UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, Bradley Wayne Foster and Brian K. Hausfeld, Plaintiffs, v. Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Nancy Johnston, Janine Hebert, and Ann Zimmerman, in their individual and official capacities, Defendants.	Court File No. 11-CV-03659 (DWF/JJK) **BRIEF OF AMICI CURIAE ERIC S. JANUS AND ACLU-MN**

I. Introduction

This Court has found that the State of Minnesota has, through two decades of persistent administrative and judicial action and inaction, converted a statutory system of civil confinement into an unconstitutional complex of indefinite confinement, infected through and through by the forbidden purpose of punishment.

> The overwhelming evidence at trial established that Minnesota's civil commitment scheme is a punitive system that segregates and indefinitely detains a class of potentially dangerous individuals without the safeguards of the criminal justice system.

Karsjens v. Jesson, 2015 WL 3755870, at *2 (D. Minn. June 17, 2015) *motion to certify appeal denied,* 2015 WL 4478972 (D. Minn. July 22, 2015).

A complex system, MSOP's unconstitutionality has been born of many parents, with diverse motivations and politics. But the singular result is the unconstitutional confinement of hundreds of human beings. In the end, the Court's remedial efforts should focus on the termination of that illegal deprivation of liberty; how that end is achieved is important, but the means will be rendered nugatory without strict accountability for the end result.

II. Aligning the Minnesota Sex Offender Program to constitutional mandates necessitates remedies that are designed to ensure that the state has purged itself of the program's "forbidden purpose."

Foundational to the Court's decision in this case is the principle that the MSOP scheme is constitutional only insofar as it is a *bona fide* civil commitment system. In a *bona fide* commitment scheme, the state may not have the "forbidden purpose" of punishment. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring). In *Hendricks*, the Supreme Court called this the "threshold" matter in determining constitutional validity. Id. at 361-2. And the *Hendricks* court made it clear that the "punitive purpose" inquiry begins with the state's "disavow[al of] any punitive intent," but does not end there. *Id*. at 368.

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from

> the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Id. at 368-369.

In its decision, this Court has found repeatedly that the purpose that is required for the *bona fides* of a civil commitment system has been negated by the past two decades of executive and judicial implementation of the MSOP system. In both its design and its application, the Court has found, MSOP has "a punitive effect and application contrary to the purpose of civil commitment." *Karsjens*, 2015 WL 3755870, at *27.

The State's behavior over the past two decades has belied its espousals of a non-punitive purpose. The statutory procedures of the MSOP have not been sufficient to ensure the non-punitive execution of this complex system.

At its core, the Court's remedy should require the State (and Defendants) to purge itself of the forbidden purpose. The burden on the State should be heavy. The State must overcome two decades of persistent misapplication of a civil statute. Common sense dictates that recent and persistent past behavior is the best predictor of future behavior. The State must overcome the natural inference that it will continue to be guided by the forbidden purpose of punishment. For this reason, the kind of evidence that might have been appropriate to judge proper purpose *ab initio* –

espousals in litigation documents and statutory preambles, and broad statutory language – cannot suffice to meet the State's burden in this posture. The Court should insist on more concrete and pointed changes to satisfy itself that the State's improper purpose has been purged.

III. Evidence of reformed purpose must be substantive, not just procedural.

Remedies that are strictly process-oriented cannot suffice to satisfy the State's burden. Substantive remedies – specifically addressing the number of people under confinement and the specific risk-levels that justify preventive detention – are necessary.

Process remedies, such as mandated risk assessments, changes in petitioning practices, and the development of less restrictive alternatives – are certainly necessary. But the State's persistent two-decades of "slow-walking" the procedural protections that were theoretically already in the law demonstrates that proper process is not sufficient to guarantee a non-punitive purpose. If the past two decades have proved anything, it is that procedural due process, standing alone, cannot protect against the subterfuge of an intent to punish.

The MSOP is a complex system. It must be recalled, unfortunately, that the unconstitutional implementation of the State's civil law has taken place under the constant scrutiny of the state courts and the highest levels of state government. The MSOP's complexity means that multiple steps need to be taken in tandem, sequentially,

and successfully to achieve the changes that are necessary to achieve constitutionality. Risk assessments must be done, but they must be done according to the highest professional standards. They must apply the correct legal standards, but these standards are nowhere articulated in statutory or case law. The judgments of professionals, which of necessity utilize professional nomenclature and categories, must be appropriately translated into the categories of the law. The legal categories must be properly articulated and applied. All of these processes must be supervised for their compliance with the law, and with constitutional standards. A breakdown at any stage of the process can effectively sabotage constitutional compliance.

