

No. 17-6798

IN THE
Supreme Court of the United States

CARL KIRK AND JAY NELSON,
Petitioners,

v.

STATE OF MISSOURI,
Respondent.

On Petition for Writ of Certiorari to the
Missouri Supreme Court

**BRIEF IN OPPOSITION TO
PETITIONS FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

In *Kansas v. Hendricks*, 521 U.S. 346 (1997), this Court held that a commitment process designated by the legislature as civil will be deemed civil absent “the clearest proof” that it is so punitive as to “negate the State’s intention.” Missouri law provides an avenue for unconditional release from civil commitment for sexually violent predators. In 2006, the Missouri legislature added a second form of release, conditional release, that allows a court to impose nonconfinement conditions designed to prevent dangerous relapse of a mental abnormality. Many of these conditions are minor, such as the condition that individuals “[o]bey all federal and state laws.” The Missouri Supreme Court held that the possibility of conditional release does not render the statute facially unconstitutional because it does not negate the plain intent of the legislature to create a civil process.

The questions presented are:

1. Did the Missouri Supreme Court correctly apply this Court’s decision in *Hendricks*?
2. When a plaintiff challenges only his commitment order and has not yet established an improvement in his mental abnormality or a decrease in the danger he poses to the community, must a State Supreme Court consider the adequacy of hypothetical release conditions that might never be imposed?

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INTRODUCTION

Petitioners ground their request on an incorrect interpretation of state law. They assert that Missouri's Sexually Violent Predator Act ("SVP Act"), on its face, requires perpetual commitment, so that a person, once committed, suffers "permanent lifetime confinement." But Petitioners identify no court that has adopted that reading of the statute, and their interpretation contradicts the plain meaning of the statute. The statute expressly enumerates dozens of nonconfinement conditions. Some are extremely minor, such as the condition that individuals "[o]bey all federal and state laws." Any suggestion that conditional release is necessarily "confinement" is unsupported.

To the extent they argue that the statute includes no provision for unconditional release, even if the conditions themselves are minor, Petitioners fail to recognize that a court has rejected that view. Because a court can remove any condition it deems unnecessary, a court can grant unconditional release. Petitioners additionally ignore another provision of the SVP Act that indicates that a person can receive unconditional release upon the recommendation of the director of the department of mental health.

Because of these misinterpretations, the Missouri Supreme Court was correct when it held that the SVP Act does not violate due process. Petitioners argue that the Act is facially unconstitutional, which means they had to prove that every possible condition a court might impose would render the statute punitive. But the possible

conditions that may be imposed include conditions that are plainly nonpunitive, such as the condition that individuals “[o]bey all federal and state laws.”

Petitioners also have failed to identify a split in authority warranting this Court’s review. They assert only that some courts correctly apply precedent and that the Missouri Supreme Court purportedly did not. Although dressed up as a split in authority, their argument asserts nothing more than an alleged misapplication of law.

The petition also poses substantial vehicle problems. First, even if this Court agreed that with Petitioners’ unreasonable interpretation of state law, the Court would still have to decide an antecedent decision of state law before considering the merits of the questions presented. Petitioners’ interpretation of state law is far from settled. Indeed, they are unable to identify a single court that has adopted their position, and multiple courts have rejected it. Second, Petitioners’ challenge to the release conditions is unripe because courts can only speculate as to what conditions, if any, might be imposed on Petitioners in the future. Third, it is unclear whether Petitioners even raised their federal claim to the Missouri Supreme Court. They expressly asked the Missouri Supreme Court to declare the SVP Act unconstitutional under the Missouri Constitution, but they did not clearly do so for the U.S. Constitution. The Missouri Supreme Court, in fact, held that their briefing violated local court rules because it was conclusory and disorganized.

This Court has recently declined to review a petition raising similar issues. And that challenge did not include the substantial vehicle problems included in this petition. The petition should be denied.

