UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1138

Kenneth Daywitt

Appellant

David James Jannetta

Steven Merrill Hogy

Appellant

Merlin Adolphson

Michael R. Whipple, et al.

Appellants

v.

Jodi Harpstead, DHS Commissioner; in their individual capacities, et al.

Appellees

Appeal from the District Court for the District of Minnesota
(0:20-cv-01743-NED)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 29, 2024

Order Entered at the Direction of the court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit .

/s/ Maureen W. Gornik

Kenneth Daywitt, Plaintiff - Appellant, David Jannetta, Plaintiff, Steven Hogy, Plaintiff - Appellant, Merlin Adolphson, Plaintiff, Michael Whipple; Peter Lonergan, and others similarly situated; Russell Hatton, Plaintiffs - Appellants v. Jodi Harpstead, DHS Commissioner; in their individual and official capacities; Marshall Smith, in their individual and official capacities; Nancy Johnston, in their individual and official capacities; Jim Berg, in their individual and official capacities; Jannine Hebert, in their individual and official capacities; Kevin Moser, in their individual and official capacities; Terry Kniesel, in their individual and official capacities; Raymond Ruotsalainen, in their individual and official capacities, Defendants - Appellees

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2024 U.S. App. LEXIS 23817

No. 24-1138

September 12, 2024, Submitted

September 19, 2024, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeal from United States District Court for the District of Minnesota.Daywitt v. Harpstead, 2023 U.S. Dist. LEXIS 174737, 2023 WL 6366610 (D. Minn., Sept. 28, 2023)

Counsel Kenneth Daywitt, Plaintiff - Appellant, Pro se, Saint Peter, MN.

Steven Merrill Hogy, Plaintiff - Appellant, Pro se, Moose Lake, MN.

Peter Gerard Lonergan, and others similarly situated, Plaintiff - Appellant, Pro se, Moose Lake, MN.

Russell Hatton, Plaintiff - Appellant, Pro se, Moose Lake, MN.

For Jodi Harpstead, DHS Commissioner; in their individual and official capacities, Marshall Smith, in their individual and official capacities, Nancy Johnston, in their individual and official capacities, Jim Berg, in their individual and official capacities, Jannine Hebert, in their individual and official capacities, Kevin Moser, in their individual and official capacities, Terry Kniesel, in their individual and official capacities, Raymond Ruotsalainen, in their individual and official capacities, Defendants

- Appellees: Emily Beth Anderson, Aaron Edward Winter, Assistant Attorney General, ATTORNEY GENERAL'S OFFICE, Saint Paul, MN.

Judges: Before BENTON, KELLY, and ERICKSON, Circuit Judges.

Opinion

PER CURIAM.

The district court[1] granted summary judgment in favor of defendants in this 42 U.S.C. 1983 action brought by civilly committed detainees in the Minnesota Sex Offender Program. After careful review of the record and the parties' arguments on appeal, we conclude that the district court, in its thorough and well-reasoned opinion, properly granted summary judgment. See Morris v. Cradduck, 954 F.3d 1055, 1058 (8th Cir. 2020) (reviewing grant of summary judgment de novo). We also conclude that the district court did not abuse its discretion in granting defendants' motion to exclude expert testimony. See Lancaster v. BNSF Ry. Co., 75 F.4th 967, 969 (8th Cir. 2023) (standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

Footnotes

1

The Honorable Nancy E. Brasel, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Elizabeth Cowan Wright, United States Magistrate Judge for the District of Minnesota.

KENNETH DAYWITT, et al., Plaintiffs, v. JODI HARPSTEAD, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2024 U.S. Dist. LEXIS 14986
Case No. 20-CV-1743 (NEB/ECW)
January 9, 2024, Decided
January 9, 2024, Filed

Editorial Information: Prior History

Daywitt v. Harpstead, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521 (D. Minn., June 1, 2021)

Counsel {2024 U.S. Dist. LEXIS 1}Kenneth Daywitt, Plaintiff, Pro se, St. Peter, MN USA.

David Jannetta, Plaintiff: DECEASED.

Steven Hogy, Plaintiff, Pro se, Moose Lake, MN USA.

For Merlin Adolphson, Plaintiff: DECEASED, Michael Whipple.

Michael Whipple, Plaintiff, Pro se, Moose Lake, MN USA.

Peter Lonergan, Plaintiff, Pro se, Moose Lake, MN USA.

Russell Hatton, Plaintiff, Pro se, Moose Lake, MN USA.

For Jodi Harpestead, DHS Commissioner; in their individual and official capacities, Marshall Smith, in their individual and official capacities, Nancy Johnston, in their individual and official capacities, Jim Berg, in their individual and official capacities, Jannine Hebert, in their individual and official capacities, Kevin Moser, in their individual and official capacities, Terry Kniesel, in their individual and official capacities, Ray Ruotsalainen, in their individual and official capacities, Defendants: Aaron Winter, LEAD ATTORNEY, St Paul, MN USA; Emily Beth Anderson, LEAD ATTORNEY, Office of the Minnesota Attorney General, Saint Paul, MN USA.

Judges: Nancy E. Brasel, United States District Judge.

Opinion

Opinion by: Nancy E. Brasel

Opinion

ORDER ON MOTION FOR AMENDED OR ADDITIONAL FINDINGS AND RELIEF FROM JUDGMENT AND MOTION TO AMEND ORDER TO COMMUNICATE

Pro se{2024 U.S. Dist. LEXIS 2} Plaintiffs, civilly committed clients of the Minnesota Sex Offender Program, brought this lawsuit alleging that MSOP's policies violate Plaintiffs' constitutional rights.1 To ensure speedy litigation, United States Magistrate Judge Hildy Bowbeer allowed Plaintiffs monthly one-hour calls during the remainder of the lawsuit. (ECF No. 234.) Later, both parties moved for summary judgment and Defendants moved to exclude expert testimony. (ECF Nos. 241, 248-49.) In a Report and Recommendation, Judge Bowbeer recommended denying Plaintiffs' motion for summary judgment, granting Defendants' motions for summary judgment and to exclude expert testimony, and dismissing this case with prejudice. (ECF No. 326 ("R&R").) Plaintiffs objected, and the Court overruled the objection, accepted the R&R, and dismissed the case. (ECF Nos. 338, 340.) Now Plaintiffs move for (1) amended or additional findings and relief from judgment and (2) an amended order extending Plaintiffs' monthly calls to two hours. (ECF Nos. 342, 347.) For the reasons below, Plaintiffs' motions are denied.

ANALYSIS

I. Motion for Amended or Additional Findings and Relief from Judgment

Plaintiffs frame their motion as one under Rule 52(b) of the Federal Rules of Civil Procedure, and ask{2024 U.S. Dist. LEXIS 3} the Court to clarify several aspects of its Order accepting the R&R. The Court will also analyze the motion under Rule 59(e) because Plaintiffs ask the Court to amend judgment and Rule 60 because Plaintiffs cite that Rule. Because Plaintiffs are not entitled to relief under Rules 52(b), 59(e), or 60, the Court denies the motion.

A. Rule 52(b)

Plaintiffs ask the Court for an amended judgment and additional findings of fact and conclusions of law under Rule 52(b). Rule 52(b) is procedurally improper here. Rule 52(b) applies to "an action tried on the facts without a jury" in which the district court makes findings of fact. Fed. R. Civ. P. 52(a)(1). Here, no trial occurred, nor did the Court make any findings of fact. *Id.* 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 . . . ."). Accordingly, the Court

denies the requested relief under Rule 52(b). *See, e.g., Stewart v. Norcold, Inc.*, 24 F.4th 1183, 1185 (8th Cir. 2022).

B. Rule 59(e)

Although Plaintiffs do not label their motion as a motion under Rule 59(e), because they question the correctness of the judgment, it is functionally a Rule 59(e) motion. *Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986). "Rule 59(e) motions serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.'" *United States v. Metro St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (citation omitted). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise{2024 U.S. Dist. LEXIS 4} arguments which could have been offered or raised prior to entry of judgment." *Id.* (citation omitted). Rule 59(e) motions cannot be used to relitigate old matters. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). District courts have broad discretion in ruling on such motions. *Glob. Network Techs., Inc. v. Reg'l Airport Auth.*, 122 F.3d 661, 665 (8th Cir. 1997).

Plaintiffs merely reargue their position, which does not warrant relief under Rule 59(e). *Exxon Shipping*, 554 U.S. at 485 n.5. Rule 59(e) is not intended to provide litigants another bite at the apple; the proper recourse is an appeal to the Eighth Circuit. Because Plaintiffs do not demonstrate a manifest error of law or fact, nor do they present newly discovered evidence, Plaintiffs are not entitled to relief under Rule 59(e).

C. Rule 60

Plaintiffs cite Rule 60(a) as support for their motion, but Rule 60 also does not provide Plaintiffs a basis for relief. (ECF No. 343 at 1.) Under Rule 60(a), the Court may "correct a clerical mistake or a mistake arising from oversight or omission." Fed. R. Civ. P. 60(a). Corrections must be "for the purpose of reflecting accurately a decision that the court actually made." *Kocher v. Dow Chem. Co.*, 132 F.3d 1225, 1229 (8th Cir. 1997) (citation omitted). Plaintiffs do not ask the Court to correct a mistake as contemplated by Rule 60(a); Plaintiffs ask the Court to reverse itself entirely. Accordingly, Rule 60(a) does not entitle Plaintiffs to relief.

Nor are Plaintiffs entitled to relief under Rule 60(b). Rule 60(b) permits relief from a final judgment,{2024 U.S. Dist. LEXIS 5} order, or proceeding for, among other things,

"mistake, inadvertence, surprise, or excusable neglect," or "any other reason that justifies relief." Plaintiffs do not identify a basis for relief under 60(b), nor can the Court find any. Relitigating issues already decided does not entitle a movant to Rule 60(b)(6) relief. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 701 F. App'x 544, 544-45 (8th Cir. 2017). Thus, the Court must deny Plaintiffs' motion.

II. Motion to Amend Order to Communicate

Judge Bowbeer allowed Plaintiffs one 60-minute video or telephone conference call each month during the remainder of the lawsuit. (ECF No. 234 at 4.) She justified her decision based on the need to ensure the "just, speedy, and inexpensive" resolution of the lawsuit. (*Id.* at 3 (citing Fed. R. Civ. P. 1).)

Plaintiffs ask the Court to amend the Order to allow Plaintiffs to meet for two hours monthly. (ECF No. 347.) They explain that the current one-hour allotment is insufficient, and they need more time to strategize for their appeal and potentially for trial. Defendants oppose the motion, arguing Plaintiffs have no legal basis for their demand and Plaintiffs do not provide evidence to suggest further accommodation is necessary. (ECF No. 350.) Defendants ask the Court to clarify that Plaintiffs' current Court-ordered{2024 U.S. Dist. LEXIS 6} accommodation expires at the end of 2023. (*Id.* at 7.)

The Court denies the motion. The Court has ensured Plaintiffs had a fair opportunity to litigate this matter, but with summary judgment granted, and the motion for reconsideration denied, the case is closed, and there is no longer a need to ensure the "just, speedy, and inexpensive" resolution of the lawsuit-the lawsuit has been resolved. Because this case is closed, the Court-ordered accommodation will expire at the end of January 2024.2 To the extent Plaintiffs have a continued need to communicate, Plaintiffs must ask the Eighth Circuit for such an accommodation.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Amended or Additional Findings and Relief from a Judgment or Order (ECF No. 342) is DENIED; and

2. Plaintiffs' Motion to Amend Order to Communicate (ECF No. 347) is DENIED.

Dated: January 9, 2024

BY THE COURT:

/s/ Nancy E. Brasel

Nancy E. Brasel

United States District Judge

Footnotes

1

The Report and Recommendation and this Court's previous orders explain the facts and procedural posture of this case, which are incorporated here. (ECF Nos. 76, 326, 340.)
2

Additionally, because this case is closed, the Court will not accept any more filings unless the case is remanded from the Eighth Circuit.

KENNETH DAYWITT, et al., Plaintiffs, v. JODI HARPSTEAD,1 et al., Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2023 U.S. Dist. LEXIS 174737

Case No. 20-CV-1743 (NEB/ECW)

September 28, 2023, Decided

September 29, 2023, Filed

Counsel {2023 U.S. Dist. LEXIS 1}Kenneth Daywitt, Plaintiff, Pro se, St. Peter, MN USA.

David Jannetta, Plaintiff, Pro se.

Steven Hogy, Plaintiff, Pro se, Moose Lake, MN USA.

Merlin Adolphson, Plaintiff, Pro se.

Michael Whipple, Plaintiff, Pro se, Moose Lake, MN USA.

Peter Lonergan, and others similarly situated |, Plaintiff, Pro se, Moose Lake, MN USA.

Russell Hatton, Plaintiff, Pro se, Moose Lake, MN USA.

For Jodi Harpestead, DHS Commissioner; in their individual and official capacities |, Marshall Smith, in their individual and official capacities |, Nancy Johnston, in their individual and official capacities |, Jim Berg, in their individual and official capacities |, Jannine Hebert, in their individual and official capacities |, Kevin Moser, in their individual and official capacities |, Terry Kniesel, in their individual and official capacities |, Ray Ruotsalainen, in their individual and official capacities |, Defendants: Aaron Winter, LEAD ATTORNEY, St Paul, MN USA; Emily Beth Anderson, LEAD ATTORNEY, Office of the Minnesota Attorney General, Saint Paul, MN USA.

Judges: Nancy E. Brasel, United States District Judge.

Opinion

Opinion by: Nancy E. Brasel

Opinion

ORDER ON REPORT & RECOMMENDATION

Pro se Plaintiffs, civilly committed clients of the Minnesota Sex{2023 U.S. Dist. LEXIS 2} Offender Program, brought this lawsuit alleging that MSOP's restrictions on clients' internet use violate Plaintiffs' First Amendment rights. Plaintiffs retained an expert to support their claims. Defendants move to exclude Plaintiffs' expert, and both parties move for summary judgment. In a Report and Recommendation, United States Magistrate Judge Elizabeth Cowan Wright recommends excluding Plaintiffs' expert, denying Plaintiffs' Motion for Summary Judgment, and granting Defendants' Motion for Summary Judgment. (ECF No. 326 ("R&R").) Because Plaintiffs object to the R&R, (ECF No. ("Obj.") 338), the Court reviews it *de novo*.2 28 U.S.C 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). After a *de novo* review, the Court overrules the objection and accepts the R&R.

BACKGROUND

The R&R and this Court's previous order explain the facts and procedural posture of this case and those are incorporated here. (R&R at 2-7; ECF No. 76 (June 1, 2021 order).) The Court repeats only those facts necessary for context.

This lawsuit concerns First Amendment challenges to three MSOP policies that restrict Plaintiffs' ability to use technologies. (ECF No. 26-1 ("Am. Compl.") 4.) First, clients may receive electronic messages through MSOP's C-Mail program, but clients may not send{2023 U.S. Dist. LEXIS 3} outgoing emails. (ECF No. 38-1 at 2-3.) Second, MSOP does not allow clients to access the internet, instead allowing clients to use computers for "approved purposes," such as completing treatment assignments, word processing, and conducting legal research. (ECF No. 38-1 at 6; *see* ECF 255 ("Hébert Decl.") 4.) Third, MSOP allows clients to use videoconference software to visit with family, friends, and support personnel, but only to visit with someone on their deathbed or to conduct a "clinically supported visit." (ECF No. 38-1 at 14-16.) Plaintiffs claim these policies violate their First Amendment right to access the internet and exercise their religion. (Am. Compl. *passim*.)

ANALYSIS

I. Motion to Exclude Patrick O'Leary as an Expert

Plaintiffs object to the R&R's recommendation to exclude their expert Patrick O'Leary, so the Court reviews this recommendation *de novo*. The R&R was thorough, and after a *de novo* review, the Court concludes that Judge Wright's analysis and conclusions are correct. Plaintiffs' objection to the exclusion of O'Leary is overruled.

II. Motions for Summary Judgment on First Amendment Claims

Plaintiffs assert that MSOP policies violate their First Amendment right to access the internet and their First Amendment right to free{2023 U.S. Dist. LEXIS 4} exercise of religion. For these claims, a threshold issue is what standard applies to constitutional claims of MSOP clients. Judge Wright applied the *Turner* factors, modified for civil commitment clients, and found no violation of constitutional rights.

