess whether committed individuals continued to meet the standards for commitment, the failure to employ objective standards for progression through treatment levels, and ultimately the failure to provide treatment designed and implemented in a way that moves Petitioners towards reduction in custody. Petitioners argued these failures amounted to violation of the Fourteenth Amendment.

Following a six-week bench trial, the district court found Minn. Stat. § 253D unconstitutional on its face and as applied by the Defendants because the indefinite

[1] The district court set forth its detailed findings from the trial proceeding in its Findings of Fact, Conclusions of Law, and Order, *109 F.Supp.3d 1139; Karsjens I,* 845 F.3d 394; Memorandum Opinion and Order, 336 F.Supp.3d 974; and *Karsjens II*, 988 F.3d 1047. The underlying facts are not repeated here because this petition presents a purely legal question.

detention under a civil statute implicates the "fundamental right to live free of physical restraint," which is a "curtailment of [plaintiffs'] liberty. Pet App.105-06. As the Minnesota Supreme Court also held[2] with regard to the Minnesota statute, the district court applied strict scrutiny to Petitioners' due process claims and found that the statute was not narrowly tailored to a compelling state interest because "the statute, on its face, authorizes prolonged commitment, even after committed individuals no longer pose a danger to the public[.]" Pet. App. 108. The court reserved judgment on Petitioners' remaining counts, including Petitioners' allegation that § 253D is unconstitutional due to its failure to provide meaningful treatment.

The Eighth Circuit reversed, rejecting the application of strict scrutiny to the broad "as applied" and "on its face" constitutional claims, and held that the Act was not unconstitutional under the standard created by *Cty. Of Sacramento v. Lewis,* 523 U.S. 833 (1998), which requires a party challenging substantive due process to demonstrate "both that the [state defendants'] conduct was conscience-shocking, *and* that the [state defendants] violated one or more fundamental rights . . . ." *Karsjens I*, 845 F.3d 394, 408 (quoting *Lewis*, 523 U.S. 833 at 846) (alterations original). The Eighth Circuit then found that the district court erred when it applied the shocks-the-conscience test without first establishing if there was a fundamental right at issue. Rather than remand the "as applied" and "on its face" constitutional

[2] *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994); see also *In re Linehan,* 557 N.W.2d 171, 181 (Minn. 1996); *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999).

claims to the district court, the Eighth Circuit summarily found that Defendants had not engaged in any conscience-shocking behavior *and* that Petitioners do not have a fundamental due process right to "appropriate or effective or reasonable treatment of the illness or disability that triggered [Petitioners'] involuntary confinement." *Karsjens I*, 845 F.3d 394, 410 (quoting *Strutton v. Meade*, 668 F.3d 549 (internal citations omitted)). The Eight Circuit remanded the case to the district court for proceedings on the remaining counts.

On remand, the district court then addressed Petitioners' remaining claims, which included a constitutional claim for failure to provide adequate treatment. The district court dismissed all of Petitioners' remaining claims under the *Lewis* test set out by the Eighth Circuit in *Karsjens I*. Specifically, with regard to Petitioners' failure-to-provide-treatment claim, the district court found that there is no recognized right to "appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement[]" as a fundamental substantive due process right and, as such, found that Petitioners' treatment claim failed both prongs of the *Lewis* standard. Pet. App. 22-23.

On appeal for the second time, the Eighth Circuit affirmed in part and vacated in part the district court's judgment. *Karsjens II*, 988 F.3d 1047. Pet. App. 1. Relevant to this petition, the Eighth Circuit again found that that the Supreme Court has not recognized a due process right to treatment for individuals who are civilly committed and, as such, affirmed the district court's dismissal of Petitioners' failure-to-provide treatment claim. *Id.*

This Petition followed.

REASONS FOR GRANTING THE PETITION

A. The Circuit Court Disagree Over Whether Involuntarily Committed Individuals Have A Right To Treatment.

The Eighth Circuit's blanket rejection of a due process right to treatment for involuntarily committed individuals – and in particular, its assertion that *Youngberg* does not create such a right – runs contrary to precedent from numerous other Circuit courts. Indeed, the prevailing trend demonstrates that courts are applying *Youngberg's* "minimally adequate training" standard as a constitutional *floor*, not a *ceiling*.

