Case No. 05-2750

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELIZABETH M., on behalf of herself and on behalf of others similarly situated, et al.,

Plaintiffs/Appellees,

v.

NANCY MONTENEZ, in her official capacity as the Director of Nebraska Department of Health and Human Services, et al.,

Defendants/Appellants.

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

BRIEF OF APPELLEES

Respectfully submitted by:

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SUMMARY OF THE ARGUMENT

In certifying the class in this matter, the United States District Court for the District of Nebraska, Honorable Lyle E. Strom, Senior Judge, did not abuse its discretion. First, contrary to the Appellants' argument, which is raised for the first time on appeal and is thereby waived, the presence of *some* individual factual determinations does not automatically render a case inappropriate for class certification. The Appellants rely on an irrelevant case, misstate the appropriate standards, and misconstrue the term "course of events" in challenging the district court's finding of typicality. Second, the Appellants challenge to the class certification of those women who, while confined in Appellant's facilities in the past, were sexually victimized both ignores the allegations of continuing and repeated violations and disregards the appropriateness of such class members: "When the claim on the merits is 'capable of repetition, yet evading review.'" Third, the Appellants' argument, raised for the first time on appeal and accordingly waived, that the portion of the class consisting of those women who, while confined in their facilities, were subject to a panoply of sexual degradation is indefinite ignores the clear precedent that classes are only deemed indefinite if they are entirely administratively unfeasible. The district court's certification order supports the administrative feasibility of the class. Finally, the Appellants'

contention that the women who will be confined in their facilities in the future and impacted by their policies and practices are indefinite and lack standing defies years of legal precedent and relies on easily distinguishable cases not supportive of the Appellants' proposition. The *class itself* has standing, and is completely administratively feasible. To find otherwise contravenes decades of precedent from district courts to the United States Supreme Court.

STATEMENT OF FACTS

This is a civil rights action by women, all of whom are or were involuntarily confined in the custody of the Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities, who have a mental illness, and some who have co-occurring developmental disabilities, physical disabilities, and/or chemical dependencies. (Jt. App. at 4-6). These women are requesting declaratory and injunctive relief from policies, procedures, and practices, known and permitted by the Appellants and their officials, policy-makers, and employees, that tolerated their repeated rape, sexual assault, sexual exploitation, and sexual harassment by male staff members and male residents upon them; and that failed to meet Appellants' obligations to provide both a safe, humane, and therapeutic environment and to provide

constitutionally required minimal levels of treatment, including treatment for trauma, for them in the NHHSS Regional Centers and in community facilities funded and regulated by NHHSS, pursuant to their obligations under the United States Constitution, and state and federal laws. (Jt. App. at 12-36; Jt. App. at 114-117, n. 1 [note materials located in the Jt. App., at 1509-1539, 550-586, and 702-882]; and Jt. App. 1010-1106 [reports from the Centers for Medicare and Medicaid Services (CMS)]).

Many of these women were known, or should have been known, to the Appellants as having histories of sexual victimization and as being highly vulnerable to sexual predators. (Jt. App. at 36-37). The Appellants, after placing the women in involuntary custody, were responsible for their treatment and at least minimal constitutional standards of care and protection. *See Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977):

> If [a state] chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations. *Id*.

In almost every way, the Appellees represent the most vulnerable women in our society. Yet, upon confining these vulnerable women in custody, the Appellants appallingly failed to protect these women from sexual assaults, exploitation, and harassment; failed to adequately protect them from pervasive and systemic practices of exploitation and intimidation;

and failed to provide them with individualized mental health programs and services designed to identify, treat, and ameliorate their mental illnesses and the consequences of their history of physical, emotional, and/or sexual trauma. (Jt. App. at 37-47, 114-117, n. 1. [note materials located in the Jt. App. at 1509-1539, 550-586, and 702-882]; and Jt. App. 1010-1106.

Examples of these egregious and systemic failures by the Appellants are illustrated in instances where representative Appellees were sexually assaulted by male residents whom the Appellants knew had previously committed sexual assaults at NHHSS mental health facilities, as well as in instances where the representative Appellees were sexually assaulted, exploited, or harassed by male staff members. (Jt. App. at 12-43, 118-119 n. 2 [note materials located in the Jt. App. at 1509-1539, 550-586, and 702-882]). In one instance, a male staff member who raped, sexually assaulted, and sexually abused numerous Appellees had a felony criminal record and an employment record involving sexually inappropriate behavior resulting in termination from that employment prior to his hiring at one of the NHHSS facilities. (Jt. App. at 119 n. 3 [note materials located in the Jt. App. at 1848-1850, 1019, and 702-882.]). Months before his rape of many of the Appellees, the Appellants' female staff members repeated complaints relating to this employee's sexually aggressive behavior toward them, and