STATEMENT OF THE CASE

I. Statutory History

Following this Court's holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that States may subject individuals to civil commitment if they are dangerous due to mental abnormality, the State of Missouri passed the SVP Act, providing for civil commitment of persons adjudicated sexually violent predators. The Missouri Supreme Court upheld that statute against a constitutional challenge because it was similar to the statute this Court upheld in *Hendricks*. *Thomas v. State*, 74 S.W.3d 789, 790 (Mo. 2002). Like the statute in *Hendricks*, the Missouri law included the opportunity to petition a court for release and required annual reviews of each committed individual. *Hendricks*, 521 U.S. at 353; Mo. Rev. Stat. §§ 632.498, 632.501 (2001). The Missouri law also provided that the State could commit an individual only “until such time as the person’s mental abnormality has so changed that the person is safe to be at large.” *Id.* § 632.495 (2001).

In 2006, the legislature added provisions designed to help formerly committed individuals avoid relapse. The legislature recognized the need for a reasonable transition period for some formerly committed individuals to help facilitate continued treatment and avoid relapse. It created a second avenue of release called “conditional release.” The “primary purpose” of this supplemental form of release is “to provide outpatient treatment and monitoring to prevent the person’s condition from

deteriorating to the degree that the person would need to be returned to a secure facility.” Mo. Rev. Stat. § 632.505.1. The statute enables courts to impose reasonable conditions of release and to remove any condition the court deems unnecessary. *Id.* § 632.505.3.

The universe of possible conditions is broad and subject to the discretion of the court. The statute enumerates a nonexhaustive list of nonconfinement conditions, many of which carry no more restraint on liberty than those restraints imposed on ordinary citizens. For example, a court might require that a released person “[o]bey all federal and state laws,” register as a sex offender, or continue taking prescribed psychiatric medications. Mo. Rev. Stat. § 632.505.3(3), (16), (20). Because conditional release is conditional, it necessarily means that a person in that category is under some degree of “control, care, and treatment of the department of mental health.” *Id.* § 632.505.5. Yet the degree of control, care, and treatment depends on what conditions, if any, are imposed by the court.

Violation of a condition can lead to recommitment, but only after the court makes another determination that the individual suffers from a mental abnormality and is likely to pose danger to the community. If a person violates a condition of release, the department of mental health cannot recommit that person unless 1) the Attorney General files a petition to revoke release; and 2) the court agrees, after a hearing, that the violation amounted to such a significant relapse that the person is no longer safe and healthy enough for release. *Id.* § 632.505.7(6)–(7). If the violation

is not substantial enough, the person is entitled to remain free from commitment despite his violating the conditions imposed. *Id.*

When it created this second avenue of release, the legislature retained the availability of unconditional release. The legislature retained a separate provision that permits a person to “petition for release” upon the director’s recommendation, and that provision nowhere states that conditions can be imposed if the director has offered his recommendation. *Id.* § 632.501. And even when a person goes through the avenue for conditional release, he can still obtain a full release. Courts can change or remove conditions *sua sponte* and leave in place only those “conditions that [the court] deems necessary.” *Id.* § 632.505.3, .6. Because a court can eliminate any unnecessary condition, “full, unconditional release” is available. *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 865 (E.D. Mo. 2015), *as amended* (Dec. 22, 2015).

The legislature also updated other provisions of the statute. Before 2006, the SVP Act provided that courts had to review each committed individual annually, and it required that individuals be provided with an annual reminder that the person can petition the court. *Id.* § 632.498.1, .2. But the legislature clarified that those provisions do not apply to people who have been released conditionally. *Id.* Not only are those persons no longer committed, but the court already has a continuing duty to review the conditions for a conditionally released person and may change those conditions *sua sponte* or upon petition by the individual. *Id.* § 632.505.6.

In creating “conditional release,” Missouri joined a large number of other states that have adopted similar programs designed to reintroduce individuals into the

community while simultaneously avoiding setting them up for failure. Indeed, by the time this Court reaffirmed the constitutionality of SVP laws in *Kansas v. Crane*, 534 U.S. 407 (2002), Kansas had already amended its SVP statute to provide for conditional release. K.S.A. § 59-29a19 (1998). Many other states have adopted similar programs. *E.g.*, Ariz. Rev. Stat. Ann. § 36-3710(A)-(B); 725 Ill. Comp. Stat. Ann. 207/60(a)-(c); Me. Rev. Stat. tit. 34-A, § 11203(1-A); N.J. Stat. Ann. § 30:4-27.32.c (permitting “conditional discharge”); Va. Code Ann. § 37.2-912(A); Wash. Rev. Code Ann. § 71.09.090.

