NO. 00-957

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

KANSAS,
PETITIONER,

V.

MICHAEL T. CRANE,
RESPONDENTS.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF KANSAS

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION, AND THE COMMITTEE FOR PUBLIC COUNSEL SEVICES, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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This *amici curiae* brief is submitted in support of Respondent, Michael T. Crane. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year in state and federal appeals courts, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues.

NACDL has a keen interest in the preservation of constitutional rights applicable to criminal prosecutions, and is concerned about the erosion of these safeguards by means of statutes authorizing nominally "civil" incapacitation in place of criminal punishment. NACDL has filed many briefs in cases before this Court involving the relationship between

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[1] As required by Rule 37.6 of this Court, counsel for *amici* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

mental health and criminal liability, including one in *Kansas v. Hendricks*, 521 U.S. 346 (1997) arguing that Kansas' Sexually Violent Predator Act (the "Act") imposes punishment in violation of the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution.

The National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights. The NLADA mostly recently has participated as an *amicus curiae* before this Court in support of the petitioner in *Dickerson v. United States*, 530 U.S. 428 (2000).

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. Because the right to be free from arbitrary restraint lies at the very heart of those constitutional guarantees, the ACLU has frequently appeared before this Court, either as direct counsel or as *amicus curiae*, in cases challenging the constitutionality of various civil and criminal commitment schemes. *See*, *e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *O'Connor v.*

Donaldson, 422 U.S 563 (1975). This case presents another such challenge. Its proper resolution is therefore a matter of significant concern to the ACLU and its members.

The Committee for Public Counsel Services (CPCS) is Massachusetts' public defender agency, created in 1983 to "establish, supervise and maintain a system for the appointment or assignment of counsel" for indigent persons involved in criminal and certain noncriminal judicial proceedings in which the right to counsel has been established. Mass.Gen.Laws c.211D, §5. Among such noncriminal proceedings are those in which the Commonwealth of Massachusetts seeks to commit putatively "sexually dangerous" persons for indeterminate periods of from one day to life. Mass.Gen.Laws c.123A.

The Massachusetts criteria for the commitment of sexually dangerous persons are, in pertinent respects, essentially equivalent to those in effect in Kansas, the subject of this Court's review in the instant action. In upholding Massachusetts' commitment law in a challenge as to its constitutionality, the Massachusetts Supreme Judicial Court, in large part, relied upon this Court's holding in *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Commonwealth v. Bruno,et al*, 432 Mass. 489 (2000). This Court's ruling in the instant action will have a substantial effect upon the substantive rights of the clients served by CPCS and, therefore, CPCS respectfully asserts a special interest therein.

SUMMARY OF ARGUMENT

The Kansas Supreme Court correctly held that the Due Process Clause requires States to circumscribe narrowly the class of sexual offenders subject to indefinite civil confinement so as to make inexorably clear that the true aims of confinement are not punitive. Because the language of Kansas' Sexually Violent Predators Act is sufficiently broad to accomodate punitive aims, the Kansas Supreme Court appropriately required that the jury be instructed that

confinement not be allowed absent a finding that the offender had a mental abnormality or personality disorder that rendered him unable to control his violent sexual impulses. Proof of volitional impairment was previously articulated by this Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), as a limiting feature of the Act necessary to make it constitutional under the Due Process Clause. The Court also made clear in *Hendricks* that without a showing that the offender was unable to control his criminal proclivities in the future, the Act would be punitive in nature and thereby violate the *Ex Post Facto* Clause of the Constitution in cases where the confinement is based, in part, upon acts that predated passage of the Act.

Civil commitment based upon volitional impairment, or some other equally severe cognitive or emotional disorder that disables a person from engaging in rational decisionmaking or caring for himself, has a long tradition in this country's common law. Kansas may not eschew this requirement under this Court's repeated admonitions that the maximum curtailment of liberty associated with civil confinement may only be imposed in the "narrow" circumstances described by this common law tradition.