toward the women-Appellees in the Appellants' care. (Jt. App. at 1018-1020. [CMS report - 7/24/02 indicating that the employee, identified as "S1" made inappropriate sexual advances towards fellow employees as early as May, 2001.]). Further, the Appellants' practice and procedure was to repeatedly fail to investigate the women's' grievances of sexual abuse; ignore the allegations; refuse to take remedial protective action; fail to provide mental health treatment for the trauma suffered; and fail to follow their own personnel policies and procedures as required by Nebraska law. (Jt. App. 120-121 n. 4 [note materials located in the Jt. App. at 433, 435-436, 1012-1015, 1054-1058, 1177-1183, 702-822.]). The Appellants continue in their failure to provide even minimal treatment and in their failure to protect these, and all women, while confined in their custody.

ARGUMENT ON THE MERITS

I. Standard of Review.

The Appellants completely confuse the applicable standard of review in this case. First, the Appellants claim that "the appropriate test for deciding whether an appeal under Fed. R. Civ. P. 23(f) is to be *allowed* is found in *In re: Lorazepam and Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002)." (Appellants' Brief at 11) (emphasis added). However, this Court has not even adopted the *Lorazepam* standard. (*See* discussion in Appellees' Brief opposing Petition to Appeal at 1-3).

Second, the *Lorazepam* standard only applies to the question of whether or not to *allow* an appeal in class certification cases, and is thus irrelevant at this stage. Once this Court has *allowed* an appeal of a district court ruling on class certification, the applicable standard of review is abuse of discretion. *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983) ("Determining the appropriateness of a class action is within the discretion of the trial court and will be overturned only upon a showing of an *abuse of that discretion*.") (emphasis added); *See also Glover v. Standard Federal Bank*, 283 F.3d 953, 959 (8th Cir. 2002).

II. The Appellants Erroneously Confuse the Standards for Class Certification with a Determination Based on the Merits.

Throughout their statement of facts, the Appellants, as they did at the district court level, continue to confuse the standards for class certification with a decision based on the merits of the case. (Appellants' Brief at 4-9). Thus, the Appellants make numerous references to judicial standards that, while possibly relevant to a motion for summary judgment or a motion to dismiss, are irrelevant to a motion for class certification. *See e.g.*, Appellants' Brief at 14-20. It should be noted that the Appellants' arguments would fail even if they were applied to a motion for summary judgment or motion to dismiss. For example, although the Appellants, in their brief, attempt to argue that the sexual assaults suffered by two of the

sixteen named Plaintiffs were "consensual," the Appellants' own policy makers and officials have already admitted under oath that women with mental illnesses, experiencing setbacks serious enough to warrant institutionalization, are *incapable* of "consenting" to such contact.[1] Such statements by the Appellants only highlight their severe indifference, and shocking callousness, toward the women with mental illnesses in their custody who were subjected to repeated sexual abuse.

Although the Appellees welcome a discussion of the merits of the case; as a matter of law, in considering a motion for class certification, a court may *not* consider the factual merits or the strengths or weaknesses of the Plaintiffs' underlying claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). For purposes of class certification, the substantive allegations of the complaint must be accepted as true. *Id*. (*See also Lockwood Motors, Inc, v. General Motors Corp.*, 162, F.R.D. 569, 573 (D. Minn. 1995).

III. The Appellants' New Opposition to the District Court's "Certification of a Class for Declaratory Relief," and their prior contentions relating to typicality, are without merit.

In their Brief in Opposition to Class Certification at the district court level, the Appellants did make many of the arguments now raised in Section

[1] *See* Exhibit 4 of class certification, 148:9-17 and 151:7-11; and Exhibit 5 of class certification, 86:17-87:6.

I of their Appellate Brief. However, each of these concerns specifically related to the issue of "typicality" required by F.R.C.P. 23(a)(3).

Now, on appeal, the Appellants raise the issue in terms of "declaratory relief" being allegedly inappropriate because a "case by case determination must be made." (Appellants' brief at 14, citing *Glover v Standard Federal Bank*, 283 F.3d 953, 965 (8th Cir. 2002)). This argument was not raised at the district court level. (Jt. App. at 146-168 [Appellants' district court brief opposing certification] *passim*. As such, the newly raised argument is waived. *Shanklin v. Fitzgerald*, 397 F.3d 596 (8th Cir. 2005) ("Absent exceptional circumstances, we cannot consider issues not raised in the district court."). Moreover, as demonstrated, *infra*, the *Glover* case is easily distinguishable and is not even applicable to the issues involved in this case.

