No. _____

In the
Supreme Court of the United States

KEVIN KARSJENS, ET AL.,
Petitioners,
v.

JODI HARPSTEAD, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Daniel E. Gustafson
Counsel of Record
Gustafson Gluek PLLC
Canadian Pacific Plaza
120 South Sixth Street
Suite 2600
Minneapolis, MN 55402
(612) 333-8844
dgustafson@gustafsongluek.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether federal courts have a duty to apply the correct legal standard to a due process claim or can the court apply the wrong legal standard based on an implied waiver?

PARTIES TO THE PROCEEDING

Petitioners Kevin Scott Karsjens, 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, David Leroy Gamble and Brian K. Hausfeld are plaintiffs in the district court and appellants in the Eighth Circuit.

Respondents Jodi Harpstead, Kevin Moser, Peter Puffer, Ann Zimmerman, Nancy Johnston, and Jannine Hébert, in their individual and official capacities are defendants in the district court and appellees in the Eighth Circuit.

STATEMENT OF RELATED PROCEEDINGS

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

Karsjens v. Jesson, No. 11-3659-DWF/JJK (D. Minn. Oct. 29, 2015).

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

Karsjens v. Piper, No. 11-3659-DWF/TNL (D. Minn. Aug. 23, 2018).

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

Karsjens v. Harpstead, No. 11-3659-DWF/TNL (D. Minn. Feb. 23, 2022).

Karsjens v. Harpstead, No. 22-1459 (8th Cir. July 13, 2023).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING. ii

STATEMENT OF RELATED PROCEEDINGS . . . iii

TABLE OF AUTHORITIES. vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW. 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION. 3

STATEMENT OF THE CASE. 6

REASONS FOR GRANTING THE PETITION . . . 12

A. Other Circuit Courts Disagree with The Eighth Circuit That a Party Can Waive the Proper Legal Standard. 12

B. *Youngberg*'s Professional Judgment is the Proper Standard to Apply in this Case. 13

C. The Undisputed Record Here Shows that the Eighth Circuit's Failure to Apply the Professional Judgment Standard Results in the Unconstitutional Detention of MSOP Patients. 15

1. The Professionals Testified that Individuals at MSOP Can and Should Be Treated in Less Restrictive Settings. 16

2. MSOP Has Restrained Petitioners and Class Members Beyond the Extent that Professionals Deemed Appropriate. 20

CONCLUSION 22

APPENDIX

Appendix A Opinion in the United States Court of Appeals for the Eighth Circuit (July 13, 2023). . . . . App. 1

Appendix B Judgment in a Civil Case in the United States District Court for the District of Minnesota (February 24, 2022) . . . . . App. 21

Appendix C Findings of Fact, Conclusions of Law, and Order in a Civil Case in the United States District Court for the District of Minnesota (February 23, 2022) . . . . . App. 23

Appendix D Order Denying Petition for Rehearing En Banc and Petition for Rehearing by the Panel in the United States Court of Appeals for the Eighth Circuit (September 12, 2023) . . . . . App. 69

Appendix E Transcript of Oral Argument Hearing in the United States District Court for the District of Minnesota (January 12, 2022) . . . . . App. 71

Appendix F Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants on the Issue Addressed Herein in the United States Court of Appeals for the Eighth Circuit (July 1, 2022). . . . . App. 130

TABLE OF AUTHORITIES

CASES

Allison v. Snyder,
332 F.3d 1076 (7th Cir. 2003). 15

Ammons v. Wash. Dept. of Soc. and Health Servs.,
643 F.3d 1020 (9th Cir. 2011). 16

Arnzen v. Palmer,
713 F.3d 369 (8th Cir. 2013). 11

Beaulieu v. Ludeman,
690 F.3d 1017 (8th Cir. 2012). 16

Beck v. Wilson,
377 F.3d 884 (8th Cir. 2004). 11

Bee v. Greaves,
744 F.2d 1387 (10th Cir. 1984). 11

Bell v. Wolfish,
441 U.S. 520 (1979). 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22

In re Blodgett,
510 N.W.2d 910 (Minn. 1994). 7

Call v. Gomez,
535 N.W.2d 312 (Minn. 1995). 7

Cameron v. Tomes,
990 F.2d 14 (1st Cir. 1993) 16

County of Sacramento v. Lewis,
523 U.S. 833 (1998). 8

Dautremont v. Broadlawns Hosp.,
827 F.2d 291 (8th Cir. 1987). 11

Feagley v. Waddill,
868 F.2d 1437 (5th Cir. 1989). 16

Finney v. Arkansas Bd. of Correction,
505 F.2d 194 (8th Cir. 1974). 20

Gensetix Inc. v. Bd. Of Regents of Univ. of Texas Sys.,
966 F.3d 1316 (Fed. Cir. 2020). 3, 5, 13

