No. 22-1459

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KEVIN SCOTT KARSJENS, AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Plaintiffs-Appellants

v.

JODI HARPSTEAD, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS ON THE ISSUE ADDRESSED HEREIN

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
KATHERINE E. LAMM
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

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INTEREST OF THE UNITED STATES

This appeal concerns whether the conditions of confinement in a state detention program for civilly committed sex offenders comport with Fourteenth Amendment substantive due process requirements. The Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, authorizes the Attorney General to investigate and seek equitable relief for a pattern or practice of unconstitutional conditions in state and local institutions, including those holding

civilly committed individuals. The United States has a substantial interest in ensuring courts properly apply the Fourteenth Amendment in this context and files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE AND APPOSITE CASES

Plaintiffs-appellants are civilly committed to the Minnesota Sex Offender Program (MSOP), which supervises and treats sex offenders. They claim that their conditions of confinement are punitive and therefore violate the Fourteenth Amendment's substantive due process guarantee. In a prior appeal, this Court directed the district court to assess plaintiffs' punitive conditions claims under the standard established for pretrial detainees in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), which requires considering whether the challenged conditions are rationally related to a legitimate non-punitive purpose or if they are instead excessive. *Karsjens* v. *Lourey*, 988 F.3d 1047, 1054 (8th Cir. 2021) (*Karsjens II*). In so doing, the Court invoked *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), which addressed conditions of civil commitment. *Karsjens II*, 988 F.3d at 1051-1053. This Court also directed the district court to assess "the totality of the circumstances of [plaintiffs'] confinement." *Id.* at 1054. (citation omitted). On remand, the district court applied *Bell* and rejected plaintiffs' claims. This brief addresses the following question:

Whether the district court erred by failing to tailor its *Bell* analysis to the civil commitment context, consistent with *Youngberg*, or to properly consider the full circumstances of plaintiffs' confinement.

Bell v. *Wolfish*, 441 U.S. 520 (1979)

Youngberg v. *Romeo*, 457 U.S. 307 (1982)

Karsjens v. *Lourey*, 988 F.3d 1047 (8th Cir. 2021)

STATEMENT OF THE CASE

1. Factual Background

Plaintiffs-appellants are civilly committed to the MSOP under the Minnesota Civil Commitment and Treatment Act (MCTA), Minn. Stat. § 253D (2013).[1] The Act provides that if a state court finds that a person has "a sexual psychopathic personality" or is "sexually dangerous," Minn. Stat. § 253D.07 (2020), it may commit the individual for "an indeterminate period" that terminates only after a subsequent finding that the individual can acceptably "adjust[] to open society, is no longer dangerous to the public, and is no longer in need of treatment and supervision," Minn. Stat. §§ 253D.07 (2020), 253D.31 (2018). The MSOP is charged with providing "specialized sex offender assessment, diagnosis, care,

[1] The MCTA was enacted in 1994 and later amended in ways not relevant here.

treatment, supervision, and other services to civilly committed sex offenders." Minn. Stat. § 246B.02 (2013).

Individuals committed to the MSOP are held in three residential facilities of differing sizes and levels of restrictiveness. *Karsjens* v. *Piper*, 845 F.3d 394, 400 (8th Cir. 2017) (*Karsjens I*). The largest facility holds newly committed individuals and those in the earliest stages of treatment and the next-largest holds individuals in later treatment stages; both facilities are behind secure perimeters. *Ibid.* The smallest and least restrictive facility, known as "Community Preparation Services" (CPS), is located outside the secure perimeter of the intermediate facility. *Ibid.* CPS facilitates community reintegration and "provides opportunities for supervised and unsupervised movement on the MSOP campus" and "supervised activities in the community." Add. 26.[2] Eligible individuals frequently have to wait for transfers to CPS due to lack of beds. R. Doc. 966, at 18.

The MSOP uses a three-stage treatment model through which residents progress based on their scores in a "Goal Matrix." *Karsjens I*, 845 F.3d at 400. All residents must complete the first phase, which emphasizes "rule compliance, emotional regulation, and treatment engagement." *Ibid.* The second phase

[2] "Add. __" refers to page numbers in appellants' addendum. "R. Doc. __, at __" refers to district court filings by docket number and internal pagination.

provides actual therapy to explore and control offensive sexual behavior. *Ibid.* The final phase focuses on community reintegration. *Ibid.*

Between the MSOP's inception in 1994 and a bench trial in this case in 2015, 714 individuals had been committed to the MSOP. *Karsjens I*, 845 F.3d at 401. At the time of trial, none had been fully discharged and only three had been provisionally discharged. *Ibid.*

2. Procedural History

a. Initial Proceedings And Appeal (Karsjens I)

i. In 2011, plaintiffs filed a *pro se* complaint against officials who manage the MSOP under 42 U.S.C. 1983. *Karsjens I*, 845 F.3d at 401-402. They subsequently obtained counsel and won class certification. *Ibid.*