The Missouri Supreme Court upheld these amendments, reaffirming the constitutionality of the SVP Act. *In re Van Orden*, 271 S.W.3d 579, 586 (Mo. 2008). A dissenting judge opined that people placed on conditional release might be “committed permanently.” *Id.* at 592 (Teitelman, J., dissenting). A “special judge”—*i.e.*, one who was not a member of the court but sat on it ad hoc for a single case—adopted a similar position. *Id.* at 590 (Cook, Sp.J., concurring). Neither judge acknowledged that many potential conditions of release do not amount to “commitment” because they do not include confinement. *See Commitment*, *Black’s Law Dictionary* (10th ed. 2014) (defining “commitment” as “[t]he act of confining a person in a prison, mental hospital, or other institution.”). Nor did those judges recognize that courts can remove all conditions. The Missouri Supreme Court, moreover, rejected their reading of state law. It held that, despite the new amendments, “the term of commitment is not indefinite.” *In re Van Orden*, 271 S.W.3d at 586.

II. Procedural History

Carl Kirk has committed multiple sexual crimes. The first time he went to prison, Kirk was convicted of molesting a young boy. *Kirk v. State*, 520 S.W.3d 443, 449 (Mo. 2017). Not even three months after he was released, “he sodomized his 10- or 11-year-old nephew.” *Id.* Kirk made limited, if any, progress while in prison. Although he completed the sex offender treatment program in prison, he admitted that he treated the program as “a joke.” *Id.* He was unable “to articulate any tools he learned to reduce his risk of reoffending if released.” *Id.* In 2013, when he was scheduled to be paroled, the State sought to commit him as a sexually violent predator. Kirk was diagnosed as a pedophile. *Id.* A risk assessment test revealed that he was more likely to reoffend than 97 percent of all test subjects. *Id.* After a trial, a judge determined that Kirk was a sexually violent predator and ordered that he be committed. *Id.* The Missouri Supreme Court unanimously affirmed.

Jay Nelson has a similarly long history of sexual misconduct and mental abnormality. “In 1988, Nelson broke into a woman’s home, threatened to kill her, and brutally raped her on top of broken glass.” *Nelson v. State*, 521 S.W.3d 229, 231 (Mo. 2017). Nelson made no progress while in prison. He committed 55 sexual misconduct violations, failed to complete the sex offender program, routinely threatened to rape and murder female staff, and sexually assaulted female corrections staff at least three times. *Id.* Nelson was diagnosed with Antisocial Personality Disorder, exhibitionism, and paraphilia characterized by a desire to “seek[] out individuals that he would like to prey upon.” *Id.* at 231-32. He scored even worse than Kirk on one of the risk

assessment tests. *Id.* After a trial, a judge ordered that he be committed. The Missouri Supreme Court unanimously affirmed.

Petitioners challenge only their commitment proceedings. To this day, both remain dangerous, and both suffer from substantial mental abnormalities. Neither is currently eligible for any form of release, conditional or otherwise.

REASONS FOR DENYING THE PETITION

I. **Contrary to Petitioners’ Contentions, the SVP Act Does Not Impose Permanent Confinement.**

The petition and amicus brief assume that Missouri law requires permanent confinement. Petitioners directly assert, “Under the SVPA, [they] will never be discharged from th[eir] commitment.” Pet. 9; *accord* Pet. 11 (asserting that the statute creates “permanent lifetime confinement”); Amicus Br. 2. Their entire petition is based on this incorrect assertion. Their unstated assumption is that all possible conditions of release amount to “commitment.” This assumption contradicts the plain meaning of the statute. Commitment is “[t]he act of *confining* a person in a prison, mental hospital, or other institution.” *Commitment*, *Black’s Law Dictionary* (10th ed. 2014) (emphasis added). Petitioners acknowledge this definition, employing the terms “commitment” and “confinement” interchangeably. *E.g.*, Pet. 11–12, 14–16, 20. Yet nothing suggests that a person on conditional release will necessarily be subject to confinement.