Hamilton v. Promise Healthcare,
No. 23-30190, 2023 WL 6635076 (5th Cir. Oct. 23, 2023) 4, 5, 13

Healey v Spencer,
765 F.3d 65 (1st Cir. 2014) 15

Hubbell v. FedEx SmartPost, Inc.,
933 F.3d 558 (6th Cir. 2019). 3, 4, 5, 13

Jackson ex rel. Jackson,
964 F.2d 980 (10th Cir. 1992). 16

Johnson v. Silvers,
742 F.2d 823 (4th Cir. 1984). 11

Karsjens v. Harpstead,
11-cv-3659 (DWF/TNL), 2022 WL 542467
(D. Minn. Feb. 23, 2022) 1, 10

Karsjens v. Harpstead,
74 F.4th 561 (8th Cir. 2023), *reh'g denied*, 2023 WL 5920137 (8th Cir. Sept. 12, 2023) 1, 3, 4, 10, 11, 12, 13

Karsjens v. Jesson,
Civ. No. 11-3659 (DWF/JJK), 2015 WL 6561712
(D. Minn. Oct. 29, 2015) 7

Karsjens v. Jesson,
109 F. Supp. 3d 1139 (D. Minn. 2015) 2, 6, 7,
17, 18, 19, 20, 21

Karsjens v. Jesson,
845 F.3d 394 (2017). 6, 7, 8, 9, 10

Karsjens v. Lourey, Karsjens II
988 F.3d 1047 (8th Cir. 2021). . 8, 9, 12, 13, 14, 15

Karsjens v. Piper,
336 F. Supp. 3d 974 (D. Minn. 2018) 8, 9

Kingsley v. Hendrickson,
576 U.S. 389 (2015). 14

Lane v. Williams,
689 F.3d 879 (7th Cir. 2012). 16

Matherly v. Andrews,
859 F.3d 264 (4th Cir. 2017). 15

McDeid v. Johnston,
984 N.W.2d 864 (Minn. 2023). 21

Moran v. Clarke,
296 F.3d 638 (8th Cir. 2002). 11

Morris v. Zefferi,
601 F.3d 805 (8th Cir. 2010). 9

Myco Inds., Inc. v. BlephEx, LLC,
955 F.3d 1 (Fed. Cir. 2020) 3, 5, 13

Noble v. Schmitt,
87 F.3d 157 (6th Cir. 1996). 16

Patten v. Nichols,
274 F.3d 829 (4th Cir. 2001). 16

Rodgers v. Horsley,
39 F.3d 308 (11th Cir. 1994). 16

Romeo v. Youngberg,
644 F.2d 147 (3d Cir. 1980) 11, 14

Shaw ex rel. Strain v. Strackhouse,
920 F.2d 1135 (3d Cir. 1990) 16

United States v. Ali,
508 F.3d 136 (3d Cir. 2007) 3, 5, 13

United States v. Watson,
893 F.2d 970 (8th Cir. 1990), *vacated in part on reh'g sub nom*, 900 F.2d 1322 11

Walton v. Dawson,
752 F.3d 1109 (8th Cir. 2014). 11

Woe ex rel. Woe v. Cuomo,
729 F.2d 96 (2d Cir. 1984) 16

Youngberg v. Romeo,
457 U.S. 307 (1982). 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22

CONSTITUTION AND STATUTES

28 U.S.C. § 1254(1). 2

42 U.S.C. § 1983 2

U.S. Const. amend. XIV, § 1 2

PETITION FOR A WRIT OF CERTIORARI

Petitioners Kevin Scott Karsjens, 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, David Leroy Gamble and Brian K. Hausfeld respectfully petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Karsjens v. Harpstead*, 74 F.4th 561 (8th Cir. 2023), *reh'g denied*, 2023 WL 5920137 (8th Cir. Sept. 12, 2023).

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Order of the United States District Court of Minnesota related to the issues on appeal are reported at 2022 WL 542467 (D. Minn. Feb. 23, 2022) and reproduced in the appendix hereto ("Pet. App.") at Pet. App. 23. The Judgment in a Civil Case in the United States District Court of Minnesota is not reported and is reproduced at Pet. App. 21.

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 74 F.4th 561 (8th Cir. 2023) and reproduced in the appendix hereto at Pet. App. 1. The Order Denying Petition for Rehearing *En Banc* and Petition for Rehearing by the Panel in the United States Court of Appeals for the Eighth Circuit is reported at 2023 WL 5920137 (8th Cir. Sept. 12, 2023) and reproduced at Pet. App. 69. The Amicus Brief of the United States filed in support of Petitioners appeal to the Eighth Circuit is reproduced at Pet. App.