ARGUMENT

The State of Kansas argues that the Constitution permits it to continue indefinitely the confinement of any sexual offender nearing the completion of his criminal sentence upon a showing that the offender has a personality disorder and is likely to reoffend in the future. Pet. Br. at 23. As illustrated by the facts of this case, that standard permits a state to obtain civil commitment merely by showing that the offender is an ordinary recidivist who is otherwise a proper target for criminal penalties.

The mental health professionals who testified in this case found Mr. Crane was likely to engage in violent sexual acts in the future because he has committed sex crimes in the

past. Pet. Br. at 4, 5, 6 (describing testimony and conclusions of state experts); *see also* Tr. at 447. And, they testified that he exhibited a personality disorder because his past criminal acts demonstrated a "pervasive pattern of disregard for and violation of the rights of others" insofar as he "fail[ed] to conform to social norms with respect to lawful behaviors," and manifested "aggressiveness." Pet. App. 10a. These characteristics are equally applicable to any person who has committed more than one violent crime. See Pet. App. 11a (describing testimony that more than 75% of prison inmates suffer from antisocial personality disorder).[2] The state's expert witnesses offered no meaningful basis to distinguish Mr. Crane from any other sexual offender who has committed multiple sexual offenses.

Kansas may be correct as a policy matter that violent sexual offenders who repeatedly violate the law should be incarcerated to prevent further harm to others. It is surely free to use its police power to enact harsh criminal punishments on recidivists in order to ensure they are incapacitated for as long as they may remain a danger to society. But any decision to punish persons for recidivist criminal histories must abide by the constitutional limitations that accompany the decision of a state to impose punishment. By permitting states to achieve lifelong incapacitation of virtually any repeat sexual offender through the mechanism of overly broad and malleable civil commitment standards,

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[2] *See also* Stephen D. Hart, Robert D. Hare & Timothy J. Harpur, *The Psychopathy Checklist – Revised (PCL-R): An Overview for Researchers and Clinicians* in 8 *Advances in Psychological Assessment* 103, 105 (J. Rosen & P. McReynolds eds. 1991) (75-80% of criminals are diagnosable with antisocial personality disorder); James S. Wulach, *Diagnosing the DSM-III Antisocial Personality Disorder*, 14 Prof. Psychol.: Res & Prac. 330 (1983) (75-80%); Romero & Williams, *Recidivism Among Convicted Sex Offenders: A 10 Year Follow Up Study*, 49(1) Federal Probation (USAO 1985) (70% of all sexual offenders have a personality disorder).

this Court would render the Constitution ineffectual in preventing states from masking punitive aims in individual commitment cases and thereby avoiding time honored limits on their power to impose punishment.

I. THE DUE PROCESS CLAUSE PROHIBITS INDEFINITE CONFINEMENT OF A PREVIOUSLY PUNISHED SEX OFFENDER WHO IS LIKELY TO REOFFEND WITHOUT A SHOWING THAT THE OFFENDER IS UNABLE TO CONTROL HIS PROPENSITY TO ENGAGE IN FUTURE CRIMINAL BEHAVIOR

This Court has had numerous opportunities to review the various efforts of state legislatures to redress the problem of psychologically impaired offenders who repeatedly commit sexual crimes. *See Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Specht v. Patterson*, 386 U.S. 605 (1967); *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). The sampling of cases that have reached this Court illustrate the wide variety of different approaches crafted by the states in that regard. For instance, some states have permitted commitment of mentally impaired sexual offenders for treatment in lieu of a criminal prosecution altogether, *see, e.g.*, *Allen*, *Humphrey* and *Pearson*, *supra*, whereas others have permitted commitment following conviction of a crime as an alternative to a criminal sentence in order to provide treatment, *see, e.g., Specht, Humphrey*, s*upra,* while more recent statutes authorize commitment of such offenders after they have been convicted of and served their entire sentences for sex offenses, yet strongly suggest that such confinement is not motivated primarily or at all by a desire to treat these individuals, *see, e.g., Hendricks*, *Seling*, *supra*.

