IN THE
SUPREME COURT OF VIRGINIA

Record No.

GALEN MICHAEL BAUGHMAN

***Petitioner*,**

v.

COMMONWEALTH OF VIRGINIA

Appellee[s].

BRIEF OF PROFESSORS OF LAW, PSYCHOLOGY, BEHAVIORAL SCIENCE, GENDER/SEXUALITY, AND CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 15 professors and professionals of academic disciplines including law, psychology, behavioral science, gender and sexuality, and criminal justice.[1] *Amici* focus their research in ways that are uniquely situated to help the Court analyze the complex problems before it, including research into fields such as criminology, sex offender policy, substantive criminal law, and the law focused on persons with mental illness. *Amici* have an interest in helping the Court understand the social science constructs underpinning Virginia's civil commitment statute (Virginia Code § 37.2-900, *et seq*.) to ensure that the law is enforced in accordance with the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

Amici concur with the Statement of the Case set forth in Petitioner Baughman's Petition for Appeal.

STATEMENT OF FACTS

Amici concur with the Statement of Facts set forth in Petitioner Baughman's Petition for Appeal.

STANDARD OF REVIEW

Amici concur with the Standard of Review set forth in Petitioner Baughman's Petition for Appeal.

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[1] A list of *Amici* appears in the Addendum.

ASSIGNMENTS OF ERROR

Amici concur with the Assignments of Error set forth in Petitioner Baughman's Petition for Appeal.

ARGUMENT

Civil commitment statutes, such as the one at issue here, have survived constitutional challenges, *but only barely***.** These statutes enable states to flip the traditional crime *then* punishment paradigm on its head to confine American citizens to "treatment centers" that strongly resemble prisons—based solely on ill-defined predictions and vague mental-status constructs—most commonly for decades. They eschew the criminal label, and with it they avoid the "great safeguards which the law adopts in the punishment of crime and the upholding of justice." *See Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).[2,3] For many, the only route out of this confinement is death. As the Supreme Court has noted—and no party disputes—civil commitment statutes impinge on the individual's liberty interest—*the very heart of what the due process clause was created to protect.*

Legislatures justified the existence of these statutes to prevent "predatory acts of sexual violence" by those with a "mental abnormality" or a "personality

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[2] *See also* Tamara Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?* 14 U. PA. J. CONST. L. 391 (2011); Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 994–1002 (2011) (detailing absence of constitutional protections in SVP laws).

[3] Unless otherwise noted, all emphasis is added and all internal citations omitted.

disorder," and courts have tepidly accepted this facial justification. States promised, and the Supreme Court of the United States accepted, that these statutes would apply only to a small subset of persons convicted of a sex offense—the archetypal "sexually violent predator"—assumed to be controlled by impulses so powerful as to be irresistible, bound to take innocent life as soon as he or she is beyond the control of the state. This archetype is, fortunately, an extreme rarity, and not at all representative of the vast majority of individuals who have been convicted of a sex offense in the past. But the repugnant nature of the worst sexual crimes has distorted the perception of the underlying social science and the purpose of these laws. Studies show that policy makers, courts, and the public at large consistently view all sex criminals through the lens of the worst offenders. They persistently overestimate recidivism risk—*both the rate of repeated offense and the severity of the future crime. See, e.g.*, Laura L. King, *Perceptions About Sexual Offenses: Misconceptions, Punitiveness, and Public Sentiment*, 30 Crim. Just. Pol'y Rev. 254, 256-57 (2019) (collecting studies).

Against this constitutional and social science backdrop, the Supreme Court of the United States has held civil confinement statutes, such as that of Virginia, are only constitutional under "narrow circumstances." In this brief, we provide critical context for this Court's evaluation of the trial court's conduct of this case.

In order to stay within the "narrow circumstances" necessary for constitutional application of Virginia's civil confinement statute, vigilant care must be taken—care that seems flagrantly absent in the court below. The trial court's decisions—prohibiting Mr. Baughman from calling any expert witnesses to off-set the pervasively partisan testimony of the Attorney General's expert while condoning the Attorney General's blatant expert shopping—are contrary to the judiciary's obligation to exercise vigilance to insure that preventive confinement is cabined appropriately.

I. THE VIRGINIA CIVIL COMMITMENT STATUTE TRENCHES A FUNDAMENTAL INTEREST: LIBERTY

Civil commitment statutes, such as that of Virginia, allow states to confine citizens *indefinitely*, based not on a conviction, but on a prediction. Thus, it is without question or dispute that these statutes strike deeply into the heart of a fundamental, constitutionally-protected interest—*liberty*—freedom from near-total physical constraint. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) ("[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause . . . .'").

The deprivation of liberty in Virginia's civil commitment scheme, like others around the country, is "massive." *Jenkins v. Dir. of Virginia Ctr. for*

Behavioral Rehab., 271 Va. 4, 14, 624 S.E.2d 453, 459 (2006) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). After a Virginia prisoner has served his or her sentence, he or she may become subject to Virginia's civil confinement statute which allows the Commonwealth to further confine the individual—who would otherwise be a free citizen—for an indefinite term if it can show that the respondent has "a mental abnormality or personality disorder" which "makes him likely to engage in sexually violent acts." VA. CODE ANN. § 37.2-900 (West 2019); VA. CODE ANN. § 37.2-908 (West 2009). In short, those subject to Virginia's civil confinement statute can be again incarcerated without committing any new crimes.

States around the country have sidestepped the massive constitutional problems with this paradigm by characterizing civil commitment laws as non-criminal, even though they carry the same stakes as criminal proceedings—*complete deprivation of liberty*. Were such laws criminal in nature, they would be unconstitutional for at least two reasons. First, they would represent punishment for predicted "future crimes," rather than actual past actions, a violation of "[t]he very core of liberty . . . ." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting); *see also Foucha* 504 U.S. at 76 n.4 ("As he was not convicted, he may not be punished."). Second, they would be viewed as punishment for the status of being "dangerous" and thus constitute the "infliction

of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *See Robinson v. California*, 370 U.S. 660, 666 (1962).

While the *amici* do not challenge the constitutionality of Virginia's civil confinement statute, we do request that the Court strongly consider the fundamental risk its misuse poses to liberty and to Mr. Baughman's liberty in particular. Neither party disputes the fundamental nature of the liberty interest at stake. But this liberty interest is meaningless unless the constitutional bounds on its deprivation are vigilantly patrolled. In the case of Mr. Baughman, they were not.

II. CIVIL COMMITMENT STATUTES HAVE BEEN UPHELD ONLY IN "NARROW CIRCUMSTANCES" PREDICATED ON QUESTIONABLE SOCIAL SCIENCE CONSTRUCTS

Civil commitment statutes, such as the one at issue here, serve a noble-sounding policy goal—protecting the public from individuals who are "unable to control their behavior and who thereby pose a danger to the public health and safety." *Hendricks* 521 U.S. at 357. But, as discussed above, they impinge on a fundamental interest: *Liberty*. Thus, there is always a risk of overreaching upon the application of these statutes, transforming them into tools of unjust confinement.

The Supreme Court has reconciled these interests in light of due process, ruling that civil commitment statutes are only allowable in certain "narrow circumstances," and then only when necessary to prevent future harm to the

general public. *Id.* at 357. To meet this dual burden, due process "requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." *Id.* Thus, the "mental abnormality" requirement is not a discretionary policy choice but is instead a constitutionally-mandated requisite for civil commitment.

The Supreme Court has mandated that the "mental abnormality" be such that it "distinguish[es] the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *See Kansas v. Crane*, 534 U.S. 407, 413 (2002). Courts (and juries) are to determine whether such a "mental abnormality" is present based on the use of social science constructs. Unfortunately, as discussed further below, the social science constructs are complex, uncertain, and subject to manipulation and misuse.

III. THE SOCIAL SCIENCE CONSTRUCTS UNDERPINNING VIRGINIA'S CIVIL COMMITMENT STATUTE ARE DISTORTED BY THE MOST EXTREME SEX CRIMES

The social science constructs underpinning civil commitment laws, such as those of Virginia, are distorted by a set of misperceptions focusing on the most extreme, but most rare, sex offenses. When policy makers and the general public conceptualize sex criminals, they invariably think of violent sexual predators,

hiding in the shadows, waiting to hurt the most vulnerable amongst us—the proverbial boogeyman. Consequently, the recidivism rate of sexual crimes has been significantly overestimated by policymakers, jurists, and laypersons. Nicholas Scurich, Jennifer Gongola & Daniel A. Krauss, *The Biasing Effect of the "Sexually Violent Predator" Label on Legal Decisions*, 47 INT'L J.OF L. AND PSYCHIATRY 109 (2016). The law's poor foundation not only raises questions about its fundamental justification but also pervades it application, including, as discussed further below, by necessitating the availability of expert witnesses who can engage in the robust and adversarial examination of the behavioral science, the very safeguards the Commonwealth disregarded in the case of Mr. Baughman.

Because of the grotesque nature of their crimes, serial rape-murderers have become the archetype for all sex crimes, even though they represent only a "thin sliver" of criminal sexual activity. ERIC JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE 2 (2006). This archetype is so powerful and pervasive that it causes the public to misunderstand what a sex crime even is. The category of sex crime is far broader than rape-murder. For example, "[s]tate laws require registration [on the sex offender registry] of a teenager who had consensual sex with another teenager, of people who possessed erotic images of anyone under 18 but had no history of any

contact offense, and even, depending on the state, someone convicted of public urination." Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 504 (2015). Consequently, studies consistently show that factfinders significantly overestimate the dangerousness of persons convicted of a sex offense. Ashley B. Batastini et al., *Does the Format of the Message Affect What is Heard?*, 19 J. FORENSIC PSYCHOL. RES. & PRACT. 44, 48 (2019).

Even the Supreme Court is not immune from these misperceptions. As recently as 2002, the Supreme Court asserted that sex criminals have a "frightening and high" rate of recidivism, "estimated to be as high as 80%" if left untreated. Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 495–96 (2015) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)). But the 80% figure is dubious at best. It comes from a pop psychology journal, with no underlying citations. *Id.* at 497–98.

In reality, recidivism rates for sexual offenders are significantly lower than the "frightening and high" rate discussed by the Supreme Court. *Id.* at 496, 507. Almost all people convicted of a sex offense are neither re-arrested for nor re-convicted of a new sex offense. In a recent Bureau of Justice Statistics (BJS) study

of sex offenders released from prison, 92.3% of the individuals were not rearrested for a new sex offense in the nine-year follow up period. MARIEL ALPER & MATTHEW R. TRUOSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP 4 (2019), *available at* https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf. A study by the California Corrections Department "recently examined cases of sex offender registrants who are returned to prison, and found that in 92% of the cases the reason was a parole violation, ... Less than 1% of those re-incarcerated had committed a new sex offense." Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 501 (2015). Similarly, the Association for the Treatment of Sexual Abusers, a leading institute of forensic professionals engaged in the treatment of sex offenders, has found that "as a criminal class, sex offenders pose a relatively low risk to reoffend." Brief of the Association for the Treatment of Sexual Abusers as Amicus Curiae, *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017) (No. 16-1394), 2017 WL 2792554 at *5–*6 (citing a nationally representative sample of released sex offenders showing a 5.3% sexual recidivism rate with a three year follow-up period).

Thus, the lay public, tasked with fact-finding in civil commitment proceedings, likely begins its deliberations under multiple fundamental misconceptions. Nonetheless, they are tasked to exercise authority over a man or woman's liberty in a proceeding that sidesteps the protections of traditional criminal justice principles.

IV. APPROPRIATE EXPERT TESTIMONY REPRESENTS AN IMPORTANT SAFEGUARD NECESSARY TO PRESERVE DUE PROCESS

Because civil confinement proceedings turn so heavily on social science constructs (e.g., mental disorder diagnoses and "risk ratios") rather than criminal justice principles, appropriate expert testimony is crucial to maintaining just proceedings. In the words of the Supreme Court:

> There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy *turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.*

Addington v. Texas, 441 U.S. 418, 429 (1979).

In the sections that follow, *Amici* analyze several ways in which the interpretive role played by psychological testimony can succumb to partisan manipulation. First, the actuarial tools used to predict recidivism risk in civil commitment proceedings are inherently complex and suffer from scientifically-

known shortcomings. Experts are necessary to properly interpret and contextualize the result of these tools. Second, the way an expert explains recidivism risk can have a dramatic impact on the fact finder. Thus, experts must take great care to convey risk information correctly and impartially.

A. The Social Science Tools Used In Civil Commitment Proceedings Are Inherently Complex And Likely To Be Misunderstood Without Proper Guidance From Experts

As discussed above, civil commitment proceedings are predicated on social science constructs, not criminal justice principles. While the social science constructs underpinning civil commitment proceedings are, at their core, abstract concepts and causal theories, these theories are explained using complex statistics and models, providing the aura of mathematical precision. Most commonly, the Commonwealth uses actuarial models such as the Static-99R and the Stable 2007 to estimate the recidivism risk of an individual subject to the statute. These tools seem to provide concrete measures of recidivism risk. But they have drawbacks that are scientifically well established, and, without proper interpretation, they are subject to misinterpretation by fact finders who, like the rest of the public, are likely to have erroneous, preconceived notions of sex crimes. We discuss three of the most serious drawbacks below. In a proceeding relying solely on a single partisan explanation, these drawbacks will be invisible to the finders of fact.

First, the Static-99R and the Stable 2007 provide scientific-sounding indicators of recidivism such as "relative risk ratios" which purport to quantify the recidivism risk of the individual subject to the civil commitment proceeding. But, without the proper context, these "relative risk ratios" are meaningless and frequently misinterpreted, "typically leading to an overestimation of risk." Gregory DeClue & Denis L. Zavodny, *Forensic Use of the Static-99R*, 1 J. THREAT ASSESSMENT & MGMT. 145, 150–51 (2014).

A relative risk ratio is an index of an individual's predicted likelihood of reoffending compared to the risk attributed to another group, often the "typical" or "average" offender. For example, a relative risk ratio could be given by stating that a hypothetical defendant is five times more likely than the average to reoffend. Without appropriate context, however, this ratio is meaningless. For example, if the "average" risk of reoffending is 6%, our hypothetical defendant has a recidivism risk of 30%, but if the "average" risk of reoffending is 1%, our hypothetical defendant has a recidivism risk of only 5%. N. Zoe Hilton & L. Maaike Helmus, *Using Graphs in Sexual Violence Risk Communication*, Sexual Abuse (forthcoming 2020 (available in Online First)). Indeed, the developers of Static-99R warn that risk ratios *are not informative* unless given in context with the risk of the comparison group, commonly referred to as the "base rate." R. Karl

Hanson et al., *Communicating the Results of Criterion Reference Prediction Measures*, 29 PSYCHOL. ASSESSMENT 582, 586 (2017). Without appropriate instruction as to the meaning of relative risk, a fact finder could easily misapply this tool and reach an erroneous determination of the recidivism risk of someone subject to Virginia's civil commitment statute. Therefore, it is vital for an expert to provide clear instruction as to the proper interpretation of a relative risk ratio. The omission of this clarifying information by a partisan expert simply highlights the central role that access to expertise plays in insuring that the constitutional limits of SVP laws are respected.

Second, risk tool scoring is not as objective and reliable in the field as non-experts may assume. Contrary to their scientific aura, risk tools are not precisely calibrated. For example a meta-analysis of the Static-99R by its own developers found "substantial variation in the absolute recidivism rates associated with the same risk score (*i.e.*, calibration) across the 23 samples examined in this meta-analysis." Leslie Helmus et al., *Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples*, 39 CRIM. JUST. & BEHAV. 1148, 1163–64 (2012). The developers went on to conclude that "[t]he range in absolute recidivism rates across studies was sufficiently large that values within the observed range could lead to meaningfully different

conclusions concerning an offender's likelihood of recidivism." *Id.* The jury is unable to weigh how much reliance to place on a risk tool's output without information about this inaccuracy. Melissa Hamilton, *The Biased Algorithm*, 56 AM. CRIM. L. REV. 1553, 1574–75 (2019).

***Third*,** risk assessment tools such as the Static-99R are not properly calibrated to account for only the violent sexual crimes contemplated by the Virginia civil commitment statute. Melissa Hamilton, *Judicial Gatekeeping on Scientific Validity with Risk Assessment Tools*, 38 BEHAV. SCI. & L. 226, 229 (2020). Instead, they are over-inclusive. As discussed above, while laypersons commonly think of a "re-offense" as a second violent sexual offense—consistent with the requirement of the statute—the Static-99R and the Stable-2007 consider a host of non-violent crimes "re-offenses." Static-99R, for example, includes in the sexual reoffending category such acts as bestiality, upskirting, pornography possession, urinating in public, revenge porn, obscene phone calls, failure to disclose HIV status, and voyeurism. AMY PHENIX ET AL., RESEARCH DIV., PUB. SAFETY CANADA, STATIC-99R CODING RULES 25–29 (2017). Similarly, the Stable-2007 counts as sexual recidivism minor contact crimes (e.g., prostitution and consensual sex in public), non-contact offenses (exhibitionism), and supervision violations (e.g., breaching a condition to avoid public parks). R. KARL HANSON ET

AL., ASSESSING THE RISK OF SEXUAL OFFENDERS ON COMMUNITY SUPERVISION: THE DYNAMIC SUPERVISION PROJECT 11 (2007).

The risk assessment tools output only a single figure, which is meant to be an all-encompassing metric encapsulating the respondent's chance to reoffend. But that number is necessarily an overestimation because it counts as "re-offenses" many more types of crimes than does Virginia's civil commitment statute. Without expert testimony to identify this misalignment between the test and the statute, fact finders are likely to assume that the results of the test are what they seem to be: the an all-encompassing metric to determine whether the respondent is "likely to engage in sexually violent acts." *See* VA. CODE ANN. § 37.2-900 (West 2019); VA. CODE ANN. § 37.2-908 (West 2009). Unconstitutional deprivation of liberty is likely without access to experts who can clearly and precisely inform fact finders of this misalignment between the test and the statute and to further delineate a recidivism risk for only violent sexual crimes.

B. The Way In Which An Expert Presents Testimony—Including Facts And Statistics—Can Dramatically Alter Outcomes

Critically and unsurprisingly, how an expert conveys a risk evaluation dramatically impacts a factfinder's conclusions. Variations in communication of risk matter to factfinders in civil commitment proceedings, and these variations lead to inconsistent results. While it may seem irrational that simply hearing

statistics differently can lead to different impressions, this is a very real phenomenon. People interpret statistics differently depending on how they are presented. This phenomenon is known as the "framing effect." For example, in one study, mock jurors were given alternative descriptions of a hypothetical sex offender who was given a score of 6 by the Static-99R risk tool. With this tool, a score of 6 is equivalent to a categorical "high risk" ranking, a percentile ranking whereby 31% of those with the same score sexually reoffended, and then a relative risk rate of 2.91 times that of the typical offender. Jorge G. Varela et al., *Same Score, Different Message: Perceptions of Offender Risk Depend on Static-99R Risk Communication Format*, 38 LAW & HUM. BEHAV. 418, 421–22 (2014). Even though these descriptions are equivalent, mock jurors reached different conclusions as to the danger posed by the mock respondent depending on which one was presented to them. *Id.*

Another study specifically using the Static-99R in a SVP hearing simulation found that altering the delivery of the same risk outcomes led to differences in mock jurors' decisions to commit. Daniel A. Krauss et al., *Risk Assessment Communication Difficulties*, 36 BEHAV. SCI. & L. 532, 544 (2018). Researchers found that mock decision makers were more severe in their assessment of recidivism risk when informed that there was a 26% likelihood of reoffending than

when presented with the reciprocal (that there was a 74% likelihood of not reoffending). Nicholas Scurich & R. John, *Prescriptive Approaches to Communicating the Risk of Violence in Actuarial Risk Assessment*, 18 PSYCHOL. PUB. POL'Y & L. 50 (2011). The *amici* note that this result represents a textbook application of the framing effect. Even though the scores are inverses of each other, the mock decision maker reached a different conclusion when faced with the positive likelihood (26%) or the negative likelihood (74%). Full access to expert testimony is necessary to insure risk is properly communicated to the fact finder.

V. THE COMMONWEALTH CIRCUMVENTED THE SAFEGUARD OF APPROPRIATE EXPERT TESTIMONY IN THE CASE OF MR. BAUGHMAN

In an adversary litigation context, the chief bulwark against error induced by partisan expert testimony is equal access to properly-appointed expert testimony. In this instant case, this safeguard was absent. Mr. Baughman was not allowed to call his own expert to rebut the hand-picked expert retained by the Attorney General. The risk of error inherent in social science testimony, discussed above, is concrete and well-documented. Thus, Mr. Baughman's inability to call his own expert was severely detrimental, all the more so because the Attorney General's expert committed multiple errors. We examine the errors of the Attorney General's expert, Dr. Sjolinder, to provide context for the decision the Court must make in determining whether the trial court's prohibition on Mr. Baughman's ability to

present expert testimony in any form is consistent with Virginia statutory law and with the fundamental nature of the constitutional right involved here.