130. The Findings of Fact, Conclusion of Law, and Order of the United States District Court of Minnesota which relate to the earlier bench trial are reported at 109 F. Supp. 3d 1139 (D. Minn. 2015).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied Petitioner's petition for rehearing *en banc* and rehearing by the panel on September 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1 - "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 - Civil Action for Deprivation of Rights -

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall

not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

The Eighth Circuit in *Karsjens v. Harpstead*, 74 F.4th 561, 569-70 (8th Cir. 2023) ("*Karsjens III*"), *see* Pet. App. 1, departed dramatically from other circuits when it found that the Petitioners waived the application of the "professional judgment" standard set forth by this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Pet. App. at 12. Based on that waiver finding, the circuit court affirmed the district court's application of the wrong standard to Petitioners' claims and refused to apply the correct *Youngberg* standard to the undisputed facts.

Other circuits uniformly hold that the prevailing standard of law to be applied to a claim cannot be waived because the federal court has a duty to apply the correct law. *See United States v. Ali*, 508 F.3d 136, 144 n.9 (3d Cir. 2007) ("While a party can waive his or her ability to appeal a ruling for failure to object, there can be no waiver here of the [trial] Judge's duty to apply the correct legal standard."); *Myco Inds., Inc. v. BlephEx, LLC*, 955 F.3d 1, 11 n.4 (Fed. Cir. 2020) (same); *Gensetix Inc. v. Bd. Of Regents of Univ. of Texas Sys.*, 966 F.3d 1316, 1325 n.8 (Fed. Cir. 2020) ("[A] party cannot waive objection to a court's failure to apply the correct legal standard to the question presented."); *Hubbell v. FedEx SmartPost, Inc.*, 933

F.3d 558, 571 (6th Cir. 2019) (rejecting defendant's argument that because plaintiff failed to argue for application of the correct legal standard to the district court, plaintiff waived "application of the governing legal standard[,]" because although "[i]ssues may be waived; application of a legal standard may not"); *Hamilton v. Promise Healthcare*, No. 23-30190, 2023 WL 6635076, at *3 n.6 (5th Cir. Oct. 23, 2023) (noting that while the plaintiff did not challenge the legal standard applied by the district court, "a party cannot waive, concede, or abandon the applicable standard").

The conflict between the Eighth Circuit's ruling in *Karsjens III* and that of other circuits requires correction by this Court because Petitioners' due process claims raise important and unresolved issues regarding Petitioners' liberty interests. Although the Eighth Circuit correctly recognized that under the Supreme Court's ruling in *Youngberg* liability may be imposed "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," it then held, "Appellants have waived reliance on *Youngberg* by failing to meaningfully raise its professional-judgment standard until this second appeal." Pet. App. at 12.[1]

---

[1] Petitioners dispute that the factual record supports a finding of wavier in this case because *Youngberg* was repeatedly raised on appeal and in the district court. *See, e.g.*, Pet. App. at 71, 80, 82-88, 118-22, 104-05 (transcript of the district court hearing at pages 10, 12-18; 50-53 (Petitioners' counsel's argument regarding the application of *Youngberg*); page 35-36 (Respondents' counsel argument regarding why *Youngberg* should not apply)). The

The Eight Circuit's refusal to apply *Youngberg*'s professional judgment standard to Petitioners' civil commitment changes the outcome in this case and is particularly egregious here because the factual record is undisputed. The judgment of the "professionals" operating the Minnesota Sexual Offender Program ("MSOP") was to transfer some patients to less restrictive settings. That professional judgment was expressly countermanded by then Governor Mark Dayton because of a lack of political support from other state leaders and funding limitations. Thus, although the professionals agreed that many of the patients at the MSOP could be safely treated in less restrictive facilities, they did nothing to place those individuals in the proper settings. Plans to move some of those individuals to less restrictive facilities (thereby greatly increasing the patients' liberty) were quashed by the Governor and these patients remain in prison-like, high security facilities. Rather than exercise professional judgment, the MSOP operated contrary to professional judgment. By finding a waiver of *Youngberg*, the Eighth Circuit avoided ruling on the merits and in favor of the Petitioners based on these undisputed facts.

United States of America also filed an amicus brief making clear that it believes *Youngberg* provides the proper legal standard. *See* Pet. App. at 130, 141-148. In any event, the factual finding or the support or lack thereof for a finding of waiver does not matter as the Eighth Circuit is obligated to apply the correct legal standard to Petitioners' due process claims. *Ali*, 508 F.3d at 144 n.9; *Myco Inds., Inc.*, 955 F.3d at 11 n.4; *Gensetix Inc.*, 966 F.2d at 1325 n.8; *Hubbell*, 933 F.3d at 571; *Hamilton*, 2023 WL 6635076, at *3.