Relevant to the current appeal, Count 3 of the Third Amended Complaint alleges that the MSOP provides plaintiffs deficient sex offender treatment in violation of the federal and Minnesota constitutions. R. Doc. 635, at 64-66. Counts 5, 6, and 7 allege that the MSOP violates plaintiffs' substantive due process right in three ways: by imposing punitive conditions of confinement relating to living conditions and institutional rules (Count 5); by not offering less restrictive alternatives (Count 6); and by providing inhumane treatment arising from punitive, unnecessarily restrictive living conditions and inadequate medical care (Count 7). R. Doc. 635, at 67-74.

During the 2015 bench trial, the district court heard testimony from the named plaintiffs, MSOP employees and staff, and four experts the court appointed under Federal Rule of Evidence 706. *Karsjens I*, 845 F.3d at 402; R. Doc. 966, at 6-50. The court also considered reports, evaluations, and audits produced by numerous experts and professionals, including: the Rule 706 Experts; the Sex Offender Civil Commitment Advisory Task Force, which was created to provide legislative proposals on topics including less restrictive alternatives and custody reduction; the MSOP Evaluation Team, which consisted of five clinical professionals who assessed participants' progression through MSOP's treatment phases; and the Site Visit Auditors, a three-member group the MSOP hired to evaluate its program annually. R. Doc. 966, at 6, 15-16 & nn.2-5.

The district court found for plaintiffs on Counts 1 and 2 of the complaint, which contested the constitutionality of Section 253D of the MCTA, without ruling on the other counts. Applying strict scrutiny, the court held that Section 253D was unconstitutional on its face and as applied because, in essence, it permitted individuals' lifelong detention even though they posed little societal danger, and because it did not provide meaningful opportunities for less restrictive conditions or for rehabilitation as a means of obtaining release. R. Doc. 966, at 66-67.

ii. Defendants appealed and this Court reversed. This Court held that only rational-basis review applied to plaintiffs' facial challenge because individuals who

endanger themselves or others lack a fundamental liberty interest in freedom from detention, and that the MCTA satisfied this standard. *Karsjens I*, 845 F.3d at 407-410. Regarding plaintiffs' as-applied challenge, this Court held that plaintiffs must show that defendants "actions were conscience-shocking and violate a fundamental liberty interest"—another test plaintiffs failed. *Id.* at 410. In so holding, this Court observed that the Supreme Court has not recognized a due process right to "treatment of the illness or disability that triggered [a] patient's involuntary confinement" or prohibited the confinement of untreatable individuals. *Ibid.* (citation omitted). The Court remanded for proceedings on the remaining counts. *Id.* at 411.

b. Initial Remand And Second Appeal (Karsjens II)

i. On remand, the district court held (as relevant here) that Counts 3, 5, 6, and 7—which it construed as challenging defendants' conduct in carrying out the MSOP—failed under the "shocks-the-conscience" test that doomed plaintiffs' as-applied challenge in *Karsjens I*. Add. 53-59. The court rejected plaintiffs' "alternative theory of liability" for these counts—that the MSOP is unconstitutionally punitive under *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963)—on these same grounds. Add. 59-61.

ii. Plaintiffs again appealed, and this Court affirmed as to Count 3 but vacated and remanded as to Counts 5, 6, and 7. *Karsjens II*, 988 F.3d 1047 (8th Cir. 2021). The Court reasoned that these three counts differed from the claims *Karsjens I* addressed, as they concern "conditions within the facility" rather than plaintiffs' "inability to be released." *Karsjens II*, 988 F.3d at 1051. Whereas *Karsjens I* resolved challenges to Section 253D and its implementation, this Court explained, Counts 5, 6, and 7 contest "conditions of confinement, including the inadequacy of meals, double-bunking, overly harsh punishment for rules violations, property being taken and destroyed before any hearing, the lack of less restrictive alternatives, and the inadequacy of medical care." *Ibid.* Taken together, this Court construed the thrust of these counts as whether "considered as a whole, [plaintiffs'] conditions of confinement amount to punishment in violation of the Fourteenth Amendment." *Ibid.* (citing *Youngberg* v. *Romeo*, 457 U.S. 307 (1982)).

Turning to the proper legal standard, this Court observed that the Fourteenth Amendment protects both pretrial detainees and civilly committed individuals from punishment. *Karsjens II*, 988 F.3d at 1052 (citing *Bell*, 441 U.S. at 535 (pretrial detainees), and *Youngberg*, 457 U.S. at 316 (civilly committed individuals)). This Court explained that, under *Bell*, a court identifies unconstitutional conditions by looking first for express punitive intent and otherwise for whether the challenged condition "is not rationally related to a legitimate governmental objective or that it

is excessive in relation to that purpose." *Ibid.* (citing *Bell*, 441 U.S. at 538, and quoting *Kingsley* v. *Hendrickson*, 576 U.S. 389, 398 (2015)).