A common feature in this Court's review of the various constitutional challenges that have been mounted against each of these commitment schemes is its unwavering insistence that Due Process imposes meaningful limits on the ability of States to define broadly the class of persons subject to indefinite civil confinement. These limits are necessary, among other reasons, to assure that the State is acting with a bona fide therapeutic or other permissible civil motive and is not using civil law to mask a punitive purpose and thereby circumvent constitutional limits on its ability to use the criminal law to punish repeat sexual offenders.

In this case, the Kansas Supreme Court held that the instructions to the jury setting forth the standards for civil confinement under Kansas' Sexually Violent Predator Act violated the Due Process Clause as interpreted by this Court in *Kansas v. Hendricks*. Specifically, it held that the Due Process Clause entitled Mr. Crane to a jury determination that he lacked the ability to control his dangerous sexual impulses. Pet. App. 12a. The Kansas Supreme Court correctly stated and applied the law of *Hendricks*. Unless the law is limited to those who are unable to control their criminal sexual proclivities, the Act provides no clear standards by which the class of civil committees could be distinguished from pure recidivists. Under our Constitution, only the criminal law can be used to deter or exact retribution against recidivists who do not suffer from a mental condition that significantly impairs their behavioral controls. The criminal law is perfectly adequate for those purposes.

As interpreted by the Attorney General, the Act gives Kansas the ability to target for additional confinement particular offenders who are fully capable of conforming their future behavior to the law, but for whom the state believes the criminal system – for whatever reason – produced an insufficiently long punishment. Permitting Kansas the unchecked discretion to use its civil commitment

statutes to punish sexual offenders for future dangerousness measured by a demonstrated unwillingness, rather than inability, to obey the law offends the Constitution and a long history of cases decided by this Court.

A. In *Kansas v. Hendricks*, Lack of Volitional Control Was A Necessary Component of the Court's Holding that Kansas' Sexually Violent Predator Act Satisfies Substantive Due Process

In *Hendricks*, this Court reversed a judgment of the Kansas Supreme Court that had invalidated the Sexually Violent Predator Act as a violation of substantive due process. The Court unanimously held that the Act's coverage of persons who suffered from a "mental abnormality" satisfied the "narrow circumstances" in which "forcible civil detainment" is constitutionally permissible, so long as it applies to the "limited subclass" of "people who are unable to control their behavior and who thereby pose a danger to the public health and safety." 521 U.S. at 357. *See also id.* at 375 (Breyer dissenting in part) (no violation of substantive due process, because "Hendrick's abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions").

There can be no doubt that it was necessary to the due process holding of the Court that statutes authorizing involuntary detainment beyond a determinate criminal sentence already served must be narrowly circumscribed to target only those mentally abnormal individuals for which the criminal system is functionally ill suited to address their problematic behavior. In *Hendricks*, the Court found a sufficient narrowing principle in a requirement that the sexual offender be unable to control his criminal sexual impulses, without foreclosing the possibility that other limiting principles might also satisfy Due Process.

The paragraph stating the majority's due process holding in *Hendricks* makes inescapably clear that the Court's understanding that the Act was limited to those with impaired volitional control provided the sort of "added statutory requirement" necessary to save the Act from constitutional infirmity. The Court began by acknowledging that a state cannot constitutionally incapacitate a person indefinitely on "[a] finding of dangerousness, standing alone." *Id.*at 358. Due process requires "proof of some additional factor, such as a 'mental illness' or 'mental abnormality,'" that "limit[s] involuntary civil confinement to *those who suffer from a volitional impairment rendering them dangerous beyond their control*." *Id.* (emphasis added). The Court then articulated its understanding that the Kansas Act required proof of the "existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.*

Because the "precommitment requirement of a 'mental abnormality' . . .narrows the class of persons eligible for confinement to those who are unable to control their dangerousness," *id.* at 358, the Court held that Due Process did not require the state to restrict coverage of the statute further to only those who demonstrate a "mental illness." *Id.* at 359. The Court reasoned that it was not the "nomenclature" of mental illness *per se* that had operated in the past to make civil commitment statutes constitutional, but rather it was "[the] criteria relating to an individual's inability to control his dangerousness." *Id.* at 360. Simply put, only if Kansas proved *both* the existence of a mental condition – which state legislatures have broad discretion to define – *and* a resulting failure of self-control was due process satisfied.