The Court's decision enumerates a series of breakdowns, particularly in the processes for insuring compliance with the durational limits on civil confinement. But fixing these processes – which will be difficult and complex – will not remove the vulnerability of the system from the pernicious effects of improper purpose. As we will demonstrate in the next section, holding the State accountable for the custody-reduction process will require the establishment of substantive risk-standards and numerical population reduction benchmarks.

IV. The Flaws in the State's Risk Assessment process require substantive benchmarks and standards.

The history of the MSOP system demonstrates that the process of risk-threshold determinations, as it has developed in Minnesota, is the Achilles heel for the

remediation of the broken MSOP system. Though major procedural changes are necessary (such as those recommended by the Plaintiffs), those changes can be rendered nugatory by the standardless, black-box adjudication system that has evolved in the State. At the urging of the State, the Minnesota courts have created an opaque "black box" for judging dangerousness. The Minnesota courts have failed to provide any meaningful superintendence of the MSOP system, having developed a jurisprudence that insulates risk-threshold decisions from review and accountability. Thus, Amici urge the Court to set substantive, as well as procedural, remedies. Only then will the Court be assured that the process changes are not being eroded by standardless, opaque decisions about risk.

Plaintiffs recommend that the State be required to petition the court for a reduction in custody, transfer or discharge for patients whose risk assessments demonstrate that they are not a high risk, thereby making their continued confinement to a secure treatment facility unconstitutional. Filing petitions in these circumstances is a critical first step to address their unconstitutional custody; however, it is just that – a first step. It does not necessarily follow that the judiciary will follow the state's recommendations. And if the petition is denied, it does not guarantee that the state will continue to advocate for reduction in custody or discharge through an appeals process, or even that an appeal would be successful. And it does not insulate the process from the intense political pressures that have been brought to bear in the past. Thus, to

ensure that the state no longer confines individuals who do not fit the criteria for civil commitment or who can be safely managed in the community, this court's remedies must be designed to do more than oblige the state to initiate a petition for reduction in custody or discharge.

The Minnesota appellate courts have thus far failed to step in to address MSOP's constitutional infirmities despite having over 400 opportunities to so. They have refused to consider a systemic challenge to the implementation of these laws by MSOP. *In re Civil Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. Ct. App. 2009). And they have refused to set standards for judging what level of risk is sufficient for commitment. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 21 (Minn. 2014)(declining to clarify the imprecise "highly likely" standard to mean that the state must demonstrate that it is substantially certain that future harmful sexual conduct will occur). They have, at almost every turn, removed impediments to commitment.

The appellate courts have played almost no role in assuring that only the "most dangerous" would be committed. Amici's prior brief to this Court noted that, in over 400 sex offender civil commitment appellate cases, only six decisions resulted in the reversal of a judgment of commitment on the merits, and only one of those decisions happened in the last 20 years. (*Brief of Amici Curiae Eric S. Janus and ACLU-MN* at 24-25, Document #408). Since that December, 2013 filing the appellate courts have not

reversed any more judgments of commitment on the merits, despite having considered approximately 50 more appeals.

In *In re Civil Commitment of Ince,* A12-1691, 2013 WL 1092438 at *9 (Minn. Ct. App. Mar. 18, 2013)(*Chief Judge Johnson concurring specially*)(*reversed and remanded* 847 N.W.2d 13, 21 (Minn. 2014)), Chief Judge Johnson's concurrence describes the failure of the Minnesota courts over nearly two decades to give any meaningful content to the standards for commitment. "The lack of a clear and definite legal standard is in tension with fundamental notions of the rule of law. A statute that may deprive a person of his or her liberty should have 'an understandable meaning with legal standards that courts must enforce.'" Id. at *14 (Johnson, J., concurring) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966)). He observed that the Minnesota courts had failed to set such standards: "Seventeen years after *Linehan III*, however, the precedential case-by-case determinations on this issue are too few in number and too general in their discussion." *Id*. at *15.