A. The presence of <u>some</u> individual factual differences and <u>some</u> questions that affect individual members does not thwart the typicality of the claims or make class certification otherwise inappropriate.

The Appellants point to *Glover* for the proposition that "where a case-by-case determination must be made, class certification is "impracticable." (Appellant's Brief at 14, citing *Glover*, 283 F.3d 953, 965). However, the Appellants misunderstand the nature of the *Glover* case. In *Glover*, the applicable provision of Rule 23(b) was 23(b)(3), requiring that "questions of law or fact common to the members of the class predominate over any

questions affecting only individual members." *Id*. (quoting F.R.C.P. 23(b)(3)). Focusing its analysis on the Rule 23(b)(3) requirement, the Court determined that the issues raised in that case "***must*** necessarily be made on a loan by loan basis, therefore eliminating class treatment" under 23(b)(3). *Id* at 960, 966 (emphasis added). Since ***all*** of the claims in *Glover* involved questions that affected only individuals, class certification was inappropriate under 23(b)(3), the provision in question in that case. *Id*.

The Appellants fail to note that Judge Strom did not certify the class in this case under Rule 23(b)(3). Rather, he properly certified the class pursuant to Rules 23(b)(1)(B) and 23(b)(2). (Jt. App. at 218). Thus, the analysis in *Glover* is entirely inapplicable to the case at bar.

It is interesting to note, however, that although Judge Strom did not certify this class pursuant to 23(b)(3), he probably could have done so. In effect, the Appellants argue that if *any* claims within a class action must be made on a case-by-case basis, or affects only individual members, then class certification is automatically inappropriate. However, even under 23(b)(3), "questions of law or fact common to the members of the class [need only] *predominate* over any questions affecting only individual members." F.R.C.P. 23(b)(3). In other words, class certification is not inappropriate even under 23(b)(3) if there are *some* questions that would require individual

factual determinations, or that would affect only individual members. If the Appellants' contention were allowed to stand, virtually no case could be maintained as a class action. For example, consider what would happen if a state government implemented a policy of training its State Patrol Officers to shoot all members of a particular racial group upon sight, and that policy were carried out. If a class action were raised to challenge this policy, under the Appellants' flawed analysis, it could not be certified. After all, each representative plaintiff would have to show that he or she was impacted by the policy, which would require individual proof. Moreover, since such a policy would invoke constitutional claims, the standards applied to those claims would also have to be discussed. In the case at bar, the claims common to the class (that the policies, procedures, and practices of the Appellants in failing to investigate complaints of rape and sexual assaults, repeatedly labeling the incidents as delusions, never taking remedial measures, and punishing the reporting women, result in a pervasive failure to provide a safe, therapeutic and humane environment; pervasive and repeated failure to provide even minimal mental health treatment to the women as required by law; deliberate indifference to the safety and protection of women, etc…) are far more pervasively widespread and thereby predominant over the individual claims of class members. Therefore, even

though he did not do so, Judge Strom almost assuredly could have maintained a class in this case, even under Rule 23(b)(3).

Even if the Appellants fall back on their "typicality" argument (that actually *was* raised at the district court level), the mere presence of some individual factual differences would still present no bar to class certification. Simply because each Appellee was assaulted in separate incidents does not mean that these assaults did not ultimately arise from the same "course of events," namely, the pervasive and repeated failure to protect women at NHHSS facilities through promulgation and implementation of appropriate policies, procedures, and practices, not to mention the failure to provide constitutionally required mental health treatment to alleviate the devastating psychological harm and additional trauma suffered by the women while in their custody and caused by the Appellants' very systematic failures.

The Appellants' previous argument is almost identical to an earlier attempt made by the Appellants' predecessors, and properly rejected by the court in *Caroline C. v. Johnson*, 174 F.R.D. 452 (D. Neb. 1996). In *Caroline C.*, the state officials argued that the plaintiffs, upon being raped or assaulted, "will each have suffered a different harm" and "the harm suffered by the plaintiffs is different in each case." *Caroline C.*, 174 F.R.D. at 465 n.14. The court rejected these arguments and certified the class, referring to

the arguments as "specious." *Id*. Other courts have regularly rejected similar arguments as well. *See e.g., Baby Neal,* 43 F.3d at 58; *Cervantes v. Sugar Creek Packing Co., Inc*, 210 F.R.D. 611, 625 (S.D. Ohio 2002).