The Court articulated a logical reason for finding the Act constitutional only if its reach was limited to those who lack an ability to control dangerous behavior. It is only when a prediction of future dangerousness is "coupled" with a "lack

of volitional control" that the potential committee may be "distinguishe[d]" from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* A person who lacks the ability to conform his behavior to societal norms due to a personality disorder will not be deterred by the prospect of lengthy prison sentences and, it might be argued, is less deserving of retributive sanctions inasmuch as he is less morally culpable for the actions he takes. On the other hand, one who both appreciates the wrongfulness of criminal conduct and is mentally and emotionally capable of restraining himself from engaging in such conduct is precisely the target of the criminal law.

The criminal law is, in theory, capable of protecting the public by either deterring the recidivist offender with volitional control, or absent deterrence, imposing prison sentences sufficient in duration to incapacitate the offender for as long as necessary to protect the public. The *Hendricks* Court recognized, however, that states may not wish to use the penal system to incapacitate indefinitely offenders who are likely to repeat their crimes but who cannot control their criminal inclinations. State legislators could rationally believe that a lifetime penal sentence is inappropriate for this class of offenders given the reduced deterrent effect on such persons and the disproportionate retribution that may be perceived by imposing a lengthy criminal sentence on someone who could not, for organic or acquired psychological reasons, suppress behavior he knows to be wrong. On the other hand, traditional civil commitment schemes may not be adequate to capture these offenders, insofar as those statutes are often directed at persons whose mental illness prevents them from forming criminal intent at all, makes them incompetent to stand trial or disables them from caring for themselves. The *Hendricks* Court therefore read the Constitution to permit states to use the more flexible constitutional measures for civil confinement in cases like

Hendricks – where civil and criminal confinement might be used productively in tandem – so long as they target selectively an identifiable class of persons for whom *exclusive* use of the criminal justice system could not achieve the state's aims.

This reasoning in *Hendricks* followed directly from this Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In *Foucha*, the Court upheld a substantive due process challenge to a civil confinement law that permitted continued confinement of a person who had been found not guilty by reason of insanity after the detainee had regained his sanity and could no longer be classified as mentally ill. The State argued that Foucha's "antisocial personality [] as evidenced by his conduct at the facility" justified continued confinement because it rendered him a danger to himself or others. *Id.* at 78. The Court refused to accept this showing as a basis for civil confinement that satisfied Due Process (*id.* at 82-83):

> If Foucha committed criminal acts [while committed to a psychiatric hospital], such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are normal means of dealing with patterns of criminal conduct.
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> Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct . . . he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder

> that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would only be a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Like Louisiana in *Foucha*, Kansas has adopted an overly broad category of potential subjects for indefinite civil confinement, which improperly sweeps within its reach persons who are appropriate targets for the criminal justice system. Without a more conscientious tailoring of its civil commitment scheme, Kansas could use the vehicle of civil commitment to impose or extend criminal punishment.

B. Adopting Kansas' Position In This Case Would Undermine A Critical Basis For the Majority's Disposition of the *Ex Post Facto* Challenges In *Hendricks*

Having found that the Act, so limited, did not violate substantive due process, the Court in *Hendricks* then addressed respondent's claim that his confinement violated the Double Jeopardy and *Ex Post Facto* Clauses of the Constitution. Hendricks argued that his confinement under the Sexually Violent Predators Act constituted successive punishment for crimes for which he had already served his sentence. Four justices held that the confinement of Hendricks violated the *Ex Post Facto* Clause because its application was reasonably considered punitive in light of the apparent sham of the State's assertion that it was acting for the civil purpose of providing treatment. *Hendricks*, 521 U.S. at 394. The majority, however, disagreed that the stated aims of treatment were a sham.