Plaintiffs object on several fronts, asserting that a modified analysis is not the proper standard to evaluate the claims, and that even if it is, Judge Wright misapplied the standard.3

A. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is "genuine" if a factfinder could reasonably determine the issue in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the nonmoving party. *Engelhardt v. Qwest Corp.*, 918 F.3d 974, 979 (8th Cir. 2019). "Nevertheless, a plaintiff seeking to defeat summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with *specific facts* showing that there is a genuine issue for trial." *Id.* (quotation marks and citation omitted).

Courts liberally construe *pro{2023 U.S. Dist. LEXIS 5} se* pleadings and hold them to a less stringent standard than those drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). But a *pro se* plaintiff's claims cannot survive summary judgment unless she has set forth specific facts showing that there is a genuine issue for trial. *Quam v. Minnehaha Cnty. Jail*, 821 F.2d 522, 522 (8th Cir. 1987) ("Although Quam is entitled to the benefit of a liberal construction of his pleadings

because of his pro se status, Federal Rule of Civil Procedure 56 remains applicable to Quam's lawsuit.").

B. The Modified Turner *Factors Apply*

Plaintiffs object to Judge Wright's application of the modified *Turner* factors to their constitutional claims.4 The question is whether a standard modeled after *Turner v. Safley*-a case about the constitutional rights of prisoners-should apply here-a case about the constitutional rights of civil commitment clients. This Court, like others in this District,5 determines that the answer to that question is yes.

In *Turner*, the Supreme Court found that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Several factors are relevant in determining the reasonableness of the regulation:

(1) whether there is a valid, rational connection between{2023 U.S. Dist. LEXIS 6} the regulation and legitimate governmental interests put forward to justify it; (2) whether alternative means of exercising their rights remain open to the prisoners; (3) whether accommodation of the asserted rights will trigger a "ripple effect" on fellow inmates and prison officials; and (4) whether a ready alternative to the regulation would fully accommodate the prisoners' rights at de minimis cost to the valid penological interest.*Beaulieu v. Ludeman*, 690 F.3d 1017, 1039 (8th Cir. 2012) (citation omitted) (listing the *Turner* factors). These factors balance the need to protect prisoners' constitutional rights with the need to be deferential to prison administrators. *Turner*, 482 U.S. at 85. This deferential standard is necessary if "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." *Id.* at 89 (alterations in original) (quoting *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977)). As the *Turner* court noted, running a prison is a difficult task better suited for the legislative and executive branches, warranting judicial deference. *Id.* at 85.

Turner considered strict scrutiny as an alternative. *Id.* at 89. But applying an inflexible strict scrutiny analysis to day-to-day judgments of prison officials would hamper their ability to anticipate security problems and{2023 U.S. Dist. LEXIS 7} adopt innovative solutions to them. *Id.* This approach would leave courts as the primary arbiters of the best solution to every administrative problem, which would "unnecessarily . . . perpetuate the

involvement of the federal courts in affairs of prison administration." *Procunier v. Martinez*, 416 U.S. 396, 407, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

The rationale underlying *Turner*'s judicial restraint applies equally in the civil commitment context. Like prison administrators, MSOP custodians are engaged in "an inordinately difficult undertaking that requires expertise, planning, and the commitment of recourses," *Turner*, 482 U.S. at 85, and they need to be able to perform their duties safely and effectively.6 *See Serna v. Goodno*, 567 F.3d 944, 953 (8th Cir. 2009) ("The governmental interests in running a state mental hospital are similar in material aspects to that of running a prison. Administrators have a vital interest in ensuring the safety of their staff, other patients, and of course in ensuring the patients' own safety." (citation omitted)). "Although an involuntarily committed patient of a state hospital is not a prisoner per se, his confinement is subject to the same safety and security concerns as that of a prisoner." *Revels v. Vincenz*, 382 F.3d 870, 874 (8th Cir. 2004).

In addition, as far as the Court is aware, every circuit to address the constitutional validity of a civil{2023 U.S. Dist. LEXIS 8} commitment program policy has identified *Turner* as the appropriate standard. *See Ahlers v. Rabinowitz*, 684 F.3d 53, 65-66 (2d Cir. 2012); *Matherly v. Andrews*, 859 F.3d 264, 280-81 (4th Cir. 2017); *Brown v. Phillips*, 801 F.3d 849, 853-54 (7th Cir. 2015); *Herrick v. Strong*, 745 F. App'x 287, 288 (9th Cir. 2018); *Pesci v. Budz*, 730 F.3d 1291, 1298-1230 (11th Cir. 2013).7 The near universal application of *Turner* to civil commitment supports the Court's decision.

So *Turner* applies, but it must be modified, because the universe of "legitimate governmental interests" is narrower for civil commitment than for prisons.8 The purpose of prisons and civil confinement are different. Commitment "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 361-62, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The government cannot justify "restraint on detainees' constitutional rights for reasons related to punitive conditions of confinement." *Pesci*, 730 F.3d at 1298. But the government can justify its program based on a valid, rational connection to legitimate interests in institutional order, safety, security, and rehabilitation and treatment of civil detainees. *Id.* Thus the modified *Turner* factors look at the government's legitimate nonpunitive interests rather than its penological interests.

Accordingly, to determine whether the regulation is reasonable, the Court applies the *Turner* factors, modified as follows: (1) whether there is a valid, rational connection between the{2023 U.S. Dist. LEXIS 9} regulation and legitimate institutional and therapeutic interests put forward to justify it; (2) whether alternative means of exercising

Plaintiffs' rights remain open to them; (3) whether accommodation of the asserted rights will trigger a "ripple effect" on MSOP clients and staff; and (4) whether a ready alternative to the regulation would fully accommodate Plaintiffs' rights at *de minimis* cost to the valid institutional and therapeutic interest.9 *Turner*, 482 U.S. at 90.

C. Internet Access

Application of the modified *Turner* factors to Plaintiffs' claim of a right to access the internet reveals that Judge Wright's analysis was correct.10

No binding case law exists about whether Plaintiffs have a right to access the internet. But the First Amendment extends to speech distributed through the internet. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 885 (1997); *Packingham v. North Carolina*, 582 U.S. 98, 104-05, 107-08, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). The First Amendment includes "the right to receive, the right to read and freedom of inquiry, [and] freedom of thought." *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (citation omitted). Assuming a right to access the internet is implicated here, the next step is to apply the modified *Turner* factors.

The first factor is whether there is a valid, rational connection between the regulation and legitimate institutional and therapeutic interests put forward to justify it. *Turner*, 482 U.S. at 89. MSOP{2023 U.S. Dist. LEXIS 10} bears the burden of proving the rational connection. *Sisney v. Kaemingk*, 15 F.4d 1181, 1190 (8th Cir. 2021). "Unless a rational connection between the regulation and the asserted interest is a matter of common sense, the [institution] must proffer some evidence to support the existence of such a connection." *Id.* at 1191 (quotation marks and citations omitted).

MSOP policies are validly and rationally connected to rehabilitation and institutional security. Restrictions on internet access and monitoring with whom clients communicate "maintain the therapeutic environment conducive to change and safe administration of MSOP." (Hébert Decl. 4.) MSOP has legitimate concerns that some MSOP clients would use the internet for countertherapeutic purposes, such as sexual communication with vulnerable people and harassing individuals outside the facility. (*Id.* 4.) Indeed, Plaintiffs acknowledge that some clients would use the internet for improper purposes. (ECF No. 252-1 at 246-318 ("Whipple Dep.") at 38:21-41:17 (acknowledging that MSOP policies address a legitimate concern that clients would use the internet to access inappropriate websites), 46:4-47:5 (discussing finding inappropriate photos on an MSOP computer);

ECF No. 252-1 at 193-244 ("Lonergan Dep.")\{2023 U.S. Dist. LEXIS 11\} at 70:14-15; *see* ECF No. 252-1 at 3-57 ("Daywitt Dep.") at 76:6-80:23.)

Additionally, MSOP has valid institutional concerns. After clients escaped from MSOP, MSOP began monitoring phone calls because those clients had planned the escape over the phone. (ECF No. 254 ("Johnston Decl.") 21.) MSOP does not have the resources to monitor websites clients view, emails clients send, and video calls clients make. (*Id.* 20-21,25-27.) Accordingly, the first factor falls in Defendants' favor.11

The second factor is whether alternative means of exercising Plaintiffs' rights remain open to them. *Turner*, 482 U.S. at 90. The right in question is "viewed sensibly and expansively." *Thornburgh v. Abbott*, 490 U.S. 401, 417, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). "Alternatives to the type or amount of speech at issue need not be ideal . . . they need only be available." *Simpson v. Cty. of Cape Girardeau*, 879 F.3d 273, 280-81 (8th Cir. 2018) (alteration in original) (quotation marks and citation omitted) (asking whether the right has been "completely foreclosed"); *Ortiz v. Fort Dodge Correctional Facility*, 368 F.3d 1024, 1027(8th Cir. 2004) (finding an adequate alternative to writing and receiving letters from family members where family could communicate via phone calls and in-person visits).

Here, a sensible and expansive view of the right in question is the right to access the information found on the internet. Plaintiffs have many alternative\{2023 U.S. Dist. LEXIS 12\} means to exercise that right. They can use conventional mail to communicate with friends, families, politicians, and others. (ECF No. 254-1 at 13-22; ECF No. 252-1 at 59-135 ("Hatton Dep.") at 72:15-21.) They can also communicate with people, including friends and family, outside MSOP via telephone (ECF No. 252-1 at 137-191 ("Hogy Dep.") at 64:20-65:5; Lonergan Dep. at 83:2-17) and in-person visits. (ECF No. 254-1 at 105-112; Hatton Dep. at 121:6-11; Whipple Dep. at 29:18-30:3; Hogy Dep. 50:24-51:1) Plaintiffs can read newspapers, watch television, and listen to the radio. (Hogy Dep. at 40:20-24; 45:12-46:10; Daywitt Dep. at 44:14-45:6; Whipple Dep. at 96:8-97:25; Hatton Dep. at 32:23-33:8) Because the exercise of this right has not been "completely foreclosed," the second factor also supports finding that the MSOP policies are constitutional. *Simpson*, 279 F.3d at 280-81.

The third factor is whether accommodation of the asserted rights will trigger a "ripple effect" on MSOP clients and staff. *Turner*, 482 U.S. at 90. Defendants present evidence that MSOP houses over 700 clients, and that MSOP cannot logistically do what Plaintiffs ask while continuing to meet their obligations to the public. (Hébert Decl. 7-8; ECF No. 256 11-12.)\{2023 U.S. Dist. LEXIS 13\} "MSOP could not provide real-time monitoring

while protecting the public safety, ensuring the security of the MSOP facility, or preventing clients from accessing materials that MSOP prohibits such as contraband and counter-therapeutic materials." (Johnston Decl. 28.) And monitoring internet access and who clients communicate with is necessary to ensure that a client is not using the internet or communicating with someone for a countertherapeutic purpose. (*Id.* 29.) So the third factor supports Defendants' position as well.

The fourth factor is whether a ready alternative to the regulation would fully accommodate Plaintiffs' rights at *de minimis* cost to the valid institutional and therapeutic interest. *Turner*, 482 U.S. at 90-91. Plaintiffs suggest that categorical blocking, which MSOP already uses to control employee internet access, would facilitate MSOP's goals while allowing Plaintiffs access to the internet. (ECF No. 257 9.) But MSOP would still have to monitor client internet access, which MSOP does not have the resources to do. (*Id.* 11-12, 14-16.) And categorical blocking is not foolproof-sometimes sites that should be blocked are not. (*Id.* 13.) Plaintiffs have not identified a sufficient alternative,{2023 U.S. Dist. LEXIS 14} so the fourth factor falls in Defendants' favor. Because all modified *Turner* factors support finding that the policies are constitutional, the MSOP policies do not violate the First Amendment right to information through access to the internet.

D. Free Exercise

Plaintiffs object to the R&R's recommendation to dismiss Plaintiffs' free exercise claim, so the Court must review it *de novo*. Having conducted a *de novo* review of the R&R, the Court concludes that Judge Wright's analysis and conclusions about Plaintiffs' free exercise claim are correct. Plaintiffs bear the burden of establishing that MSOP policies place a substantial burden on their ability to practice their religious beliefs, *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009), and they have not done so.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Objection to the Report and Recommendation (ECF No. 338) is OVERRULED;

2. The Report and Recommendation (ECF No. 326) is ACCEPTED;

3. Defendants' Motion to Exclude Plaintiffs' Expert (ECF No. 241) is GRANTED;

4. Plaintiffs' Motion for Summary Judgment (ECF No. 248) is DENIED;

5. Defendants' Motion for Summary Judgment (ECF No. 249) is GRANTED; and

6. This action is DISMISSED{2023 U.S. Dist. LEXIS 15} WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 28, 2023

BY THE COURT:

/s/ Nancy E. Brasel

Nancy E. Brasel

United States District Judge

Footnotes

1 Harpstead is the Commissioner of the Minnesota Department of Human Services. Plaintiffs' complaints, motions, and briefs misspell the Commissioner's name. The Court will use the correct spelling.
2

Defendants argue that the Court should apply a clear error standard when Plaintiffs fail to make specific objections. (ECF No. 339 at 2, 7-8.) Although courts in this District have applied the clear error standard of review for non-specific objections, the Eighth Circuit has emphasized the necessity for *de novo* review when a party makes any objection. *See United States v. Chapman*, No. 18-CR-250 (ECT/SER), 2019 U.S. Dist. LEXIS 58305, 2019 WL 1487847, at *1-2 (D. Minn. Apr. 4, 2019) (collecting cases and discussing Eighth Circuit precedent); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995).
3

Plaintiffs also argue that the R&R did not cite all of their evidence. But "[t]he Court is not required to address every piece of evidence and/or testimony in its opinion [on a motion for a summary judgment], and the fact that each item on Plaintiff's list was not specifically addressed . . . does not mean that it was not appropriately considered." *Zuno v. Wal-Mart Stores, Inc.*, No. CIV.A. 06-2392, 2009 U.S. Dist. LEXIS 104629, 2009 WL 3837198, at *3 (E.D. Pa. Nov. 6, 2009); *see Paz v. Wauconda Healthcare & Rehab. Ctr. LLC*, No. 04 C 3341, 2005 U.S. Dist. LEXIS 15689, 2005 WL 1838428, at *3 (N.D. Ill. July 29, 2005) ("[T]he court is not required to make specific reference to every piece of evidence it reviews . . . .").
4

Defendants assert that the Court must apply the modified *Turner* factors here because the Court applied the test at the motion-to-dismiss stage, and the Court is bound by the law of the case. (ECF No. 339 at 5.) The law-of-the-case doctrine, however, "applies only to issues decided by final judgments." *Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 522 (8th Cir. 1992); *United States v. Hively*, 437 F.3d 752, 766 (8th Cir. 2006) ("The [law-of-case] doctrine does not apply to interlocutory orders, however, for they can always be reconsidered and modified by a district court prior to entry of a final judgment."). The Court's ruling on Defendants' motion to dismiss was not a final judgment, so the doctrine does not apply. *See Wright v. S. Ark. Reg'l Health Ctr., Inc.*, 800 F.2d 199, 202 (8th Cir. 1986) ("[A] denial of summary judgment is not treated as final . . . until the conclusion of a case on the merits."). Regardless, for the reasons discussed below, application of the modified *Turner* standard is proper.
5

Ivey v. Johnston, No. 18-CV-1429 (PAM/DTS), 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *3 (D. Minn. Jan. 13, 2021); *Banks v. Jesson*, No. 11-CV-1706 (SRN/LIB), 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *7-8 (D. Minn. May 8, 2017).
6

Judicial restraint and deference to the judgment of institutional officials also remain relevant to civil detention. *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). In *Youngberg*, the Supreme Court evaluated a civil detainee's constitutionally protected liberty interest under the Fourteenth Amendment Due Process Clause by weighing the constitutional rights of the detainee against the relevant state interest. *Id.* at 321. The Court explained that "courts must show deference to the judgment exercised by a qualified professional." *Id.* at 322.
7

The Eighth Circuit has applied *Turner* in the context of civil commitment, but in that case "both parties agree[d] that the *Turner* test applies." *Beaulieu*, 690 F.3d at 1039 (applying *Turner* without modification).
8

The narrower universe of legitimate governmental interests for civil confinement reflects that the liberty interests of civilly committed people "are considerably less than those held by members of free society," *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006), but they are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22; *see also Bell v. Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("A detainee simply does not possess the full range of freedoms of an unincarcerated individual."); *id.* at 546 ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.").
9

Other courts have similarly modified the *Turner* factors for civil confinement. *E.g.*, *Matherly*, 859 F.3d at 282; *Phillips*, 801 F.3d at 853-54; *Pesci*, 730 F.3d at 1298; *Ivey v. Johnston*, No. 18-CV-1429 (PAM/DTS), 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *3 (D. Minn. Jan. 13, 2021); *Banks v. Jesson*, No. 11-CV-1706 (SRN/LIB), 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *20-22 (D. Minn. May 8, 2017).
10

Plaintiffs construe their claim as the right to access the internet. While the Complaint questions the validity of the three specific policies-the C-Mail policy, internet policy, and videoconferencing policy-Plaintiffs' subsequent memoranda focus on their right to access the internet generally. (ECF No. 260 at 17-37; ECF No. 280 at 8-15, 20-39; ECF No. 287 at 11-20; Obj. at 29-38.) Plaintiffs have not developed arguments or evidence to support

the unconstitutionality of the C-Mail and videoconferencing policy specifically. Plaintiffs have therefore failed to meet their burden of showing that the C-Mail and videoconference polices are unconstitutional. *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.")
11

Plaintiffs argue that Defendants have failed to provide evidence that MSOP's policy achieves the stated goal. But *Turner* does not require "actual proof that a legitimate interest will be furthered by the challenged policy. The connection between the two need only be objectively rational." *Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th Cir. 1999). And here there is a common sense and rational connection between MSOP's policies and the stated interest.