Indeed, the statute enumerates numerous examples of nonconfinement conditions. Mo. Rev. Stat. § 632.505.3(1)–(20). For example, a court might require that a conditionally released person comply with sex-offender registration

requirements or “[n]ot possess a firearm,” *id.*, but those conditions are already imposed by state and federal law, *id.* § 589.400–589.425; 18 U.S.C. § 922(g). True, these conditions restrain liberty, but this Court has repeatedly held that States can impose nonconfinement restrictions on individuals without establishing the higher due process standard required for commitment. *E.g., Smith v. Doe*, 538 U.S. 84 (2003) (upholding sex offender registry requirements); *Hudson v. United States*, 522 U.S. 93 (1997) (permitting occupational debarment). Petitioners’ attempt to invoke the more stringent due process standards of *Hendricks* fails because they contradict the face of the statute when they assert that the SVP Act creates “permanent lifetime confinement.” Pet. 11.

II. The Missouri Supreme Court Correctly Determined That the Availability of Conditional Release Does Not Violate Due Process.

Petitioners contend that they argued before the Missouri Supreme Court that the SVP Act is punitive. To prevail, they had to establish one of two things. First, they could prevail if they established that the legislature manifested an intent on the face of the statute to create a criminal proceeding. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Second, if the legislature manifested an intent to create a civil proceeding, they could prevail only upon providing “‘the clearest proof’ that ‘the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention’ to deem it ‘civil.’” *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980) (brackets omitted)). Moreover, because Petitioners challenge the facial validity of the SVP Act, they had to “establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

For the reasons established below, it is not clear that Petitioners raised their federal claim before the Missouri Supreme Court. But assuming they did raise a federal claim, they did not meet this demanding standard. First, the legislature manifested a facial intent to create a civil proceeding. It expressly placed all the statutes under the topic heading “sexually violent predators, *civil* commitment.” Mo. Rev. Stat. § 632.480–632.525 (emphasis added). Second, Petitioners did not provide “the clearest proof” to negate that manifested intent. Because they claim to have challenged the statute on its face, they had to prove that *every* possible condition was punitive. *See Salerno*, 481 U.S. at 745. But this Court has foreclosed that argument. This Court has determined that some of the available conditions are nonpunitive. For example, one condition a court can impose is requiring individuals to register as sex offenders. Mo. Rev. Stat. § 632.505.3(20). But this Court has upheld this kind of requirement as nonpunitive. *Smith v. Doe*, 538 U.S. 84 (2003). Another condition a court might impose is prohibiting a sexually violent predator from possessing a firearm. Mo. Rev. Stat. § 632.505.3(4). But by definition, sexually violent predators are felons, so federal law already bars them from possessing firearms. 18 U.S.C. § 922(g). And if the condition that individuals “[o]bey all federal and state laws” is punitive, then every law Congress passes is punitive.

The idea that the creation of a conditional release program somehow makes the SVP Act punitive also contradicts the facial purpose of the 2006 amendments: “to provide outpatient treatment and monitoring to prevent the person’s condition from deteriorating to the degree that the person would need to be returned to a secure

facility.” Mo. Rev. Stat. § 632.505.1. People who are committed often relapse when reintroduced into the general community. *See, e.g., People v. Hedge*, No. D050292, 2008 WL 660253, at *1 (Cal. Ct. App. Mar. 13, 2008) (recounting the petitioner’s history of relapse after release). The conditional release provisions serve the important interest of preserving progress made during civil commitment. Thus, Missouri law quite reasonably provides that a court can require those who are conditionally released to “[t]ake all psychiatric medications as prescribed by a treating physician,” “[n]ot consume alcohol or use a controlled substance except as prescribed,” or “[n]ot be employed or voluntarily participate in an activity that involves contact with children without approval.” Mo. Rev. Stat. § 632.505.3(5), (6), (16).

Assuming Petitioners raised a federal claim, it is not surprising that the Missouri Supreme Court rejected that argument, nor that it did so unanimously. Petitioners had to establish that every possible condition a court might impose would be punitive, and they had to do so with “the clearest proof.” Petitioners came nowhere near meeting that demanding standard.