This Court acknowledged that the Supreme Court has not firmly set a standard for unconstitutional conditions in the civil commitment context, but has stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Karsjens II*, 988 F.3d at 1052 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972)). The Court identified one in-circuit case applying *Bell* to conditions in the MSOP, *Beaulieu* v. *Ludeman*, 690 F.3d 1017, 1042-1043 (8th Cir. 2012), and several applying *Bell* in challenges to conditions of pretrial detention. *Karsjens II*, 988 F.3d at 1052-1053.

In light of "the Supreme Court's pronouncements in *Bell* and *Youngberg*" that neither pretrial detainees nor civilly committed individuals may be subjected to punitive conditions, this Court held that *Bell* applies to both contexts. *Karsjens II*, 988 F.3d at 1053 (collecting cases from other circuits that support this conclusion). The Court thus remanded with instructions for the district court to consider plaintiffs' punitive conditions "claims in Counts 5, 6, and 7" under *Bell*, taking into consideration "the totality of the circumstances of [plaintiffs']

confinement." *Id.* at 1053-1054 (quoting *Morris* v. *Zefferi*, 601 F.3d 805, 810 (8th Cir. 2010)).[3]

c. Proceedings On Remand Post-Karsjens II

The district court again dismissed Counts 5, 6, and 7. Add. 41. To begin, the court held that Count 6's challenge to the lack of less restrictive alternatives should be dismissed as duplicative of claims rejected in *Karsjens I*. Add. 9 & n.8. The court found that, in any event, the count failed under *Bell* because there is no right to the "least restrictive alternative" and because the MSOP's offerings were not punitive despite "grave" implementation flaws, especially considering the deference afforded to officials to ensure secure and orderly facilities. Add. 10 n.8 (citation omitted). The court also held that treatment-related claims failed and must be excluded from the totality analysis because they were outside the remand's scope and there is no recognized right to treatment. Add. 10-11 nn.9-10.

Turning to the legal standard for plaintiffs' punitive conditions claims, the court summarized *Bell* as follows: "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" Add. 13 (quoting *Bell*, 441 U.S.

[3] This Court also directed the district court to consider the portion of Count 7 challenging inadequate medical care under the "deliberate indifference standard outlined in *Senty-Haugen* [v. *Goodno*, 462 F.3d 876, 889-890 (8th Cir. 2006), cert. denied, 549 U.S. 1348 (2007)]." *Karsjens II*, 988 F.3d at 1053-1054. This brief does not address that claim.

at 539). The court stated that "legitimate governmental interests" include facility-management goals, such as maintaining security and order and avoiding introduction of contraband—complex objectives that necessitate affording administrators "wide-ranging deference." Add. 13-14 & n.12 (quoting *Bell*, 441 U.S. at 547).

The court then applied *Bell*, focusing substantially on the governmental interests that the challenged policies ostensibly serve. Add. 29-39. It analyzed each condition in Counts 5 and 7 separately, finding some to meet *Bell*'s "reasonable relation" standard and others—inadequate meals, denial of group therapy, furniture removal, and disposal of personal property—to lack factual support. Add. 31-38. The court concluded that: double-bunking was permissible under *Beaulieu* and reasonably tied to an interest in "efficient[] and cost-effective[] housing"; restrictive housing was rationally related to "control[ling] behavior" not addressed by "less restrictive interventions"; policies regarding plaintiffs' movement, transport, and the use of restraints were reasonably related to preserving "security," "safety" and "order"; and search-and-seizure policies were reasonably related to the "legitimate objective to preserve institutional security." Add. 31-38. The court also observed that the Rule 706 Experts did not find certain MSOP policies and practices to be concerning or atypical in civil commitment programs. Add. 31-38. The court addressed plaintiffs' therapeutic needs only as

to three challenged policies, concluding that the MSOP's "use of [behavioral expectation reports]," "property policy and related grievance procedure," and conditioning of vocational opportunities on "rule compliance and treatment" properly balanced "therapeutic and security needs." Add. 31-38.

The court concluded that "no condition, in isolation, or in combination" violates *Bell* because each "is reasonably related to a legitimate government objective, is not excessive in relation to the objective(s) and is not punitive," noting that the Rule 706 Experts had reviewed but were unconcerned with the challenged policies. Add. 38. Although the court sympathized with plaintiffs' preference for "fewer restrictions and greater independence," it held that this must yield to the MSOP's "adoption and execution of policies and practices that in [its] judgment are needed to preserve internal order and discipline and to maintain institutional security." Add. 39 (brackets in original) (quoting *Bell*, 441 U.S. at 547).