This litigation now spans more than a decade and despite three appeals, the Eighth Circuit has yet to rule once on the merits of Petitioners' constitutional claims. At the start of this case, not a single patient (population of over 700) had been discharged from civil commitment despite having completed their prison sentences for offenses that prompted their commitment. Although a handful have now been released, hundreds languish in a program crippled by political expediency rather than professional oversight. That is exactly the situation that *Youngberg* addresses – why and when to defer to decisions made about a patient's liberty. At the very least, the Petitioners deserve to have the Court apply the proper legal standard to their claims and make a merit-based determination regarding their fundamental right to liberty.

STATEMENT OF THE CASE

This *pro se* case was filed on December 21, 2011, alleging constitutional and state law violations relating to Minnesota's indefinite civil commitment scheme of people adjudged mentally ill based on their prior criminal conduct. At the commencement of the litigation, not a single person (of over 700 committed) had been released from MSOP. *See Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015) ("*Karsjens Trial Order*"), *vacated and remanded on other grounds by Karsjens v. Jesson*, 845 F.3d 394 (2017) ("*Karsjens I*"). In essence, civil commitment to the MSOP constitutes a life sentence.

Shortly after the case was filed, the district court appointed Gustafson Gluek PLLC to represent the

pro se class. After the class was certified, years of discovery and significant motion practice, on November 7, 2014, the district court started a bifurcated bench trial. After nearly six weeks of trial, the district court issued findings of fact and conclusions of law on counts I and II, concluding that the Minnesota Commitment and Treatment Act (the "Act") was unconstitutional on its face and as applied. *See generally Karsjens Trial Order*, 109 F. Supp. 3d at 1139.

Based on the Minnesota Supreme Court's previous decisions, which applied strict scrutiny to the Act, *e.g.*, *In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994); *Call v. Gomez*, 535 N.W.2d 312, 318-19 (Minn. 1995), and because the Act implicated the fundamental liberty rights of Petitioners, the district court applied strict scrutiny to Petitioners' counts I and II. *See Karsjens Trial Order*, 109 F. Supp. 3d at 1166-67, 1170.[2] After seeking input from Respondents on the appropriate remedy—which Respondents refused to provide—the district court entered an injunction requiring Respondents to implement remedial action. *See Karsjens v. Jesson*, Civ. No. 11-3659 (DWF/JJK), 2015 WL 6561712, at *14 (D. Minn. Oct. 29, 2015), *vacated and remanded by Karsjens I*, 845 F.3d 394. The Eighth Circuit then stayed that injunction pending appeal. Order, *Karsjens v. Jesson*, No. 15-3458 (8th Cir. Dec. 2, 2015).

---

[2] The district court expressly declined to decide counts III, V, VI and VII in the trial order "because any remedy fashioned [as to Counts I and II] will address the issues raised in the remaining . . . Counts." *Karsjens Trial Order*, 109 F. Supp. 3d at 1173.

On appeal, the Eighth Circuit reversed the district court's application of strict scrutiny to the Act and reversed the district court's findings on counts I and II. Rather than remanding for a new trial or new findings based on the correct legal standard, the Eighth Circuit summarily dismissed (without addressing a single one of the district court's findings of fact) the notion that any conduct found by the district court was unconstitutional on its face or as-applied under the "shocks the conscience" test articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Karsjens I*, 845 F.3d at 408, 410-11. Although the Eighth Circuit held that the "shocks the conscience standard" applied to counts I and II, it did not discuss or decide Petitioners' due process claims under counts III, V, VI or VII. *Id*.

On remand, the district court addressed Petitioners' remaining claims in counts III, V, VI and VII that the MSOP's treatment programs, medical treatment and conditions of confinement were unconstitutional and punitive as to Petitioners. Respondents argued that the "shocks the conscience" standard from *Karsjens I* also should be applied to those claims. *See Karsjens v. Piper*, 336 F. Supp. 3d 974, 980 (D. Minn. 2018), *aff'd in part and vacated in part by Karsjens v. Lourey*, 988 F.3d 1047 (8th Cir. 2021) ("*Karsjens II*"). Petitioners responded that *Karsjens I* did not address those claims and argued instead that whether the Act was punitive was governed by *Bell v. Wolfish*, 441 U.S. 520 (1979), and its progeny. *See Karsjens v. Piper*, 336 F. Supp. 3d at 980, 986. Based on those claims and evidence, Petitioners argued that the district court should find the Act punitive, and therefore unconstitutional, as

alleged in counts III, V, VI and VII. *Id.* at 986. On August 23, 2018, the district court dismissed Petitioners' remaining Phase One claims (counts III, V, VI and VII) with prejudice based on the Eighth Circuit's prior ruling in *Karsjens I*. *See generally id.* at 986-87, 990-96.