For the majority, the volitional impairment requirement that the Court read into the Act enabled it to find a legitimate

non-punitive aim in the statute and thereby uphold Hendricks' confinement as not "so punitive in purpose or effect as to negate the State's intention to deem it 'civil.'" *Id.* at 361 (internal quotations omitted). The Court reached this conclusion, because of its view that the Act could not be intended to function as a deterrent in light of the volitional impairment requirement:

> Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their own behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.

Id. at 362-63. Likewise, it stated that the duration of the civil confinement demonstrated a non-punitive purpose, because the Act prohibits confinement once the person no longer "suffers from a mental abnormality rendering him unable to control his dangerousness." *Id.* at 364.

At least some members of the five-justice majority would likely have found the Act punitive in nature if Kansas had in *Hendricks* articulated the position it takes now. To be consistent with its legal position here, Kansas must concede that civil commitment under the Act would have a deterrent effect if it applies to those who can control their behavior. But as Justice Kennedy pointed out in his *Hendricks* concurrence, "retribution and general deterrence are reserved for the criminal system alone." *Id.* at 373. Moreover, Kansas would also have to disagree that the duration of the confinement would be cut short by a showing that the offender has regained control over his future actions, as was assumed by the majority in *Hendricks.* So long as Kansas could show that the offender's antisocial personality disorder remained, Kansas believes continuing confinement is appropriate.

Justice Kennedy wrote separately in *Hendricks* to point out the "dangers inherent when a civil confinement law is used in conjunction with the criminal process." *Id.* at 371-72. He warily forecast situations in which the state could use civil confinement as "a mechanism for retribution or general deterrence" or "to impose punishment after the State makes an improvident plea bargain on the criminal side." *Id.* at 373. Such a concern seems well grounded in light of statistics showing that states do not appear to be utilizing the full range of punishments authorized by the criminal law. Lawrence A. Greenfield, *Sex Offenses and Offenders, An Analysis of Data on Rape and Sexual Assault*, Bureau of Justice Statistics, NCJ-163392, February 1997, at 14, available at http://www.ojp.usdoj.gov/bjs (only 2/3 of convicted rape offenders receive a prison sentence and the average rapist served only half of their 10-year sentences). To the extent state prosecutors enter plea agreements resulting in minimal prison time as a result of budget crunches or the overwhelming press of criminal business or any other reason, it would be improper to permit a state to compensate for its failure to pursue increased criminal sentences by achieving indefinite, punitive confinement under the guise of civil commitment.

Such a concern would be far less likely to come to fruition if the civil confinement statute was limited in its application to (1) those whom the criminal law could not deter and (2) those against whom the state would be less likely to seek the full amount of retribution due to diminished moral culpability. Justice Kennedy voted with the majority because he was convinced that Kansas' Act – with its requirement of volitional impairment – did not target "too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks*, 521 U.S. at 373. Without a requirement that the mental abnormality or personality disorder serving as the basis for confinement cause a lack of volitional control, any precision

in the definition of the category of persons to which the Act applies vanishes.

The Court's recent decision in *Seling v. Young*, 531 U.S. 250 (2001), emphasizes the practical ramifications of the Court's reliance in *Hendricks* on a volitional impairment requirement to find the Act was not punitive. In *Seling*, the Court held that once a commitment statute is found to be facially civil in its general application, a committee may not mount an *Ex Post Facto* challenge based on punitive conditions of confinement resulting from the particular application of the statute to him. In *Hendricks*, the majority found the Act was not, on its face, punitive because it was limited to those who lacked volitional control. But if Kansas uses the Act to target individuals who can control their impulses, subjects them to punitive confinement conditions and deprives them of access to treatment, those individuals would be unable to mount a constitutional challenge, in light of *Hendricks* and *Seling*, establishing that the Act – as applied to them – was punitive and a violation of the *Ex Post Facto* clause. The majority in *Hendricks* could not have believed it was authorizing Kansas to accomplish its punitive aims through applications flatly inconsistent with the assumptions on which its *Ex Post Facto* holding was based.[3]