The **Fifth Circuit** and the **Ninth Circuit** have the most expansive understanding of the right to treatment. In *Wyatt v. Aderholt*, plaintiffs brought a class action lawsuit against an Alabama state school for the intellectually disabled, claiming that the school was depriving its committees of constitutional rights to treatment. 503 F.2d 1305 (5th Cir. 1974). The district court held that these patients "have a constitutional right to receive such individual treatment as will give each of them a reasonable opportunity to be cured or to improve his or her mental condition." *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974). In a supplemental opinion, the district court held that the patients have a constitutional right to "such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful

life and to return to society." *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972) *aff'd sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

Prior to final judgment being entered in *Wyatt*, the Fifth Circuit decided *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974). Plaintiff Donaldson was involuntarily committed to a psychiatric institution due to a diagnosis of paranoid schizophrenia in 1957 and not released until 1971. *Donaldson,* 493 F.2d at 510. While he was committed, he received "no commonly accepted psychiatric treatment," and when he refused to submit to electroshock treatments, "[n]o other therapy was offered." *Id.* The Fifth Circuit found that Donaldson "received only the kind of subsistence level custodial care he would have received in a prison, and perhaps less psychiatric treatment than a criminally committed inmate would have received." *Id.* at 512. The Fifth Circuit held that "a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition*." Id.* at 520. The court reasoned that the only permissible justifications for civil commitment, and for the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others, or the individual's need for treatment and care. *Id.* at 521. Thus, where the rationale for commitment was treatment, it offends the fundamentals of due process if treatment were not in fact provided. *Id.* at 521-22. Alternatively, if a person is committed under the "police power" rationale, then treatment has to be provided as the "quid pro quo extended by the government

to justify confinement." *Id.* at 522. Notably, the Fifth Circuit drew authority for this formulation in part from *Jackson v. Indiana*, 406 U.S. 715 (1972), which established the rule that due process requires the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed. *Jackson* at 738. The Fifth Circuit interpreted *Jackson* to say "[i]f the 'purpose' of commitment is treatment, **and treatment is not provided**, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose', and the constitutional rule of Jackson is violated." *Donaldson,* 493 F.2d at 521 (emphasis added).

Applying the precepts in *Donaldson,* the Fifth Circuit's decision in *Wyatt* affirmed the district court's decision, noting "[t]his court views as serious a state's failure to ensure the fulfillment of appellees' constitutional rights. . ." *Id.* at 1319.

The **Ninth Circuit's** formulation of the right to treatment is similar. In *Sharp v. Weston*, plaintiffs – all persons civilly committed as sexually violent predators under Washington's sex offender statutes – sued the director of the Washington Special Commitment Center ("SCC") for constitutional violations of their right to mental health treatment. 233 F.3d 1166, 1172 (9th Cir. 2000). Following a 1994 trial, a jury found that SCC was not providing plaintiffs with constitutionally adequate mental health treatment and the district court ordered an injunction requiring the SCC to bring the treatment program into compliance with constitutional requirements. *Id* at 1168-69; *see Turay v. Seling,* 108 F.Supp. 2d 1148 (W.D. Wash. 2000), *aff'd in part, dismissed in part sub nom. Turay v. Anderson,* 12 F.App'x 618 (9th Cir. 2001).

After failing to comply with the injunction, the defendants appealed. On appeal, the Ninth Circuit stated that the appropriate legal standard for analyzing SCC's treatment program is set forth in *Ohlinger v. Watson*, 652 F.2d 775 778 (9th Cir. 1980). In *Ohlinger*, the Ninth Circuit found that "the Fourteenth Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released." *Sharp,* 233 F.3d at 1173 (applying *Ohlinger*, 652 F.2d at 778) (internal quotations omitted). Accordingly, the Ninth Circuit held that the district court did not err by finding that the cumulative effects of the SCC's actions resulted in a scheme that deprived plaintiffs of a realistic opportunity to be cured and released. *Id.* at 1172-73.

The **Fourth Circuit** in *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986) also recognized the right to treatment for committed individuals. In *Morrow*, plaintiff was an adult who had been a ward of North Carolina from birth and who sued the state alleging he had been denied substantive due process under the Fourteenth Amendment. *Id.* at 367. The district court granted summary judgment against defendants on the due process claims. *Thomas S. by Brooks v. Morrow*, 601 F.Supp. 1055 (W.D.N.C. 1984), *aff'd as modified and remanded sub nom. Thomas S. v. Morrow,* 781 F.2d 367 (4th Cir. 1986). Although the district court recognized factual differences between the *Marrow and Youngberg* plaintiffs, the district court held that "[plaintiff] is like the plaintiff in *Youngberg* insofar as the state has control over [his] liberty and care." *Id.* The district court went on to find that due process

afforded plaintiff the right to treatment that is presumptively valid except "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* (quoting *Youngberg* at 323). The Fourth Circuit affirmed and offered a prescient comment on *Youngberg*: "Much of *Youngberg* necessarily addresses the situation of a single patient confined to an institution, but the Court did not intend the liberty interests it identified to be limited to these circumstances. The liberty interests protected in *Youngberg* did not arise because of the institutional confinement. Rather, the Court's premise was that involuntary confinement 'do not extinguish' pre-existing liberty interests in safety and freedom from bodily restraint." *Thomas S. v. Morrow*, 781 F.2d at 373 (quoting *Youngberg* at 315).