III. Petitioners Have Not Identified a Split in Authority.

Although Petitioners argue that a split in authority exists, they really assert nothing more than a purported misapplication of Supreme Court precedent. They argue that *Hendricks* requires courts to consider “the entirety” of the SVP statute before determining whether the SVP Act is punitive. Pet. 12. They then assert that other courts follow this mandate but that the Missouri Supreme Court did not because it purportedly failed to consider the conditional release provisions. *Id.*

(asserting that the court “failed to follow this Court’s *Hendricks* framework”); *id.* at 21 (asking this Court to force the Missouri Supreme Court “to follow *Hendricks*”). But if a split in authority arises whenever one court properly applies Supreme Court precedent and another does not, then every case of misapplication amounts to a split in authority. This Court should deny the petition because a petition for certiorari is “rarely granted” when the petition merely asserts a “misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

The petition should also be denied because the relief Petitioners seek has already occurred. They ask this Court to force the Missouri Supreme Court to consider the conditional release provisions before determining whether the SVP Act is punitive. *E.g.*, Pet. at 21–22. But the court already did so three times. It first did so in 2008 when it decided *In re Van Orden*, two years after conditional release was added. The Petitioners contend that the court did not consider the provisions concerning conditional release and considered only the provision that lowered the standard of proof from proof beyond a reasonable doubt to proof by clear and convincing evidence. Pet. 13. But that assertion does not square with the opinion. To resolve whether the reduced standard was permissible, the court first had to determine whether the statute was punitive. *In re Van Orden*, 271 S.W.3d at 585. The court expressly considered the argument that “the proceedings may subject [plaintiffs] to indefinite commitment” and rejected that argument, finding that the SVP Act was not punitive because “the term of commitment is not indefinite.” *Id.* at

586. The court considered the entirety of the SVP Act and rejected precisely the argument Petitioners raise here.

Having already disposed of Petitioners' argument in 2008, the Missouri Supreme Court in the instant proceedings could have simply relied on its precedent. Indeed, it stated that the "entire collection of arguments" Petitioners raise "has been rejected in the past." *Kirk v. State*, 520 S.W.3d 443, 449 (Mo. 2017) (footnote omitted); 4A. But it took the additional step of briefly considering the argument again and rejecting it. In *Kirk*, the Missouri Supreme Court stated, "Kirk's arguments that unconditional release is not offered under the statute as revised in 2006 does not persuade the Court to depart from the relevant precedents," because the SVP Act was still "substantially similar" to the statute this Court upheld in *Hendricks*. *Id.* at 450; 4A–5A. In *Nelson*, the court stated that "Nelson, like Kirk, claims various amendments to the SVPA"—specifically the amendments that concern conditional release—"should convince this Court that the essential purpose and effect of the SVPA have changed." *Nelson v. State*, 521 S.W.3d 229, 232 (Mo. 2017); 35A. But it rejected those arguments because its decision in "*Kirk* rejects those arguments." *Id.* Thus, the Missouri Supreme Court has already considered, three times, whether availability of conditional release makes the SVP Act unconstitutional. Contrary to what Petitioners contend, the court did not refuse to consider the entirety of the Act when it held that the Act is not facially punitive.

IV. This Petition Presents a Poor Vehicle for Resolving Any Questions.

This petition also presents a poor vehicle to address substantive questions regarding the constitutionality of SVP commitments. This Court would have to settle a dispute over state law before addressing the merits; it is unclear whether Petitioners even raised the pertinent federal claim before the Missouri Supreme Court; and Petitioners' second question presented is not ripe.

A. Reviewing the questions presented would require first deciding an antecedent question of state law.

As established above, Petitioners' assertion that the SVP Act imposes permanent confinement contradicts the face of the statute. They assert that the SVP Act imposes permanent confinement for all individuals, but the statute plainly enables courts to impose a variety of nonconfinement conditions. To answer Petitioners' question, this Court would first have to resolve this dispute of state law.

To the extent Petitioners also assert the less ambitious argument that the statute permits nonconfinement but still bars unconditional release, that interpretation is also subject to substantial dispute. A person on conditional release is subject only to those "conditions that [the court] deems necessary," and the court can change those conditions *sua sponte*. *Id.* § 632.505.3, .6. As one court has held, these provisions indicate that a court can remove all conditions, granting a person a "full, unconditional release." *Van Orden*, 129 F. Supp. 3d at 865. Petitioners, moreover, consider only one of the two sections that permit a person to petition for release. They focus on the section that is invoked when a person submits a petition "over the director's objection." That section expressly creates conditional release. Mo.