And Judge Stauber, in dissent, points out that dangerousness testimony and district court findings are couched within "credibility assessments insulated from appellate review. Given this standard of review, it will continue to be almost impossible to overturn even borderline cases . . . ." *Id.* at *24 (Stauber, J., dissenting).

Despite the serious concerns expressed by two of the three judges on the panel, they nonetheless affirmed Ince's civil commitment. *Id*. at *9. The Minnesota Supreme

Court granted review of the case and was asked to provide clarification to the meaning of the imprecise "highly likely to engage in acts of harmful sexual conduct" by requiring the government to demonstrate that it is substantially certain that future harmful sexual conduct will occur. *In re Civil Commitment of Ince*, 847 N.W.2d 13, 21 (Minn. 2014). The Court declined to do so. *Id.* The Court was also asked to update the factors enunciated in *Linehan I* for assessing dangerousness in order to reflect up to date research on re-offending and guide courts in making an objective measurement of an individual's risk of re-offense while avoiding the cumulative impact of double-counting some factors used in multiple assessment approaches. Again, the Court declined to provide any much-needed clarity. Instead the Court chose to defer to the trial courts to decide how much weight to attribute to each of the *Linehan* factors, noting that, "[a]s the trier of fact, the district court will be in the best position to determine the weight to be attributed to each factor… ". *Id* at 23-24.

Although the Court reversed and remanded the case to the District Court, the remand was specifically for the District Court to provide a clearer record and factual findings for appellate review. *Id.at 24-26.* The *Ince* case is perhaps the clearest example of the persistent failure of Minnesota courts to ensure that only the "most dangerous" face commitment to MSOP.

The courts have even approved civil commitment of individuals who only pose a moderate and even low risk based on actuarial risk assessment instruments. *See, e.g.*,

In re Commitment of Schmidt, No. A10-1588, 2011 WL 781343, at *3 (Minn. Ct. App. Mar. 08, 2011) (approving commitment of an individual whose risk on the MnSOST-R was below 50%); *In re Lueck*, No. A10-18, 2010 WL 3744394, at *3 (Minn. Ct. App. Sept. 28, 2010) (approving commitment of individual with re-offense risk of 19% on the STATIC-99 risk assessment tool); *In re Civil Commitment of Cermak*, No. A09-1080, 2009 WL 3736196, at *2 (Minn. Ct. App. Nov. 10, 2009) (approving commitment of person with score of 9 on MnSOST-R); *In re Commitment of Garza*, No. A08-0288, 2008 WL 2889700, at *4 (Minn. Ct. App. Jul. 29, 2008) (approving commitment of person with MnSOST-R score of 2); *In re Holden*, 2001 WL 683004, at *4 (approving commitment of person whose MnSOST-R score indicated a "low" risk of re-offense).

Indeed, risk predictions need not be based on state-of-the-art science, such as actuarial risk assessment instruments. *See Linehan IV*, 557 N.W.2d at 191 ("[D]angerousness prediction under the SDP Act is not simply a matter for statisticians."). The courts have never subjected risk assessment testimony to any form of searching reliability review normally applied to expert or scientific testimony. *See, e.g.*, *In re Schultz*, No. CX-99-1296, 1999 WL 1100941, at *5 (Minn. Ct. App. Nov. 30, 1999); *In Matter of Martinelli*, No. C6-98-569, 1998 WL 613845, at *6 (Minn. Ct. App. Sept. 15, 1998); *Matter of Clements*, 440 N.W.2d 133, 135-36 (Minn. Ct. App. 1989) (all characterizing questions about expert's testimony as determinative of "weight" and "credibility," not admissibility). And the courts have never insisted that risk assessment

testimony be presented in quantified form with information about error rates and confidence intervals. Thus, risk assessment decisions are largely subjective, relying on idiosyncratic judicial and expert definitions of "highly likely."