Although not a civil commitment case, the **Third Circuit** acknowledged the right to treatment as a fundamental and cognizable liberty interest when the length of a prisoner's sentence was predicated on the completion of treatment. In *Leamer v. Fauver*, 288 F.3d 532 (3d Cir. 2002), the Third Circuit found that New Jersey's unique statutory scheme – which explicitly created a right to treatment for convicted sex offenders and conditioned the length of their prison sentence on progress through treatment – created a liberty interest for both procedural and substantive due process analyses. *Id.* at 545-46. Although *Leamer* involved a penal statute, its progeny expanded its reasoning to apply to other forms of detained individuals. *Lopez v. Christie*, No. CIV.A. 10-3725 SRC, 2010 WL 4940968, at *9-10

(D.N.J. Nov. 24, 2010) ("[T]his Court finds the Third Circuit's holding in *Learner* to clearly extend to an involuntarily committed sex offender under New Jersey's [sex offender commitment statute]."); *Bondurant v. Christie,* No. 10-3005(FSH), 2010 WL 4869094, at *12 (D.N.J. Nov. 22, 2010) ("[B]ased on *Youngberg* and *Leamer*, this Court concludes that [defendant's] liberty interest in treatment is fundamental and cognizable for purposes of both procedural and substantive due process analyses.").[3]

Thus, the circuits that have decided cases on the constitutional right to treatment all agree that such a right exists except the Eighth circuit. The Fifth and the Ninth Circuit have explicitly found that persons detained for the purpose of treatment or protection have a constitutional right to *effective* treatment. The Fourth Circuit has recognized that involuntary commitment does not extinguish any pre-existing rights and the Third and the Tenth Circuits have recognized a fundamental liberty interest in the right to treatment created by state law. That recognition, as applied in those circuits, affords civilly committed individuals more constitutional protections than *Youngberg*. Each of these holdings is in direct conflict with the Eighth Circuit's finding that there is "no recognized right to appropriate or effective or reasonable treatment" for the illness or disability that triggered the involuntary commitment.

[3] While the Tenth Circuit has not addressed this issue directly, it appears to recognize a substantive due process right to treatment based on state requirements. *See Doe v. Heil*, 533 F.App'x 831 (10th Cir. 2013) (recognizing a substantive due process right to treatment based on state requirements as found in *Beebe v. Heil*, 333 F.Supp.2d 1011 (D.Colo. 2004)).

B. Eighth Circuit's Holding Offends Constitutional Principles

Against this backdrop, the Eighth Circuit created a rule of law that is as disturbing as it is aberrant. In *Bailey v. Gardebring*, 940 F.2d 1150, 1154 (8th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992), the Eighth Circuit found that *Youngberg* did not establish a right for civilly committed individuals to treatment *per se*, but rather that *Youngberg* requirements for minimally adequate training were limited to their reasonableness in relation to freedom and unreasonable restraints and concluded that the plaintiff had no right to "psychiatric treatment to overcome a sexual offender condition" because he was "neither in danger during his civil commitment nor was he subject to any restraints beyond the ordinary incidents of involuntary confinement." *Id* at 1153, 1154 (internal quotations omitted). Thus, *Bailey* construed *Youngberg* to apply only to minimally adequate treatment that reduces the need for restraints. *See also Nicolaison v. Ludeman*, 2008 WL 508549, at *8 (D.Minn. 2008) (applying *Bailey* in concluding that *Youngberg* creates no right to "treatment that facilitates release.").

In 2012, the Eighth Circuit decided *Strutton v. Meade*, 668 F.3d 549 (8th Cir. 2012) *cert denied,* 568 U.S. 816 (2012), a lawsuit brought by a civilly committed sex offender challenging the adequacy of treatment at the Missouri Sexual Offender Treatment Center. Under Missouri statute, those persons who are determined to be a "sexually violent predator" are "committed to the custody of the director of the department of mental health for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large."

Mo.Rev.Stat. § 632.495(2). Strutton argued that his commitment was constitutionally deficient because the treatment provided required him to admit his guilt for the crimes for which he was convicted, the program contained punitive measures unrelated to treatment, and budget and staffing shortages caused disruptions in his treatment. *Strutton* at 552-54. Strutton argued that his right to effective treatment was guaranteed to him by state statute, and that the *Youngberg* "professional judgment" ought to apply. *Id.* at 554.