Kenneth Daywitt, et al., Plaintiffs, v. Jodi Harpestead, et al., Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2023 U.S. Dist. LEXIS 130641
Case No. 20-cv-1743-NEB-ECW
July 28, 2023, Decided
July 28, 2023, Filed

Editorial Information: Subsequent History

Adopted by, Motion granted by, Summary judgment denied by, Summary judgment granted by, Dismissed by, Objection overruled by Daywitt v. Harpstead, 2023 U.S. Dist. LEXIS 174737 (D. Minn., Sept. 28, 2023)

Editorial Information: Prior History

Daywitt v. Harpstead, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521 (D. Minn., June 1, 2021)

Counsel {2023 U.S. Dist. LEXIS 1}Kenneth Daywitt, Plaintiff, Pro se, St. Peter, MN USA.

David Jannetta, Plaintiff, Pro se.

Steven Hogy, Plaintiff, Pro se, Moose Lake, MN USA.

Merlin Adolphson, Plaintiff, Pro se.

Michael Whipple, Plaintiff, Pro se, Moose Lake, MN USA.

Peter Lonergan, and others similarly situated |, Plaintiff, Pro se, Moose Lake, MN USA.

Russell Hatton, Plaintiff, Pro se, Moose Lake, MN USA.

For Jodi Harpestead, DHS Commissioner; in their individual and official capacities |, Marshall Smith, in their individual and official capacities |, Nancy Johnston, in their individual and official capacities |, Jim Berg, in their individual and official capacities |, Jannine Hebert, in their individual and official capacities |, Kevin Moser, in their individual and official capacities |, Terry Kniesel, in their individual and official capacities |, Ray Ruotsalainen, in their individual and official capacities |, Defendants: Aaron Winter, LEAD ATTORNEY, Minnesota Attorney General's Office, St Paul, MN USA; Emily Beth Anderson, LEAD ATTORNEY, Office of the Minnesota Attorney General, Saint Paul, MN USA.

Judges: ELIZABETH COWAN WRIGHT, United States Magistrate Judge.

Opinion

Opinion by: ELIZABETH COWAN WRIGHT

Opinion

ORDER AND REPORT & RECOMMENDATION

This action{2023 U.S. Dist. LEXIS 2} comes before the Court on Defendants Jodi Harpestead, Marshall Smith, Nancy Johnston, Jim Berg, Jannine Hébert, Kevin Moser, Terry Kniesel, and Ray Ruotsalainen's (collectively, "Defendants") Motion to Exclude the Plaintiffs' Expert ("Motion to Exclude") (Dkt. 241); Plaintiffs Kenneth Daywitt, Steven Hogy, Merlin Adolphson,1 Michael Whipple, Peter Lonergan, and Russell Hatton's (collectively, "Plaintiffs") Motion for Summary Judgment (Dkt. 248); Defendants' Motion for Summary Judgment (Dkt. 249); and Plaintiffs' "Motion to Allow Weekly ITV Communication Between Plaintiffs'" ("Motion for ITV Communication") (Dkt. 285).

The case has been referred to the undersigned United States Magistrate Judge for an order on any pretrial motions and a report and recommendation on any dispositive motions pursuant to 28 U.S.C. 636 and Local Rule 72.1. (*See* Dkt. 270.)

For the reasons stated below, the Court recommends granting Defendants' Motion to Exclude; granting Defendants' Motion for Summary Judgment; and denying Plaintiffs' Motion for Summary Judgment. The Court also denies the Motion for ITV Communication.

I. FACTUAL AND PROCEDURAL BACKGROUND

"The Minnesota Sex Offender Program ('MSOP' or 'Program') was{2023 U.S. Dist. LEXIS 3} created by the State of Minnesota to securely house and treat sex offenders

who are civilly committed because they are determined to be 'sexually dangerous persons.'" *Banks v. Jesson*, No. 11-CV-1706 (SRN/LIB), 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *1 (D. Minn. May 8, 2017) (citing Minn. Stat. 246B.02) (footnote omitted). "A 'sexually dangerous person' is one who '(1) has engaged in a course of harmful sexual conduct as defined in subdivision 8; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct as defined in subdivision 8.'" *Id.* (citing Minn. Stat. 253D.02, subd. 16(a)). "MSOP is statutorily mandated to enact policies that prohibit persons within the Program (often referred to as 'clients' or 'patients') from obtaining obscene or pornographic materials." *Id.* (citing Minn. Stat. 246B.04, subd. 2). "Clients within the secure treatment facilities operated by MSOP are not permitted to use the internet." (Dkt. 255 (Declaration of Jannine Hébert) 4.) MSOP has policies relating to internet and email use, including MSOP's Client C-Mail Policy, Client Computer Network Policy, Computer Internet Streaming Policy, Internet Access Policy, and Mobile Device Use at Program Sites. (Dkt. 254 (Declaration of Nancy Johnston) 8, 9, 12, 13 & Exs. 8, 9, 12, 13).)

Plaintiffs, who are civilly committed{2023 U.S. Dist. LEXIS 4} MSOP clients2 detained at the MSOP facility in Moose Lake, Minnesota3 filed an initial Complaint against Defendants in their individual and official capacities on August 10, 2020. (*See* Dkt. 1.)4 On January 7, 2021, Plaintiffs filed a motion to amend the initial Complaint, along with a proposed First Amended Complaint Pursuant to 42 U.S.C. 1983, 1985, and 1988 ("First Amended Complaint"). (Dkts. 26, 26-1.)

On January 25, 2021, Defendants filed a motion to dismiss the initial Complaint, and then filed a motion to dismiss the First Amended Complaint on January 27, 2021. (Dkts. 35, 43.) On January 27, 2021, Plaintiffs filed a motion for temporary restraining order. (Dkt. 51.) On June 1, 2021, United States District Judge Nancy Brasel denied Defendants' motion to dismiss the initial Complaint as moot, granted Defendants' motion to dismiss the First Amended Complaint in part, and denied Plaintiffs' motion for temporary restraining order ("Order on Motion to Dismiss"). (Dkt. 76.)5 In so ruling, Judge Brasel described Plaintiffs' First Amended Complaint as challenging three MSOP policies ("the Policies") that allegedly restrict Plaintiffs' abilities to use technology in violation of the First and Fourteenth Amendments. (*Id.* at 2.) The Policies{2023 U.S. Dist. LEXIS 5} are: (1) MSOP's Client C-Mail policy which "permits clients' friends and family to send emails to clients but prohibits clients from sending outgoing emails"; (2) a Client Computer Network policy restricting clients from using the internet, limiting clients' use of MSOP-provided computers, and allowing "clients [to] only use computers for 'approved purposes,' such as completing treatment assignments, doing word processing, and conducting legal research and writing"; and (3) a Video Visiting policy permitting "clients to visit with family, friends, or support personnel via videoconferencing

software" when the person they are visiting is on "his or her deathbed" and/or to "conduct a 'clinically supported visit.'" (*Id.* at 2-3 (citing Dkt. 38-1, Ex. A; Dkt 38-1, Ex. B; First Am. Compl. 10-15, 36, 57; Dkt. 38-1, Ex. C).)

Judge Brasel construed the First Amended Complaint as asserting three claims under the First Amendment: (1) a right to access the internet/information claim; (2) a right of access to the courts claim; and (3) a free exercise claim. (*Id.* at 4-9.) Judge Brasel also found that Plaintiffs asserted a substantive due process claim under the Fourteenth Amendment. (*Id.* at 10.) As to Plaintiffs' right to access{2023 U.S. Dist. LEXIS 6} the internet/information claim, Judge Brasel considered that claim under the "modified" *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), factors, and found that it was ill-suited for dismissal on a motion to dismiss due to the fact inquiry required under *Turner* and because Plaintiffs had alleged sufficient facts to state a claim.6 (*Id.* at 6-8 (citing *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 937 (D. Minn. 2014); *Ivey v. Johnston*, No. 18-CV-1429 (PAM/DTS), 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *1 (D. Minn. Jan. 13, 2021).) Judge Brasel dismissed Plaintiffs' access to the courts claim but found that the First Amended Complaint alleged sufficient facts to survive the motion to dismiss as to the free exercise claim, noting that it was also subject to the modified *Turner* analysis and was a fact-specific issue. (*Id.* at 8-9 (citing *Karsjens v. Piper*, 336 F. Supp. 3d 974, 992 (D. Minn. 2018), *overruled on other grounds by Karsjens v. Lourey*, 988 F.3d 1047 (8th Cir. 2021).) Judge Brasel dismissed Plaintiffs' substantive due process claim based on the Fourteenth Amendment, and all "unspecified statutory and common law" claims asserted by Plaintiffs. (*Id.* at 10 n.9.)

Judge Brasel also found that the Eleventh Amendment barred recovery of monetary damages from Defendants in their official capacities. (*Id.* at 12.) And that Defendants were entitled to qualified immunity as to the civil damages claims against them in their individual capacities because Plaintiffs did not allege that they "violated any 'clearly established' rights.{2023 U.S. Dist. LEXIS 7} To the contrary, courts have determined that the MSOP's policies restricting internet usage are not unconstitutional."7 (*Id.* at 11.) Lastly, Judge Brasel found that Plaintiffs adequately alleged that Defendants were personally involved in the alleged constitutional violations. (*Id.* at 12.)

On June 15, 2021, Defendants filed an answer to the First Amended Complaint. (Dkt. 78.) On November 4, 2021, Plaintiffs filed a Motion for Class Certification Pursuant to Fed. R. Civ. P. 23(b)(2) along with a supporting memorandum and declarations, which was denied on March 23, 2022. (Dkts. 85, 87, 88-150, 159, 228.) On January 27, 2022, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint, along with a supporting memorandum. (Dkts. 180, 181.) That motion was denied on March 23, 2022,

making the First Amended Complaint the operative complaint in this case. (Dkt. 228.) The parties' request to conduct depositions were granted. (Dkts. 183, 190, 196, 202, 229.)

On November 1, 2022, Defendants filed the Motion to Exclude as well as their Motion for Summary Judgment. (Dkt. 241, 249.) Plaintiffs also filed their Motion for Summary Judgment on November 1, 2022. (Dkt. 248.) On December 2, 2022, Plaintiffs filed the{2023 U.S. Dist. LEXIS 8} Motion to Allow ITV Communication. (Dkt. 285.) On December 14, 2022, Plaintiff Kenneth Daywitt sought permission from the Court to respond to Defendants' Motion for Summary Judgment and Motion to Exclude, which was granted in part on January 5, 2023. (Dkts. 295, 313.)

This matter is now ripe for decision.8

II. LEGAL STANDARD

A. Exclusion of Expert Testimony and Opinions Under Rule 702 and *Daubert*9

Rule 702 governs the admission of expert testimony and states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.Fed. R. Evid. 702.

"Before accepting the testimony of an expert witness, the trial court is charged with a 'gatekeeper' function of determining whether an opinion is based upon sound, reliable theory, or whether it constitutes rank speculation." *City of Farmington Hills Emples. Ret. Sys. v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 981, 998 (D. Minn. 2013){2023 U.S. Dist. LEXIS 9} (citing *Daubert*). A proposed expert's testimony "must meet three prerequisites to be admissible," including: (1) "evidence based on scientific, technical or other specialized knowledge must be useful to the fact-finder in deciding the ultimate issue of fact"; (2) "the proposed expert must be qualified"; and (3) "the proposed evidence must be reliable." *Id.* (citations omitted). The Court considers the following in

determining reliability: "(1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known rate of potential error; and (4) whether the theory has been generally accepted." *Smith v. Cangieter*, 462 F.3d 920, 923 (8th Cir. 2006). "The purpose of these requirements 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *City of Farmington Hills Emps. Ret. Sys.*, 979 F. Supp. 2d at 998 (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

"The Court's focus should be on whether the testimony is grounded upon scientifically valid reasoning or methodology." *Id.* The proffered testimony must be useful to the fact-finder, the expert must be qualified, and the proposed evidence must be reliable. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). The proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible. *Id.* "[R]ejection of expert testimony is the exception rather than the rule," and expert testimony should be admitted if it "advances the trier of fact's understanding to any degree." *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1101 (8th Cir. 2006)). "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination." *City of Farmington Hills Emps. Ret. Sys.*, 979 F. Supp. 2d at 998 (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001)). "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Id.* (quoting *Bonner*, 259 F.3d at 929-30).

B. Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As this wording suggests, the initial burden of{2023 U.S. Dist. LEXIS 10} showing that no genuine issue of material fact exists lies with the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A factual dispute is "material" only if resolving it might affect a suit's outcome under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Furthermore, a factual dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'")

(citation omitted). When assessing a summary judgment motion, a court should draw all justifiable inferences in the nonmovant's favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)).

When a motion for summary judgment has been made and supported by the pleadings and affidavits as provided in Rule 56(c), the burden shifts to the party opposing the motion to proffer evidence demonstrating that a trial is required because a disputed issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "To defeat a motion for summary judgment, a party may not rest upon allegations, but must produce probative evidence sufficient to demonstrate a genuine issue [of material fact] for trial." *Davenport v. Univ. of Ark. Bd. of Trs.*, 553 F.3d 1110, 1113 (8th Cir. 2009) (citing *Anderson*, 477 U.S. at 247-49). "In evaluating the evidence at the summary judgment stage, we consider{2023 U.S. Dist. LEXIS 11} only those responses that are supported by admissible evidence." *Duluth News-Tribune v. Mesabi Publ'g Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996); *see also JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 737 (8th Cir. 1995) ("[A] successful summary judgment defense requires more than argument or re-allegation; [the party] must demonstrate that at trial it may be able to put on admissible evidence proving its allegations."). Indeed, Rule 56(c) provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated" and a party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." *See* Fed. R. Civ. P. 56(c)(2), (4).

When ruling on a motion for summary judgment, the Court is not required to adopt the plaintiff's version of the facts when those facts are "so 'blatantly contradicted by the record . . . that no reasonable jury could believe' them." *Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 790 (8th Cir. 2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)). "A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor' without resort to 'speculation, conjecture, or fantasy.'" *Id.* at 790-91 (cleaned{2023 U.S. Dist. LEXIS 12} up). When considering a motion for summary judgment, pleadings submitted by pro se litigants are held to less stringent standards than formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam). Nevertheless, claims of even a pro se plaintiff cannot survive a motion for summary judgment unless the plaintiff has set forth specific facts demonstrating that there is a genuine issue for trial. *See Quam v. Minnehaha Cty. Jail*, 821 F.2d 522, 522 (8th Cir. 1987) ("Although Quam is entitled to the benefit of a liberal construction of his pleadings

because of his pro se status, Federal Rule of Civil Procedure 56 remains applicable to Quam's lawsuit.").

Given this framework, the Court turns to the parties' motions and begins with Defendants' Motion to Exclude.