It should also be pointed out that another district court in the Eighth Circuit recently certified a virtually identical class after state officials raised similarly erroneous arguments. *Christina A. v. Bloomberg*, 197 F.R.D. 664 (D. S.D. 2000). (stating, "The fact that each named Plaintiff has personally experienced a different combination of . . . conditions, policies and practices does not defeat the typicality of the claims."). Despite individual factual differences and standards applied to constitutional Due Process claims, the court properly certified the class, citing Eighth Circuit precedent that "The typicality requirement of Rule 23(a)(3) is not an onerous one." *Id*. at 668 (citing *Paxton v. Union National Bank,* 688 F.2d 552, 562 (8th Cir. 1982).

Thus, whether the Appellants fall back on their prior arguments pertaining to typicality, or continue with their erroneous reliance on *Glover*, the Appellants' entire analysis under Section I of their brief is irrelevant and flawed. The presence of some individual factual inquiries the district court might face does not make class certification inappropriate. Moreover, the argument based on *Glover* was not even raised, and is, thus, waived. For all of the forgoing reasons, Judge Strom did not abuse his discretion.

B. The fact that constitutional standards will be applied to some of the claims does not thwart the typicality of the claims or make class certification otherwise inappropriate.

As amply demonstrated in the prior section, the fact that a district court might have to make some individual determinations relating to some of the claims does not in any way render class certification inappropriate, particularly when the class has been certified under Rules 23(b)(1)(B) and 23(b)(2). Thus, while some of the claims in this case may require some individual inquiry due to the constitutional nature of the claims, such a concern is irrelevant in that Judge Strom did not certify this class under 23(b)(3). Moreover, as discussed in the previous section, even if this case had been certified under 23(b)(3), common questions do predominate, and the constitutional nature of the claims does not change that inescapable fact. In addition, the Appellants' arguments pertaining to the constitutional nature of the claims are also flawed in numerous other ways.

First, the Appellants point to *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) for the proposition that the standard to be applied relating to the Appellants' duty to persons confined in their custody is either the standard of "deliberate indifference," if there was time for deliberation, or "whether the Defendant acted maliciously or sadistically" if there was not time for deliberation. (Appellants' Brief at 17). Moreover, the Appellants

argue that even this threshold inquiry relating to the time for deliberation will require an "instance by instance" analysis. *Id*.

The Appellants are misguided in these assertions. First, In *Lewis*, the Supreme Court was actually quite clear regarding when each standard would apply. 523 U.S. at 850-852. For example, the Court noted that the regular "deliberate indifference" standard is "sensibly employed" when "actual deliberation is practical." *Id*. at 851 (citations omitted). As an example of this, the Court pointed to the "custodial situation of a prison" and noted that, in that situation, "forethought about an inmate's welfare is not only feasible but *obligatory* under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Id.* (emphasis added). To emphasize how forethought is *obligatory* under such circumstances, the Court explained that "[b]y 'actual deliberation,' we do not mean 'deliberation' in the narrow, technical sense . . ." *Id* at 851 n.11. Rather, the Court explained, "deliberation" exists "even if it be only for a moment or instant of time." *Id*. The Court then summed up by stating:

> "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, ***medical care***, and ***reasonable safety*** – it transgresses the substantive limits on state action set by the … Due Process Clause." *Id*. (quoting *Deshaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. at 199-200) (emphasis added).

Alternatively, in *Lewis* itself, the Court faced a situation involving a high-speed chase. *Id*. at 852-53. The Court distinguished this situation from those in which persons are held in State custody, by analogizing to a prison riot, as opposed to general custody in either a prison, or a *mental institution*, as in *Youngberg v. Romero*, 457 U.S. 307 (1982). *Id*. at 851-52. (The Appellants erroneously cite *Revels v. Vincenz*, 382 F.3d 870, 875-76 (8th Cir. 2004) for the proposition that a more exacting analysis will be required to determine the standard even in cases involving a mental institution. [Appellants' brief at 17]. However, the Court specifically noted that neither party had raised due process considerations, and thus "analyzed Mr. Revels's claim as if he were a prisoner with standing to make an *Eighth Amendment* claim." *Id*. (emphasis added)). In the context of a riot, a high-speed chase, or any other "violent disturbance," the state actors will have very little time to think prior to acting. *Id*. at 852. Such is not the case in the general custodial situation. *Id*. In the case at bar, it is clear that only the general "deliberate indifference" standard would apply. The Appellants' actions and deliberate indifference were never in any way a "response to a violent disturbance." No exacting inquiry would be needed to apply the appropriate standard.