The Minnesota Court of Appeals has also foreclosed any type of scrutiny by District Courts into the widespread, systemic constitutional infirmities of the MSOP program. In *In re Civil Commitment of Travis*, 767 N.W.2d 52 (Minn. Ct. App. 2009), the Minnesota Court of Appeals had the opportunity to provide that scrutiny and definitively rejected the opportunity. The district court indicated its intention to examine the *bona fides* of the MSOP scheme:

> It is alarming when one compares the current near zero "success" rates of the program with the fact that at least some of the earlier laws had eventually released as many as 50 percent of those committed. As a result, rather than being a "step away" from confinements for dangerousness alone, the actual implementation of the SDP/SPP laws suggest a regime of [preventive] detention itself, heretofore anathema to due process.

Id. at 56 (quoting the district court's order).

The Court of Appeals queried whether the district court had authority to "examine substantive due process in a challenge to the constitutional purpose of civil commitment statutes by investigating treatment in practice and thus by studying the experiences of others." *Id*. at 56-57. The Court of Appeals unambiguously and authoritatively prohibited the district court from undertaking this critical examination.

The end result has been that the people actually subjected to commitment to MSOP are not the "most dangerous" as is required of a constitutional civil commitment scheme. A 2013, study by Minnesota Department of Corrections researcher Grant Duwe came to a similar conclusion. The study endeavored to determine the profile of individuals who have been chosen for civil commitment in Minnesota.[1] Duwe compared the likely recidivism rate for 105 civilly committed offenders had they not been committed, and the likely recidivism rate for offenders who were not civilly committed. Although the likely recidivism rate for civilly committed offenders would be slightly higher, he concluded that civilly committing those 105 offenders only resulted in a reduction of the state's overall four-year sexual recidivism rate of less than half of one percent (reduction from 3.2% to 2.8%). *Id*. at 6. Most importantly, the study concluded that "…nearly two-thirds of these offenders would be unlikely to be rearrested for another sex offense in their lifetime if they were released to the community. In other words, for every true positive, there are likely two false positives." *Id.* at 8. Applying this "false positive" rate to the 700-plus people who have been committed, we can conclude that in its twenty-year history the Minnesota courts have likely committed over 462 human beings who, had they been released, would not have been arrested for a new sex crime. In exchange, the program has likely reduced the overall rate of

[1] Duwe, G., To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota, *Journal of Criminal Justice* (2013), available at http://dx.doi.org/10.1016/j.jcrimjus.2013.06.009 . Nelson Declaration, Exhibit 1.

recidivism in Minnesota by only 0.4%. While every reduction in sexual violence is desirable, a reduction in sexual recidivism of 0.4% can hardly support the conclusion that only a narrow group of the "most dangerous" is being civilly committed.

Even when the Department of Human Services has been willing to support the eventual release of an offender, that decision is accompanied by tremendous political backlash. Take, for example, the case of Thomas Duvall. In August, 2013, the Special Review Board recommended Duvall's conditional release and that decision was initially supported by both Commissioner Jesson and Governor Dayton.[2] Soon after, though, Attorney General Swanson announced her vehement opposition to Duvall's release and moved to block it.[3] By early November, 2013, the case had become a political football and neither the Department of Human Services nor the Hennepin County Attorney's office opposed AG Swanson's motion to the Supreme Court Appeals Panel for a formal public hearing on whether to grant Duvall's conditional release.[4] Fearing that the issue would be used in the upcoming governor's race, Governor Dayton ordered DHS Commissioner Jesson to suspend provisional releases from the MSOP until concerns about its constitutionality could be addressed by the Legislature.[5] Governor Dayton

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[2] Brad Schrade, *Minnesota recommends release of two repeat sex offenders*, STAR TRIB., Aug. 20, 2013, (*available online at* http://www.startribune.com/aug-20-state-recommends-release-of-2-sex-offenders/220291461/).
[3] Paul McEnroe, *Minnesota attorney general tries to block release of serial rapist*, STAR TRIB., NOV. 3, 2013 (*available online at* http://www.startribune.com/nov-3-minn-ag-tries-to-block-release-of-serial-rapist/230366301/?c=y&page=1).
[4] Chris Serres, *Sex offender's case appears headed for public hearing*, STAR TRIB., Nov. 8, 2013 (*available online at* http://www.startribune.com/sex-offender-s-case-appears-headed-for-public-hearing/231239981/).
[5] Briana Bierschbach, *Dayton wants to temporarily suspend provisional release of sex offenders*, POLITICS IN MINNESOTA: CAPITOL REPORT, Nov. 13, 2013, (*available online at* http://politicsinminnesota.com/2013/11/dayton-wants-to-suspend-provisional-release-of-sex-offenders/).