C. *Hendricks'* Requirement of a Volitional Impairment For Civil Commitment Is Steeped In The Common Law and This Court's Jurisprudence

English common law provided for the confinement of persons deemed insane and dangerous to the public. Although the common law granted the mentally ill few legal

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[3] It is worth noting that Kansas' civil commitment scheme also fails to pass constitutional muster if characterized as a preventive detention measure, because it lacks the procedural protections and the limited duration required for preventive detention by this Court. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987).

protections, it limited confinement to the duration of the person's lack of control over his or her reason:

> [I]n the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our antient [sic] law, that persons deprived of their reason might be confined till they recovered their senses.

4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at 25 (1769).

During the colonial period in this country, common law provided that anyone could arrest and confine a person deemed "furiously insane" or "dangerous to be permitted to be at large." Albert Deutsch, THE MENTALLY ILL IN AMERICA 419 (2d ed. 1949) (internal quotations omitted). Confinement could continue only for the duration of the person's dangerous condition. *Id.* At common law, lack of volitional control was intricately linked to dangerous mental illness and was a requirement for continuing commitment. In 1689, the records of York County, Virginia describe an order regarding a "madman" named John Stock,

> whoe keepes running about the neighborhood day and night in a sad Distracted Condition to the great Disturbance of the people, therefore for the prevention of his doeing any further Mischeife It is Ordered by the Court that Mr. Robt. Read, High Sherr: doe take Care that the said Stock bee Lade hold of and safely kept in some close Roome, where hee shall not bee suffered to go abroad until hee bee in a better condition to Governe himselfe . . .

Deutsch, *supra* at 43.

Developments in psychiatry in the nineteenth century brought about reform of mental institutions and changes in laws concerning the mentally ill. Around the time of passage of the Fourteenth Amendment, many states passed statutes that established procedural safeguards for persons whom the State or relatives wished to commit to insane asylums. A newly recognized form of mental illness called "moral insanity" also greatly impacted nineteenth century laws. This form of insanity, considered distinct from "intellectual insanity," was characterized by an uncontrollable impulse to commit particular offenses even though the affected individual was otherwise sane. Francis Wharton, 1 WHARTON AND STILLE'S MEDICAL JURISPRUDENCE 567 (3d ed. 1873).

These developments in the nineteenth century, however, did not significantly alter common law provisions regarding the civil commitment of mentally ill persons. As late as 1880, the Supreme Court of New Hampshire provided the following summary of the common law regarding the arrest of dangerous mentally ill persons:

> [I]t is lawful to seize and restrain any person incapable of controlling his own actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity, and ceases with the necessity.

Keleher v. Putnam, 60 N.H. 30, 31 (1880). This statement of late nineteenth century law demonstrates that despite changes in statutory laws and conceptions of mental illness, the common law preserved a requirement of volitional impairment or other extreme cognitive impairment to justify the continuing confinement of dangerous mentally ill individuals.

The twentieth century witnessed the development of the first legislation specifically allowing the civil commitment of dangerous sex offenders. In the late 1930s, many states enacted "sexual psychopath" statutes that provided for the civil commitment of this class of recidivists. Committee on Psychiatry and Law, Group for the Advancement of Psychiatry, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S, Pub. No. 98 at 853 (April 1977). Fueled by widespread publicity of violent sexual offenses, these statutes set forth various criteria for commitment, including an explicit or implied requirement that the committed individual pose a high probability of future risk to the community. *Id.* at 853, 863. To express this requirement, legislatures used language similar to common law provisions regarding confinement of the mentally ill. One commonly used phrase was "[persons who] lack control over their impulses." *Id.* at 863 (internal quotations omitted).