Moreover, the Appellants' contention flies directly in the face of the long-held precedent that Rule 23(b)(2) "must be read liberally in the context of civil rights suits." *See Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980). Conceptually, if the Appellants' argument were allowed to stand, *any* Due Process claim involving enough plaintiffs to meet the numerosity requirement would automatically fail because the supposed need to exactingly analyze each specific claim would eliminate typicality.

This entire argument by the Appellants also begs for an answer to the following inquiry: Even if the standard were "shocks the conscience," just what sort of activity would it take to shock the conscience of the Appellants? While still a child, a young girl is raped, abused, sold out as a prostitute and develops numerous mental illnesses. Later in life, the Appellants involuntarily commit her to their mental health facility. They then fail to provide her with an individualized treatment plan, instead simply dispensing medications to her based on boilerplate methodologies. Moreover, they are aware of her history of sexual victimization, yet place her in the same living community with male residents who have histories of sexual aggression. Finally, a staff member is hired without a proper background check that would have shown a violent and aggressive past. Fellow workers report his sexual aggression toward them and the residents. These reports go

unattended and, on repeated occasions, the young woman is raped in the very institution charged with her care and protection. When summoning the courage to report the abuse, she is told she is "delusional." The man moves on to other victims, and the cycle is repeated, and repeated, and repeated.

This state of affairs apparently does not shock the conscience of the Appellants. It should, however, shock the conscience of this honorable Court. This Court once noted that the respected Judge Posner had provided an "apt description of what prisoners must prove in deliberate indifference cases." *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996):

> If [prison officials] place a prisoner in a cell that has a cobra... [and] they know that there is a cobra there, or *at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference*. *Id*. at 1197 (emphasis added).

In this case, the Appellants knew there was a high probability that these women had been involuntarily committed to live among a *pit* of cobras (a serial rapist who had been reported by fellow staff members as sexually aggressive, and male residents with histories of sexual aggression). Knowing this, they *did nothing*.

In summation, the fact that a district court might have to make some individual determinations relating to some of the claims does not in any way render class certification inappropriate. It is clear that not only did Judge

Strom not abuse his discretion when certifying this class, but made a sound ruling supported by the facts of this case and legal precedents.

IV. Past Female Residents of the NHHSS Facilities are Appropriate Class Members Both as a Matter of Law, and as a Matter of Fact.

In their flawed analysis, the Appellants argue that Judge Strom abused his discretion by including past female residents in the class, because past residents supposedly are not subject to an on-going violation of federal law and allegedly will not benefit from prospective relief. (Appellants' Brief at 21-23). This is incorrect both as a matter of fact and as a matter of law.

As a matter of law, courts regularly certify such past class members. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 398 (1980) (stating, "When the claim on the merits is 'capable of repetition, yet evading review,' the named Plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation."). (emphasis added) (citations omitted).

The Supreme Court's ruling on this issue in *Geraghty* was fairly recently applied by a district court in the Eighth Circuit. *Christina A. v. Bloomberg*, 197 F.R.D. 664 (D. S.D. 2000). Recognizing *Geraghty*, the district court of South Dakota found that past facility residents could end up back in the custody of the facility in the future and "become subject once

again to the conditions, policies and practices they now object to." *Id*. This is the same situation in the case at bar. Many of the named Appellees, while not currently residents of NHHSS facilities, have been involuntarily committed on repeated occasions in the past (Jt. App. at 4-6), and given their continuing mental illnesses, will certainly become repeatedly "subject once again to the conditions, policies and practices they now object to."[2]

In addition to erring as a matter of law, the Appellants also err as a matter of fact. The past female residents of the NHHSS facilities *are* subject to an on-going violation of federal law and would benefit from prospective relief. The Appellants completely ignore the Plaintiffs' claims relating to the lack of trauma and mental health treatment, both before the sexual assaults, and *continuing* thereafter.

Finally, the equitable aspect of this issue must also be considered. The *Christina A.* court addressed this concept, stating:

> If being transferred from a facility were enough to prevent a Plaintiff from representing a class, Defendants would only need to transfer all of the named Plaintiffs out of the facility in question to defeat an action." *Id*. at 670.

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[2] This point is even stronger in this case given the fact that Plaintiffs Robin H. and Susan Z. were not in one of the NHHSS facilities earlier in this action, yet have recently been re-confined. Most of the Plaintiffs have been confined more than once. Additionally, two of the Plaintiffs, Caroline C. and Robin H., have been in and out of confinement in *each* of the three NHHSS mental health facilities since 1994.