SUMMARY OF ARGUMENT

The district court's rigid application of *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and narrow totality-of-circumstances analysis failed to incorporate the principles underlying this Court's instructions in *Karsjens II*.

While *Bell* provides a general framework for assessing unconstitutional conditions of non-punitive confinement, it addressed only temporary pretrial detention for the purpose of securing presence at trial—not indefinite commitment

to a treatment facility. The district court's analysis thus needed to consider, consistent with *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), the purpose of plaintiffs' civil commitment and whether qualified professional judgment was exercised in imposing the challenged conditions, including plaintiffs' access to less restrictive alternatives and treatment. The district court did not do so and instead mistakenly proceeded as if plaintiffs were no different from pretrial detainees.

Further, in conducting a totality-of-circumstances analysis, the court should have incorporated all of plaintiffs' challenged conditions of confinement—even those that do not by themselves give rise to viable claims—as well as their duration, severity, and necessity. Indeed, where a court fails to do so, it is difficult to see how it performs the core *Bell* inquiry: whether challenged conditions are "excessive" in relation to legitimate, non-punitive government purposes. Here, the district court's totality-of-circumstances analysis discussed a series of discrete conditions present in MSOP facilities while erroneously omitting central aspects of plaintiffs' claims and the duration, severity, and need for the challenged conditions.

Accordingly, this Court should vacate the dismissal of Counts 5, 6, and 7 and remand for the district court to properly conduct the analysis required by *Karsjens II*.

ARGUMENT

THE DISTRICT COURT DID NOT TAILOR ITS ANALYSIS TO THE CIVIL COMMITMENT CONTEXT OR MEANINGFULLY CONSIDER THE TOTALITY OF PLAINTIFFS' CONDITIONS OF CONFINEMENT

A. In Determining Whether Plaintiffs' Conditions Of Confinement Were Unconstitutionally Punitive, The District Court Needed To Tailor Its Bell *Analysis To The Civil Commitment Context*

As this Court acknowledged in *Karsjens II*, it is well settled that neither pretrial detainees nor civilly committed individuals may be punished, but less clear whether *Bell* applies identically to these groups. See *Karsjens II*, 988 F.3d 1047, 1052-1053 (8th Cir. 2021) (citing *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), in regards to pretrial detainees and civilly committed individuals, respectively). The authorities that this Court credited in *Karsjens II* demonstrate that while *Bell* provides an overarching inquiry for Fourteenth Amendment conditions-of-confinement claims, *Youngberg* requires accounting for the non-punitive purpose of civil commitment and whether challenged conditions incorporate qualified professional judgment. Here, the district court entirely failed to incorporate *Youngberg* into its determination of whether plaintiffs' conditions of confinement are punitive.

1. Youngberg *Requires Courts To Examine The Purpose Of Civil Confinement And Whether Qualified Professional Judgment Was Appropriately Exercised In Imposing The Challenged Conditions*

Bell sets a baseline for the substantive due process rights of individuals in non-punitive detention, but it is context-specific. *Youngberg*, which this Court incorporated in its analysis in *Karsjens II*, confirms that additional considerations apply in the civil-commitment setting.

a. In *Bell*, the Supreme Court addressed, among other things, whether double-bunking pretrial detainees violated the Fourteenth Amendment. 441 U.S. at 536-543. The Court held that the key inquiry for detainees who have not been criminally convicted is whether the challenged conditions "amount to punishment." *Id.* at 537. The Court discussed impermissible punishment against the backdrop of the government's ability to detain people accused of crimes to secure their presence at trial, and the related "entitle[ment] to employ devices that are calculated to effectuate this detention," including "confinement in a facility." *Ibid.* Indeed, the Court noted, "[w]hether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain." *Ibid.* In delineating a test for punitive conditions—whether they are "reasonably" or "rationally" related to a "legitimate governmental interest[]" or instead are "excessive"—the Court tethered its analysis to the broader purposes of "ensuring the detainees' presence at trial"

and "effective management of the detention facility." *Id.* at 537-540 (citation omitted).

Youngberg demonstrates how *Bell*-like balancing operates in the civil-commitment context. There, the Supreme Court considered the due process claims of an individual with developmental disabilities who had been civilly committed to a state facility because his family "could neither care for him nor control his violence." 457 U.S. at 320 n.27. He claimed that he had been injured and restrained excessively, and that he had been insufficiently treated or trained in self-care and behavior management. See *id.* at 310-311, 315. The Court held that the plaintiff's constitutionally protected interests included "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests," and that "[s]uch conditions of confinement would comport fully with the purpose of [his] commitment." *Id.* at 324. The Court cited *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972), which stated that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Youngberg*, 457 U.S. at 324. "[T]he purpose of respondent's commitment," the Court stated, "was to provide reasonable care and safety, conditions not available to him outside of an institution." *Id.* at 320 n.27.