This Court has addressed constitutional challenges to a variety of civil commitment laws with this common law tradition in mind. Most notably, the Court in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), upheld a civil commitment law permitting confinement of persons with "psychopathic personalit[ies]" evidenced by a "habitual course of misconduct in sexual matters." *Id.* at 272 & 273. The Court held that the statute was not constitutionally vague because it required proof that the committee demonstrate "an utter lack of power to control [his] sexual impulses." *Id.* at 274 (internal quotations omitted). Although the Minnesota Supreme Court had merely stated that coverage of the statute *included* persons who lacked control, the Court adopted this feature of the statute as mandatory to avoid the constitutional doubt that would be raised if it applied to those outside that definition. *Id.* at 274. Nothing in the Court's decisions since *Pearson* eliminates the constitutional doubt engendered by civil

confinement of offenders who are able to exercise rational and emotional control over their behavior.

II. KANSAS HAS NOT OTHERWISE SHOWN A COMPELLING JUSTIFICATION FOR THE MASSIVE CURTAILMENT OF LIBERTY THAT RESULTS FROM ITS CIVIL CONFINEMENT SCHEME

Long before its decision in *Hendricks*, this Court emphasized the principle that the Fourteenth Amendment places stringent limits on the ability of a state to impose the "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 506 & 509 (1972), attendant to indefinite confinement under the rubric of a civil statute. Last Term, the Court stated:

> A statute permitting indefinite detention . . . would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and "narrow" non-punitive "circumstances," where a special justification such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint."

Zadvydas v. Davis, No. 99-7791, slip. op. at 9-10 (U.S. June 28, 2001) (citations omitted).

No doubt, the Court has permitted an individual's liberty interests to be overcome in various circumstances, but only

on a demonstration by the state that civil confinement is specially needed to redress a legitimate, non-punitive aim and that the nature and duration of the confinement is tailored to that aim. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Foucha*, 504 U.S. at 87-88 (O'Connor concurring) (nature and duration of detention must be "tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness"). Kansas has provided no justification for the breadth and vagueness of the criteria on which it seeks confinement under the Sexually Violent Predators Act, which might otherwise justify its rejection of a volitional control requirement.

The Court has recognized that an individual's liberty may be overcome in cases where there is no indication in the record one way or the other mentioning volitional control, but nonetheless has insisted upon evidence of some other kind of well-defined, severe inability to function, whether deriving from cognitive or emotional impairments. For instance, the Court has approved civil confinement where the state invokes its *parens patriae* powers to incapacitate mentally ill persons who are dangerous to self or others and who are "unable because of emotional disorders to care for themselves." *Addington v. Texas*, 441 U.S. 418, 426 (1979). It has similarly approved commitment of those whose mental illnesses rise to a level of insanity so severe that they are excused from criminal responsibility altogether, *Jones v. United States*, 463 U.S. 354 (1983), so long as the confinement ends if and when when the offender regains sanity. *Foucha, supra.*

Kansas has not made, nor could it make on this record, any comparable showing that its Sexual Predator Act falls within the few "special and narrow non-punitive circumstances," *Zadvydas*, slip. op. at 10, in which the Court has approved indefinite civil confinement. Rather, its position is much more akin to that of the state in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where the Court rejected

the proffered justifications for involuntarily confining for an indefinite period, without treatment, a person adjudged mentally ill but not dangerous. Here, the state wishes to confine – with a principal motivation of incapacitation, not treatment, *Hendricks*, 521 U.S. at 366 – all sexual offenders who are dangerous, but whose mental abnormalities make them no different than the prison population at large. There is nothing "special" or "narrow" about Kansas' position in this case, and it calls into substantial doubt the basis upon which it asserted in *Hendricks* that its aims were non-punitive.

CONCLUSION

For the foregoing reasons, the decision of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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