Petitioners appealed the district court's ruling on October 24, 2018, as to counts III, V, VI and VII. Over two years later, on February 24, 2021, the Eighth Circuit reversed the district court's opinion as to counts V, VI and VII because the district court applied the wrong legal standard. *Karsjens II*, 988 F.3d 1047. The Eighth Circuit specifically held: "[b]ased on the Supreme Court's pronouncement in *Bell* and *Youngberg*, we conclude that the *Bell* standard applies equally to conditions of confinement claims brought by pretrial detainees and civilly committed individuals, as neither group may be punished." *Id.* at 1053. The Eighth Circuit then directed the district court to consider the remaining claims under the standard for punitive conditions of confinement outlined in *Bell*, including a direction to the court to review "the totality of the circumstances of [Appellants'] confinement." *Id.* (quoting *Morris v. Zefferi*, 601 F.3d 805, 910 (8th Cir. 2010)).

Despite this direction by the Eighth Circuit and argument by Petitioners that the *Bell* standard as refined by *Youngberg* (for civil committed persons) should apply to the remaining counts related to punitive conditions, *see* Pet. App. at 71, 80, 82-88, 118-22, on February 23, 2022, the district court dismissed Petitioners' remaining claims with prejudice,

concluding that "this Court is bound by and obligated to follow the law as it currently exists. The Eighth Circuit has determined that the MSOP is constitutional both on its face and as applied." *Karsjens v. Harpstead*, 11-cv-3659 (DWF/TNL), 2022 WL 542467, at *18 (D. Minn. Feb. 23, 2022). As such, the district court concluded that "based on the governing legal standards, Petitioners' claims related to the conditions of confinement and inadequate medical care also fail." *Id.*

In its order, the district court found that count VI was duplicative of the claims in counts I and II, and dismissed court VI as already decided in *Karsjens I*. *Id.* at *13. The district court also, in a footnote, briefly considered Count VI under the *Bell* standard. However, here the court wrongly asserted that Petitioners' claims rely on a "right to the least restrictive alternative", which has never been Petitioners' claim. *Id.* at *4 n.8. The district court next considered counts V and VII under the *Bell* standard and summarily found that even applying this standard, counts V and VII failed. *Id.* at *13-17.

Petitioners appealed arguing that the district court failed to apply the proper standard as set forth in *Bell* and *Youngberg* to Petitioners' punitive condition claims when it ignored the holding in *Youngberg* that liability may be imposed 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." *Youngberg*, 457 U.S. at 323. The Eighth Circuit, in *Karsjens III*,

recognized this standard (and acknowledged that it had been applied in a prior MSOP case)[3] but found that *Youngberg* professional-judgment standard, which it acknowledged has been applied narrowly in cases relating to the physical restraint of civilly committed persons, is distinct from *Bell*. Pet. App. at 12-14.

After acknowledging that it was the correct standard, the Eighth Circuit refused to apply *Youngberg*'s professional judgment standard in *Karsjens III* because it found that Petitioners waived it

---

[3] The Eighth Circuit suggested that *Youngberg* arose only out of a narrow set of circumstances involving physical restraints (and thus implying it was not applicable to broader infringement of liberty factual situations). *Karsjens III* at App. at 12-14. But that suggestion is belied by other Eighth Circuit cases. *E.g.*, *Walton v. Dawson*, 752 F.3d 1109, 1120 (8th Cir. 2014) (failure to take reasonable steps to prevent inmate-on-inmate attack in county jail); *Arnzen v. Palmer*, 713 F.3d 369, 372 (8th Cir. 2013) (security cameras in single-user bathroom areas at sex offender treatment facility); *Beck v. Wilson*, 377 F.3d 884, 891 (8th Cir. 2004) (failure to enforce policies in treatment facility resulting in rape); *Moran v. Clarke*, 296 F.3d 638, 644 (8th Cir. 2002) (malicious prosecution); *United States v. Watson*, 893 F.2d 970, 977 (8th Cir. 1990) (forceable medication), *vacated in part on reh'g sub nom*, 900 F.2d 1322; *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987) (involuntary use of psychotherapeutic drugs). Cases from other circuits likewise belie such a rationale. *E.g.*, *Bee v. Greaves*, 744 F.2d 1387, 1393 (10th Cir. 1984) ("If incarcerated individuals retain a liberty interest in freedom from *bodily* restraints of the kind in *Romeo* [*v. Youngberg*,] then a fortiori they have a liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs."); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984) ("We are satisfied that the forcible administration of antipsychotic drugs presents a sufficiently analogous intrusion upon bodily security to give rise to such a protectible liberty interest.").