III. ANALYSIS

A. Motion to Exclude

Defendants seek to exclude Plaintiffs' expert, Patrick O'Leary, pursuant to *Daubert* and Federal Rule of Evidence 702, because:

> [Mr.] O'Leary's opinion consists of cut-and-pasted hearsay material from the internet, offered through the lens of someone with no formal training or recent personal experience with internet monitoring, email filtering, or mobile device management. He describes no reliable method on which his opinion is based. And large swaths of his report comment and opine on issues on which he admits he is no expert. In short,{2023 U.S. Dist. LEXIS 13} Mr. O'Leary's testimony and opinions fail Rule 702 and the *Daubert* test.(Dkt. 244 at 1.)

1. Mr. O'Leary's Credentials and Report

Mr. O'Leary earned his bachelor's degree in electrical engineering/computer science in 1987 and a master's in business administration in 2020. (Dkt. 245-1, Ex. 1 at 16.) In 2011, he "completed seven IT security certifications with ISC2, EC-Counsel, and Comp-TIA," identified as "(CISSP [Certified Information Systems Security Professional)], CEH [Certified Ethical Hacker], CHFI [Computer Hacking Forensic Investigator], etc.)." (*Id.*) He states he has "been admitted to the 1st, 2nd, 3rd, and 5th Federal Circuits as an Internet subject-matter expert," has testified in "other Federal Courts as an Expert Witness or Litigation Support Consultant," and claims experience in the: "Internet technical areas of Security, Programming, Databases, Websites, SEO, Engineering, Software, Hardware, Networking, Routing, Life-cycle, Risk Management, Information Technology (IT), Facility Maintenance/Construction, Social Networking, Linux, Apache, MySQL, PHP, C#, HTML, Big Data platforms and content management systems like

Drupal."10 (*Id.* at 16-17.) He states: "I am considered a qualified expert in{2023 U.S. Dist. LEXIS 14} the above-mentioned fields." (*Id.* at 17.)

Mr. O'Leary's Report, signed on August 5, 2022, provides opinions on numerous topics, including "solutions that will resolve" the "Internet Web Access Dispute" (*id.* at 50-66), "Email Access Dispute" (*id.* at 67-71) and the "Mobile Device Dispute" (*id.* at 77-87). He asserts as a "FACT" that: "There is no risk or threat to public safety as Step #1 of the recommended solution will deliver 100% effectiveness." (*Id.* at 26.) He makes a number of other statements, such as "MSOP leadership appears to be working overtime to keep the clients from getting limited, filtered, and monitored Internet access" and "[t]his Expert Report will expand on and support these statements and Plaintiff's position entirely *with* solid professional opinions." (*Id.* at 27.)

Mr. O'Leary begins his report with an overview of content filtering, blocking, and monitoring software. (*Id.* at 32-42.) He then reviews various products, including those used by the provisional discharge program and Minnesota Department of Corrections, based on "Google searches," which he asserts "quickly yield[ed] many pages of links/solutions that would explain or implement what the Plaintiffs are requesting.{2023 U.S. Dist. LEXIS 15} There was no need to attend a conference, seminar, or continuing education course to find this information." (*Id.* at 43-49.) Mr. O'Leary next identifies WebTitan as the product to "resolve" the Internet web access dispute. (*Id.* at 50-59.) In doing so, he asserts:

According to the MSOP executive clinical director, Jannine Herbert [sic], no MSOP client profile is the same. Hence, MSOP could use the granular feature of WebTitan (*with an Active Directory instance*) to customize and improve its clinical protocols and practices due to having unique behavioral data for each client from the WebTitan reporting system.

This granular feature would also be invaluable to the MSOP provisional discharge program as it would spot issues in an MSOP's client's progress long before a Provisional Discharge (PD) is considered. Hence, the Provisional Discharge program would avoid many failures.

Therefore, a significant win for public safety, one of the concerns she raised in her deposition - done problem solved!(*Id.* at 57.) Mr. O'Leary concludes as to WebTitan: "There is no reason why the Defendants cannot be reasonable and implement this product for the Plaintiffs." (*Id.* at 59.)

As for the "email dispute," Mr.{2023 U.S. Dist. LEXIS 16} O'Leary identifies SpamTitan, which "scans all outbound emails for spam, content, and malware and blocks any emails that may result in an organization's IP address being blocked. For this scenario, this product could monitor email content sent to recipients." (*Id.* at 68.) He identified ArcTitan because it "allows for the long-term archiving of emails." (*Id.*) As to public safety, based on these products, he asserts again, "*done, problem solved*!" (*Id.*)

Finally, as to mobile devices, Mr. O'Leary identified mobile device management ("MDM") software, which "is required for Apps, Content, and Security on Mobile Devices and other endpoints." (*Id.* at 73.) He recommended MobiControl as the solution for this problem. (*Id.* at 78.)

With respect to implementation of these solutions, Mr. O'Leary recommended step-by-step implementation, but asserted that he was "not talking about a do-nothing paper study that many MSOP/DHS11 /MNIT12 bureaucrats would talk about over coffee for three years!" (*Id.* at 80-81; *see generally* 80-87.) He further "suggest[s] that the Court order a three-year proof-of-concept implementation, whereby experts like myself and *knowledgeable* people at TitanHQ (WebTitan) would launch{2023 U.S. Dist. LEXIS 17} a solution for MSOP" and asserts that he is "*talking about a real, live, usable, implemented solution*," which he believes "*could be up and running in under 30 days*." (*Id.* at 81.) According to Mr. O'Leary, the "step-by-step implementation with a special master or MSP oversight squelches all excuses by the Defendants - *done, problem solved*!" (*Id.* at 87.)

The remainder of the Report contains criticisms of Declarations offered by Defendants and Defendants' deposition testimony, framed as a rebuttal (*id.* at 88-103, 112-15), and Mr. O'Leary's report "on the *results* and *findings* of the sex-offender recidivism studies that were done by *well-known* sex-offender industry qualified professionals" (*id.* at 104-11). Mr. O'Leary's rebuttal contains opinions such as: "a person can only conclude that Defendants are": "Giving personal opinions [a]s no data or science-based evidence was given. No professional opinions were given . . . [u]nknowledgeable or not trained in Information Technology . . . [o]perating with a personal bias . . . [b]eing uncooperative bureaucrats [and] [l]astly, just completely lazy or incompetent."13 (*Id.* at 118.) He also asserts: "The Defendants are being absolutely{2023 U.S. Dist. LEXIS 18} silly and unreasonable!" (*Id.* at 101.) As to his recidivism section, Mr. O'Leary states: "This gathering and reporting on my part is purely *data forensics*. Given my credentials, data forensics is undoubtedly within my skillset." (*Id.* at 104.)

Mr. O'Leary concludes: "For the record, I apologize for being so direct in my report; I needed to call out the bureaucracy, contradictions, and personal opinions/bias for what it is to make specific points for the Court." (*Id.* at 119.)

2. Analysis

As a threshold matter, Plaintiffs argue that the Motion to Exclude should be denied as untimely because it is a *motion in limine* or nondispositive motion that relates to discovery issues. (Dkt. 271 at 1 (citing Dkt. 84 and referencing June 1, 2022 as the deadline for nondispositive motions).) This argument lacks merit. District of Minnesota Local Rule 7.1 states that "motions to exclude experts under Fed. R. Evid. 702 and *Daubert*" are "considered dispositive motions." D. Minn. LR 7.1(c)(6)(D). The scheduling order in this case set November 1, 2022 as the dispositive motion deadline. (*See* Dkt. 84 at 4.) Defendants filed their Motion to Exclude and supporting materials on November 1, 2022. (*See* Dkts. 241-245, 245-1.) Consequently, Defendants' Motion to Exclude is timely.{2023 U.S. Dist. LEXIS 19}

Next, Defendants seek exclusion of Mr. O'Leary on the basis that he is not qualified as an expert on the topics he opines on because he is "someone with no formal training or recent personal experience with internet monitoring, email filtering, or mobile device management" and "large swaths of his report comment and opine on issues on which he admits he is no expert." (Dkt. 244 at 1.) They argue: "Mr. O'Leary has personal experience implementing internet filtering, blocking, and monitoring software from 1990-1999, but not since. Mr. O'Leary has never implemented a Cisco Umbrella14 installation and does not have any personal experience implementing WebTitan products." (*Id.* at 2-3 (citations omitted).) Defendants further argue that Mr. O'Leary admitted he is not an expert in sex offender recidivism and treatment. (*Id.* at 5 (citing Dkt. 245-1, Ex. 1 at 103-10).) Plaintiffs respond that Mr. O'Leary covered content monitoring, email monitoring, and filtering at a high level when obtaining his certifications in 2011, Defendants have not explained why more recent training is required, and that Defendants failed to disclose that Mr. O'Leary was an expert in another case "with very similar facts."{2023 U.S. Dist. LEXIS 20} (Dkt. 271 at 5-6, 17-18.)

Rule 702 requires an expert to be qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Mr. O'Leary has no experience in the areas of sex offender treatment or recidivism; he has no education, work experience, or training related to a detention facility; he has never worked in a detention facility; and he has never consulted, provided an opinion, nor obtained any education or experience related specifically to any

kind of security issue at a detention facility. (Dkt. 245-1, Ex. 2 at 20:9-24:19.) The Court recommends exclusion of Mr. O'Leary's opinions insofar as they relate to sex offender treatment and recidivism, the risks posed by internet access at a detention facility, or the "reasonableness" of any proposed solution, as he has no basis for providing such opinions. *See Onyiah v. St. Cloud State Univ.*, Civ. No. 08-4948 (MJD/LIB), 2011 U.S. Dist. LEXIS 52380, 2011 WL 1868794, at *6 (D. Minn. May 16, 2011) (finding expert did not have the requisite qualifications to be considered an expert in the field of university salaries and that his statement that "he is a professor of Mathematics is irrelevant with regard to offering an opinion on how much Plaintiff initially should have been making"), *aff'd*, 684 F.3d 711, 721 (8th Cir. 2012), *cert denied*, 568 U.S. 1213 (2013); *see also Olson v. Macalester Coll.*, No. 21-cv-1576 (ECT/DJF), 2023 U.S. Dist. LEXIS 114699, 2023 WL 4353820, at *24 (D. Minn. July 5, 2023) (excluding expert's opinions because the expert failed{2023 U.S. Dist. LEXIS 21} to "identify what scientific, technical, or other specialized knowledge" she possessed "that might enable her to opine regarding these matters" and her resume disclosed "no education, training, or experience in the area"). As to Mr. O'Leary's opinions on the technical capabilities of his proposed solutions, the Court is not persuaded that decade-old certifications at which content monitoring and email monitoring and filtering were covered "at a high level" qualify Mr. O'Leary to offer those opinions-particularly when Mr. O'Leary has no memory of what was covered when obtaining those certifications. (Dkt. 245-1, Ex. 2 at 14:18-15:6.) As for the fact that Mr. O'Leary was deemed qualified to testify on such topics over 20 years ago, in 2001 (Dkt 245-1, Ex. 2 at 32:14-35:15; 42:2-44:11), that does not provide sufficient qualification for his opinions about technology developed decades later. Indeed, Mr. O'Leary's only experience with implementing internet or email monitoring software occurred before 2000, and involved "proprietary solutions" instead of the "turnkey software" (WebTitan, SpamTitan, ArcTitan, and MobiConnect) he identifies as solutions in his Report. (*See id.* at 87:6-94:23.){2023 U.S. Dist. LEXIS 22} Further, Mr. O'Leary's investigation of the turnkey software was limited to internet research and some phone/video conferences with WebTitan, including a 30-minute live product demo. (*See id.* at 74:21-79:22, 98:15-107:9; *see also* Dkt. 245-1, Ex. 1 at 32-49 (describing software); *id.* at 124-27 (Report's Exhibit B showing websites searched).) While Mr. O'Leary's background may theoretically qualify him to explain terminology and some limited aspects of the turnkey software, it certainly does not qualify him to testify as to that software's effectiveness, as he has no more insight into the software's effectiveness, much less its effectiveness in the institutional setting of MSOP, than any layperson who reviewed the materials and spoke with WebTitan's representatives.

Even if Mr. O'Leary has some minimal qualifications in the area of modern-day content and email monitoring software, his opinions should be excluded because they are not "the product of reliable principles and methods." *See* Fed. R. Evid. 702(c). In making this determination, a court's focus is on an expert's methodology, not his or her conclusions. *Bonner*, 259 F.3d at 929-30. Here, Defendants argue that Mr. O'Leary's opinions are

nothing more than a "vehicle for hearsay."{2023 U.S. Dist. LEXIS 23} (Dkt. 244 at 10-11.) Plaintiffs respond that the video conference Mr. O'Leary had with WebTitan representatives constitutes "independent research and testing of the product" and that his "method of conducting Google research was for the benefit of showing Defendant's [sic] just how simple it was to do some research." (Dkt. 314 at 7, 9.)

"Rule 703 requires that if experts rely on otherwise inadmissible hearsay, that expert's opinion may be admitted only to the extent that the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *United States v. Martinez*, 3 F.3d 1191, 1197 (8th Cir. 1993) (cleaned up). "[T]rial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine 'scientific, technical, or other specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue.'" *Williams v. Illinois*, 567 U.S. 50, 80, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (quoting Fed. R. Evid. 702(a)). The Court is not persuaded that an expert would rely on generalized product and sales information from the internet and a 30-minute product demo when forming opinions about whether specific software could adequately monitor, block, and filter internet and email{2023 U.S. Dist. LEXIS 24} in the MSOP setting-much less rely solely on such material. Mr. O'Leary did not perform any testing representative of an installation and implementation of the turnkey software at MSOP or identify or rely on any third-party or peer review of the turnkey software's effectiveness in an MSOP setting. He also did not perform any testing or rely on any third-party or peer review of the turnkey software to determine if the manufacturer's effectiveness claims are even accurate. In sum, Mr. O'Leary's theory that the turnkey software he identified will be 100% effective in blocking, filtering, and monitoring internet and email access at MSOP has not been tested, has not been subjected to peer review and publication, has no known error rate, and has no standards controlling its implementation. *See Smith*, 462 F.3d at 923 (listing relevant factors). Indeed, there has been no testing or peer review of the turnkey software in general-Mr. O'Leary relies only on the manufacturer's statements. There is "simply too great an analytical gap between the data"-which constitutes a few statistics from the software developers' websites-"and the opinion proffered"-that this software will be 100% effective and solve the problems{2023 U.S. Dist. LEXIS 25} at MSOP relating to client's internet and email access. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Plaintiffs have not met their burden of showing that Mr. O'Leary's opinions that the turnkey software "solve[s]" the problems of internet and email filtering, monitoring, and blocking at MSOP with 100% effectiveness is reliable. *See Lauzon*, 270 F.3d at 686.

Mr. O'Leary also opined that WebTitan "offers better pricing for software licensing" (Dkt. 245-1 at 66) but did not provide any pricing analysis or estimates of what it would cost for MSOP to implement the turnkey software, rather stating "MSOP spends over 100

million dollars per year, I am sure they can find a way to fund this recommended solution for providing this limited, filtered and monitored internet access to its clients." (*Id.* at 87; *see also* Dkt. 245-1, Ex. 2 at 149:21-154:19 (Mr. O'Leary "willing to guess," but stating he did not "want to get into [the cost of just using WebTitan for MSOP] in the deposition," and making a "qualitative" estimate with "large assumptions").) Mr. O'Leary did not provide an estimated cost for implementing and operating any of the turnkey software in his Report or deposition, and indeed has no basis to do so. Any such opinions as to cost should be excluded.{2023 U.S. Dist. LEXIS 26} *See Onyiah*, 2011 U.S. Dist. LEXIS 52380, 2011 WL 1868794, at *7 (excluding expert's opinion regarding university faculty member's salaries because "the report and proposed testimony is speculation. . . . Dr. Kalia's assignment of Plaintiff to a random starting salary is 'devoid of competent, factual predicates,' and thus must be excluded").