To determine whether plaintiff's interests had been infringed required balancing them against societal interests, the Court explained, drawing in part on *Bell*'s "reasonably related to legitimate government objectives" test for pretrial detainees. *Youngberg*, 457 U.S. at 320-322. With respect to the rights of involuntarily committed people, *Youngberg* held that proper balancing is achieved by ensuring "that professional judgment in fact was exercised." *Id.* at 321 (citation omitted). The Court acknowledged that this was an elevated standard, explaining that such individuals are entitled to "more considerate treatment and conditions of confinement than criminals." *Id.* at 321-322. In *Youngberg*, the field of the relevant "qualified professional[s]" was developmental disabilities; the Court explained that their decisions would be presumed correct, especially in light of operational needs, but that deference would dissipate when there is a "substantial departure from accepted professional judgment, practice, or standards." *Id.* at 322-324 & n.30.

Thus, *Youngberg* builds on *Bell* in the civil-commitment context in at least two ways. First, *Youngberg* requires balancing individual liberties and societal interests—just as *Bell* requires a rational relationship between deprivations of liberty and legitimate governmental interests—but restrictions on those liberty interests must be tethered to the purpose of detention. In *Bell*, that purpose was to secure pretrial detainees' appearance at trial, and thus the government's sole

interests were in effectuating the detention and managing the facility. Under *Youngberg*, purposes such as care and treatment also must be considered and may affect the scope of civilly committed individuals' rights and permissible infringements—*i.e.*, an entitlement to some treatment for the condition that is the basis for commitment in order to minimize liberty restrictions within the facility.

Second, *Youngberg* requires the exercise of qualified professional judgment to support the particular conditions imposed and related limits on individual liberties. This standard is deferential so long as exercises of professional judgment do not depart substantially from accepted practice.

b. This Court relied on *Youngberg* in deciding *Karsjens II*. It acknowledged *Youngberg* as the source of civilly committed individuals' due process right to non-punitive conditions, similar to but distinct from *Bell*'s treatment of pretrial detainees. 988 F.3d at 1052-1053. And echoing *Youngberg*, this Court observed that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 1052 (quoting *Jackson*, 406 U.S. at 738).

Indeed, the civil commitment cases that *Karsjens II* highlighted to identify the proper standard for plaintiffs' remaining claims incorporate *Youngberg* into their *Bell* analyses. *Karsjens II*, 988 F.3d at 1052-1053. *Beaulieu* v. *Ludeman*, for example, addressed MSOP residents' challenge to both the use of restraints during

transport and double-bunking. 690 F.3d 1017 (8th Cir. 2012). This Court analyzed the restraints claim primarily under *Youngberg*, but held that "whether one applies *Youngberg*'s professional judgment standard or *Bell*'s punitive versus non-punitive distinction, the outcome is the same," as both standards require deference to professional expertise. *Id.* at 1032 (citation omitted). Absent evidence that the challenged practices deviated from professional standards, they were a "proper exercise of [facility] officials' professional judgment." *Id.* at 1032-1033. As for double-bunking, the Court found *Bell* and circuit precedent governed the claim, but noted the warden's testimony that there was a legitimate need for double-bunking and that officials considered whether double-bunking would be "counter-therapeutic" for certain residents. *Id.* at 1042-1043 (brackets omitted). Consistent with *Youngberg*, *Beaulieu* presupposed that the *Bell* analysis should incorporate the purpose of commitment and the use of professional judgment.

The other circuit court cases this Court relied on in directing the district court to apply *Bell* to plaintiffs' claims, see *Karsjens II*, 988 F.3d at 1053, similarly incorporate *Youngberg*'s key principles. See *Matherly* v. *Andrews*, 859 F.3d 264, 275 (4th Cir.), cert. denied, 138 S. Ct. 399 (2017) (addressing punitive-conditions claims of civilly committed sex offenders and requiring consideration of the purpose of confinement and exercise of professional judgment under *Youngberg*); *Healey* v. *Spencer*, 765 F.3d 65, 78-79 (1st Cir. 2014) (same); *Allison* v. *Snyder*,

332 F.3d 1076, 1079-1080 (7th Cir.), cert. denied, 540 U.S. 985 (2003) (addressing claims of sex offenders in a pretrial diversion program and holding that *Bell* governed challenges to institutional rules but that *Youngberg* confirms a right to "some kind of treatment" and to "programs designed using the exercise of professional judgment"). These cases confirm—as this Court already appears to have acknowledged—that properly assessing punitive-conditions claims arising from civil commitment requires a *Youngberg*-informed analysis.