by not sufficiently arguing it on appeal before and in the district court. *See Karsjens III*, Pet. App. at 12. But this finding is contrary to the finding in *Karsjens II* when this same court found that Petitioners "contend that, considered as a whole, their conditions of confinement amount to punishment in violation of the Fourteenth Amendment." *Karsjens II*, 988 F.3d at 1051 (citing *Youngberg*, 457 U.S. at 315-16). The court in *Karsjens II* then went on to specifically cite *Youngberg* when it recognized that "[n]either pretrial detainees nor civilly committed individuals may be punished without running afoul of the Fourteenth Amendment." *See Karsjens II*, 988 F. 3d at 1052 (citing *Bell*, 441 U.S. at 535; *Youngberg*, 457 U.S. at 316). Even the court in *Karsjens III* had to acknowledge that Petitioners did indeed raise *Youngberg* on previous appeals and at the district court, but nonetheless concluded that those were not sufficient to preserve the issue. *Karsjens III*, Pet. App. at 14-15.

REASONS FOR GRANTING THE PETITION

A. Other Circuit Courts Disagree with The Eighth Circuit That a Party Can Waive the Proper Legal Standard.

The appellate court in *Karsjens III* failed to apply the professional judgment standard from *Youngberg* that this Court found applied to civilly committed detainees, such as the Petitioners in this case. Despite acknowledging that "[w]hatever the scope of *Youngberg*, its professional-judgment standard is distinct from *Bell*'s non-punitive standard," it then found that the failure of Petitioners to raise the *Youngberg* standard before the district court or

appellate court "results in its waiver." *See Karsjens III*, Pet App. at 14.

This ruling conflicts with law from other circuits that have found the appropriate standard cannot be waived. *E.g.*, *Ali*, 508 F.3d at 144 n.9; *Myco Inds., Inc.*, 955 F.3d at 11 n.4; *Gensetix Inc.*, 966 F.3d at 1325 n.8; *Hubbell*, 933 F.3d at 571; *Hamilton*, 2023 WL 6635076, at *3 n.6. For this reason alone, the Supreme Court should grant this petition in order to make clear this important rule of law.

B. *Youngberg*'s Professional Judgment is the Proper Standard to Apply in this Case.

In *Karsjens II*, the Eighth Circuit recognized that "[n]either pretrial detainees nor civilly committed individuals may be punished without running afoul of the Fourteenth Amendment. Regarding pretrial detainees, this prohibition against punishment encompasses conditions of confinement." 988 F.3d at 1052 (citing *Youngberg*, 457 U.S. at 316; *Bell*, 441 U.S. at 535-37). The Eighth Circuit continued:

> In analyzing whether a condition of confinement is punitive, courts decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Unless the detainee can show an expressed intent to punish, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to such alternative purpose.

Id. at 1052 (quotations omitted) (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) ("[A]s *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.")). The circuit court additionally noted that "[i]n considering whether the conditions are unconstitutionally punitive, the court must review the totality of the circumstances of [Appellants'] confinement." *Id.* at 1054 (citing *Morris*, 601 F.3d at 810).

In *Youngberg*, the Supreme Court held that, in balancing the legitimate interests of the state and the rights of involuntarily committed persons to reasonable conditions of safety and freedom from unreasonable restraints, "the Constitution only requires that the courts make certain that professional judgment in fact was exercised." 457 U.S. at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, J., concurring)). The Court continued "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 321-22. The *Youngberg* Court held that "Respondent thus enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Id.* at 324. Most importantly, "[the State] may not restrain residents *except when and to the extent professional judgment*

deems this necessary to assure such safety or to provide needed training." *Id.* (emphasis added).

Given that *Youngberg* post-dates and cites *Bell* repeatedly, and that *Youngberg* specifically pronounced that civilly committed persons cannot be punished in violation of the Fourteenth Amendment, the subsequent guidance of *Youngberg* is the correct legal standard to be applied to Petitioners' due process claims related to the lack of less restrictive alternatives (count VI). Even the cases cited by the Eighth Circuit in *Karsjens II* all cite to and rely on *Youngberg* with respect to claims about punishment vis-à-vis civilly committed people. *E.g.*, *Matherly v. Andrews*, 859 F.3d 264, 274-76 (4th Cir. 2017); *Healey v Spencer*, 765 F.3d 65, 78-79 (1st Cir. 2014); *Allison v. Snyder*, 332 F.3d 1076, 1079 (7th Cir. 2003).

C. The Undisputed Record Here Shows that the Eighth Circuit's Failure to Apply the Professional Judgment Standard Results in the Unconstitutional Detention of MSOP Patients.

Despite uncontroverted evidence that the confinement of Petitioners and the class members directly contradicts the professional judgment of Respondents' own employees and the district court's 706 experts, the Eighth Circuit refused to rule on the merits of the claim. Instead, it wrongly found that Petitioners waived application of the *Youngberg* "professional judgment" standard for civilly committed patients. But even if Petitioners did not sufficiently raise *Youngberg* (which is controverted by the record), the district court and the circuit court were obligated to

apply the correct legal standard to Petitioners' due process claims.

Simply put, this Court ruled more than 40 years ago that *Youngberg*'s "professional judgment" standard applied to due process claims involving civilly committed patients. Federal courts across the country – including the Eighth Circuit – have acknowledged that fact time after time. *E.g.*, *Cameron v. Tomes*, 990 F.2d 14, 18 (1st Cir. 1993); *Woe ex rel. Woe v. Cuomo*, 729 F.2d 96, 105 (2d Cir. 1984); *Shaw ex rel. Strain v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990); *Patten v. Nichols*, 274 F.3d 829, 835 (4th Cir. 2001); *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir. 1989); *Noble v. Schmitt*, 87 F.3d 157, 161-62 (6th Cir. 1996); *Lane v. Williams*, 689 F.3d 879, 882 (7th Cir. 2012); *Beaulieu v. Ludeman*, 690 F.3d 1017, 1032-33 (8th Cir. 2012); *Ammons v. Wash. Dept. of Soc. and Health Servs.*, 643 F.3d 1020, 1027 (9th Cir. 2011); *Jackson ex rel. Jackson*, 964 F.2d 980, 991-92 (10th Cir. 1992); *Rodgers v. Horsley*, 39 F.3d 308, 311 (11th Cir. 1994).

To instead apply the waiver doctrine to Petitioners' due process claim flies in the face of due process. This Court should grant the petition and rectify this mistake. Applying *Youngberg* to Petitioners' punitive confinement claims results in a clear finding of unconstitutional conditions under *Bell* and *Youngberg*.

1. The Professionals Testified that Individuals at MSOP Can and Should Be Treated in Less Restrictive Settings.

There is no record evidence in this case that any of MSOP's administrators, experts, or employees of

Respondents claimed that MSOP's policies and procedures regarding Petitioners' lack of access to less restrictive alternatives was related to order, discipline, or institutional security. Rather, the evidence unequivocally demonstrates that these policies were created in the interests of political convenience and unwillingness to expend additional resources. As such, the lower courts in this case should have evaluated whether professional judgment was exercised in MSOP's decisions on when and to what extent it restrains the liberty of Petitioners and class members. If professional judgment was not the basis for those decisions (and it undisputedly is not), the program is punitive and therefore unconstitutional. *See Youngberg*, 457 U.S. at 324.

The professionals in this case testified repeatedly over the course of a six-week trial. Their judgment is clear and has never been challenged by Respondents. First, the district court appointed four experts (with agreement of the parties) pursuant to Federal Rules of Evidence 706, Dr. Naomi Freeman, Deborah McCulloch, Dr. Robin Wilson, and Dr. Michael Miner (the "706 experts"), to assist the court in this case. *Karsjens Trial Order*, 109 F. Supp. 3d at 1149-50, n.4. Contrary to the professional view that individuals should be treated in the least restrictive environment possible, the 706 experts testified that there are individuals at MSOP who could be treated in less restrictive settings and that MSOP treatment personnel know this. *See id.* at 1152 (finding that Dr. McCulloch credibly testified that there are individuals at both the Moose Lake and St. Peter facilities who could be treated in a less restrictive environment).

Second, the MSOP professionals agreed with the 706 experts and admitted that patients at MSOP should be treated in less restrictive facilities. *See id.* (finding that Dr. Nicole Elsen - Clinical Supervisor of MSOP St. Peter facility, James Berg - Associate Clinical Director of MSOP, Terrance Ulrich - Senior Clinician at MSOP, Dennis Benson - former Executive Director of MSOP, Sue Persons - former Associate Clinical Director of MSOP, Peter Puffer - Clinical Director of MSOP Moose Lake facility, Jannine Hébert - Executive Clinical Director of MSOP; Nancy Johnston - Executive Director of MSOP, Anne Barry - Deputy Commissioner of DHS Direct Care and Treatment, and Dr. Haley Fox - Clinical Director of MSOP, "all credibly testified that there are committed individuals at the MSOP, including some of the sixty-seven juvenile-only offenders at the MSOP who could be treated safely in a less secure facility"). Indeed, the district court found that "the evidence overwhelmingly demonstrates, as Dr. Fox—MSOP's Clinical Director—concluded, that providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety." *Id.* at 1153.