The Court concludes with Mr. O'Leary's opinions as to the motivations, biases, reasonableness, and credibility of Defendants and MSOP. "Lay juries routinely assess questions like the presence or absence of bias or the credibility of witnesses without expert testimony." *Olson*, 2023 U.S. Dist. LEXIS 114699, 2023 WL 4353820 at * 24. Mr. O'Leary's testimony on these issues would not "help a jury 'to understand the evidence or to determine a fact in issue.'" *Id.* (quoting Fed. R. Evid. 702(a)). His opinions as to the motivations, biases, reasonableness, and credibility of Defendants should be excluded. *See id.* ("The better answer is that a jury would not benefit from Dr. Brandon's testimony or expert knowledge to understand or resolve these questions here."). Similarly, to the extent Mr. O'Leary opines on legal conclusions, "expert testimony on legal matters is not admissible" because "[m]atters of law are for the trial judge." *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003). For all of these reasons, the Court recommends exclusion of{2023 U.S. Dist. LEXIS 27} Mr. O'Leary's Report and opinions.

Finally, the Court turns to Plaintiffs' request that the Court extend the nondispositive motion deadline for Plaintiffs so that they can bring a motion to exclude Defendants' experts and for sanctions against Defendants due to "lawyering." (Dkt. 271 at 1-2. (citing Dkt. 272).) The Court recommends denying both. Plaintiffs' request for an extension of the nondispositive motion deadline should be denied for failure to comply with Local Rule 16.3 insofar as they have not filed a motion, *see* D. Minn. LR 16.3(a) (request to modify schedule must be made by motion) or shown good cause and described the effect on any deadlines, *see* D. Minn. LR 16.3(b)(1)-(2). Specifically, as to good cause, Local Rule 7.1 is clear that "motions to exclude experts under Fed. R. Evid. 702 and *Daubert*" are dispositive motions, D. Minn. LR 7.1(c)(6), and the schedule set November 1, 2022 as the deadline for dispositive motions (Dkt. 84 at 4). Plaintiffs, regardless of their *pro se* status, are required to comply with procedural and local rules. *Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir.1983) (per curiam). Plaintiffs' misunderstanding of the

deadline to file a motion to exclude Defendants' experts does not constitute good cause. Plaintiffs also request Rule 11 sanctions or an order to show cause under Rules 11(c)(3) and (4). (Dkt. 271 at 2.) The request for an order{2023 U.S. Dist. LEXIS 28} to show cause appears to be an attempt to circumvent the requirements under Rule 11(c)(2) for a motion for sanctions, including that the motion "must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)" and the pre-filing service requirements. *See* Fed. R. Civ. P. 11(c)(2). The Court sees no basis for an order to show cause as to Defendants' conduct in filing the Motion to Exclude. To the extent Plaintiffs are seeking sanctions, Plaintiffs have not complied with Rule 11(c)(2). The Court recommends denial of Plaintiffs' request for relief under Rule 11.

The Court turns to the parties' Motions for Summary Judgment.

B. Motions for Summary Judgment

The parties brought cross-Motions for Summary Judgment. (Dkts. 248, 249.) As stated previously, the remaining claims in the First Amended Complaint are Plaintiffs' right to access the internet/information claim and their free exercise claim under the First Amendment. (*See* Dkt. 26-1; *see also* 76.) The Court discusses these claims below.

1. Access to the Internet/Information

In the First Amended Complaint, Plaintiffs contend that the Policies preventing clients from accessing the internet are unconstitutional as they prevent them from obtaining information on the internet{2023 U.S. Dist. LEXIS 29} and accessing emails and telephone and video calls in violation of the First Amendment. (Dkt. 26-1 4, 6, 24-111.) Plaintiffs seeks injunctive and declaratory relief for the alleged constitutional violation. (*Id.* 5, 9.)

a. Applicable Standard

Because much of the parties' arguments are dedicated to the applicable standard, the Court begins with this issue. Plaintiffs rely on the standard set forth in *Packingham v. North Carolina*, 582 U.S. 98, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). (*See* Dkt. 260 at 6; *see also* Dkt. 280 at 23; Dkt. 287 at 7.) While Plaintiffs previously argued for the applicability of *Turner, supra*, (*see* Dkt. 64 at 11), they now argue that *Turner* does not

apply to the instant issue and that the standard enumerated in *Bell* 15 , as "incorporated" in *Karsjens*, 988 F.3d 1047, applies here (Dkt. 280 at 26-33; *see also* Dkt. 287 at 1-3, 8, 10-14; Dkt. 315 at 9-12).

However, the Court need not delve further into this issue because it has already been decided by Judge Brasel in the Order on Motion to Dismiss. *See Daywitt*, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521, at *2 n.5. That Order stated:

Plaintiffs heavily rely on *Packingham v. North Carolina* to argue that they have a constitutional right to access the internet generally, and social media specifically. But *Packingham* dealt with restrictions on the use of social media by registered sex offenders, including those who had completed their{2023 U.S. Dist. LEXIS 30} sentences. Civilly committed people, after all, have less liberty interests than members of the public.(*Id.* (citations omitted).)

Judge Brasel therefore applied the modified *Turner* test to Plaintiffs' access to internet/information claim:

Assuming that Plaintiffs have a First Amendment right to receive information, the Court analyzes their claim under the modified *Turner* analysis that courts in this District have applied to MSOP clients' constitutional claims. *E.g., Karsjens*, 6 F. Supp. 3d at 937 (citing *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)); *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746 at *5-6.(*Id.* at 6 (footnote omitted).)

"When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This principle applies to both appellate decisions and district court decisions that have not been appealed." *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 326 F.R.D. 513, 528 (D. Minn. 2018) (cleaned up). Moreover, "[t]he law of the case doctrine specifies that once a court decides a rule of law, that decision should govern the same issue in all stages of the case. . . . Law of the case provides consistency, promotes efficiency, and avoids relitigation of settled issued." *United States v. Wolf*, No. 22-cr-137 (KMM/DTS), 2022 U.S. Dist. LEXIS 189744, 2022 WL 16699808, at *2 (D. Minn. Sept. 27, 2022)). Consequently, the Court applies the modified *Turner* test to Plaintiffs' access to the internet/information claim.

b. Evidentiary Challenges

Plaintiffs make certain evidentiary{2023 U.S. Dist. LEXIS 31} challenges to Defendants' evidence submitted in connection with summary judgment. The Court addresses those challenges next.

"The evidence supporting a summary judgment motion, including the statements or information contained in affidavits or declarations, should be admissible at trial. Thus, 'inadmissible hearsay evidence' cannot be considered at the summary judgment stage." *Gilmore v. City of Minneapolis*, Civ. No. 13-1019 (JRT/FLN), 2015 U.S. Dist. LEXIS 32090, 2015 WL 1189832, at *5 (D. Minn. Mar. 16, 2015), *modified sub nom. Gilmore v. Dubuc*, 2015 U.S. Dist. LEXIS 74796, 2015 WL 3645846 (D. Minn. June 10, 2015), *aff'd sub nom. Gilmore v. City of Minneapolis*, 837 F.3d 827 (8th Cir. 2016) (citations omitted). "[T]he requirement of authenticating or identifying an item of evidence" is satisfied by "evidence sufficient to support a finding that the item is what the proponent claims it is.'" Fed. R. Evid. 901(a); *see also Felix v. Rios*, Civil No. 08-4925 (PAM/RLE), 2009 U.S. Dist. LEXIS 82740, 2009 WL 2958001, at *3 (D. Minn. Sept. 10, 2009) ("Rule 901 mandates only that the authentication requirement as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. . . . The Rule then notes that the testimony of a witness with knowledge suffices.") (cleaned up). "Where a witness authenticates a document as accurate, and the record establishes the witness's qualification to authenticate the document, the district court does not abuse its discretion in finding that the authentication is reliable and the document is authentic."{2023 U.S. Dist. LEXIS 32} *Stojkowski v. Fisher*, Civ, No. 10-2390 (PJS/LIB), 2011 U.S. Dist. LEXIS 51228, 2011 WL 1831680, at *3 (D. Minn. April 18, 2011) (citing *United States v. Two Elk*, 536 F.3d 890, 905 (8th Cir. 2008); *United States v. Coohey*, 11 F.3d 97, 99 (8th Cir. 1993) ("to meet the authentication standard 'the proponent need only demonstrate a rational basis for its claim that the evidence is what the proponent asserts it to be')").

Plaintiffs generally argue that "the depositions completed in this case are now directly relevant to the veracity of" Defendants' Motion for Summary Judgment and "supporting declarations" because the Declarations submitted in this case "are identical duplicates" to those submitted in a separate case. (Dkt. 280 at 10 n.7.) To the extent Plaintiffs argue that the Court should consider the deposition testimony in connection with the Motions for Summary Judgment, the Court has done so. To the extent Plaintiffs suggest the Declarations should not be considered or given less weight because identical declarations were filed in another case, they cited no authority supporting that argument.

Plaintiffs object to the Declaration of Defendant Jannine Hébert due to "key inconsistencies discovered during" her deposition and because she is not an expert in IT

or software. (Dkt. 280 at 10-12, 14-15.) Defendant Hébert did not hold herself out as an expert in IT or software; her statements were based on her experience as the{2023 U.S. Dist. LEXIS 33} Executive Clinical Director of MSOP since 2008 and her over 20 years' experience in the field of sexual violence. (*See* Dkt. 255 1-3.) Plaintiffs have not identified any statement given by Defendant Hébert as outside of the scope of her personal knowledge. Further, as to the alleged inconsistencies between her Declaration and deposition testimony, the Court finds no inconsistency that would justify exclusion of her Declaration. Plaintiffs can-and have-identified what they perceive as the inconsistencies and made their arguments accordingly. (*See e.g.*, Dkt. 280 at 10-11, 13-14.)

As to Defendant Nancy Johnston, similarly, her Declaration is based on her experience as the Executive Director of MSOP and her positions held at DHS since 2003. (Dkt. 254 1-3.) She does not offer any opinions on IT or software, although she does offer opinions as to the effect of Mr. O'Leary's proposal on MSOP administration and resources. Again, Plaintiffs do not identify which of Defendant Johnston's statements exceeds her personal knowledge.

Turning to Dan Storkamp, Plaintiffs argue he does not work for MNIT and has no first-hand knowledge of whether MNIT's resources would be strained by implementation{2023 U.S. Dist. LEXIS 34} of the "modern technology" proposed by Mr. O'Leary. (Dkt. 280 at 12.) Mr. Storkamp attested that he is employed as the Operation Services Director at Minnesota Direct Care and Treatment in DHS; that before joining DHS in 2008, he held various positions, including Operation Service Manager at MSOP, Deputy Director at MSOP, Administrative Director at MSOP, and IT Director at MSOP; that he worked for the Minnesota Department of Corrections in various roles including as the Director of Information and Technology; and that he had personal knowledge of the facts in his declaration. (Dkt. 256 1-2.) Plaintiffs have not presented anything to this Court to show that Mr. Storkamp's employment with MNIT is a predicate for his testimony to be admissible. Moreover, Mr. Storkamp attested in his Declaration that in his "role as the Operation Services Director at Direct Care and Treatment," he has "personal knowledge of MSOP's Client Computer Network Policy" and that he worked with MNIT "to create MSOP's Client Computer Network." (*Id.* 4.)

With respect to Chris Luhman, Plaintiffs argue he testified that "declarations are made up of questions and answers opposing counsel came up with." (Dkt. 280{2023 U.S. Dist. LEXIS 35} at 12 (citing Dkt. 262-7, Ex. D at 121:4-13).) Mr. Luhman testified in response to a question about where a statement in his Declaration came from: "We wrote the statement together. They asked me a question and that was the answer to the question." (Dkt. 262-7, Ex. D at 121:10-13.) The Court sees no basis for exclusion in Mr.

Luhman's testimony. Plaintiffs also have not identified any statement made by Mr. Luhman, who had been employed by MNIT since 2011 in various information securing roles and was the Information Security Director at MNIT when he signed his Declaration (Dkt. 257 1, 4), for which he lacked personal knowledge.

Finally, Plaintiffs object to the Declaration of John Israel as "untested" because he was not deposed. (Dkt. 287 at 5.) While Plaintiffs argue that the Declaration is "suspect," they do not explain what is suspect about the Declaration other than the fact that Mr. Israel was not deposed. There is nothing improper about "simply [] using declarations instead of depositions." *Gilmore*, 2015 U.S. Dist. LEXIS 32090, 2015 WL 1189832, at *5 (citing Fed. R. Civ. P. 56(c)). The Court will not exclude the Declaration on this basis, nor does the Court believe an evidentiary hearing is necessary to test its veracity. (*See* Dkt. 287 at 5 (requesting evidentiary{2023 U.S. Dist. LEXIS 36} hearing).)

In sum, Plaintiffs have not shown that any of these declarants lacked the requisite "first-hand knowledge" of the matters the declarants averred to or that the declarants were otherwise incompetent to make the statements in their Declarations. *See Gilmore*, 2015 U.S. Dist. LEXIS 32090, 2015 WL 1189832, at *5 (finding declarants had "first-hand knowledge" of the matters they averred to, including a Minneapolis Police Chief regarding the Minneapolis police force and its practices, and were "competent to testify to the matters stated"), *order modified in other respects*, 2015 U.S. Dist. LEXIS 74796, 2015 WL 3645846 (D. Minn. June 10, 2015). The Court rejects Plaintiffs' challenges to the Declarations submitted by Defendants.

Having addressed the evidentiary challenges, the Court turns to the merits of the parties' Motions.

c. Plaintiffs' Right to Access the Internet/Information

Plaintiffs and Defendants both contend they are entitled to summary judgment on the right to access the internet/information claim. (Dkt. 251 at 27-34; Dkt. 260 at 38.) As discussed above, Judge Brasel has already found the modified *Turner* test applies to this claim. (Dkt. 76 at 6.) Indeed, another decision from this District recently observed "[c]ourts in this District have applied a modified version of the test announced by the Supreme{2023 U.S. Dist. LEXIS 37} Court in *Turner*, when considering constitutional claims of a civilly committed person." *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746 at *1 (citing *Karsjens*, 336 F. Supp. 3d at 992).

Courts apply the following four-factor test in determining whether policies are reasonably related to a valid penological interest: (1) "whether the challenged policies are rationally related to the MSOP's institutional or therapeutic interests"; (2) "whether Plaintiffs have alternative avenues of exercising their rights"; (3) "the effect granting Plaintiffs' requested relief would have on the 'MSOP, its resources, staff, and other clients"; and (4) "whether simple and cost-effective alternatives exist that meet the program's objectives." *Daywitt*, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521, at *3 (citing *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *1; *Banks*, 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *7-8). Plaintiffs bear the burden of proving that the modified *Turner* factors weigh in their favor. *Banks*, 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *7. MSOP clients are civilly committed and have "'considerably less [liberty interests] than those held by members of free society' but are 'entitled to more considerate treatment and conditions of confinement' than prisoners." *Id.* (quoting *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006)).

To a great extent, Plaintiffs' arguments have been rejected by two recent decisions in this District which have upheld MSOP's internet and email policies as constitutional. *E.g.*, *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746 at *3 ("Plaintiff fails to demonstrate{2023 U.S. Dist. LEXIS 38} that there is any genuine material fact in dispute as to the constitutionality of MSOP's internet policies under the *Turner* standard."); *Banks*, 2016 U.S. Dist. LEXIS 83876, 2016 WL 3566207, at *10 ("MSOP's limitations on detainees' use of computers, email, and internet, to the extent they implicate constitutional concerns at all, pass this [modified *Turner*] test."). In *Ivey*, the plaintiff, an MSOP client, asserted that "MSOP's internet policies violate his First Amendment rights because he could not interact with others via social media, contact political candidates and elected officials, and access other political and news information online." 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746 at *1 (cleaned up). The *Ivey* court found that the plaintiff failed to satisfy the modified *Turner* test because: he did not demonstrate that "MSOP's ban on internet use is not rationally related to legitimate and institution therapeutic interests, as *Turner* requires"; did not contest that he had alternative means of accessing information found on the internet and provided no authority that convenient access to information found on the internet is the relevant standard; and failed to demonstrate that limited internet access would satisfy the third and fourth *Turner* factors. 2021 U.S. Dist. LEXIS 6591, [WL] at *2-3. Similarly, in *Banks*, the plaintiff argued that{2023 U.S. Dist. LEXIS 39} MSOP's policies unconstitutionally limited his access to the internet and email and prevented him from possessing a personal computer of his choice and videogame systems. 2016 U.S. Dist. LEXIS 83876, 2016 WL 3566207, at *9. The *Banks* court found that "MSOP's limitations on detainees' use of computers, email, and the internet do not raise constitutional concerns" and that in any event, the *Turner* factors "weigh[ed] heavily in favor of MSOP's restrictions on computer and internet use." 2016 U.S. Dist. LEXIS 83876, [WL] at *10 (collecting cases).