justified his order at a news conference, stating, "The political partisanship made it clear this was going to be an issue seized upon and abused. We just can't proceed in that kind of environment." *Id.* By the following September, both Commissioner Jesson and the Hennepin County Attorney's reversed their position and opposed Duvall's conditional release and Duvall withdrew his petition.[6]

Given the Minnesota judiciary's institutional failure to address MSOP's constitutional infirmities and the intense political gamesmanship that surrounds even the possibility that an offender will be released, Amici urge this Court's to impose remedies that do more than ensure Petitions for reductions in custody, transfer and discharge are filed and litigated in good faith and are given meaningful consideration. In addition to these procedural reforms, we urge the Court to create benchmarks for the state to meet and require a regular independent review of all petitions filed, the outcome of those petitions and any subsequent appeals and a report on whether or not those benchmarks have been met, and whether or not the process has resulted in the release of individuals who can no longer be constitutionally confined to a secure treatment facility. As we describe more fully below, the benchmarks should be tied to the commitment and confinement rates of best-practice states such as Wisconsin and New York.

[6] John Collins, *Serial rapist withdraws petition for release*, MPR NEWS, Sept. 16, 2014, (*available online at* http://www.mprnews.org/story/2014/09/16/sex-offender-release-petition-withdrawn).

V. Legislative inaction should not be a barrier to implementing the remedies ordered by the Court

The Legislature has had ample opportunities to address the glaring problems with MSOP and they have so far failed to do so. Even in the face of a Federal Court Order declaring the program unconstitutional, Legislative leaders have not stepped up to remedy the constitutional infirmities.[7]

During the 2013 Legislative session, there was some movement on a bill that would have required evaluations of each person civilly committed, the creation of a specific treatment and intensive supervision plan and biennial reviews of adherence to the plan and presentation before a judicial appeals panel for potential release. Senate File 1014 passed the Minnesota Senate on May 14, 2013 and was referred to the House for consideration where it languished without any action. SF 1014 Status in the Senate for the 88th Legislature (2013 - 2014).[8] Reform bills introduced in the 2014 and 2015 sessions did not move out of committees in either body. Changes the Legislature did make in 2013 were largely cosmetic. *See* 2013 Laws of Minnesota, Ch. 49 §9 (recodifying and combining SPP and SDP sections).

[7] Briana Bierschbach, *Nobody is in a rush to fix Minnesota's sex offender program*, MinnPost, Aug. 11, 2015 (*available online at* https://www.minnpost.com/politics-policy/2015/08/nobody-rush-fix-minnesotas-sex-offender-program). The Legislature also ignored previous urgent recommendations for reform including a 2011 Legislative Auditor's report (Office of the Legislative Auditor, State of Minnesota, *Evaluation Report: Civil Commitment of Sex Offenders* (March 2011), available at http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf) and the unequivocal recommendations of the Task Force appointed by this Court.

[8] *available online at https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF1014&ssn=0&y=2013.*

There is strong evidence that the legislature's failure to act reflects an intentional and knowing abdication of constitutional duties. In response to this Court's February 2014 ruling allowing the case to move forward, Representative Cornish reacted with the query, "Why would any legislator touch this issue? Are you that worried about the civil rights of sex offenders? I admit it, I don't have the courage to have a sex offender released in my hometown."[9] Representative Cornish is also on record stating his preference to wait until the court forces the State to act.[10] In a 2015 William Mitchell Law Review Article, Senator Kathy Sheran provided important insight into why the legislature is intentionally abdicating its constitutional duties.

> Legislators know of this public anxiety [surrounding the release of sex offenders] and will avoid a vote that could be manipulated in a future election. This is a failure on the part of legislators to honor their oath of office to act in a manner that upholds the constitutional rights of all people, including sex offenders. It is a decision to place self-preservation ahead of the rights of the 700 persons currently civilly committed. The public will not confront this legislative inaction, because they share the desire to maintain their sense of safety at the expense of others' rights.

Senator Kathy Sheran, *MSOP: A Minnesota State Senator's Perspective*, 41 Wm. Mitchell L. Rev. 689, 695 (2015).

