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Even sex offenders have constitutional rights

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On Monday, the Supreme Court ruled that a North Carolina preventing sex offenders from accessing social media and other websites – without any attempt to tailor restrictions to potential contact with minors – violated the First Amendment. But restrictions on the freedom of speech aren't the only unconstitutional deprivations sex offenders face.

In 1994, Minnesota passed what has become arguably the most aggressive and restrictive sex-offender civil-commitment statute in the country. The Minnesota Sex Offender Program (MSOP) provides for the indefinite civil commitment of "sexually dangerous" individuals, over and beyond whatever criminal sentence they may have already completed.

And while there is technically a system in place whereby committed individuals can petition for release or a loosening of their restrictions, in the more than 20 years that the MSOP has existed, only one person has ever been fully discharged (someone in the program for offenses committed as a minor, and he was only discharged after a court challenge).

The Supreme Court has held that states have the authority to commit individuals against their will outside the traditional criminal justice context, but only for the purpose of keeping genuinely dangerous people off the streets while undergoing rehabilitative treatment. Punishment and deterrence are legitimate goals exclusively of the criminal justice system, so any deprivation of liberty for either of those two purposes must follow only from that system, with all the procedural protections our Constitution requires.

What sets Minnesota's program apart from other schemes that have been upheld is that it doesn't provide for any sort of periodic assessment to determine who does or doesn't meet the requirements for discharge. By the state's own admission, hundreds of civilly committed individuals have never received an assessment of their risk to the public, and hundreds more have received assessments only sporadically.

The MSOP is aware that at least some of the people in its custody satisfy statutory-discharge criteria, yet has taken no steps to determine who they are, let alone begin discharge proceedings. For these reasons, Kevin Karsjens and other similarly committed individuals have brought a federal class action challenging the MSOP as an irrational violation of their right to freedom from bodily restriction. They prevailed in the trial court, but the U.S. Court of Appeals for the Eighth Circuit reversed, stating that the plaintiffs have no liberty interest in freedom from

physical restraint—not that their liberty interest must be balanced against the state's interest in protecting the public from violence, but that for sex offenders, that liberty interest simply does not exist.

The plaintiffs now seek Supreme Court review. Cato, joined by the Reason Foundation, has filed an amicus brief in support of the committed individuals. The lack of periodic risk assessment and the punitive nature of the state's policies represent an unconstitutional attempt to exact effectively criminal penalties on individuals who have not been provided the full procedural protections of criminal law.

The high court should intervene and repair the damage done by the unfettered confinement of sex offenders and restore the appropriate level of constitutional scrutiny to serious deprivations of liberty.

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