Yet, the court reasoned, the deprivations would continue as to a constant *class* of persons. *Id*. at 671. (citing *Geraghty* for the proposition that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."). *Id*. The Supreme Court has also found that class certification was proper *even though the named Plaintiffs were no longer in the facility at issue*. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (noting that although the length of custody in that case could not be readily ascertained, "the constant existence of *a class* of persons suffering the deprivation is certain."). *Id*. (emphasis added). Thus, Judge Strom did not abuse his discretion, and his order should be affirmed.

V. The Portion of the Class of Women Who were, while Confined, Subject to a Panoply of Sexual Degradation, is Quite Administratively Feasible and Sufficiently Definite. Moreover, This Argument, Raised for the First Time on Appeal, is Waived.

In their Brief in Opposition to Class Certification in the district court, the Appellants did raise a complaint about the appropriateness of one portion of the class of plaintiffs due to that portion allegedly not being sufficiently "identifiable" (Jt. App. at 151). However, the Appellants challenged *only* the portion of the class of women who, "in the future will be" in the care and custody of the NHHSS and thus subject to the policies and procedures thereof. *Id*. (stating, "Future female patients cannot be certified as a class

because such a class would be indefinite.") (emphasis added). This also was the case in their Petition to Appeal. (Petition to Appeal at 16).

Now on appeal, for the first time, the Appellants raise the issue of definiteness as to the portion of the class who "were subjected to rape, sexual assault, sexual harassment, sexual exploitation, and physical assault, during all material times, while in the care and custody of Nebraska Health and Human Services System (NHHSS) as residents at one or more of the NHHSS residential mental health facilities." Since this issue was not raised as to the portion of the class now being challenged, the Appellees object to consideration of the issue. Eighth Circuit precedent is clear that such an argument, raised for the first time only on appeal, absent exceptional circumstances, is waived. *Shanklin v. Fitzgerald*, 397 F.3d 596 (8th Cir. 2005) ("Absent exceptional circumstances, we cannot consider issues not raised in the district court.") Moreover, Judge Strom cannot be found to have abused his discretion by not considering an issue that was never raised.

The Appellants will no doubt argue that the issue was raised previously, and will claim that many of the same arguments and cases were cited in their district court brief and petition. However, the Appellees encourage this Court to carefully examine the record. This issue was simply not raised as to any portion of the class other than future plaintiffs.

Moreover, the Appellants will likely argue that this case involves extraordinary circumstances, such that this Court should hear this argument even though not properly raised below. However, this is clearly not an "extraordinary circumstance" under any analysis. Even if, *arguendo*, this argument were allowed to proceed, Judge Strom certainly did not abuse his discretion, and the portion of the class challenged is not "indefinite."

The Appellants cite *Mike v. Safeco Insurance Co. of America*, 223 F.R.D. 50, 52-53 (D. Conn. 2004) for the proposition that "[T]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is *administratively feasible* for the court to determine whether a particular individual is a member." (Appellants' Brief at 24) (emphasis added by Appellees). This is most certainly a true statement. However, this Court should notice that the issue of definiteness goes to *administrative feasibility*. Most assuredly, this is a question in which the trial court judge should be given all due deference.

The Appellants erroneously contend that if the trial court may need to undertake *any* sort of individual inquiry, then the class is per se indefinite. This flies in the face of class certifications that have proceeded throughout the years, and even those that have proceeded all the way through the United States Supreme Court. For example, in 2003 the Supreme Court handed

down a well-publicized decision involving academic affirmative action programs. *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003). In that case, the certified class was defined as:

> "all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgement is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School." *Grutter*, 539 U.S. at 317, 1234 S.Ct. at 2333.

Certainly, the district court would have had to make <u>*some*</u> factual determinations in that case in order to determine who was and was not a member of the class. However, such determinations do not automatically make a case administratively unfeasible, and clearly did not in *Grutter*.

Contrast *Grutter* with some of the cases relied upon by the Appellants, including *Guillory v. American Tobacco Co.*, 2001 WL 290603, * 2 (N.D. Ill. 2001), and *Oshana v. The Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005). For example, in *Guillory*, the proposed class was defined as:

> "All Illinois residents who smoke or smoked cigarettes manufactured by Defendants, who started smoking while a minor, who purchase or purchased cigarettes in Illinois and who desire to participate in a program designed to assist them in the cessation of smoking and/or monitor their medical condition to promote early detection of disease caused by, contributed, or exacerbated by cigarette smoking." *Guillory*, 2001 WL 290603, at *1.