The district court disagreed. First, the district court recited the litany of cases following *Youngberg* that slowly eroded the protections afforded civilly committed persons in the Eighth Circuit and found that an involuntarily committed sex offender's right to treatment is not "clearly established" and that *Youngberg* creates no affirmative right to treatment that facilitates release. *Strutton v. Meade*, No. 4:05CV02022 ERW, 2010 WL 1253715, at *34 (E.D. Mo. Mar 31, 2010), *aff'd,* 668 F.3d 549 (8th Cir. 2012) (quoting *Semler v. Ludeman*, 2010 WL 145275, at *26 (D.Minn. 2010); *Nicoliason v. Ludeman*, 2008 WL 508549, at *8 (D.Minn. 2008)). The *Strutton* district court then analyzed *Kansas v. Hendricks*, 521 U.S. 346, 358-60 (1997) (Breyer, J., dissenting) and found that the Supreme Court held that substantive due process is satisfied so long as the state "conditions the involuntary commitment on a finding of dangerousness and a mental abnormality that makes it unlikely that the individual will be able to control his dangerous behavior regardless of the availability or effectiveness or treatment. *Id.* As such, the district court concluded, therefore, that no fundamental substantive due process right

existed, and the *Youngberg* "professional judgment" standard was inapplicable. Applying instead the "shocks the conscience" standard, the district court found there was no deprivation of Strutton's due process rights. *Id.*

The Eighth Circuit affirmed the district court opinion, while noting that the district court did not address the question of whether an individual "committed for care and treatment under state law has a state substantive right to habilitation which is entitled to substantive protection under the Due Process Clause of the Fourteenth Amendment." *Strutton* at 557 (internal alterations omitted). The Eighth Circuit recognized that other circuits have found that "the Fourteenth Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cursed and released." *Id.* (citing *Sharp v. Weston*, 233 F. 3d 1166, 1172 (9th Cir. 2000); (*Ohlinger v. Watson*, 652 F.3d 775, 778 (*9th Cir. 1980)). But the Eighth Circuit stated clearly that it did not adopt such an approach, finding instead that the Supreme Court "[…has not recognized] a broader dure process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement." *Id.* (citations omitted). The Eighth Circuit then summarily found "[t]he district court was correct that Strutton does not have a fundamental due process right to sex offender treatment." *Id.*

In *Karsjens II,* the Eighth Circuit provided little additional comment regarding the right to treatment but instead simply reiterated its holding in *Strutton*. *Karsjens II* at 410.

That precedent set by the Eighth Circuit is so antithetical to other circuits that an uninitiated reader would not believe they originated from the same line of cases. Accord, for example, the holding in *Karjens I* – "we have previously held that although 'the Supreme [C]ourt has recognized a substantive due process right to reasonably safe custodial conditions, it has not recognized a broader due process right to appropriate or effective or reasonable treatment of the illness or disability that triggered the patient's involuntary confinement," with *Donaldson*: "civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition." 845 F.3d 394 at 410; 493 F.2d 507. This conflict needs to be resolved by this Court.

The latter treatment aligns with our understanding of ordered liberty and fairness; the former does not. Indeed, consider what remains of the right to treatment under Eighth Circuit precedent. Because there is no *per se* right to treatment under *Youngberg* and because there is not a fundamental due process right to treatment that would trigger a standard lower than *Lewis*' "shocks the conscience" standard, a civilly committed person will not have a cognizable constitutional claim even if they were in fact given no treatment. Additionally, the factual circumstances of *Strutton* and the instant case lay bare how meaningless are the circuit court's assurances that categorical denial of treatment would be conscience shocking. In *Strutton*, the plaintiff was denied treatment – which experts testified was necessary for his path to release – for over *two years* due to budget and staffing issues. *Strutton,* 2010 WL 1253715, at *36-37. In the instant case, the

evidence presented at trial demonstrates that the treatment provided to MSOP committees – many of whom never advance past Phase I of a three Phase system – is fundamentally worthless. If neither of these treatment schemes rises to the level of a "categorical denial of treatment," there is no set of circumstances that will.

This Court should resolve this circuit split and not permit sham treatments to pass constitutional muster. If the state has the ability to indefinitely commit a person for the purpose of treatment, the state surely has an obligation to provide meaningful treatment that comports with professional judgment which has a reasonable probability of successfully treating the committee's condition *and* to ensure that professional judgment is in fact being exercised. The Eighth Circuit's holding here has failed to assure this constitutional minimum.

CONCLUSION

Petitioners respectfully requests that the Court issue a writ of certiorari to resolve the present conflict among the circuits and to hold that involuntarily committees such as Petitioners have a fundamental right to treatment that affords them a meaningful probability of completion of treatment to provide a reasonable path to discharge from involuntary commitment.

Respectfully submitted,

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