2. The District Court Failed To Incorporate Youngberg*'s Key Principles Into Its* Bell *Analysis*

The district court departed from the precedents and principles underlying this Court's instructions in *Karsjens II* by failing to tailor its *Bell* analysis to the civil-commitment context. Indeed, the court did not even mention *Youngberg*, let alone evaluate the therapeutic purpose of plaintiffs' civil commitment or the MSOP's implementation of qualified professional judgment.

a. As discussed, *Youngberg* holds that the conditions imposed on civilly committed individuals must bear a rational relationship to the purpose of the detainees' civil confinement. But the district court did not address *Youngberg* or its progeny, or meaningfully consider the purpose of plaintiffs' civil commitment: treatment and supervision to enable a safe return to society. See pp. 9-12, *supra*. Instead, it proceeded as if plaintiffs were pretrial detainees held temporarily to

secure their presence at trial rather than individuals committed indefinitely for treatment and supervision.

Not surprisingly, then, the court's *Bell* analysis focused almost entirely on the preservation of order and security in MSOP facilities without meaningfully weighing treatment-related objectives. Add. 29-39 (holding that the MSOP's policies on double-bunking, restrictive housing, resident movement and transport, and the use of restraints were reasonably related to interests such as institutional security, order, and efficiency). Only with respect to three challenged policies—the MSOP's use of behavior reports, its property policy and grievance procedure, and conditioning access to vocational opportunities on rule compliance—did the court look to whether the MSOP had properly balanced "therapeutic and security needs." Add. 29-39. And ultimately, the court held that plaintiffs' desire for a less restrictive setting must yield to the MSOP's "adoption and execution of policies and practices that in [its] judgment are needed to preserve internal order and discipline and to maintain institutional security." Add. 39 (brackets in original) (quoting *Bell*, 441 U.S. at 547).

The court's error is striking because it heard trial evidence and made factual findings on key topics—the availability of less restrictive alternatives and the adequacy of sex offender treatment at the MSOP—that bear on whether plaintiffs' conditions of confinement comport with the purpose of their civil commitment or

instead are excessive and punitive. Indeed, the court found that "[t]he stated goal of the MSOP's treatment program, *observed in theory but not in practice*, is to treat and safely reintegrate committed individuals at the MSOP back into the community." R. Doc. 966, at 23 (emphasis added). The court also reached what it characterized as the same conclusion as an MSOP clinical director: that "providing less restrictive confinement options would be beneficial to the State of Minnesota and the entire civil commitment system without compromising public safety." R. Doc. 966, at 23. Similarly, the MSOP's Site Auditors reported that the lack of progress within and through MSOP's treatment program might be "demoralizing to clients and staff, and in the long run may increase security concerns." R. Doc. 966, at 33.

The court, however, bypassed these findings and construed *Bell* to require the consideration of government interests in security and order above all else. This conflicts with *Youngberg* and may have led the court to erroneously weigh whether plaintiffs' indefinite detention in secure facilities was in fact reasonably related to legitimate government purposes.

b. The court also erred in failing to appropriately consider whether qualified professional judgment was exercised in establishing plaintiffs' conditions of confinement. This error stemmed from the court's disregard of relevant findings it had made after the trial regarding the actual operation of the MSOP.

To be sure, the court referred to the judgment of qualified professionals in a limited fashion, holding that several of the challenged conditions were constitutional in light of their accepted use in sex offender treatment facilities or based on experts' opinions that these conditions were unexceptional. Add. 31-38. And, in its discussion of the totality of the circumstances, the court gave weight to the fact that the Rule 706 Experts "raised no concerns" about MSOP's challenged policies "being unusual or excessive for similar civil commitment programs, individually or in combination." Add. 38-39.

But the court might not have found the MSOP's conditions unobjectionable by professional standards had it properly considered the record, including expert and professional critiques of the MSOP's restrictiveness and treatment program on which the court based its post-trial findings. For example, the court found that, according to the testimony of several highly placed clinical staff members at the MSOP, many residents (including dozens of juvenile-only offenders) could be treated in less secure facilities. R. Doc. 966, at 21. The Site Visit Auditors "reported that there are individuals at the MSOP who may have reached the maximum benefit within the treatment program and who could receive services in a different setting." R. Doc. 966, at 33. Indeed, Minnesota was one of only two states at the time of trial that did not require regular review of civilly committed sex offenders' risk level. R. Doc. 966, at 36. The court ultimately concluded that

less restrictive confinement options would benefit both residents and the public without compromising safety. R. Doc. 966, at 23.

The court's post-trial order also found that the MSOP's sex-offender treatment program failed to align with the expectations of experts and professionals. The court stated, for instance, that the "Matrix factors"—which the MSOP uses to advance residents through treatment—"are not used by any other civil commitment program in the country." R. Doc. 966, at 29. And, "[i]ndependent evaluators and internal staff at the MSOP have repeatedly observed confusion regarding how the Matrix factors were to be used and inconsistencies with the application of the Matrix factors." R. Doc. 966, at 29.