Further, there is a major barrier to Plaintiffs' access to internet/information claim: "MSOP's limitations on detainees' use of computers, email, and the internet do not raise constitutional concerns." *Banks*, 2016 U.S. Dist. LEXIS 83876, 2016 WL 3566207, at *10 (collecting cases). As explained in *Banks*:

The problem with [Banks'] claim that he was unconstitutionally denied computer privileges-both the privilege to possess a personal computer of his choice and to access the internet and e-mail-is that [Banks] has no identifiable constitutional right to possess or use a computer or have an email account or internet access. Although it would likely be more convenient for [Banks] to communicate with others through electronic rather than conventional mail, there is nothing to indicate that the content{2023 U.S. Dist. LEXIS 40} of his speech was in any way limited by these computer policies, so First Amendment speech concerns are not triggered. The same is true with respect to internet access.*Id.* The absence of a constitutional right alone is sufficient reason to grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment on the access to internet/information claim.

Even if the Court assumed for purposes of argument that the Policies did implicate a First Amendment right, it would still recommend dismissal of this claim because Plaintiffs have not met their burden to show that the modified *Turner* test weighs in their favor.

As to the first *Turner* factor, "[t]he rehabilitation of sex offenders and institutional security of MSOP are legitimate government interests under *Turner*." *Stone v. Jesson*, Case No. 11-cv-0951 (WMW/HB), 2019 U.S. Dist. LEXIS 224574, 2019 WL 7546630, at *5 (D. Minn. Dec. 3, 2019) (cleaned up); *see also Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *2 (same). Plaintiffs do not contend that the State of Minnesota does not have a legitimate government interest in rehabilitating sex offenders and the institutional security of MSOP.

As to the relationship between those interests and the Policies, Defendant Hébert averred that MSOP's clients' internet restriction is reasonably related to legitimate institutional and therapeutic interests and that MSOP restricts{2023 U.S. Dist. LEXIS 41} access to the internet to ensure "public safety and to maintain the therapeutic environment that is conducive to change and safe administration at MSOP." (Dkt. 255 4, 6.) She further averred:

Individuals committed to MSOP often have anti-social tendencies and all have engaged in harmful sexual conduct. Based on my experience, it is likely that if given access to the internet, some MSOP clients would use the internet to: (1) engage in sexual communication with minors and other vulnerable people, (2) contact their victims or family members, (3) plot escapes, (4) stalk, abuse, and harass individuals outside the secure facility, (5) view, read, or listen to counter-therapeutic stimuli including, but not limited to, sexually explicit or violent content, and (6) coordinate and direct criminal activity outside the secure facility, such as assaultive behavior, extortion, or prostitution.(*Id.* 4.)

Defendant Johnston, the Executive Director of MSOP, averred that "MSOP has an obligation to monitor client contact with those outside of the secure facility in order to ensure public safety and maintain a therapeutic environment, and does so in a number of ways[,]" including through its policies,{2023 U.S. Dist. LEXIS 42} and that "MSOP also restricts client access to the internet for administrative reasons, because allowing clients to have internet access would severely impact the balance of institutional resources at MSOP as a whole." (Dkt. 254 20-23, 25, 27.) Defendant Johnston further states:

Additionally, MSOP could not provide real-time monitoring while protecting the public safety, ensuring the security of the MSOP facility, or preventing clients from accessing materials that MSOP prohibits such as contraband and counter-therapeutic materials. MSOP staff could only stop MSOP clients from using the internet after they have viewed prohibited content, not prevent them from seeing the content at all, and that after the fact review would also require significant staff resources. Although I do not know the exact cost of real-time monitoring or review of client internet use after the fact, MSOP would not have the resources to provide either because it would require that MSOP hire additional staff and pay the staff to monitor MSOP clients at all times while they access the internet or to review all of their activity after the fact.(*Id.* 28.)

Plaintiffs argue that "Defendants' [sic] have not assessed{2023 U.S. Dist. LEXIS 43} the Plaintiffs' [sic] to make a rational determination whether they can safely use *modern technology* [the turnkey software identified by Mr. O'Leary] or not" and assert that MSOP never conducted any study or research that led to the Policies. (Dkt. 280 at 35.) Whether Plaintiffs individually can safely use the turnkey software is not the relevant question. The modified *Turner* test considers institutional interests as a whole and does not require consideration of the individual dangerousness posed by each Plaintiff.16 *See Daywitt*, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521, at *3 (describing modified *Turner* test factors including "whether the challenged policies are rationally related to the MSOP's institutional and therapeutic interests" as well as the effects granting Plaintiffs' requested relief would have on the "'MSOP, its resources, staff, and other clients").

Plaintiffs cite no authority for the proposition that the modified *Turner* test is to be applied on an individual basis, and the Court rejects this argument.

In sum, the Court concludes that no reasonable juror could find that the challenged policies are not rationally related to the MSOP's institutional or therapeutic interests. This factor weighs in favor{2023 U.S. Dist. LEXIS 44} of Defendants.

As to the second factor, Plaintiffs argue that they "do not have ample First Amendment alternatives to receive information." (Dkt. 315 at 2.) But they admit they have access to the U.S. Mail and a telephone. (*Id.* at 6.) They can also receive email, and apparently Daywitt has a Netflix account. (*Id.* at 7-8.) Further, Defendants identify other ways for Plaintiffs to receive information and communicate with other people, including video visits and in-person visits, if therapeutically appropriate; streaming services; purchasing from approved vendors; calling friends and family; access to CDs, DVDs, books, newspapers, and magazines not prohibited by MSOP policy; watching television and listening to the radio; and access to computers containing legal research materials and word processing software. (Dkt. 251 at 14-23 (citing numerous deposition transcripts and declarations); *see also* Dkt. 252-1, Hatton Dep. at 69:4-8, 80:9-81:22, 121:6-11 (Plaintiff Hatton testifying that he can contact vendors through "mail or telephone" and could have in-person and video visits); *id.*, Hogy Dep. at 50:7-52:12, 64:10-65:5 -(Plaintiff Hogy testifying that he can make telephone calls, makes about 5 to 6 calls{2023 U.S. Dist. LEXIS 45} per week, and that MSOP permits clients to have in-person visits); *id.*, Lonergan Dep. at 81:8-83:23 (Plaintiff Lonergan testifying that outbound telephone calls are permitted at MSOP and that he retrieves information about political candidates from others); *id.*, Whipple Dep. at 29:18-30:18 (Plaintiff Whipple testifying that he had received "ten-plus" in-person visits with family members and had sent mail to family members).) Plaintiffs have not disputed that these alternatives are available; instead they argue that they are less convenient than being able to access the internet and send email. (Dkt. 315 at 6-7.) They also identify certain publications that they cannot access. (*Id.* at 11.) But "Plaintiffs have not pointed to, and the Court cannot find, any cases suggesting a First Amendment right to access specific publications." *Daywitt*, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521, at *6. Based on the record, the Court concludes that no reasonable juror could find that Plaintiffs cannot access the information they seek through other means. "Because Plaintiffs may receive the information they seek via offline means, the second modified *Turner* factor favors the MSOP." *Daywitt*, 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521 at *6 (citing *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *2 (concluding that an MSOP client had alternative means to access information about{2023 U.S. Dist. LEXIS 46} politics) (denying motion for temporary restraining order); *see also Banks*, 2016 U.S. Dist. LEXIS 83876, 2016 WL 3566207, at *10 ("Moreover, despite MSOP's restrictions on his computer and internet use, Banks is

able to exercise his First Amendment rights through other mediums (e.g., letters, phone calls, etc.)").

This brings the Court to the third and fourth modified *Turner* factors, the effect granting Plaintiffs' requested relief would have on the MSOP, its resources, staff, and other clients and whether simple and cost-effective alternatives exist that meet the program's objectives. Basically, Plaintiffs seek the implementation of "modern technology," that is, the turnkey software identified by Mr. O'Leary. (Dkt. 280 at 38; Dkt. 315 at 10.) They generally argue that implementing that software would not impose a great burden on MSOP and they would be willing to bear the costs of doing so. (Dkt. 315 at 10.)

For the reasons explained in Section III.A.2, the Court recommends excluding Mr. O'Leary's opinions in their entirety. As such, Plaintiffs' arguments are unsupported by expert testimony and should be rejected. *See Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *3 ("Further, Plaintiff suggests that MSOP staff members could monitor clients' internet use in real time, yet presents no evidence or expert{2023 U.S. Dist. LEXIS 47} testimony that such supervision would not unreasonably burden MSOP.") (citing Fed. R. Civ. P. 56(c)(1)(A)).

But even if the Court considers Mr. O'Leary's opinions, Plaintiffs would still fail to meet their burden as to these factors because Mr. O'Leary did not offer any opinion as to what it would cost to implement the WebTitan, SpamTitan, ArcTitan, and MobiConnect software; monitor clients' internet usage on an ongoing basis; update the "blocked" and "unblocked" websites, email recipients, etc. on an ongoing basis; and otherwise ensure that the legitimate government interests currently served by the Policies would be served if the turnkey software were used. There is no evidence as to what it would cost to install and implement Mr. O'Leary's turnkey software solution. Notably, while Mr. O'Leary made some generalized statements about costs, he also repeatedly testified that he was "just guessing" as to certain costs. (Dkt. 245-1, Ex. 2 at 153:4-154:17; *see also id* at 150:4-14 (also guessing as to mailroom costs).) Mr. O'Leary himself defines guessing as "speculative" (Dkt. 245-1, Ex. 1 at 113), says "[g]uessing is not science-based and thus is not a professional opinion (*id.* at 147), and says guessing is not{2023 U.S. Dist. LEXIS 48} a "science-based answer" (*id.* at 149). He also testified that he did not make a specific calculation as to implementation costs because "I didn't want to make a statement in a report that would then be refuted later. You know what I mean? If I'm making statement in a report, I'm very confident I can stand behind that." (Dkt. 245-1, Ex. 2 at 153:4-12.) No reasonable juror could credit Mr. O'Leary's generalized guesses about implementation cost. Consequently, Plaintiffs have not presented evidence of a "simple and cost-effective alternative[]"-much less one that could "meet the program's objectives."

Moreover, there is extensive evidence that allowing MSOP clients access to the internet and email, even using Mr. O'Leary's turnkey software solutions, would not serve the legitimate interests served by the current Policies because, as Defendant Hébert explained, "MSOP would have a responsibility to ensure clients utilize those allowed categories of websites in a way that is consistent with public safety rather than assuming that all use of the internet in these broad categories presents no risk." (Dkt. 255 8.) Defendant Johnston explained that "real-time monitoring" would be needed to{2023 U.S. Dist. LEXIS 49} protect the public safety, ensure the security of the MSOP facility, and prevent clients from accessing materials that MSOP prohibits such as contraband and counter-therapeutic. (Dkt. 254 28.)

Mr. Storkamp, the Operation Service Manager at Minnesota Direct Care and Treatment in DHS, attests that "MNIT does not have the resources or technology to monitor the activities of MSOP clients on the client network in real time"; "MNIT's [current] work inspecting and monitoring the client network is conducted after the fact, meaning that the potentially unauthorized activities, files, or breaches occur before MNIT can monitor and inspect them"; and that "[i]f MSOP clients were given access to the internet similar to staff, MNIT would be required to take significant steps and greatly increase staff to prevent potentially unauthorized activities, files access, or breaches from occurring." (Dkt. 256 6, 9, 12.) According to Mr. Storkamp, "[t]hese additional steps and resources would not totally eliminate the potential unauthorized activities, file access, or breaches from occurring." (*Id.* 12.) Further, Mr. Luhman, the Information Security Director at MNIT, stated: "[b]ased on my experience{2023 U.S. Dist. LEXIS 50} and professional judgment, MNIT could not extend the current employee internet access to MSOP clients while also protecting public safety, ensuring the security of the MSOP facility, or preventing MSOP clients from accessing materials that MSOP does not allow" and that "there are rare occasions when sites which should be categorically blocked are not in fact blocked." (Dkt. 257 11, 13.) Mr. Luhman further stated that "if MSOP clients were provided with the same access as employees, there could be situations where MSOP clients could access materials related to sexuality, pornography, hate/discrimination, and illegal activities because they were not properly blocked by MNIT's vendor" and that he is "not aware of any technology that MNIT could purchase that would allow MNIT to both provide persons with access to social media websites and personal electronic mail accounts" "while allowing MNIT to monitor or control a person's activities or communications on those social medica websites or personal electronic mail accounts." (*Id* 13, 15.)

Mr. O'Leary, however, asserts that real-time monitoring is not necessary. (Dkt. 245-1, Ex. 1 at 96 ("Today, in 2022, with modern technology, you do{2023 U.S. Dist. LEXIS

51} not need to have a human sitting at a computer screen watching all the MSOP client activity!").) Instead, according to Mr. O'Leary:

If I were to install and configure WebTitan, I would enable the features that will notify the MSOP clinical staff when a content violation takes place by an MSOP client. In addition, the software would automatically electronically log the policy violation and have it available for the client's next counseling session with an MSOP clinical staff member. MSOP stated in their depositions that every MSOP client is unique; thus, this individual client behavioral data is invaluable for a person's therapeutic progress.(*Id.* at 97.) In other words, he relies on after-the-fact monitoring.17 This ignores the harm to the public and the MSOP client's treatment occurring at the same time as the "content violation."

One court has already rejected an MSOP client's assertion "that MSOP can purchase technology that would allow MSOP clients to access certain websites while blocking access to other websites" because "MSOP, however, cannot purchase the technology that Plaintiff describes because no technology exists that would allow MSOP to monitor client communications in real{2023 U.S. Dist. LEXIS 52} time." *Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *2 (citations omitted). Nothing in Mr. O'Leary's opinions changes that conclusion that no technology exists that would allow MSOP to monitor client communications in real time. For this reason, and because no reasonable juror could find Plaintiffs have met their burden as to cost to implement the turnkey software identified by Mr. O'Leary (with or without real-time monitoring), the Court finds the third and fourth *Turner* factors weigh in Defendants' favor.

For all of these reasons, the Court recommends that Defendants' Motion for Summary Judgment be granted and Plaintiffs' Motion for Summary Judgment be denied as to Plaintiffs' access to the internet/information claim.

2. Free Exercise

Regarding their free exercise claim, Plaintiffs allege in the First Amended Complaint that a lack of internet access prevents Plaintiffs with religious beliefs from fully engaging in religious activities. (Dkt. 26-1 53, 70, 86.)

To state a free exercise claim, Plaintiffs must establish that MSOP's policies place a substantial burden on their religious practice. *See Patel v. U.S. Bureau of Prisons*, 515

F.3d 807, 813 (8th Cir. 2008). The Eighth Circuit has explained that to be considered a "substantial burden,"

the governmental action must significantly inhibit or{2023 U.S. Dist. LEXIS 53} constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) (citations omitted).

Plaintiffs bear the burden of establishing that MSOP has placed a substantial burden on their ability to practice their religious beliefs. *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009). "Once a person demonstrates that their sincerely held religious beliefs have been substantially burdened, and does so in the context of civil commitment, courts in this district have historically applied a modified version of the [*Turner*] multi-factor test." *Daywitt v. Moser*, No. 17-cv-1720 (WMW/LIB), 2019 U.S. Dist. LEXIS 157806, 2019 WL 5104804, at *8 (D. Minn. June 5, 2019). "In doing so, the court considers a Plaintiff's First Amendment claims in light of appropriate therapeutic interests as well as relevant safety and security concerns." *Daywitt*, 2019 U.S. Dist. LEXIS 157806, 2019 WL 5104804, at *8 (cleaned up).

Plaintiffs identify the following facts as evidence that the Policies burden their religious practice: a monthly magazine on Judaism has gone to an online only format, a church has moved to "an online format almost entirely," one plaintiff cannot participate in an online bible study{2023 U.S. Dist. LEXIS 54} group, one plaintiff has to pay for certain ministry materials (but they would be free online), one plaintiff cannot enroll in a particular online bible college, and one plaintiff "could practice Orthodox Judaism more effectively if he had personal access to the internet." (Dkt. 260 at 18-20; *see also* Dkt. 280 at 39-42.) Plaintiffs did not identify any aspect of their religions that requires them to do any of the activities prohibited by the Policies.

Moreover, the record is clear that Plaintiffs participate in religious activities on a regular basis. Defendants assert in their brief (and Plaintiffs do not dispute) that: Plaintiff Daywitt testified that he participated with others in daily congregate prayer and in weekly Kiddush and Havdalah services at the MSOP facility in Moose Lake, Minnesota. (Dkt. 252-1, Daywitt Dep. at 16:21-17:22.) Plaintiff Hatton testified that he participates in a spiritual group at the MSOP and that he is provided a spiritual room as well as a sweat lodge area to practice Anishinabe traditions. (*Id.*, Hatton Dep. at 37:9-38:16, 120:4-17.) As to Plaintiff Whipple, he has practiced his spirituality in "the Native Talking Circle,

Native sweat lodge" and powwows.{2023 U.S. Dist. LEXIS 55} (*Id.*, Whipple Dep. at 8:11-15, 11:15-12:15, 108:23-109:6, 113:4-13.) He has also purchased a CD containing spiritual songs and communicated with a medicine man. (*Id.* at 111:9-12, 113:16-114:2.) During his time at the MSOP, Plaintiff Lonergan has studied daily with another client who shares his faith; has received print materials from, and had phone calls with, his preferred ministry; ministers to incarcerated individuals "through the mail"; and can access to DVDs or CDs relating to his faith. (*Id.*, Lonergan Dep. at 49:6-52:11, 54:7-17, 56:14-20; 83:18-25; 86:3-19.) He also belongs to a ministry located outside the MSOP. (*Id.* at 49:4-5.)

Further, MSOP clients are generally permitted to possess faith-based media. (*See id.*, Daywitt Dep. at 40:1-6; 68:22-24 (Plaintiff Daywitt testifying that he reads the Torah and other religious texts, and receives a Jewish magazine called "Moment" at the MSOP); *see also id.*, Hogy Dep. at 86:5-9 (Plaintiff Hogy testifying that he does not need special permission to possess or read religious materials); *id.*, Hatton Dep. at 35:6-19 (Plaintiff Hatton testifying that he has access to DVDs through which he learns about Native American traditional and spiritual{2023 U.S. Dist. LEXIS 56} teachings).) MSOP clients can also use the U.S. Mail and telephone for religious communications and to receive faith-based media. (*See id.*, Hatton Dep. at 120:18-121:11 (Plaintiff Hatton testifying that he is able to call, mail and have in person visits with spiritual leaders); *see also id.*, Daywitt Dep. at 15:21-25, 16:7-11 (Plaintiff Daywitt testifying that a rabbi visited the MSOP facility in Moose Lake, Minnesota three times per month and acknowledging that a rabbi could visit him at the MSOP facility in St. Peter, Minnesota); *id.*, Hogy Dep. at 56:18-59:9, 66:2-7, 85:1-4 (Plaintiff Hogy testifying that he receives church newsletters monthly and devotionals by mail and speaks to other parishioners and his pastor by phone).) MSOP clients can also view approved internet streaming programming as part of their designated spiritual practice. (*See* Dkt. 254-1, Defs.' Ex. 9 (MSOP's Computer Internet Streaming policy); *see also* Dkt. 252-1, Daywitt Dep. at 15:6-12 (Plaintiff Daywitt testifying that he streams religious programming at the MSOP monthly and during Yontif).)

While Plaintiffs would prefer to use the internet to engage in their religious observances, "[a] prisoner need not be afforded{2023 U.S. Dist. LEXIS 57} his preferred means of practicing his religion as long as he is afforded sufficient means to do so." *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004); *see also Biron v. Hurwitz*, Case No. 19-cv-57 (SRN/LIB), 2019 U.S. Dist. LEXIS 251356, 2019 WL 13334558, at *12 (D. Minn. Nov. 22, 2019) (granting motion to dismiss free exercise claim because [b]ased on the allegations in her Second Amended Complaint, Plaintiff remains free to communicate via United States mail or telephone with the persons discussed in her Second Amended Complaint" and "Plaintiff's mere desire to communicate with people through email, as opposed to through conventional mail sent through the United States

Postal Service or via telephone, fails to demonstrate a substantial burden on her ability to practice her religious beliefs") (citation omitted).

In any event, even if the Court were to find that Plaintiffs have sufficiently shown that their religious beliefs have been substantially burdened, because the essence of Plaintiffs' free exercise claim relates to using the internet in practicing their religions, no reasonable juror could find that the modified *Turner* factors weigh in favor of Plaintiffs on this claim for the same reasons stated with respect to the access to internet/information claim in Section III.B.1.c. The Court therefore recommends that Defendants' Motion for Summary Judgment{2023 U.S. Dist. LEXIS 58} be granted, and Plaintiffs' Motion for Summary Judgment be denied, as to Plaintiffs' free exercise claim.

* * *

In sum, the Court recommends that Defendants' Motion to Exclude be granted; Plaintiffs' Motion for Summary Judgment be denied; Defendants' Motion for Summary Judgment be granted; and the remaining claims in this lawsuit be dismissed.

C. Motion for ITV Communication

On December 2, 2022, Plaintiffs filed the Motion for ITV Communication asking that the Court amend its "May 2, 2022 Order to allow" Plaintiffs "to have weekly ITV meetings to allow for them to effectively litigate and prepare for trial" in view of the December 1, 2022 trial-ready date. (Dkt. 285 at 1; Dkt. 308.) Defendants opposed the Motion. (*See* Dkt. 293.) Defendants argued that there is no date certain for trial because the Court had not ruled on the Motions for Summary Judgment and that Plaintiffs had been able to effectively litigate through summary judgment using the U.S. Mail and telephone. (*See id.* at 1-2.) In response, Plaintiffs argued that they needed weekly ITV meetings to respond to the Motions for Summary Judgment, particularly because Plaintiff Daywitt was in a different location from the other Plaintiffs.{2023 U.S. Dist. LEXIS 59} (Dkt. 308).

However, the Court permitted Plaintiff Daywitt to file his own briefs in connection with summary judgment, which he did. (*See* Dkts. 313-315.) This remedies any alleged harm resulting from having monthly, rather than weekly, ITV meetings. And to the extent Plaintiffs request weekly ITV meetings to prepare for trial, the need for those meetings is moot insofar as the Court is recommending dismissal of this lawsuit and not ripe insofar

as there is no date certain for trial such that Plaintiffs would need to prepare. For all of these reasons, the Court denies the Motion for ITV Communication.

IV. ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS ORDERED THAT:

1. Plaintiffs' Motion to Allow Weekly ITV Communication Between Plaintiffs (Dkt. 285) is DENIED.

V. RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS RECOMMENDED THAT:

1. Defendants' Motion to Exclude the Plaintiffs' Expert (Dkt. 241) be GRANTED;

2. Plaintiffs' Motion for Summary Judgment (Dkt. 248) be DENIED;

3. Defendants' Motion for Summary Judgment (Dkt. 249) be GRANTED; and

4. This action be DISMISSED WITH PREJUDICE.

Dated: July{2023 U.S. Dist. LEXIS 60} 28, 2023

/s/ Elizabeth Cowan Wright

ELIZABETH COWAN WRIGHT

United States Magistrate Judge

Footnotes

1

Plaintiff Merlin Adolphson passed away during the pendency of this case. (*See* Dkt. 181 at 1; *see also* Dkt. 211 2.) Additionally, while David Jannetta is named as a plaintiff in the initial Complaint, he is not named in the First Amended Complaint. (*Compare* Dkt. 1 at 1, *with* Dkt. 26-1 at 1.)

2

Persons committed within the MSOP are often referred to as "clients." *Banks*, 2017 U.S. Dist. LEXIS 70413, 2017 WL 1901408, at *1 (citing Minn. Stat. 246B.04, subd. 2).

3

Plaintiff Kenneth Daywitt has been relocated to MSOP's St. Peter facility. (Dkt. 195 at 1.)

4

Unless stated otherwise, references to page citations refer to the CM/ECF pagination.

5

The Order on Motion to Dismiss is available on Westlaw at *Daywitt v. Harpstead*, No. 20-CV-1743 (NEB/KMM), 2021 U.S. Dist. LEXIS 102573, 2021 WL 2210521, at *6 (D. Minn. June 1, 2021). The Court uses the Westlaw citation in the Analysis section of this Report and Recommendation.

6

In the Order on Motion to Dismiss, Judge Brasel noted that "within the past half-decade two other courts in this District have dismissed similar claims on similar facts. *See Ivey*, 2021 U.S. Dist. LEXIS 6591, 2021 WL 120746, at *1-3 (concluding that the plaintiff's challenge to the MSOP's ban on internet use fails under the modified *Turner* analysis); *Banks v. Jesson*, No 11-CV-1706 (SRN/JSM), 2016 U.S. Dist. LEXIS 83876, 2016 WL 3566207, at *9-10 (D. Minn. June 27, 2016) (finding that the plaintiff had no

constitutional right to a computer or to access the internet and even if he did, his claim would fail under the modified *Turner* analysis). The key difference is that those cases are summary judgment decisions and were not decided on the motion-to-dismiss standard. The lack of factual development here makes summary dismissal inappropriate. *E.g., Stone v. Jesson*, No. 11-CV-951 (WMW/HB), 2017 U.S. Dist. LEXIS 39265, 2017 WL 1050393, at *4 (D. Minn. Mar. 17, 2017) (distinguishing cases at the summary judgment stage and explaining that the court cannot conduct a *Turner* analysis on a barren record.") (Dkt. 76 at 8 n.7.)
7

Judge Brasel noted that the immunity did not apply to Plaintiffs' claims for injunctive and declaratory relief. (Dkt. 76 at 11 n.10.)
8

The Court only discusses the remaining issues in the First Amended Complaint in this Order and Report and Recommendation, which are Plaintiffs' claim for their right to access the internet/information claim and their free exercise claim under the First Amendment. (*See* Dkt. 76 (dismissing all other claims presented in the First Amended Complaint).)
9

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
10

All emphases (bold, underline, italics, etc.) in quotes from Mr. O'Leary's Report are original.
11

Minnesota Department of Human Services is generally referred to as "DHS."
12

MNIT, or Minnesota Information Technology Services, "is the central IT organization for the State of Minnesota." *Minnesota IT Services*, https://mn.gov/mnit/ (last visited July 27, 2023).
13

Exhibit D1 contains Mr. O'Leary's notes and analysis of Defendants' depositions. (Dkt. 245-1 at 130-168.)
14

Cisco Umbrella is used by MSOP to monitor employees' web browsing. (*See* Dkt. 262-6 (Deposition of Christopher Luhman) at 25:3-27:10) (referred to as "SYSCO Umbrella" in the deposition transcript).) Citations to deposition transcripts are in line:page format.
15

Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).
16

To the extent Plaintiffs seek to litigate their designation as sexually dangerous persons, they may not do so in this 1983 action. *Muhammad v. Close*, 540 U.S. 749, 750, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004) (per curiam) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . requests for relief turning on circumstances of confinement may be presented in a 1983 action.") (citation omitted); *see also Kearney v. U.S. Marines Presidents*, Case No. 21-CV-1789 (PJS/ECW), 2021 U.S. Dist. LEXIS 178775, 2021 WL 4255401, at *1 (D. Minn. Aug. 17, 2021) ("There are two primary methods for a prisoner to seek relief in federal court: an action concerning the legality or duration of a sentence or conviction is a habeas action (28 U.S.C. 2241, 2254, 2255), or an action concerning the actual conditions of confinement is a civil rights suit, under the Civil Rights Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. 1983."), *R. & R. adopted*, 2021 U.S. Dist. LEXIS 177425, 2021 WL 4250153, at *1 (D. Minn. Sept. 17, 2021).
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Mr. O'Leary provides no estimate as to the cost of after-the-fact monitoring.

Case No: CO/1672/2011

Neutral Citation Number: [2012] EWHC 1680 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2012

Before:

LORD JUSTICE MOSES
MR JUSTICE EADY

Between:

Shawn Eugene Sullivan	**Claimant**
- and -	
The Government of the United States of America	**1st Defendant**
The Secretary of State for the Home Department	**2nd Defendant**

Mr B Brandon (instructed by **Sonn McMillan Walker Ltd**) for the **Applicant**
Mr Aaron Watkins (instructed by **the Crown Prosecution Service**) for the **1st Respondent**
and **Mr B Watson** (instructed by **the Treasury Solicitor**) for the **2nd Respondent**

Hearing dates: 24th April, 2012

Judgment

Lord Justice Moses :

1. The Government of the United States seeks the extradition of this appellant to prosecute him for sexual offences alleged to have been committed against three children between July 1993 and February 1994. On 14 December 2010 Senior District Judge Riddle sent the appellant's case to the Secretary of State for her decision as to whether extradition should be ordered. Following representations from the appellant, the Secretary of State rejected those representations by letter dated 10 February 2011, and ordered the appellant's extradition to the United States.

2. The appellant now appeals against the judge's order under s.103 of the Extradition Act 2003 and against the Secretary of State's order pursuant to s.108 of the 2003 Act. The appellant contends that if extradited, there is a real risk that the appellant will be detained under a process known as "civil commitment". He says that his civil commitment would amount to a flagrant denial of his rights enshrined in Art. 5 of the European Convention on Human Rights. Although the United States Government disputed that were the appellant subject to an order for civil commitment his rights under Art. 5 would be infringed, the focus of the argument was directed at the risk of an order for civil commitment.

3. The appellant also contended that the process of civil commitment would amount to a flagrant breach of his Art. 6 rights and, finally, that the Secretary of State's order for extradition breaches her obligations under s.95 of the 2003 Act (Speciality) because the risk of civil commitment carries with it a risk that the appellant will be dealt with for offences other than those for which he is to be extradited.

4. This appeal does not concern the particular offences in respect of which extradition is sought. It suffices to recall that by two complaints in Dakota County, Minnesota, it is alleged that the appellant indecently assaulted two girls under the age of 13 in the autumn of 1993. The third allegation is contained in a complaint in Hennepin County, Minnesota, alleging that the appellant raped a girl aged 14 on 31 January 1994. Senior District Judge Riddle found that the appellant had fled the United States at about the time of the alleged rape and after being interviewed about the indecent assault. He was not arrested until 28 June 2010. As Judge Riddle found, there can be no question but that Mr Sullivan ought to be extradited to face prosecution for those crimes. The only issue is whether his extradition is incompatible with his Convention rights or breaches the rule against Speciality. As will be seen, it would be most unfortunate from the point of view of the victims and of justice should the appellant be able to escape trial because of the risk he runs of being the subject of an order for civil commitment.

5. Civil commitment is unknown to European law, but is a process available in 20 states in the United States. Minnesota's law is said to be more draconian than many others. Under Minnesota law, as described by Professor Janus, who has considerable experience of representing those subjected to petitions for civil commitment in Minnesota, a "sex offender" may be committed indefinitely if under criteria specified in the Sexually Dangerous Persons Act 1994 he is found by a judge to be "irresponsible for personal conduct with respect to sexual matters and thereby dangerous to other persons". The evidence at the date of the hearing suggested that no sex offender committed to indeterminate detention since the programme began in its current form in 1988 has been released. The Court was referred to three cases

where there is a likelihood of release but when I questioned counsel for the United States he was unable to report that any one of those three had been released at the time of this hearing.

6. Most of the evidence relating to the nature of civil commitment in Minnesota was not disputed. The relevant statutory provisions contained in the Sexually Dangerous Persons Act 1994 broadened the scope of civil commitment from the more restricted provisions of the Psychopathic Personality Act which dated back to 1939. It provides for indeterminate confinement of "a sexually dangerous person". In the Sexually Dangerous Persons Act 1994:

> "(a) a sexually dangerous person means a person who:-
>
> (1) has engaged in a course of harmful sexual conduct as defined in sub-division 7(a) (such conduct means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another);
>
> (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and
>
> (3) as a result, is likely to engage in acts of harmful sexual conduct as defined in sub-division 7(a).
>
> (b) For the purposes of this provision it is not necessary to prove that the person has an inability to control the person's sexual impulses." (Minn. Stat. & 253B.02.sub-div18c)

7. Professor Janus's report explains and expands upon a report prepared by the Office of the Legislative Auditor (OLA) for the State of Minnesota "a Valuation Report: Civil Commitment of Sex Offenders" published in March 2011 and applies the Minnesota Department of Corrections "Sex Offender Screening Tool" (MnSOST-R).

8. The OLA reports that the standard for commitment is relatively low, and many sexual offenders qualify for commitment. It is not necessary to establish that a person has an inability to control his sexual impulses. It is sufficient to prove that he cannot "adequately control his sexual impulses" (in *re Linehan (Linehan II 594N.W2d 867 at 876)*). Unconvicted criminal misconduct may be taken into account. A course of harmful sexual conduct may be established on as few as two prior incidents. It is important to record that Minnesota law does not require that a person be mentally ill or mentally incompetent to be committed as a sex offender. Although a trial court must find that future sexual crime is highly likely, Professor Janus says that Minnesota courts have approved commitment despite evidence showing only moderate risk of future sexual misconduct.

9. It is not necessary that a patient be "treatable" to be committed and the OLA reports difficulties in relation to the availability of treatment for those who have been civilly committed.

10. The procedure for commitment is mainly applied to those serving prison sentences for sexual crimes. The Department of Corrections reviews inmates as they approach release. If the Department decides to refer an individual for commitment, his file is sent to the relevant prosecutor's office, an elected county attorney, who determines whether the case is appropriate for civil commitment or not. Civil commitment proceedings start when a prosecutor files a petition to a district court. The court appoints a mental health expert as examiner.

11. The examiner interviews the respondent, reviews records and issues a report as to whether the statutory elements for commitment are satisfied. The matter then proceeds to trial at which the burden of persuasion is on the state on all issues save as to harm. If the court finds that the statutory criteria are satisfied the respondent is committed to the Minnesota Sex Offender Programme which assesses the respondent and writes a report to the court within 60 days. Within 90 days of commitment a second hearing is held at which the court decides whether the respondent continues to satisfy the statutory criteria. If in that brief period the respondent has not changed then the court will order the individual to be committed for an indefinite period. There is a right of appeal at which deference is given to factual findings made by the trial court. Once committed, it is for an individual to petition for release; the state does not have periodically to prove that he should remain confined. The individual must establish eligibility for release. As I have recorded, of the 600 committed since 1988, the evidence suggests that not one has been released, even on a conditional, supervised basis.

12. The underlying scheme of the procedure and law is not in dispute. But there is a dispute between Professor Janus and Judith L Cole, Assistant Prosecuting Attorney for Hennepin County, as to the risk of an order for civil commitment, if the appellant is extradited.

13. Articulating how risk is to be measured is notoriously difficult. Plainly, if the risk of infringing the requested person's convention rights is fanciful there can be no question of refusing extradition. At the other end of the spectrum will be cases where an infringement is a "near certainty". That was the test suggested in relation to Art. 2 by the Commission in *Dehwari v The Netherlands* 29 E.H.R.R. CD 74 (paragraph 61). But between those two extremes there exists the difficulty of identifying the extent of the risk which an applicant must establish before he can resist extradition.

14. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 [2004] UKHL 26 Lord Bingham said:-

> "While the Strasbourg jurisprudence does not preclude reliance on Articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to Art. 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subject to torture or to inhuman or degrading treatment or punishment: *Soering* paragraph 91...Where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering* paragraph 113...Successful reliance on Article 5 would have to

> meet no less exacting a test. The lack of success of applicants relying on Articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes."

This passage is authority for the proposition that what must be established is a real risk of infringement. The use of the adjective "flagrant" does not assist as to the extent of the risk which must be established. Rather, it refers to the extent of the denial or violation: only a flagrant denial of rights enshrined in Art. 5 or Art. 6 will be sufficient. In *Soering v United Kingdom* [1989] 11 E.H.R.R. 439 the European Court of Human Rights suggested, as Lord Bingham recorded, that it must be shown that a person suffered or risks suffering a flagrant denial of a fair trial [113]. In an earlier paragraph in relation to Art. 5 the court said:-

> "Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, *assuming that the consequences are not too remote* attract the obligations of a contracting state under the relevant Convention guarantee." [85] (my emphasis)

This was the passage cited by Lord Steyn when he enunciated the proposition that articles other than Art. 3 may be engaged in cases of extradition [37].

15. At paragraph 86 the court in *Soering* stated that the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot absolve "the contracting parties from responsibility under Art. 3 for all and any *foreseeable* consequences of extradition suffered outside of their jurisdiction". [87] (my emphasis)

16. I must apply the test proposed by the European Court of Human Rights, by Lord Bingham and Lord Steyn, namely, that this applicant must show strong grounds for the conclusion that if returned, he would face a *real risk* of a flagrant denial of Art. 5 or Art. 6.

17. Mr Sullivan is, as I have recalled, alleged to have committed three incidents of prior harmful sexual misconduct in Minnesota. Further, once he had fled the United States he was convicted of two indecent assaults on two 12 year-old girls in Ireland in 1997. That will be evidence admissible in relation to consideration of civil commitment. The OLA report discloses that 45% of the men currently incarcerated under the Minnesota Civil Commitment Programme have two or fewer felony convictions prior to their commitment (OLA Report 1.2).

18. Under that programme, there is no requirement that the offences took place recently (Professor Janus 19) nor, indeed, that the misconduct resulted in conviction, provided that the sexual misconduct is substantiated by credible evidence (Professor Janus, paragraph 18).

19. Nor is there any requirement that the person committed suffers from a medically-diagnosed mental illness or disorder. The Sexually Dangerous Persons Act merely requires dysfunction. All that is required is that the person manifests a "sexual...disorder or dysfunction" (see the definition of sexually dangerous person to which I have referred, above (Professor Janus at paragraph 23)). The assessment of

risk of future sexually harmful behaviour is made by the Department of Corrections, the petitioning County Attorney and the committing court, using an actuarial instrument known as MnSOST-R. Professor Janus has applied that instrument and suggests that, on the current known information about the appellant, he would be placed on the high level of risk for future sexual offending [7]. He says he would score at least ten (paragraph 26) and asserts that those with scores of eight or higher are assigned the highest risk level [60] unless there are mitigating circumstances. He predicts that if prosecutors petition for his commitment the historical probability that Mr Sullivan would be committed is better than 80% (paragraph 61).

20. These predictions are disputed by Judith L Cole, the Assistant Hennepin County Attorney. In her affidavit she accuses Professor Janus of lack of objectivity and speculation. Her stance is that at this stage the United States cannot say whether a petition for civil commitment will be filed (see paragraph 5). The timing for determination does not occur until 12 months before a person convicted completes his prison sentence. No accurate score can be predicted until a person has actually served a prison sentence "because a significant part of the scoring involves institutional/dynamic variables that include disciplinary history, chemical dependency treatment, and sex offender treatment while incarcerated" (paragraph 6). This is not of particular comfort in light of the fact that there have been difficulties in providing treatment, as recorded by the Office of the Legislative Auditor, and the fact that although Judith Cole noted in November 2011 that of the three individuals on the verge of release, none had in fact been released by the time of this hearing.

21. The Department of Justice supports Miss Cole's evidence, noting that during the four year period 2006-2009, only about 13% of all sex offenders released from prison in Minnesota were referred by the Department of Corrections to county attorneys for possible civil commitment. Further, as the Office of the Legislative Auditor noted, only about three per cent of registered sex offenders in Minnesota are civilly committed. In light of the expected sentence in the region of 86 months' imprisonment, the Government of the United States, therefore, contends that there is no basis for concluding that Mr Sullivan faces a real risk of civil commitment and that it is not realistically possible at the moment to predict whether he is at risk or not.

22. There is, in my view, a major difficulty in the evidence advanced by the Government of the United States. It is a difficulty which arises out of a significant change in the evidence proffered on its behalf. By letter dated 20 November 2010 Judith Cole told Senior District Judge Riddle that:-

> "Even if Sullivan is convicted of the charges in Dakota and Hennepin counties, he does not meet the criteria for civil commitment for a sexually dangerous person under [the statute]"

At the end of the letter she wrote that:-

> "Based on current available information, there is no real basis to believe that Sullivan will meet the criteria for a high-risk category under [the statute]."

23. It was on the basis of this evidence that the judge, quoting those passages, concluded that:-

> "There is no evidence available to me that this defendant meets the stated criteria of a sexual psychopathic personality or a sexually dangerous person. It appears that a very long time has elapsed since he was last accused of any sexual offence. There is no evidence to suggest that he has an utter lack of power to control his sexual impulses. There is no evidence to suggest that he has a sexual, personality or mental disorder. For these reasons, I conclude that there is no evidence from which I can find that Mr Sullivan faces the possibility of civil commitment. If I thought otherwise, I would consider whether to obtain an undertaking from the American authorities."

24. The references to sexual psychopathic personality and utter lack of power to control are references to the predecessor to the Sexually Dangerous Persons Act, the Sexual Psychopathic Personality Act which did, as interpreted by the courts, require there to be proved an utter lack of power to control. The Sexually Dangerous Persons Act, as I have recorded, changed that requirement so that it is not necessary to prove an inability to control. Nor is it necessary to prove anything more than dysfunction.

25. Senior District Judge Riddle lacked the benefit of any report from Professor Janus. But it is a matter of considerable concern that the emphasis in the letter dated 20 November 2010 subsequently shifted. The position now adopted by the Assistant County Attorney is that it is too early to say. She now says the United States cannot state, whether a petition for civil commitment will be filed...(affidavit paragraph 5). It is accepted by the second respondent, the Secretary of State for the Home Department, that "the Assistant County Attorney appeared to resile from her earlier statement..." (see the application for an adjournment (xi)).

26. I regard this change of position as being of some significance. It is true the earlier letter was qualified by reference to information currently available but not so as to alert the reader, or the judge, to the position now adopted. It undermines the cogency of the Assistant County Attorney's evidence. If the true position was that it was too early to say and no prediction could be made, the Senior District Judge should and would never have been led into concluding that Sullivan did not meet the criteria. The true position, according to the Government of the United States, is that it was premature to say whether he did or not.

27. Further, the essential and justifiable purpose of these proceedings is to ensure that the appellant faces the trial he ought to face in respect of the serious allegations made against him. It is plainly in the interests of justice that he should face such a trial. Extradition is not being sought for the purposes of civil commitment. The Senior District Judge was likely to have sought an undertaking had the evidence not compelled his conclusion that Mr Sullivan did not meet the criteria for civil commitment. If the risk of civil commitment is as low as the United States asserts, that is because the risk to the citizens of Minnesota is low. It is, therefore, surprising that no undertaking has been given.

28. In my view, the apparent change of emphasis of the Government of the United States of America undermines its resistance to the clear and cogent evidence given by Professor Janus, amply supported by the material on which he relies. In those circumstances, I conclude that there is a real risk that if returned Mr Sullivan will be the subject of an order of civil commitment. Accordingly, it remains to consider whether such an order would constitute a flagrant denial of his rights enshrined in Art. 5 or Art. 6.

Article 5

29. The relevant provisions of Art. 5.1 are:-

> "No one should be deprived of his liberty save in the following cases, and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (c) the lawful arrest or detention of a person...when it is reasonably considered necessary to prevent his committing an offence...
>
> ...
>
> (e) the lawful detention of persons of unsound mind."

30. Although in written submissions the Government of the United States argued that the appellant's detention fell within 5.1(a), that submission was rightly not pursued by Mr Watkins although it was not abandoned. There is no question of the sentencing court, should Mr Sullivan be convicted, of playing any part in the making of a civil commitment order. Indeed, the United States Government's whole argument as to risk was to distinguish between events on conviction and material or evidence which might emerge during the end of the period during which the appellant is in prison.

31. The argument centred on whether the order for civil commitment fell within Art. 5.1(e), namely, whether an order for civil commitment was the lawful detention of persons of unsound mind. The primary authority as to the meaning of persons of unsound mind is *Winterwerp v Netherlands* [1979-1980] 2 E.H.R.R. 387. The court noted that no definitive interpretation could be given to the words "persons of unsound mind" but:-

> "It is a term whose meaning is continually evolving as research and psychiatry progresses, and continuing flexibility and treatment is developing and society's attitude to mental illness changes...[38].
>
> The individual concerned should not be deprived of his liberty unless he has been reliably shown to be of unsound mind. The very nature of what has to be established before the competent national authority – that is a true mental disorder – calls for

> objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder." [39]

32. It is of note that in *M v Germany* [2010] 51 E.H.R.R. 41 the recidivist had been diagnosed as suffering from a pathological brain disorder and found by the sentencing court to be suffering from a serious mental disorder but by 1986 his condition was not pathological and he did not need to be treated medically. Although he was regarded as continuing to be of danger, Frankfurt-am-Main Court of Appeal had held in 2001 that he no longer suffered from a serious mental disorder. Thus a clear distinction had to be drawn between dangerousness and unsound mind. Only in the case of a serious mental disorder would detention under sub-paragraph (e) of Art.5.1 be justified. The court, when considering preventative detention in Germany, seemed to draw a distinction between persons of unsound mind and those who "acted with full criminal responsibility when committing their offences" (paragraph 70). It drew attention to the fact that the applicant was no longer suffering from a *serious* mental disorder and that therefore his detention could not be justified under Art. 5.1(e) (paragraph 103).

33. In the instant appeal the evidence does not come close to establishing that orders for civil commitment are only made in respect of those suffering from an unsound mind within the meaning of Art. 5.1(e), let alone a serious mental disorder. I have already identified the Minnesota statutory authority for an order of civil commitment which merely requires that the person:-

> "(2) has manifested a sexual, personality, or other mental disorder or dysfunction; (Minnesota Statute paragraph 253B.02 sub-div.18c)"

The risk I have found that Mr Sullivan will be detained under an order of civil commitment exists only if he manifests a sexual dysfunction. Since it is not necessary to prove that that amounts to an inability to control his sexual impulses, it is plain that the criteria fall far short of the necessity of proving he is of unsound mind. In those circumstances, it is clear to me that were an order of civil commitment to be made, it would be a flagrant denial of this appellant's rights under Art. 5.1 because it fell outwith the provisions of Art. 5.1(e).

34. In the light of that conclusion it is unnecessary to detail the further grounds advanced in respect of Art. 6 and Speciality. In *Othman v UK* [2012] ECHR 56 (17 January 2012) the Court recorded the principles in relation to whether extradition would expose an appellant to a flagrant denial of justice in breach of Art. 6 (see paragraphs 258-259). The Court recorded that a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures. Such a denial only exists where the breach of the principles of fair trial guaranteed by Art. 6 is so fundamental as to amount to a nullification of the very essence of the right (260). In the light of the focus of the argument upon risk and Art. 5, I heard no full argument as to Art. 6, and in those circumstances think it unwise to reach a concluded view. I am inclined, but only inclined, to think that Mr Sullivan would have found it difficult to establish a risk of a flagrant denial of justice in violation of Art. 6.

35. Again, I have no need in the light of my view, to consider further the arguments in relation to Speciality which concern only the Secretary of State. I should merely record that the controversy focussed on whether the proceedings amounted to a civil rather than a criminal procedure. Speciality provisions contained in s.95 of the 2003 Act only protect an extradited individual from "detention, trial and/or punishment for criminal offences". It may be difficult to establish that an order for civil commitment amounted to detention, trial or punishment for criminal offences (see *OB v Director of the SFO* [2012] EWCA Crim 67 paragraphs 17 and 51). In that case the Court of Appeal concluded that Art. 18, containing the Rule of Speciality in the UK/US Extradition Treaty, had no application other than in relation to criminal offences. It seems likely, but again I reach no concluded view, since I heard no full argument on the point, that an order for civil commitment, just like an order in respect of civil contempt which might mean committal to prison, did not amount to trial or punishment for a criminal offence.

36. I emphasise again that my judgment rests solely on my conclusion that there is a real risk that if extradited the appellant might be subject to an order for civil commitment within Minnesota and that that amounts to a risk that he would suffer a flagrant denial of his rights enshrined in Art. 5.1. Because the United States may now wish to give an assurance, and because if I allow the appeal that may be of no avail (s.104(1)(a) and (5)), I should hear further argument as to disposal of the appeal on handing down this judgment. I would make no order on the appeal under s.108.

Mr Justice Eady:

37. I agree. The crux of the matter is the assessment of risk to be made on the evidence available to this court. Instead of becoming clearer with the passage of time, the position is now more uncertain than was the case before the District Judge. I too would conclude the material before us reveals that there is a more than fanciful risk that the appellant would become subject to the civil commitment process in the State of Minnesota and, accordingly, that he would suffer a flagrant denial of his rights under Art 5.1. That assessment of risk is borne out by the absence of any undertaking up to this point.

Additional material from this filing is available in the Clerk's Office.