Amici agree with Plaintiffs' position that, at the core, the issue is the constitutionality of the confinement and that confinement is being carried out by the Defendants. It matters not whether the unconstitutional conditions are caused directly

[9] Chris Serres, *Federal judge questions legality of Minnesota's sex offender program*, STAR TRIB., Feb 20, 2014 (available online at http://www.startribune.com/judge-orders-reforms-of-minnesota-s-sex-offender-program/246389931/).

[10] *See e.g.* Trisha Volpe, *Trial may bring changes to sex offender program*, MPR NEWS, Feb. 9, 2015 (*available online at* http://www.mprnews.org/story/2015/02/06/court-case-changes-sex-offender-program).

by Defendants or by the overall state government's failure to remedy the unconstitutionality through the legislative and judicial process. Defendants are effectuating and are therefore responsible for the unconstitutional confinement and can be ordered to end it. The Defendants have been sued in both their individual and official capacities. It is well settled that official capacity claims are claims against the entity (in this case, the State of Minnesota) rather than simply the individual named defendants. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) *citing Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55(1978).

Past experience provides strong evidence that the legislature will continue to shirk its responsibility, and that there is a high likelihood of continued unconstitutionality. This legislative intransigence should not be a barrier to reform and the Court should spell out the ultimate remedies for non-compliance. The ultimate remedies cannot be limited to contempt. The State has demonstrated that monetary considerations are immaterial when it comes to the perpetuation of its punitive version of MSOP. And imprisonment of the Defendants is not a realistic or fair remedy for the intransigence of the political leaders of the state.

VI. Remedies imposed by the Court should include substantive benchmarks and standards, as well as a timetable for compliance and sanctions for non-compliance.

Even if the state complies with a court mandate to perform risk assessments, petition for reduction in custody, and provide timely adjudications, the unfortunate fact remains that there is no clearly articulated standard for commitment – and therefore, no clearly articulated standard for reduction in custody. Past history shows clearly that the Minnesota Courts will not develop or apply such standards. Without such standards, there is copious room for undercutting even the best risk-assessments; state-adjudications that lack articulable standards will not provide a remedy for the unconstitutionality of the MSOP system.

For these reasons, Amici urge the court to go beyond procedures and order substantive change so that the impact on the excessive population of MSOP can be directly measured. We recommend substantive remedies along two lines.

First, we urge the court to set benchmarks for the reduction of the population under commitment, and the movement of substantial numbers of clients into lower levels of supervision and custody. The Court should require the State to reduce the number of confined individuals to a number derived from a comparison with the best-practice states of Wisconsin and New York. The court should set a timeline for a full reduction, and intermediate benchmarks for partial reductions. We suggest that two years is ample for the complete reduction.

A second line of substantive remedies should require the State to articulate actionable and reviewable standards for the risk-threshold justifying confinement. The

current state articulation – "highly likely" – clearly is not adequate, especially given the absolute insulation from appellate review of these judicial determinations. The State should set out exactly how the risk-assessors are to judge whether an individual's level of risk is sufficient for confinement under the MSOP regime.

Finally, we believe that the only truly effective remedy may be the possibility of shutting down the MSOP system. The complexity of the MSOP system means that multiple actors, including courts and legislators, are required to fix the decades-in-the-making catastrophe that is MSOP. Yet those actors are not directly under this Court's jurisdiction. Nonetheless, the consequences of the legislative and state-judicial roles – which is the unconstitutionality of confinement – is directly within this Court's control. In the end, the only power the Court will have to deal with recalcitrant political leaders and standardless state court adjudications, is to enjoin the operation of the program. We urge the Court to make this eventuality plain.

VII. Conclusion

Though years in the making, and caused by multiple actions and failures to act, the unconstitutionality of the MSOP complex boils down to a singular wrong: the illegal and irreparable confinement of human beings. Over two decades, the State has developed, and tolerated, entrenched practices to prolong confinement and neuter due process, all in service to a punitive purpose whose forbidden presence deprives the entire system of its legitimacy. We urge the Court to focus its remedies not only on the

practices and processes, but also on the end results in terms of human confinement. If the State, within a reasonable period, does not demonstrate that it has purged itself of the forbidden purpose of punishment, and cleansed the MSOP complex of the decades-long fruits of its illegal purpose, the Court should close MSOP.

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