Thus, in *Guillory*, the court determined that the class was indefinite not because it would require <u>*some*</u> factual inquiry to determine who was, or was not a member of the class; but rather that it would be <u>*entirely unfeasible*</u> for the Court to identify which Illinois residents *started smoking while a minor*, purchased cigarettes *in Illinois*, and *desired to participate* in the program. *Id*. Also, in *Oshana*, the Court faced what it called a "boundless" proposed class: including all persons in Illinois who had purchased Coca-Cola products. *Oshana*, 225 F.R.D. at 578. Again, the problem was not that <u>*some*</u> factual inquiry might be needed, but rather that determining class membership would be *entirely* administratively unfeasible. *Id*.

Certainly, the newly challenged portion of the class may require some inquiry, as did the class certified in *Grutter*. However, this is hardly a "boundless" class riddled with all sorts of nuances such as whether or not the class members ever smoked cigarettes, in Illinois, as minors.

In summation, as this argument was not even raised prior to this appeal, it is waived. Moreover, even if the Appellants' gossamer argument is, *arguendo*, allowed to proceed, Judge Strom in no way abused his discretion in finding this portion of the class administratively feasible.

VI. Judge Strom Appropriately Certified the Women who will, in the future, be confined and subject to the Appellants' Policies, Practices and Procedures.

In their flawed analysis, the Appellants argue that women in the future involuntarily confined to NHHSS facilities may not be certified for two reasons: 1) because such a class would supposedly be "indefinite;" and 2) because such class members would allegedly not have standing. (Appellants' Brief at 23-28, and 29-30). Both arguments are incorrect as a matter of law.

A. Classes Including Future Members are Not "Indefinite."

The Appellants' contention that the class of future female residents of the NHHSS facilities would somehow be "indefinite" simply defies a plethora of legal precedent. Courts have consistently certified classes including all persons who "will, in the future" be members of the said class, with no concern about such persons being identifiable, unless they are indefinite for other reasons. *See e.g.*, *Caroline C.*, 174 F.R.D. at 461 (citing a long list of such cases); *Christina A. v. Bloomberg*, 197 F.R.D. 664, 672 (D. S.D. 2000); *Edmond v. Goldsmith*, 38 F. Supp.2d 1016, 1020 (S.D. Ind. 1998); and *Picon v. Morris*, 933 F.2d 660 (8th Cir. 1991).

While one can never say for certain that any one individual will, or will not, be a member of any particular class of persons, this does not change the fact that the *class itself,* is still readily identifiable. As concisely identified by the court order and definition of the class below, once a woman becomes confined at an NHHSS facility, she would be a class member.

In contending that a class including future plaintiffs would be indefinite, the Appellants cited three cases in their Petition to Appeal, and reassert those three cases in their Appellate Brief. (Petition to appeal at 17; Appellants' Brief at 23-24). However, in these cases, the classes for which certification was sought did not even include future plaintiffs. *See Oshana v. The Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005); *In re A.H. Robbins Co.*, 880 F.2d 709 (4th Cir. 1989); *Guillory v. American Tobacco Co.*, 2001 WL 290603 (N.D. Ill. 2001). Rather, in these cases, when a class was found to be inadequately definite, it was for other reasons. (Please reference the discussion of these cases in Section IV, *supra*, noting that the problem was not that the court may face <u>*some*</u> factual inquiry. Rather, the classes were found indefinite because they were <u>*entirely*</u> *administratively unfeasible*.).

In reality, the proposed class in this case is similar to the classes certified by courts throughout the country, including the courts in *Caroline C.* and *Christina A.* (discussed *supra*). *See Caroline C.*, 174 F.R.D. at 468; and *Christina A.*, 197 F.R.D. at 672. And, both of these cases, unlike those cited by the Appellants, involved classes including future plaintiffs. *Id.*

B. Future Class Members Do Not "Lack Standing."

In their brief, the Appellants, in effect, make the same assertion they made at the district court level, that the holdings in *Ortiz v. Fibreboard*

Corp., 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) have "effectively overruled" *Caroline C.* and "the litany of 'numerous courts [which] have certified classes composed, in part, of persons who will be subject to a policy or practice that may in the future subject them to harm.'" (Jt. App. at 164– quoting *Caroline C.*, 174 F.R.D. at 461). This assertion is without merit.

The Appellants fail to point out that the *Ortiz* case did not even deal with a proposed class involving future plaintiffs. (See *Ortiz*, 521 U.S. 815). No where in either of these decisions did the Supreme Court even infer an intention to overrule such past precedent. Perhaps most tellingly, in *Amchem Products*, although the Supreme Court cited Article III standing requirements, and there *were future plaintiffs involved in the certification*, the Court did *not* then proceed to disqualify such future plaintiffs, instead finding class certification inappropriate on *other grounds*. *Amchem Products*, 521 U.S. 591. In fact, the language cited by the Appellants, and utilized by the Court in *Ortiz* and *Amchem Products*, in reality represents nothing more than a restatement of the long-held precedent of requiring Article III standing for classes. *See e.g. Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Coleman v. McLaren*, 98 F.R.D. 638 (N.D. Ill. 1983). Nonetheless, the Article III standing requirement has never impaired

certification of future plaintiffs. For instance, in *Coleman*, the Court pointedly repeated the necessity of Article III standing. 98 F.R.D. at 643. Yet, after specifically stating that such standing is required, the Court, in that *same case*, then certified a class that included *future plaintiffs*. *Id*. at 655.

The Appellants also cite *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994) for the proposition that "A speculative or hypothetical claim of future injury is insufficient to generate standing." (Appellants' brief at 29). The Appellants attempt to mislead this Court into interpreting this statement in an untenably expansive fashion, to mean that ***any*** claim of future injury fails to generate standing. However, such is not the case. Indeed, the Eighth Circuit clearly went on to explain in *Watt* that the plaintiff had failed to show a "***real*** . . . ***threat*** that the plaintiff will be wronged again in a similar way…" because he had "not produced any evidence, *or even alleged*, that there [was] a likelihood that he [would] be subjected in the future to [the policy]." *Id*. (citations omitted). Had the plaintiff made such an allegation or produced such evidence, he then *would* have held standing.

Unlike in *Watt*, the Appellees in this case have both alleged, and produced evidence showing that they, and women similarly situated, will be harmed and subjected in the future to the Appellants' constitutionally infirm policies, procedures, and practices which continue to deny them their

constitutional right to treatment, and right to protection. Moreover, such violations are virtually identical to claims of sexual assault and failure to protect which were successfully vindicated against some of the same state officials or their predecessors in *Caroline C., et al., v. Dale Johnson, et al.*, Consent Decree entered Dec. 23, 1998, Case No. 4:CV95-22 (Filing 133). These violations have not abated, and are on-going. In fact, the lead plaintiff in *Caroline C.*, now a representative plaintiff in the case at bar, has been subjected to sexual assault and abuse in both cases, and in two of the facilities operated by the Appellants.

Finally, courts, including those in the Eighth Circuit, have also continued to certify classes of future plaintiffs well *after* the decisions in *Ortiz*, *Amchem Products*, and *Watt*. *See e.g.*, *Christina A.*, 197 F.R.D. at 672 (2000); *Edmond v. Goldsmith*, 38 F. Supp.2d 1016, 1020 (S.D. Ind. 1998).

Thus, the Appellants' arguments pertaining to Article III standing are also flatly erroneous. Moreover, this Court has a responsibility to take into account two separate policy considerations relating to this issue as well. First, it is clear that Congress intended a private right of action to be sustainable under many of the civil rights statutes invoked herein. Conceptually, district courts frequently need to include future plaintiffs in class action cases. This is necessary in order to enable continuing

jurisdiction over consent decrees and court orders for injunctive relief. To eliminate the district courts' ability to include such class members would inappropriately thwart Congress' intent that these laws include a *meaningful* private right of action. Moreover, this would cause administrative difficulty for the district court judges. It should also be noted that some sort of never-ending jurisdiction would be unnecessary (Appellees expert witnesses have estimated that systemic policy changes can occur under court supervision in as little as two years). (Jt. App. at 131 n.15)

CONCLUSION

The district court based its determination that all of the requirements of F.R.C.P. 23 for class certification are amply met in this matter on sound reasoning and legal precedent. Judge Strom did not in any way abuse his discretion, and his order should be immediately affirmed.

Respectfully submitted this 2nd day of September, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2005 I sent, via certified mail, a true and accurate copy of the foregoing Appellees' Brief in Opposition to Appellants' Brief to David Cookson, Assistant Attorney General, Douglas D Dexter, Assistant Attorney General, and Frederick Coffman, Assistant Attorney General, attorneys for the Appellants.

_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Circuit Rule 28A(d), the undersigned hereby certifies that the diskette containing the Brief of Appellees was created using Microsoft Word 2003, and was scanned for viruses using InoculateIT Signature Version 23.69 and was found to be virus free.

Dated this 1st day of September, 2005

_____

Michael J. Elsken
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman type style, font size 14.

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Dated this 1st day of September, 2003.

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