Third, professionals have been critical of the failure to establish a continuum of treatment, lack of regular risk assessments, and failure to create lower cost, reasonable alternative facilities, among other things, for many years. *See id.* at 1149-1150 (finding that since 1994, various evaluators have published reports that are critical of the state's civil commitment system including the Governor's Commission on Sex Offender Policy in January 2005 recommending, among other

things, the transfer of the screening process of sex offenders for possible civil commitment to an independent panel and the establishment of a continuum of treatment options; The Office of the Legislative Auditor for the State of Minnesota in March 2011 recommending numerous changes to the civil commitment scheme, including creating lower cost reasonable alternatives to commitment at high-security facilities; the Sex Offender Civil Commitment Task Force, which recommended among other things the development of less restrictive programs; the MSOP Program Evaluation Team that found that MSOP's requirement for phase progression may be too stringent and recommended modifications to the program; the 706 experts report criticizing the commitment and placement of certain committed individuals and a final report identifying problems with the program including the lack of periodic assessments; and the MSOP Site Visit Auditors who had issued reports every year since 2006 identifying deficiencies in the program and making recommendations to improve the system).

Finally, it is also undisputed that Respondents could implement policies to properly place people in the correct settings. *See id.* at 1154 (finding that MSOP does not perform risk assessments on newly committed individuals which would undoubtedly be helpful in determining the proper facility in which to house that individual and into which phase of treatment that individual should be admitted); *id.* at 1151-52 (individuals who are cleared for reduction in custody are not transferred to the Community Preparation Services building outside the secure perimeter of the St. Peter campus because there are insufficient beds

due to budget constraints); *id.* at 1160 (testimony from both MSOP employees and the 706 experts that juvenile-only offenders have low recidivism rates but there are not actuarial risk assessment tools for these individuals).[4]

2. MSOP Has Restrained Petitioners and Class Members Beyond the Extent that Professionals Deemed Appropriate.

The judgment of MSOP professionals and the district court's 706 experts is clear and undisputed. As noted above, the experts (both external and within MSOP) agree many patients (perhaps hundreds) at MSOP could be safely treated in less restrictive alternative facilities. But the Respondents' policies and practices (imposed by the State's political leaders) interfered with that professional judgment.

Respondents apply a blanket policy requiring all patients committed to MSOP to start treatment at the high security, prison-like Moose Lake facility, regardless of their risk level or amenability to less restrictive alternatives. *See Karsjens Trial Order*, 109 F. Supp. 3d at 1151-52, 1154. In fact, MSOP does not even assess risk for patients committed to it. *Id.* The result is that some patients, while they might meet the criteria for commitment, are needlessly confined in the most secure facilities (and are therefore being punished), when both public safety and the need for

---

[4] Budgetary restrictions or lack of resources cannot justify constitutional violations. *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration.").

effective treatment might be better served in a less restrictive environment.

It was also clear that decisions to provide less restrictive placement options were not being made based on professional judgment. Rather, they were being politically driven. As the district court found, again undisputed, as early as 2015, MSOP professionals identified several individuals who could be transferred to a less restrictive facility but efforts to transfer those individuals were halted by the then Governor of Minnesota for reasons unrelated to their treatment needs. *See id.* at 1152.[5]

The sum of these actions and inactions is a scheme which runs directly contrary to *Bell* and *Youngberg*: Petitioners, who should be treated better than pretrial detainees and should "not be punished at all," continue to be housed in a prison-like atmosphere in direct contravention of MSOP's professional judgment. *See Bell*, 441 U.S. at 539; *Youngberg*, 457 U.S. at 322-32. Respondents' official and unofficial policies regarding less restrictive alternatives directly contradict professional judgment. Thus, they are excessive restraint under *Youngberg* and unconstitutional punishment under *Bell*.

---

[5] To the extent that anyone suggests that Respondents' policies have improved since the 2015 trial, Respondents currently operate MSOP not only in contravention of professional medical judgment, but also in violation of state court orders directing patients to be transferred to less restrictive facilities. *See McDeid v. Johnston*, 984 N.W.2d 864 (Minn. 2023).

Despite the overwhelming, uncontroverted professional judgment that numerous individuals could be and should be treated in less restrictive settings, politics, aberrant policies, and unjustified practices have preempted the professional judgment, resulting in an unconstitutionally punitive program when the proper standard under *Bell* and *Youngberg* is applied.

CONCLUSION

Petitioners respectfully request that the Court issue a writ of certiorari to resolve the present conflict among the circuits and hold that the proper standard cannot be waived. As such, the district court and the Eighth Circuit must apply the proper standard in this case, which is the professional judgment standard under *Youngberg*.

Respectfully submitted,

Daniel E. Gustafson
Counsel of Record
Gustafson Gluek PLLC
Canadian Pacific Plaza
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
(612) 333-8844
dgustafson@gustafsongluek.com

Counsel for Petitioners