Rev. Stat. § 632.498.3. But a separate provision, ignored entirely by Petitioners, enables a person to submit a petition with the director's recommendation. That provision discusses only "release," not conditional release. *Id.* § 632.501.

Petitioners and the amicus brief fail to acknowledge these shortcomings in their interpretation of state law. They instead assume that their reading is uncontroversial. But the federal district court expressly rejected their interpretation when it held that Missouri's SVP Act was not facially unconstitutional because the amendments "permit the full, unconditional release of civilly committed persons." *Van Orden*, 129 F. Supp. 3d at 865. And they have failed to identify a single court that has adopted their interpretation. Tellingly, they rely only on concurring and dissenting opinions. *E.g.*, Pet. 7–8, 11, 13–15, 20–21 (citing *In re Van Orden*, 271 S.W.3d at 592 (Teitelman, J., dissenting) and *id.* at 590–91 (Cook, Sp.J., concurring)). But the majority rejected those opinions when it held that commitment is not permanent under the statute. *In re Van Orden*, 271 S.W.3d at 586. This Court should not grant the petition because it has no "authority to place a construction on a state statute different from the one rendered by the highest court of the State," *Johnson v. Fankelli*, 520 U.S. 911, 916 (1997), and because this Court cannot review the merits question without adopting Petitioners' highly disputable interpretation of state law.

Even if the Missouri Supreme Court had left this issue unresolved, it would be unconventional for this Court to grant certiorari to a petition that presents not only a contested reading of state law, but a reading that contradicts the plain text of the statute. This Court does not ordinarily grant certiorari when it will have to resolve a

question of state law before reaching the merits of the question presented. It should not do so here.

B. Petitioners' second question is not ripe.

Although the Missouri Supreme Court expressly considered—and rejected—Petitioners' argument that the conditional release provisions render the SVP Act punitive, the court refused to consider the second question Petitioners present to this Court: whether the release provisions of the statute are constitutionally sufficient. *Kirk v. State*, 520 S.W.3d 443, 450 (Mo. 2017); 5A. The Court refused to consider the question because Petitioners challenged only commitment. *Id.* To this day, Petitioners remain dangerous and suffer from substantial mental abnormalities. Thus they are not eligible for release of any kind, whether conditional or unconditional.

This Court should also refuse to consider the question because it is unripe. “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted). Whether Petitioners might be released depends on a future determination that Petitioners are no longer dangerous or no longer suffer from a mental abnormality. Even if they eventually obtain a favorable determination, this Court can only guess at what conditions, if any, might be imposed. Petitioners might be subject to minor conditions no more restrictive than those that bind all citizens, such as complying with federal and state law, Mo. Rev. Stat. § 632.505.3(3); Petitioners might be subject to more

substantial conditions; or they might be subject to no conditions at all. Petitioners' second question presented is unripe.

C. Petitioners expressly asked for relief under the Missouri Constitution but did not do so under the U.S. Constitution.

This Court should also deny the petition because it is far from clear that Petitioners even raised the pertinent federal claim before the Missouri Supreme Court. In the part of his brief where Kirk discussed conditional release, Kirk asked the Missouri Supreme Court to “declare the SVP Act unconstitutional on its face under Mo. Const. art. I, §§ 2, 10”—the state provisions that concern equal protection and due process. 99A. But he never included any similar statement asking for relief under the U.S. Constitution. Nelson’s brief suffered from a similar problem. Nelson specifically asked the Missouri Supreme Court to declare that “[t]he Act is unconstitutional on its face under Mo. Const. art. I, §§ 2, 10, and 21.” 230A. But Nelson included no similar request regarding the U.S. Constitution.

Kirk and Nelson did raise some federal arguments in their briefs, but disentangling which provision attaches to which claim is far from straightforward. Indeed, the Missouri Supreme Court held that they failed to preserve their claims because they organized them so poorly. The Missouri Supreme Court Rules require that a plaintiff present each individual claim in its own heading; failure to do so waives each claim. *Kirk*, 520 S.W.3d at 450 n.3 (citing Mo. Sup. Ct. R. 84.04(d)); 4A n.3. The purpose of this rule is to prevent parties from cramming multiple claims into a single section, rendering it harder to discern what analysis under a heading concerns which claim. *See, e.g., Evans v. FirstFleet, Inc.*, 345 S.W.3d 297, 310 (Mo. Ct.

App. 2011). The Missouri Supreme Court held that Kirk failed to comply with its rules when it asserted “multifarious” claims, citing seven different state or federal constitutional provisions under a single heading. *Kirk*, 520 S.W.3d at 450 n.3; 4A n.3. Nelson’s brief also violated this rule. *See* 214A (asserting violations of 12 constitutional provisions under a single heading); 216A (asserting violations of 10 provisions under a single heading).

The Missouri Supreme Court exercised its discretion to excuse waiver, but it never indicated that it was resolving federal claims concerning the specific argument Petitioners now raise. It excused waiver because it was plain that the SVP Act, even with the new amendments, “evidences no punitive intent.” *Kirk*, 520 S.W.3d at 450 & n.3; 4A–5A. But the Missouri Supreme Court gave no indication that it was ruling on a federal claim. Indeed, it is unlikely the Missouri Supreme Court interpreted the briefs as raising the pertinent federal claim because Petitioners expressly asked the Missouri Supreme Court to rule under the *state* Constitution, but they never expressly asked for relief on this issue under the U.S. Constitution. It is therefore unlikely Petitioners even raised this claim before the Missouri Supreme Court. This Court will not consider a question when “the state courts have had no opportunity to pass upon it.” *Monks v. New Jersey*, 398 U.S. 71, 71 (1970) (dismissing a writ as improvidently granted when a question was raised in a petition for the first time).

It is no answer to this problem to assert that state constitutional provisions sometimes incorporate federal law. Determining whether and to what extent Missouri law incorporates federal constitutional standards would again require

this Court to settle disputed interpretations of state law. *See, e.g., State v. Walsh*, 713 S.W.2d 508, 509, 514–15 (Mo. 1986) (holding that federal interpretations “may, or may not, be considered persuasive” and that those interpretations are often unpersuasive when considering the “right to privacy”). And this Court routinely refrains from considering a case even when a state law directly incorporates federal law. In *Florida v. Casal*, for example, this Court dismissed a petition as improvidently granted because the petition was decided on the basis of state law even though the state law was “construed in conformity with the 4th Amendment . . . , as interpreted by the United States Supreme Court.” 462 U.S. 637, 638 (1983) (Burger, C.J., concurring) (citation omitted).

V. This Court Has Recently Declined to Review a Case That Presented Similar Issues.

Just this term, this Court denied a petition for writ of certiorari in a case that presented similar issues to this case, but without the vehicle problems. In that case, the federal district court held that the SVP Act in Minnesota was unconstitutional on its face for numerous reasons. Among those reasons, the district court determined that it was “indisputabl[e]” that the statute authorized “prolonged commitment even after committed individuals no longer pose a danger to the public.” *Karsjens v. Piper*, 845 F.3d 394, 402 (8th Cir. 2017) (citing the district court opinion). The district court also determined that the statute impermissibly shifted the burden of proof to the committed individual and, among other things, lacked adequate procedures to obtain release. *Id.* at 402, 408-09. The Eighth Circuit nonetheless reversed the district court,

determining that the SVP procedures were rationally related to the interests of the people of Minnesota. *Id.* at 409. This Court denied certiorari. 138 S. Ct. 106 (2017).

Karsjens more cleanly presented the question whether a statute was unconstitutional on its face if it authorized prolonged commitment, and the question of what procedures for release a statute must include. That case did not involve a highly suspect, disputed reading of state law that this Court would have to resolve; the district court considered its interpretation of the statute “indisputabl[e].” *Karsjens*, 845 F.3d at 402. The decision did not involve the possibility that the petitioners neglected to present their claims to the court below. It did not ask this Court to force the lower court to do something it had already done. And no ripeness issues were readily present. Yet this Court declined to review *Karsjens*. The Court should decline to review this case as well.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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