First, Dr. Sjolinder's appointment was the result of blatant expert shopping. Prior to retaining Dr. Sjolinder, the Commonwealth had appointed Dr. Ilona Gravers to diagnose Mr. Baughman and to testify at his civil commitment hearing. Dr. Gravers conducted her analysis, concluding that Mr. Baughman did not have a paraphilia diagnosis and that his "risk is noted to decrease with increased time offense-free in the community." (Pet'r's Mot. Reverse Finding of Probable Cause and to Dismiss or, in the Alternative, to Preclude Dr. Michelle Sjolinder from Testifying at Trial, March 16, 2018, at 3, 4.) She went on to note that "[d]espite being at liberty for four years in the community where he had contact with and access to children, he did not sexually reoffend or sexually reoffend in a violent manner. He evidenced stable functioning in the community." *Id.* Unhappy with that diagnosis, the Attorney General asked Dr. Sjolinder to conduct a "file review" of the matter and dismissed Dr. Gravers. Dr. Sjolinder reached the opposite conclusion of Dr. Gravers and was, unsurprisingly, asked to testify in Dr. Gravers' stead.

Second, Dr. Sjolinder presented her risk assessment testimony using the framework of relative risk ratios without discussing the misleading nature of these

ratios. *See supra* § IV. Consistent with the literature discussed above, then-Chief Judge Johnson explained why relative risk is irrelevant in civil commitment proceedings:

> These descriptions of Ince's relative risk of re-offending are incapable of answering the key question in this case: whether Ince is "highly likely" to reoffend. . . . That question does not ask for a comparison of the probability that Ince will reoffend and the probability that another person will reoffend. Rather, that question asks for a comparison of the probability that Ince will reoffend and the probability that he will not reoffend.

In re Civil Commitment of Ince, No. A12-1691, 2013 WL 1092438, at *12 (Minn. Ct. App. Mar. 18, 2013) (Johnson, J., concurring), *rev'd,* 847 N.W.2d 13 (Minn. 2014). Considering Mr. Baughman had no expert of his own to clarify the nature of relative risk ratios, Dr. Sjolinder should have been "unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact." AM. PSYCHOLOGY–LAW SOCIETY AND THE AM. ACAD. OF FORENSIC PSYCHOLOGY, AM. PSYCHOLOGICAL ASS'N, SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY Guideline 1.02 (2012). She should have explained the misleading nature of relative risk ratios or refrained from discussing them at all. She did not do so.

Third, Dr. Sjolinder conducted her analysis without interviewing Mr. Baughman and failed to make "reasonable efforts" to set up such an interview.

The professional standards for forensic psychologists require that "psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions," except for limited, inapplicable exceptions. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 9.01(b) (2016). Dr. Sjolinder rendered her diagnosis without interviewing Mr. Baughman and compounded her error by failing to inform the fact finders of the issues this can cause in a diagnosis.

Because Dr. Sjolinder did not interview Mr. Baughman, her file review necessarily relied on old data, referencing events and assessments 14 to 20 years in the past. *See generally* MICHELLE SJOLINDER, SEXUALLY VIOLENT PREDATOR EVALUATION OF GALEN BAUGHMAN (Nov. 2, 2007); *see also* Oct. 8, 2019 Hrg. Tr. 61:21-62:2. Dr. Sjolinder tried to justify her failure to interview Mr. Baughman by claiming that Mr. Baughman's diagnoses were such that his 20-year-old assessments were still valid, but her justification was itself incorrect. For example, on page two of her 2017 report, Dr. Sjolinder stated that "[a]lthough an interview may provide current mental status information and thus help diagnose certain mental disorders; most mental disorders that are operative under the SVP Act tend to be long term in nature and are not dependent on current mental status."

MICHELLE SJOLINDER, SEXUALLY VIOLENT PREDATOR EVALUATION OF GALEN BAUGHMAN 2 (Nov. 2, 2007).

But this assertion is wrong. Personality disorder traits are unstable from adolescence to maturity and multiple interviews at different points in time are recommended to assess their stability. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 647 (2013). Narcissistic traits in adolescence do not necessarily predict narcissistic personality disorder in adulthood. *Id*. at 671. Remission is possible in all paraphilic disorders. *Id*. at 816.

Similarly, when asked whether the seriousness of the disorders she attributed to the defendant might be alleviated with advancing age, Dr. Sjolinder testified that "research" did not show any alleviation with age, but she did not identify any studies in support of this assertion. This assertion, as well, is incorrect. Research indicates that personality disorder symptomatology and psychosocial immaturity decrease dramatically from late adolescence to young adulthood. Mark F. Lenzenweger, Matthew D. Johnson & John B. Willett, *Individual Growth Curve Analysis Illuminates Stability and Change in Personality Disorder Features*, 61 ARCH GEN PSYCHIATRY 1015, 1024 (2004); Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile*

Death Penalty, and the Alleged APA "Flip-Flop," 64 AM. PSYCHOLOGIST 583, 590 (2009). Thus, it too is no justification for failing to meet with Mr. Baughman.

Because Mr. Baughman was unable to call an expert to testify in his favor, he was unable to correct these errors in Dr. Sjolinder's testimony. Consequently, the finder of fact was not presented with the current, correct social science. Instead, they were left with unrebutted testimony providing an erroneous justification for the expert's failure to conduct an interview with Mr. Baughman.

Finally, Dr. Sjolinder improperly downplayed the status of "hebephilia"—the diagnosis she applied to Mr. Baughman—in the psychiatric community. Dr. Sjolinder diagnosed Mr. Baughman with a "Paraphilic Disorder" that she described as attraction to adolescent males between 14 and 17. MICHELLE SJOLINDER, SEXUALLY VIOLENT PREDATOR EVALUATION OF GALEN BAUGHMAN 23-24, 26, 28 (Nov. 2, 2007). On cross-examination, she acknowledged that the more specific diagnostic category—hebephilia (attraction to 14-year-olds)—was "not included" in DSM-5, but she did not inform the court that this diagnosis was, in fact, specifically rejected for inclusion in the DSM-5. Paul S. Appelbaum, *Commentary: DSM-5 and Forensic Psychiatry*, 42 J. OF THE AM. ACAD. PSYCHIATRY AND THE L. 136, 138 (2014); Ray Blanchard, *A Dissenting Opinion on DSM-5 Pedophilic Disorder*, 42 ARCHIVES OF SEXUAL BEHAVIOR 675, 675 (2013);

Michael B. First, *DSM-5 and Paraphilic Disorders*, 42 J. OF THE AM. ACAD. PSYCHIATRY AND THE L. 191, 192 (2014). This distinction is important because it means that mental health professionals specifically considered hebephilia and determined it was not properly classified as a mental disorder. Dr. Sjolinder's testimony distorts this scientific consensus. The trial court's decisions excluding Mr. Baughman's expert witnesses undercut the key tool offered by the adversarial system to confine the statute's deprivation of liberty to its proper constitutional scope.

CONCLUSION

While the Commonwealth has noble intentions to protect the public from sexual predators who are unable to control their behaviors, these laws pose a substantial danger of overreach. Unless proper safeguards are in place, these civil commitment statutes stand to indefinitely confine law-abiding US citizens. Here, unfortunately, the Commonwealth circumvented many of these exact safeguards, placing Mr. Baughman's liberty at risk, based not upon a charge, and certainly not on a conviction, of any crime. Accordingly, the *amici* respectfully request the Supreme Court review Mr. Baughman's petition to properly ensure that the constitutional limits have been honored in this case.

Dated: November 9, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Virginia Supreme Court Rules that pertain to the filing of briefs, including but not limited to Rules 5:6, 5:26, and 5:30, as this brief is produced in size 14 point Times New Roman font and does not exceed 35 pages and/or 6,125 words and that per the Court's Temporary E-Filing Guidelines Pursuant to Supreme Court of Virginia's Order Addressing Operations Under Public Health Emergency Created By Covid-19 Virus, a true and correct copy of the foregoing Motion was electronically filed with the Clerk of Court using the VACES CM/ECF system and served electronically via email, upon:

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I hereby certify that on this 9th day of November 2020, in accordance with Rules 5:17, 5:26, and 5:30 of the Rules of the Supreme Court of Virginia, and the Court's Temporary E-Filing Guidelines Pursuant to Supreme Court of Virginia's Order Addressing Operations Under Public Health Emergency Created By Covid-19 Virus, a true and correct copy of the foregoing Motion was electronically filed with the Clerk of Court using the VACES CM/ECF system and served electronically via email, upon:

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