The court also found that, according to the Evaluation Team, many committed individuals were in the wrong phase of treatment. Indeed, "thirty percent of the Phase I patient files reviewed reflected that the patients were not placed in the proper phase based on the MSOP's own policies." R. Doc. 966, at 26. The court observed that "evaluators and outside experts have repeatedly criticized the lack of progression," and that the annual reports by the Site Visit Auditors repeatedly voiced concern "about the disproportionately high number of committed individuals in Phase I compared to those in Phase III of the treatment program." R. Doc. 966, at 32. In some reports, the auditors observed that slow movement through the MSOP "hampers program effectiveness" and has a

"demoralizing" effect that "in the long run may increase security concerns." R. Doc. 966, at 32-33. According to one of the MSOP's clinical directors and the Site Visit Auditors, some residents even had "reached the maximum benefit" of treatment available at the MSOP. R. Doc. 966, at 33.

At bottom, despite having ample record evidence to evaluate, the district court's application of *Bell* erred because it did not incorporate the appropriate exercise of qualified professional judgment at the MSOP. This may have produced an erroneous weighing of plaintiffs' and the State's interests given the purpose of plaintiffs' confinement.

B. To Conduct A Proper Totality-Of-Circumstances Analysis, The District Court Should Have Considered All Of Plaintiffs' Challenged Conditions Of Confinement, As Well As Their Duration, Severity, And Necessity

The district court compounded its error in performing a stunted version of the totality-of-circumstances analysis this Court required in *Karsjens II*. Eighth Circuit precedent, including cases this Court relied on in *Karsjens II*, makes clear that this inquiry should analyze evidence regarding all the conditions of confinement, as well as their duration, severity, and necessity. Indeed, where a court fails to do so, it is difficult to see how it performs the core *Bell* inquiry: whether challenged conditions are "excessive" in relation to legitimate government purposes. This error, too, supports vacating the district court's judgment and remanding for a more complete analysis.

1. The Totality-Of-Circumstances Inquiry Is Broad And Requires Considering Conditions That May Not Be Independently Actionable

In *Karsjens II*, this Court instructed the district court to "review the totality of the circumstances of [plaintiffs'] confinement." 988 F.3d at 1054 (quoting *Morris* v. *Zefferi*, 601 F.3d 805, 810 (8th Cir. 2010)). *Morris*, which involved a pretrial detainee's transport in a dog cage, confirms that such an analysis sweeps broadly to include even conditions that might not, when viewed in isolation, give rise to viable claims. 601 F.3d at 810. This Court rejected arguments that the detainee's claim must fail because the component parts of his experience—the unsanitary conditions of the cage, the restrictiveness of the space, and the humiliating and degrading nature of this treatment—might not form independent constitutional violations. *Ibid.* Such a "piecemeal" analysis "misse[d] the point," the Court explained, because "[i]n considering whether the conditions of pretrial detention are unconstitutionally punitive, we review the totality of the circumstances of a pretrial detainee's confinement." *Ibid.*

Other Eighth Circuit decisions analyzing claims under *Bell* similarly envision that courts will consider challenged conditions in their totality and account for the cumulative effect of their severity and duration. In *Owens* v. *Scott County Jail*, the court held that the "totality" analysis required consideration of the "length of [the detainee's] exposure to unsanitary conditions and how unsanitary

the conditions were," and determined that sleeping next to a toilet for five weeks might violate the Fourteenth Amendment. 328 F.3d 1026, 1027 (8th Cir. 2003) (citing *Hutto* v. *Finney*, 437 U.S. 678, 686-687 (1978) (in the Eighth Amendment context, observing that "[a] filthy, overcrowded cell" and unpalatable food "might be tolerable for a few days and intolerably cruel for weeks or months")). In *Smith* v. *Copeland*, as well, the court observed that "the length of time a [detainee] is subjected to harsh conditions is a critical factor in our analysis." 87 F.3d 265, 268-269 (8th Cir. 1996) (holding that four days of exposure to sewage was not unconstitutional).

Particularly relevant here, this Court's en banc decision in *Villanueva* v. *George* shows that a "totality" analysis properly includes whether less restrictive alternatives were suitable. 659 F.2d 851 (8th Cir. 1981). *Villanueva* concerned a pretrial detainee's challenge to a temporary transfer to a highly restrictive and unsanitary facility. *Id.* at 853-854. The district court found the evidence insufficient to support a punitive-conditions claim under *Bell*, but this Court reversed, considering "the totality of the circumstances," which included the detainee's housing and living conditions and also that his "past behavior demonstrated an ability to be confined under less restrictive conditions without incident." *Id.* at 854. Indeed, consideration of a detainee's ability to be confined in less restrictive conditions is helpful in answering *Bell*'s core question: whether

conditions are "excessive" in relation to legitimate government purposes, which surely hinges on whether a detainee's risks and needs can be addressed in a less restrictive fashion.

Accordingly, a proper totality-of-circumstances analysis of plaintiffs' conditions of confinement should include all challenged conditions, regardless of whether each independently gives rise to a legal claim. It should consider as well their severity, duration, and necessity to effectuate plaintiffs' safe and orderly confinement.

2. The District Court Failed To Fully Consider The Totality Of Plaintiffs' Conditions Of Confinement

The district court purported to consider the totality of the circumstances of plaintiffs' confinement but instead analyzed a series of discrete conditions separately, without considering the availability of less restrictive confinement settings in the MSOP, the MSOP's sex-offender treatment program, or the indefinite nature of the challenged conditions. The court misread this Court's prior decisions to preclude consideration of facts underlying plaintiffs' less-restrictive-alternatives and inadequate-treatment claims. In fact, the district court had to weigh these aspects of plaintiffs' claims in order to comply with this Court's instruction in *Karsjens II* to apply *Bell* and consider the conditions of plaintiffs' confinement in their totality.

The district court reasoned incorrectly that Count 6's challenge to the lack of less restrictive alternatives at the MSOP was subsumed within the dismissal of plaintiffs' constitutional challenge to MCTA Section 253D (Counts 1 and 2) in *Karsjens I*. Add. 7-9, 30. Not so. First, this Court in *Karsjens II* differentiated the "remaining claims" before it in Counts 5, 6, and 7—which included "the lack of less restrictive alternatives"—from those that had been dismissed in *Karsjens I*. 988 F.3d at 1051. Second, *Karsjens II* instructed the district court to consider Count 6 on remand. *Id.* at 1053-1054. Third, *Karsjens II* directed the district court to consider plaintiffs' punitive conditions claims in their "totality," an analysis that includes allegations that may not constitute freestanding violations. Thus, the district court erred in refusing to consider less restrictive alternatives apart from a passing footnote (Add. 9 n.8). See *Villanueva*, 659 F.2d at 854 (assessing whether challenged conditions are excessive in relation to whether less restrictive conditions are sufficient).

Nor did the dismissal of plaintiffs' freestanding inadequate treatment claim in Count 3, which *Karsjens II* affirmed, preclude the district court from considering claimed deficiencies in the MSOP's treatment program. *Karsjens II* made no such statement, and instead directed the district court to "review the totality of the circumstances of [plaintiffs'] confinement." 988 F.3d at 1054 (citation omitted). As already explained, this analysis incorporates each of the

challenged conditions, whether or not they may give rise to an independent legal claim. See, *e.g.*, *Morris*, 601 F.3d at 810. The district court should have factored the adequacy MSOP's treatment program into an analysis tailored to the civil commitment context.

Finally, the district court does not appear to have weighed at all the duration of plaintiffs' exposure to the challenged conditions. This was so even though, based on the trial record, the court concluded that the MSOP constituted "indefinite and lifetime detention" from which no person ever had been released. R. Doc. 966, at 11. Although this Court in *Karsjens II* indicated that "the indefinite nature of [plaintiffs'] confinement" was among the challenges considered and dismissed in *Karsjens I*, the Court did not bar the district court from considering this as part of the totality analysis. 988 F.3d at 1051. To the contrary, *Karsjens II* incorporated Eighth Circuit precedent holding that the duration of contested conditions is key to evaluating whether they are punitive. *Id.* at 1053 (citing *Smith*, 87 F.3d at 268-269 ("[T]he length of time a [detainee] is subjected to harsh conditions is a critical factor in our analysis.")).

Thus, while the district court analyzed both separately and cumulatively each subpart of plaintiffs' allegations in Counts 5 and 7, it erred by failing to include core aspects of plaintiffs' challenge that were important to performing the tailored, context-specific analysis that *Bell* and *Youngberg* envision. Omitting

these aspects of the challenge may have hindered the district court from properly evaluating whether plaintiffs' conditions of confinement are constitutional.

CONCLUSION

This Court should vacate the dismissal of Counts 5, 6, and 7 and remand for further proceedings under the standards discussed herein.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Katherine E. Lamm
ERIN H. FLYNN
KATHERINE E. LAMM
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6432 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font; and

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: July 1, 2022

CERTIFICATE OF SERVICE

I certify that on July 1, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

Daniel E. Gustafson
Gustafson Gluek PLLC
Canadian Pacific Plaza
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402

Scott H. Ikeda
Minnesota Attorney General's Office
445 Minnesota Street, Suite 1400
St. Paul, MN 55101

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney