

IN THE SUPREME COURT OF VIRGINIA
RECORD NO. _____

GALEN MICHAEL BAUGHMAN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

**BRIEF *AMICUS CURIAE* OF THE CENTER FOR HIV LAW AND
POLICY, GLBTQ LEGAL ADVOCATES AND DEFENDERS, HEALTH
PROFESSIONALS ADVANCING LGBTQ EQUALITY, THE O'NEILL
INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW, BRAD
SEARS, J.D., THE NATIONAL CENTER FOR REASON AND JUSTICE,
AND THE NATIONAL CENTER FOR LESBIAN RIGHTS**

Cary Citronberg
VSB 81363
Zwerling/Citronberg, PLLC
114 North Alfred Street
Alexandria, VA 22314-3011
Phone: 703-684-8000
Fax: 703-684-9700
Email: cary@zwerling.com

Anne Kelsey
Pro hac vice pending
Center for HIV Law & Policy
147 Prince Street
Brooklyn, NY 11201
Phone: 212-430-6733
Fax: 212-430-6734
Email: akelsey@hivlawandpolicy.org

Counsel for Amici Curiae

November 9, 2020

TABLE OF CONTENTS

	<u>Page</u>
I. INTEREST OF AMICI CURIAE.....	1
II. STATEMENT OF THE CASE.....	4
III. STATEMENT OF FACTS.....	4
IV. ASSIGNMENTS OF ERROR.....	4
V. STANDARD OF REVIEW.....	4
VI. ARGUMENT.....	5
 A. THE COMMONWEALTH RELIED ON FLAWED TOOLS, AN UNSUPPORTABLE PSYCHIATRIC DIAGNOSIS, AND FUNDAMENTALLY UNSOUND EXPERT TESTIMONY TO ATTEMPT TO ESTABLISH THAT MR. BAUGHMAN IS A “SEXUALLY VIOLENT PREDATOR” IN NEED OF SUPERVISION AND/OR INDEFINITE CONFINEMENT.	6
1. The Commonwealth’s Expert Relied on an Unsupported Diagnosis that the American Psychiatric Association Explicitly Rejected from Inclusion in the DSM-5.....	6
2. The Static-99R Assessment Tool Cannot Predict Future Dangerousness and Incorporates Bias Against Gay Men.....	10
3. The Concept of Grooming Is Vague and Subject to Evaluator Bias and Should Not Be Used as a Basis for Civil Commitment.....	19
4. The Expert Testimony Provided by Dr. Sjolinder Relied on Faulty Science and Anti-Gay Bias and Should Be Rejected.....	21
 B. THE EVIDENCE OF LONG-STANDING BIAS AGAINST GAY MEN AND LESBIANS IN FEDERAL AND VIRGINIA LAW SHOULD NOT BE IGNORED IN DETERMINING WHETHER BIAS AGAINST PEOPLE SUCH AS MR. BAUGHMAN INFORMS DETERMINATIONS OF WHETHER THEY ARE “SEXUALLY VIOLENT PREDATORS”...)	30
VII. CONCLUSION.....	38

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>A.O.V. v. J.R.V.</i> , Nos. 0219-06-4, 0220-06-4, 2007 WL 581871 (Va. Ct. App. Feb. 27, 2007).....	36
<i>Bostock v. Clayton County</i> , 590 U.S. ____ (2020).....	30
<i>Bottoms v. Bottoms</i> , 249 Va. 410 (1995).....	36
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	31–32
<i>Branche v. Commonwealth</i> , 489 S.E.2d 692 (Va. Ct. App. 1997).....	34
<i>DePriest v. Commonwealth</i> , 537 S.E.2d 1 (Va. Ct. App. 2000).....	34
<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 U.S. 137 (1999)	27
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	31, 32
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n</i> , 548 U.S. ____ (2018).....	31
<i>Macdonald v. Moose</i> , 710 F.3d 154 (4th Cir. 2013).....	32
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).....	30
<i>Palmore v. Sidoti</i> , 466 U.S. 429, 433 (1984).....	37
<i>Pedersen v. City of Richmond</i> , 254 S.E.2d 95 (Va. 1979).....	33-34
<i>Romer v. Evans</i> , 517 U.S. 620, 635 (1996).....	37
<i>Singson v. Commonwealth</i> , 46 Va. App. 724 (Va. Ct. App. 2005)	33
<i>Sirney v. Sirney</i> , No. 0754-07-4, 2007 WL 4525274 (Va. Ct. App. 2007).....	36
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	31

Tjan v. Commonwealth, 46. Va. App. 698 (Va. Ct. App. 2005) 32–33

Statutes and Legislative Materials

Va. Const. art. I, §15-A.....	35, 36
Virginia Code § 8.01-401.1.....	27
Virginia Code § 18.2-361	32
Virginia Code §§ 20-45.2, 20-45.3.....	35
Virginia Code § 37.2-900 <i>et seq.</i>	5
<i>An Act to amend and reenact §§ 17.1-275.12, 18.2-67.5:1, 18.2-346, 18.2-348, 18.2-356, 18.2-359, 18.2-361, 18.2-368, 18.2-370, 18.2-370.1, 18.2-371, and 18.2-374.3 of the Code of Virginia, relating to sodomy; penalties, ch. 794</i> (Va. 2014)	32
<i>An Act to repeal §§ 20-45.2 and 20-45.3 of the Code of Virginia, relating to same-sex marriages; civil unions, ch. 75</i> (Va. 2020).....	35
Senate Joint Resolution No. 2, <i>Proposing the repeal of Section 15-A of Article I of the Constitution of Virginia, relating to marriage</i> (Va. 2016), available at https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SJ2&161+sum+SJ2	36
Joint Legis. Audit & Rev. Comm'n, <i>Review of the Civil Commitment of Sexually Violent Predators</i> , H.R. Doc. No. 5 (Va. 2012)	16, 17, 18

Other Authorities

Christopher Agee, <i>The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950-1972</i> (2014).....	34
Am. Psychiatric Ass'n, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (5th ed. 2013)	8
Am. Psychiatric Ass'n, <i>Paraphilic Disorders Fact Sheet</i> (2013), available at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DS_M-5-Paraphilic-Disorders.pdf	8
Am. Psychiatric Ass'n, <i>Guideline I: Review of Psychiatric Symptoms, Trauma History, and Psychiatric Treatment History, in Practice Guidelines for the</i>	

<i>Psychiatric Evaluation of Adults</i> (3d ed. 2015), https://psychiatryonline.org/doi/10.1176/appi.books.9780890426760.pe02	22
Amnesty Int'l, <i>Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the U.S.</i> (2015), available at https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf	33
Paul S. Appelbaum, <i>Commentary: DSM-5 and Forensic Psychiatry</i> , 42 J. Am. Acad. Psychiatry & L. 136 (2014).....	9
Howard Barbaree et al., <i>Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components</i> , 36 Crim. Just. & Behav. 443 (2009).....	12
Renzo Barrantes et al., <i>The Role of Minority Stressors in Lesbian Relationship Commitment and Persistence Over Time</i> , 4 Psychol. Sexual Orientation & Gender Diversity 205 (2017).....	15
Natalie Bennett & William O'Donohue, <i>The Construct of Grooming in Child Sexual Abuse: Conceptual and Measurement Issues</i> , 23 J. Child Sexual Abuse 957 (2014).....	19, 20, 26
Guyora Binder & Ben Notterman, <i>Penal Incapacitation: A Situationist Critique</i> , 54 Am. Crim. L. Rev. 1 (2017).....	18
Roy Blanchard et al., <i>Pedophilia, Hebephilia, and the DSM-V</i> , 38 Archives Sexual Behav. 335 (2009).....	8
Brief of Nat'l Ctr. for Lesbian Rights as Amicus Curiae in Support of Appellant, Brome v. Cal. Highway Patrol, 44 Cal. App. 5th 786 (Cal. Ct. App. 2020) (No. A154612).....	34
Brief of Professors of History as Amici Curiae in Support of Petitioners, Lawrence v. Texas 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350.....	34
Chris Carr et al., <i>Review of Florida's Sexually Violent Predator Program Office</i> (Sept. 23, 2013), https://media.cmgdigital.com/shared/news/documents/2013/09/23/09.23_SVPP_Report.pdf	14

Dean Cauley & Michelle Brownfield, <i>Static-99R: Item #1 - What is the Offenders Age?: Lack of Consensus Leads to a Defective Actuarial</i> (Mar. 22, 2013) (unpublished research paper), available at https://ssrn.com/abstract=2237968	11, 12, 13, 25
Jakob Cordes, <i>Documentary Sheds Light on History of Richmond Gay Community</i> , VPM NPR News (June 23, 2020), https://vpm.org/news/articles/14378/documentary-sheds-light-on-history-of-richmond-gay-community	34
Allen Frances & Michael B. First, <i>Hebephilia is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5</i> , 39 J. Am. Acad. Psychiatry & L. 78 (2011).....	9, 10, 23
Karen Franklin, <i>Hebephilia: Quintessence of Diagnostic Pretextuality</i> , 28 Behav. Sci. L. 751 (2010).....	9
Alasdair Gillespie, <i>Grooming Definitions and the Law</i> , 154 New L.J. 586 (2004).....	19
Chris Graham, <i>Virginia Ban on Same-Sex Marriage, Civil Unions Repealed</i> , Augusta Free Press (Mar. 3, 2020), https://augustafreepress.com/virginia-ban-on-same-sex-marriage-civil-unions-repealed/	39
Melissa Hamilton, <i>Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law</i> , 47 Ariz. St. L.J. 1 (2015).....	18
Leslie Helmus, <i>Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights</i> ; 24 Sexual Abuse: J. Res. & Treatment 64 (2012).....	13
Leslie Helmus et al., <i>2016 Static-99R Booster Session: Overview of New Manual</i> , https://www.gifrinccom/wp-content/uploads/2016/10/Static-99R-Booster-SLIDES.pdf (last visited Nov. 2, 2020).....	24
Int'l Ctr. for Missing & Exploited Children, <i>Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review</i> (2020), https://www.icmec.org/wp-content/uploads/2017/09/Online-Grooming-of-Children_FINAL_9-18-17.pdf	20

Kara Joyner et al., <i>Gender and the Stability of Same-Sex and Different-Sex Relationships among Young Adults</i> (Ctr. for Family & Demographic Research, Bowling Green State Univ., Working Paper, Jan. 2017), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/center-for-family-and-demographic-research/documents/working-papers/2015/WP-2015-23-v4-Joyner-Gender-and-Stability-of-Same-Sex.pdf	15
Charles Lau, <i>The Stability of Same-Sex Cohabitation, Different-Sex Cohabitation, and Marriage</i> , 74 J. Marriage & Fam. 973 (2012).....	15, 25
Tamara Rice Lave, <i>Controlling Sexually Violent Predators: Continued Incarceration At What Cost</i> , 14 New Crim. L. Rev. 213 (2011).....	18
Jill S. Levenson, <i>Restricting Sex Offender Residences: Policy Implications</i> , A.B.A. Hum. Rts. Mag., Spring 2009, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/restricting_sex_offender_residences_policy_implications/	26
Charles Moser, <i>Letter to the Editor, When is an Unusual Sexual Interest a Mental Disorder?</i> , 38 Archives Sexual Behav. 323 (2009).....	9
Amy Phenix et al., <i>Static-99R Coding Rules</i> (rev. ed. 2016), available at http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf	
	10, 11, 12, 14, 15, 24
Amy Phenix et al., <i>Static-99R & Static-2002R Evaluators' Workbook</i> (2016), http://www.static99.org/pdfdocs/Evaluators_Workbook_2016-10-19.pdf	14
Patrick Singy, <i>Hebephilia: A Postmortem Dissection</i> , 44 Archives Sexual Behav. 1109 (2015).....	8
Skye Stephens & Michael C. Seto, <i>Hebephilic Sexual Offending</i> , in <i>Sexual Offending: Predisposing Antecedents, Assessments and Management</i> 29–41 (Amy Phenix & Harry Hoberman eds., 2015).....	8

<i>Timeline on Same-Sex Marriage and Virginia</i> , Richmond Times Dispatch (Published Feb 16, 2014; Updated Sept. 19, 2019); https://richmond.com/news/virginia/government-politics/timeline-on-same-sex-marriage-and-virginia/article_34cee40b-c322-5f74-a6e9-96a274629e31.html	35
Helen Whittle, et al., <i>A Review of Young People's Vulnerabilities to Online Grooming</i> , 18 Aggression & Violent Behav. 62 (2013).....	21
Georgia M. Winters & Elizabeth L. Jeglic, <i>Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters</i> , 38 Deviant Behav. 724 (2017).....	20
Richard Wollert & Allen Frances, <i>Use of the DSM-5 Paraphilic Taxonomy and Its Residual Categories in Sexually Violent Predator Evaluations in The Wiley Handbook on the Theories, Assessment, and Treatment of Sexual Offending</i> 903 (D.P. Boer et al. eds., 2017).....	9
Richard Wollert, <i>Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem</i> , 12 Psychol. Pub. Pol'y & L. 56 (2006).....	18
<i>The Freedom to Marry in Virginia</i> , Freedom to Marry Campaign, http://www.freedomtomarry.org/states/virginia (last visited Nov. 2, 2020).....	35
Thomas K. Zander, <i>Commentary: Inventing Diagnosis for Civil Commitment of Rapists</i> , 36 J. Am. Acad. Psychiatry & L. 459 (2008).....	9

I. INTEREST OF AMICI CURIAE

The Center for HIV Law and Policy (“CHLP”) is a national legal resource and support hub that challenges barriers to the sexual health and rights of people on the basis of stigmatized health status or identity. We do this through legal advocacy, high-impact policy initiatives, and creation of cross-issue partnerships, networks and resources that amplify the power of communities to mobilize for change that is rooted in racial, gender, disability, and economic justice. CHLP’s interest in this case stems from the Commonwealth of Virginia’s reliance on unsound theories for predicting future sexual dangerousness and the extent to which homophobic bias informs those theories and the determinations.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (“GLAD”) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that LGBTQ people are treated fairly and not subjected to discrimination and unfounded stereotypes in the criminal justice system and civil commitment proceedings such as those at issue in this case.

Founded in 2007, the O’Neill Institute for National and Global Health Law is a center for health law, scholarship, and policy based at Georgetown University. Its mission is to contribute to a more powerful and deeper understanding of the multiple ways in which law can be used to improve the public’s health, using objective evidence as a measure. The O’Neill Institute seeks to advance scholarship, science, research, and teaching that will encourage key decision-makers in the public, private, and civil society to employ the law as a positive tool for enabling more people in the United States and throughout the world to lead healthier lives.

Health Professionals Advancing LGBTQ Equality (“GLMA”) is the largest and oldest association of lesbian, gay, bisexual, transgender and queer (LGBTQ) health professionals. GLMA’s mission is to ensure health equity for LGBTQ and all sexual and gender minority (SGM) individuals, and equality for LGBTQ/SGM health professionals in their work and learning environments, by utilizing the scientific expertise of its diverse multidisciplinary membership to inform and drive advocacy, education, and research. Previously known as the Gay and Lesbian Medical Association, GLMA is a national leader in addressing the full range of health concerns and issues affecting LGBTQ people, including by ensuring that sound science and research informs health policy and practices for the LGBTQ community.

Brad Sears, J.D., is Associate Dean for Public Interest Programs, Founding Director of the Williams Institute, and David Sanders Distinguished Scholar of Law and Policy at UCLA School of Law. The Williams Institute is an academic research center at the UCLA School of Law dedicated to the study of sexual orientation and gender identity. Sears teaches courses on sexual orientation law, disability law, and U.S. legal and judicial systems. He has published a number of research studies and articles, primarily on discrimination against LGBT people in the workplace and HIV discrimination in health care. He has testified before Congress and a number of state legislatures, authored amicus briefs in key court cases, and helped to draft state and federal legislation.

The National Center for Reason and Justice (“NCRJ”) is a non-profit organization that educates and advocates for child-protective laws and criminal justice practices based on science, fairness, and good sense, and supports people who are falsely accused or convicted of crimes. NCRJ educates about fearmongering, junk science, and unfair criminal justice practices; partners with attorneys and advocates to overturn wrongful convictions; and promotes fair and research-based laws, investigation, treatment, and penalties.

The National Center for Lesbian Rights (“NCLR”) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation,

public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBT people in the criminal legal system and represents LGBT people in cases challenging discriminatory conduct by governmental entities in courts throughout the country.

II. STATEMENT OF THE CASE

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

III. STATEMENT OF FACTS

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

IV. ASSIGNMENTS OF ERROR

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

V. STANDARD OF REVIEW

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

VI. ARGUMENT

The Supreme Court should accept the petition for appeal because, as described by the petitioner and this and other *amici* briefs, there were clear errors made by the lower court in its determination that Galen Baughman (hereinafter “Galen”) is a “sexually violent predator” (hereinafter “SVP”) under Virginia’s “Civil Commitment of Sexually Violent Predators” Act. Va. Code § 37.2-900, *et seq.* Errors were due to the bias inherent in the tools used to determine “future dangerousness” in civil commitment proceedings such as Galen’s, the bias and faulty application of questionable science in the testimony of the prosecution’s expert, and the long yet still-recent history of homophobic bias reflected in federal and Virginia court decisions.

The record demonstrates that reliance on faulty assessment tools, improper diagnosis, and unsound and biased expert testimony led to an incorrect determination that Galen Baughman is an SVP with a mental abnormality that requires he be placed on indefinite civil supervision and restrictions. In this case, the Commonwealth’s reliance on a first-time probation violation — that under normal circumstances likely would not even lead to jail time — and conduct previously determined insufficient to support a determination that he is an SVP can only be explained as sexual-orientation-based bias. Allowing this precedent to stand dramatically expands the scope of who may be civilly committed as a

dangerous sex offender, and subjects young gay men to legally enshrined stigma and discrimination.

In summary, the lower court's decision was not rooted in sound science or sound application of the law and should be reviewed.

A. THE COMMONWEALTH RELIED ON FLAWED TOOLS, AN UNSUPPORTABLE PSYCHIATRIC DIAGNOSIS, AND FUNDAMENTALLY UNSOUND EXPERT TESTIMONY TO ATTEMPT TO ESTABLISH THAT MR. BAUGHMAN IS A “SEXUALLY VIOLENT PREDATOR” IN NEED OF SUPERVISION AND/OR INDEFINITE CONFINEMENT.

1. The Commonwealth’s Expert Relied on an Unsupported Diagnosis that the American Psychiatric Association Explicitly Rejected from Inclusion in the DSM-5.

The Commonwealth of Virginia has spent more than a decade trying to civilly commit Galen as an SVP. In 2009, shortly before Galen's impending release from incarceration for his 2003 convictions, the Office of the Attorney General (“OAG”) filed their first civil commitment petition. In 2012, however, a jury determined that Galen is not an SVP in need of commitment or intensive supervision under the statute. Four years later, after Galen was reincarcerated based solely on a non-violent probation violation, the Commonwealth once again attempted to have Galen committed as an SVP. The Virginia Department of Behavioral Health and Developmental Services (“DBHDS”) hired Dr. Ilona Gravers, a psychologist with more than 20 years of experience in assessment and

treatment of sex offenders, to do an evaluation. Dr. Gravers found, as the jury had previously, that Galen was not an SVP and recommended his release.

Rejecting Dr. Gravers' assessment, the OAG instead went expert shopping, eventually finding a psychologist willing to provide the diagnosis the Commonwealth was seeking. Dr. Michelle Sjolinder, the Commonwealth's preferred expert, was only able to reach her conclusion that Galen was an SVP by relying on a diagnosis that has been expressly rejected by the psychological community, and by using a diagnostic instrument that is both inherently biased against gay men and no longer considered reliable for assessing future dangerousness. The trial court erred when it allowed the Commonwealth's expert to testify despite the obvious deficiencies underlying her opinion. The Court further erred by denying Galen the opportunity to elicit evidence from the Commonwealth's first expert who had found he was not an SVP.

Based only on a review of the papers, Dr. Sjolinder opined that Galen suffered from Narcissistic Personality Disorder and "Other Specified Paraphilic Disorder, Adolescent Males," which is also known as hebephilia. (Tr. 44:19-45:3, Oct. 07, 2019; Tr. 186:8-20, Oct. 8, 2019). This diagnosis conflicts with that of Dr. Gravers, who determined that Galen did not have a paraphilia of any form. (Tr. 105:16-19, Jan. 22, 2020.)

While psychiatric experts do recognize various paraphilic disorders as legitimate diagnoses, “hebephilia” is not one of them. Paraphilia generally is the experience of intense sexual arousal in response to atypical objects, situations, fantasies, behaviors, or individuals.¹ The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5),² which is the American Psychiatric Association’s (“APA”) principle authority for psychiatric diagnoses, distinguishes paraphilia from paraphilic disorders, stating that paraphilias do not require or justify psychiatric treatment while paraphilic disorder is a “paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others.”³

¹ Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 685–86 (5th ed. 2013) [hereinafter DSM-5]. See also Am. Psychiatric Ass’n, *Paraphilic Disorders Fact Sheet* (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Paraphilic-Disorders.pdf.

² DSM-5, *supra* note 1.

³ *Id.* While the DSM-5 acknowledges that many paraphilic disorders exist, it only specifically lists eight: voyeuristic disorder, exhibitionistic disorder, frotteuristic disorder, sexual masochism disorder, sexual sadism disorder, pedophilic disorder, fetishistic disorder, and transvestic disorder. *Id.* In 2009, psychologist Ray Blanchard and colleagues proposed the diagnosis of hebephilia, a paraphilic disorder for any adult who, for six or more months, experiences sexual attraction to postpubescent or pubescent children that was equal to or greater than their attraction to adults, and who also either found the attraction distressing, used child pornography, or had sought sexual stimulation from a child. Roy Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 Archives Sexual Behav. 335, 335–50 (2009). In other words, hebephilia is the strong, persistent sexual interest in children who are in early adolescence. It differs from pedophilia, which is the primary or exclusive sexual interest in prepubescent children. Skye Stephens &

Although other paraphilic disorders can be diagnosed under the Other Specified Paraphilic Disorder category, DSM editors rejected hebephilia as a paraphilic disorder and explicitly warned against the misuse of the paraphilia diagnoses to justify the inappropriate involuntary commitment of individuals who do not in fact qualify for a diagnosis of mental disorder.⁴ They noted that hebephilia could be used as a paraphilic label to pathologize unusual sexual interests and incarcerate individuals on the basis of their sexual orientation rather than their behavior, a prescient warning in view of its use in Galen's case.⁵ Indeed, not only did the APA reject hebephilia as a paraphilic disorder that should be included in the DSM, it

Michael C. Seto, *Hebephilic Sexual Offending*, in *Sexual Offending: Predisposing Antecedents, Assessments and Management* 29–41 (Amy Phenix & Harry Hoberman eds., 2015). Blanchard's proposal was rejected by the APA. Patrick Singy, *Hebephilia: A Postmortem Dissection*, 44 Archives Sexual Behav. 1109, 1109–16 (2015).

⁴ Allen Frances & Michael B. First, *Hebephilia is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5*, 39 J. Am. Acad. Psychiatry & L. 78, 78–85 (2011).

⁵ Charles Moser, *Letter to the Editor*, *When is an Unusual Sexual Interest a Mental Disorder?*, 38 Archives Sexual Behav. 323, 323–25 (2009). See also Paul S. Appelbaum, *Commentary: DSM-5 and Forensic Psychiatry*, 42 J. Am. Acad. Psychiatry & L. 136–40 (2014); Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 Behav. Sci. L. 751–68 (2010) (“Hebephilia is . . . a quintessential example of pretextuality, in which special interests promote a pseudoscientific construct that furthers an implicit, instrumental goal. [There are] [i]nherent problems with the construct's reliability and validity.”); Thomas K. Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. Am. Acad. Psychiatry & L. 459 (2008); Richard Wollert & Allen Frances, *Use of the DSM-5 Paraphilic Taxonomy and Its Residual Categories in Sexually Violent Predator Evaluations in The Wiley Handbook on the Theories, Assessment, and Treatment of Sexual Offending* 903 (D.P. Boer et al. eds., 2017).

was also not even included in the appendix of potential disorders that are debated but lack sufficient research to support their inclusion.⁶

DSM editors underscored an additional concern: that the research support for hebephilia is “remarkably undeveloped, weak, and unconvincing.”⁷ Therefore, hebephilia, or the disordered attraction to pubescent adolescents (roughly the ages of 11 to 14), is not currently a diagnosis in the manual. Dr. Sjolinder acknowledged this, but nonetheless hinged her conclusions on a diagnosis she knew to be seriously flawed. (Tr. 203:19–204:04, Oct. 08, 2019.) The trial court erred in allowing Dr. Sjolinder’s testimony to be admitted into evidence unchallenged by other, non-partisan expert testimony.

2. The Static-99R Assessment Tool Cannot Predict Future Dangerousness and Incorporates Bias Against Gay Men.

The Commonwealth’s reliance on the Static-99R tool to establish Galen’s supposed future likelihood to engage in violent, predatory sexual acts against children is unsupported and unsupportable. The tool’s creators have cautioned against its use for the very purpose for which it was used in Galen’s case and this court should reject its application here as well.

The Static-99R is an actuarial assessment instrument designed to position adult male sexual offenders in terms of their relative degree of risk for sexual

⁶ DSM-5, *supra* note 1.

⁷ Frances & First, *supra* note 4, at 84.

recidivism.⁸ This instrument was formed using demographic and criminal history information that the instrument’s creators deemed to correlate with sexual recidivism in adult male sex offenders. It consists of ten items used for scoring by evaluators. Used in combination with a set table of norms, the Static-99R characterizes the individual’s risk for re-offense in terms of how unusual it is (using percentiles) and in terms of how it compares to the average rates of re-offense across all persons with prior sex-related convictions in the development sample used to calibrate the actuarial tool (using risk ratios). The higher the Static-99R score, the higher the risk of recidivism.⁹ The Static-99R’s developing team stated, in its 2016 manual “Static-99R Coding Rules,” that it no longer endorses the use of Static-99R to assess risk for violent recidivism, as it was used in Galen’s case, due to Static-99R’s significant accuracy problem with regards to violent recidivism.¹⁰

The Static-99R suffers from other well-known applicability, accuracy, and inter-rater reliability problems directly relevant to this case.¹¹ For example, there is

⁸ Amy Phenix et al., *Static-99R Coding Rules* 12 (rev. ed. 2016), available at http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf [hereinafter *Static-99R Coding Rules*].

⁹ See generally *id.*

¹⁰ *Id.* at 13.

¹¹ *Id.* at 7, 46; Dean Cauley & Michelle Brownfield, *Static-99R: Item #1 - What is the Offenders Age?: Lack of Consensus Leads to a Defective Actuarial* (Mar. 22, 2013) (unpublished research paper), available at <https://ssrn.com/abstract=>

a disagreement regarding how to score Item # 1, the offender’s age, which causes a significant difference in an individual’s Static-99R score.¹² The Static-99R recognizes higher risk of recidivism in youth and that advanced age mitigates future risk.¹³ This is in keeping with generally accepted research in the field: crime declines with age.¹⁴ Based on the Static-99R Workbook, the offender’s age can be set either at the time of the test or at some date in the future when exposure to risk may occur (age at release).¹⁵ Despite that flexibility, nothing in the Static-99R Coding Rules or the Static-99R Workbook permits setting age backwards in time, prior to the current or upcoming exposure to risk, as was done in Galen’s case.¹⁶ Despite this consensus in the Workbook and Rules, some evaluators suggested that “age” may mean age at the time of release from the most recent sexual offense incarceration, regardless of how long ago that was.¹⁷ With this approach, age is scored as age in the past. If so, Static-99R is no longer responding to the research

2237968. Inter-rater reliability is the degree of consensus among evaluators using an instrument regarding how to score or interpret the tool.

¹² Cauley *supra* note 11, at 2.

¹³ *Static-99R Coding Rules* at 46.

¹⁴ See generally Howard Barbaree et al., *Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components*, 36 Crim. Just. & Behav. 443, 443–65 (2009).

¹⁵ *Static-99R Coding Rules* at 46–48.

¹⁶ Cauley, *supra* note 11, at 8.

¹⁷ *Id.* at 1.

showing that recidivism risk declines with age, nor is it keeping with any of the Static-99R coding manuals or workbook.

These discrepancies in scoring can actually double the risk level, moving the offender's risk level from moderate to high. The percentile ranking in such cases could raise the offender from the 50th percentile into the 90th percentile.¹⁸ When the consequences of such discrepancies and subjective interpretation can be lifetime detention and intensive surveillance of an individual, courts should require a conservative and objectively consistent method.

Additionally, the Static-99R cannot be applied to an offender whose release date was more than two years ago.¹⁹ This is because once the offender is more than two years past the release date, he is no longer like the sample group. This research limitation was acknowledged by Static-99R's developers, who stated that the instrument was developed with and intended for sexual offenders with a current or recent sexual offense.²⁰ Given the inter-rater reliability variance regarding age and Static-99R's research limitation, researchers confirmed that the actuarial tables can

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4.

²⁰ Leslie Helmus, *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 *Sexual Abuse: J. Res. & Treatment* 64, 73 (2012).

no longer be confidently used in assessing current or future recidivism more than two years past a scheduled release date.²¹

Yet another issue is that the Static-99R requires evaluators to place the offender in one of four different groups: Routine, Preselected for Treatment Need, High Risk/Needs Sample, and Non-routine Sample. This requirement responds to the research revelation that different groups of offenders have markedly different recidivism risk rates.²² Although predicted levels of recidivism vary dramatically by sample group, the method of selecting which group to use is poorly defined and controversial. There is also no standardized procedure for making this assignment and the sample that is chosen can significantly alter the level of risk.

Hence, the precision of the instrument is routinely challenged, and its usage has become increasingly controversial in civil commitment trials. One review of such prosecutions in Florida found that: “data on the re-offense rates of individuals in Florida recommended for indefinite civil commitment as sexually violent predators reveals a high false-alarm rate. Research . . . indicates that the Static-99/Static-99R has played a large role in this type of error in overestimating risk.

²¹ Cauley, *supra* note 11, at 23.

²² Amy Phenix et al., *Static-99R & Static-2002R Evaluators' Workbook* 31 (2016), http://www.static99.org/pdfdocs/Evaluators_Workbook_2016-10-19.pdf.

The estimated recidivism rates associated with the Static-99R contribute to that overestimation.”²³

The Static-99R was developed from statistical samples of adult male offenders and possesses no mitigating factors to account for homosexuality. Two items on the test that have been found to disproportionately affect gay men are Item # 2 — “Ever Lived with an Intimate Partner – 2 years” and Item # 10 — “Any Male Victims.”²⁴ A person is given one point and considered greater risk if they had male victims. According to the Static-99R Coding Rules, “Research shows that offenders who have offended against male children or male adults recidivate at a higher rate compared to those who do not have male victims.

Having male victims is correlated with measures of sexual deviance and is seen as an indication of increased sexual deviance.”²⁵ The Rules manual then cites to one article from 1998 as proof.²⁶ This obviously fails to take into consideration men who are attracted to men, and evaluates male-to-male sexual contact through the

²³ Chris Carr et al., *Review of Florida’s Sexually Violent Predator Program Office* (Sept. 23, 2013), https://media.cmgdigital.com/shared/news/documents/2013/09/23/09.23_SVPP_Report.pdf.

²⁴ *Static-99R Coding Rules* at 84.

²⁵ *Id.*

²⁶ *Id.*

lens of sexual deviance. Gay men are more likely to have sexual contact with men, thereby placing them in a higher-scoring category.²⁷

A person is also given one point and considered a greater risk if they have not cohabitated with an intimate partner for two years. The cohabitation item affects gay offenders disproportionately because same-sex cohabitations have been found to have higher rates of dissolution than different-sex cohabitations and marital unions.²⁸ Same sex couples also live together less frequently than heterosexual couples.²⁹ Some explanations for these differences are: less family and peer support, higher levels of stress due to stigma, and possible need for secrecy about their relationships or their living situations due to homophobia.³⁰

²⁷ While not at issue in Galen’s case, the Static-99R also penalizes individuals living with HIV by counting failure to disclose one’s HIV status as a “Category B” sexual offense. Under the Static-99R, if a person has any “Category A” (non-consensual offenses or offenses against children) on their record, then “Category B” offenses are counted as sex offenses for the purpose of scoring. *See Static 99-R Coding Rules* at 22, 24.

²⁸ Charles Lau, *The Stability of Same-Sex Cohabitation, Different-Sex Cohabitation, and Marriage*, 74 J. Marriage & Fam. 973, 973 (2012). *See also* Kara Joyner et al., *Gender and the Stability of Same-Sex and Different-Sex Relationships among Young Adults* (Ctr. for Family & Demographic Research, Bowling Green State Univ., Working Paper, Jan. 2017), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/center-for-family-and-demographic-research/documents/working-papers/2015/WP-2015-23-v4-Joyner-Gender-and-Stability-of-Same-Sex.pdf>.

²⁹ *Id.*

³⁰ Renzo Barrantes et al., *The Role of Minority Stressors in Lesbian Relationship Commitment and Persistence Over Time*, 4 Psychol. Sexual Orientation & Gender Diversity 205, 205–07 (2017).

The recognition of serious problems with the Static-99R is not new. In 2012, the Virginia Joint Legislative Audit and Review Commission published a *Review of the Civil Commitment of Sexually Violent Predators* in Virginia.³¹ The Commission called Virginia’s actuarial risk assessment approach “flawed.”³² Among the key findings were that: 1) “Virginia’s switch to the Static-99 actuarial risk assessment instrument [ARAI] and score of ‘5’ resulted in a 450 percent increase in the number of offenders eligible for civil commitment as [SVPs]”; and 2) Expert SVP evaluators “find offenders to be SVPs at widely varying rates.”³³ Thus Virginia’s own review shows the inconsistency and bias of the civil commitment process.

The Commission also questions whether any ARAI — like the Static-99 used here — is able to reliably predict whether a given individual will re-offend. ARAIs “have limited predictive ability for a single person. Researchers emphasize that accurate predictions for a large group as a whole do not necessarily translate into accurate predictions for a specific individual within that group.”³⁴ The Commission cites research showing that “an individual who scores a ‘5’ may have a risk of re-offense as low as four percent or as high as 92 percent” — an

³¹ Joint Legis. Audit & Rev. Comm’n, *Review of the Civil Commitment of Sexually Violent Predators*, H.R. Doc. No. 5 (Va. 2012) [hereinafter JLARC Review].

³² *Id.* at 2.

³³ *Id.* at i.

³⁴ *Id.* at 32.

unacceptably wide range.³⁵ Likewise, individuals with different risk scores — such as one person scoring a 4 and one person scoring a 5 on the Static-99R — show “negligible” difference in the risk of re-offense. Therefore, evaluations cannot “conclude with any degree of certainty that someone who scores a ‘5’ is more risky than someone who scores a ‘4.’”³⁶ ARAIs like the Static-99R over-predict dangerousness, as a large majority of offenders classified as dangerous never commit violent crimes.³⁷ The predictive accuracy of the Static-99R and other

³⁵ *Id.* at 33.

³⁶ *Id.* at 33–34.

³⁷ Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 Am. Crim. L. Rev. 1, 26 (2017). (“[A] U.S. Department of Justice study of almost 10,000 sex offenders (almost all convicted of rape, sexual assault, or child molestation) found that only 5.3% were arrested for a new sex crime within the first three years after release. Only 3.3% of convicted child molesters were rearrested for a sex crime against a child during that period. In the face of such low base rates, any tool predicting recidivism is likely to be far less accurate than the assumption that any given past offender will not recidivate. . . . [A]ctuarial tools exaggerate the likelihood that any particular offender poses a danger to the public.”). See also Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 Ariz. St. L.J. 1 (2015) (“[A]ctuarial risk models fail to meet the high standards of validity and reliability for admissibility in the law as expert evidence. . . . It is questionable whether many evaluators are sufficiently knowledgeable about actuarial risk methodologies to qualify as expert witnesses in the first place. Further, this Article maintains that actuarial predictions are overly prejudicial, confusing, and misleading, and therefore judges ought to act as gatekeepers for the law to exclude or substantively limit actuarial risk results.”); Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators: An Application of Bayes’s Theorem*, 12 Psychol. Pub. Pol’y & L. 56, 56 (2006) (“[A]ctuarial scores for predicting sexual recidivism in civil commitment cases . . . were inaccurate for identifying recidivists, and misclassified many nonrecidivists as recidivists.”);

ARAIs is highly speculative when predicting the likelihood that any specific person, such as Galen, will re-offend.

3. The Concept of Grooming Is Vague and Subject to Evaluator Bias and Should Not Be Used as a Basis for Civil Commitment.

The trial court further erred by permitting testimony regarding “grooming,” a concept for which there is not a scientific consensus. Despite extensive studies and literature published about the concept, grooming is still not well understood and clearly demarcated.³⁸ Grooming is generally understood to be a course of conduct abusers use to prepare future victims for abuse.³⁹ There is a lack of consensus, however, regarding exactly what the process of grooming entails and how it is distinguished from normal adult/child interactions.⁴⁰ It is widely understood that grooming is multifaceted and establishing where grooming begins and ends is almost impossible.⁴¹ This makes it difficult for both psychologists and forensic experts to determine whether an alleged perpetrator’s behaviors constitute

Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration At What Cost*, 14 New Crim. L. Rev. 213, 213 (2011) (“the actuarial instruments used in SVP determinations make many mistakes”).

³⁸ Natalie Bennett & William O’Donohue, *The Construct of Grooming in Child Sexual Abuse: Conceptual and Measurement Issues*, 23 J. Child Sexual Abuse 957, 959 (2014).

³⁹ *Id.*

⁴⁰ *Id.* at 957.

⁴¹ Alasdair Gillespie, *Grooming Definitions and the Law*, 154 New L.J. 586, 586–87 (2004).

grooming. Hence, the reliability and validity of these judgements are largely unknown, leaving high rates of false positives and false negatives.⁴²

A reliable assessment of grooming as an indicium of dangerousness would require, at the least, a clear and universally accepted definition of the concept. Such a definition does not exist.⁴³ However, the published literature and empirical studies show two major commonalities in: 1) inappropriate behavior on the part of the prospective abuser; and 2) the function of this inappropriate behavior is to increase the adult's ability to sexually abuse the child.⁴⁴

Before “grooming” could be used as a reliable indicium of future dangerousness, moreover, there would need to be a validated model for assessing inappropriate behavior.⁴⁵ The difficulty of forming assessment methods to properly identify grooming stems from the fact that many behaviors used by perpetrators appear innocent and typical of adult/child interactions. Immature, socially awkward communications can be and have been inappropriately characterized as grooming. The only difference between innocent communication and grooming is the *intent* to sexually abuse a child through manipulation, coercion, and

⁴² Bennett & O'Donohue, *supra* note 38 at 959.

⁴³ *Id.*

⁴⁴ *Id.* at 968.

⁴⁵ Georgia M. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 Deviant Behav. 724, 724–33 (2017).

introduction of sexual content.⁴⁶ But that essential element of intent is difficult to confirm based on so-called grooming behavior alone. While there is a body of literature suggesting there are common grooming behaviors that occur during the processes of selecting a victim, one of the few areas of consensus is that sexualizing the communication with the child is a key feature of the grooming process.⁴⁷ This feature is completely absent from Galen's texts and contacts. Thus, the one factor that experts can agree on as a feature of grooming is absent in Galen's case. The Court erred by excluding Dr. Gravers' assessment, and instead allowing the Commonwealth to shop for and then present an expert who relied on amorphous and insufficiently defined concepts such as grooming that are more indicative of homophobic bias than scientific assessment.

4. The Expert Testimony Provided by Dr. Sjolinder Relied on Faulty Science and Anti-Gay Bias and Should Be Rejected.

According to the American Psychiatric Association Practice Guidelines for the Psychiatric Evaluation of Adults, a psychiatric evaluation typically involves a direct interview between the patient and clinician. The interview allows direct questioning and observations of the patient's behavior during the interview.

⁴⁶ Int'l Ctr. for Missing & Exploited Children, *Online Grooming of Children for Sexual Purposes: Model Legislation & Global Review* 5 (2020), https://www.icmec.org/wp-content/uploads/2017/09/Online-Grooming-of-Children_FINAL_9-18-17.pdf.

⁴⁷ Helen Whittle, et al., *A Review of Young People's Vulnerabilities to Online Grooming*, 18 Aggression & Violent Behav. 62, 62–70 (2013).

Interactions with the patient in this manner are important to the accuracy of psychiatric diagnoses. When available, records can be used to add details or corroborate information obtained in the interview. Family members, friends, and other individuals involved in the patient's support network are important sources of collateral information to increase reliability of the diagnosis.⁴⁸

Instead of complying with the common practice in the profession by directly interviewing Galen, Dr. Sjolinder diagnosed him after performing a record-based evaluation. (Tr. 42:4–11, Oct. 07, 2019.) Even more troubling, Dr. Sjolinder only reviewed records provided to her by the OAG and her most recent information was from 2016, three years before the trial. (Tr. 108:6–9, 219:1–8, Oct. 08, 2019.) This limitation creates fundamental accuracy, reliability, and relevancy problems, especially when the issue in the 2019 trial is Galen's mental health condition in 2019 (not 2012 or 2016). Moreover, despite the clear deficit in information, Dr. Sjolinder did not supplement her diagnosis with collateral source interviews that the DBHDS required her to do when feasible, and the record shows that these interviews were feasible. (Tr. 69:11–73:10, Oct. 08, 2019.)

⁴⁸ Am. Psychiatric Ass'n, *Guideline I: Review of Psychiatric Symptoms, Trauma History, and Psychiatric Treatment History, in Practice Guidelines for the Psychiatric Evaluation of Adults* (3d ed. 2015), <https://psychiatryonline.org/doi/10.1176/appi.books.9780890426760.pe02>.

Despite procedural and severe source limitations, Dr. Sjolinder diagnosed Galen with “Other Specified Paraphilic Disorder, Adolescent Males,” a qualifier that Dr. Sjolinder admitted was not mentioned in the DSM-5. (Tr. 203:19–204:04, Oct. 08, 2019.) Dr. Sjolinder argued that the eight paraphilic disorders identified in the DSM-5 were never intended to be a comprehensive list and that attraction to adolescent males is a legitimate paraphilic disorder diagnosis. (Tr. 204:11–205:6, Oct. 07, 2019.) However, Other Specified Paraphilic Disorder, Adolescent Males is merely another name for the rejected diagnosis of Paraphilic Disorder, Hebephilia. Hebephilia is the interest by adults in adolescents. Hence, Dr. Sjolinder’s made-up “Adolescent Males” label merely provided gender specificity to avoid using the rejected diagnosis. This is the sort of abuse DSM editors Allen Frances and Michael First specifically warned against when they rejected the inclusion of Hebephilia in the DSM-5. They stated, “the alleged diagnosis paraphilia not otherwise specified, hebephilia, arose not out of psychiatry but rather to meet a perceived need in the correctional system . . . hebephilia is not an accepted mental disorder that can be reliably diagnosed and should not be treated as such in SVP proceedings.”⁴⁹ Dr. Sjolinder’s diagnosis is evidence of the Commonwealth’s intent to prosecute Galen because of his sexual orientation rather than his behavior.

⁴⁹ Frances & First, *supra* note 4, at 84.

This bias against Galen’s sexual orientation further manifests itself in Dr. Sjolinder’s misuse of the Static-99R. Dr. Sjolinder’s usage of Static-99R is unreliable, unscientific, and severely disadvantaged Galen as a gay man. Dr. Sjolinder knew her evaluation was for an SVP case and still utilized the Static-99R even though the instrument’s coding manual and the developing team clearly stated, “we no longer endorse using Static-99R to comment on risk for violent recidivism.”⁵⁰ (Tr. 6:20–7:16, 128:7–17, Oct. 08, 2019.) This could be attributed to the fact that Static-99R defines reoffending acts far more broadly than just sexually violent offenses. (Tr. 254:15–255:11, Oct. 08, 2019.) The record does not reflect which offender group Dr. Sjolinder placed Galen in, which sample group she used to arrive at her recidivism findings, or her methods in doing so. Given that predicted levels of recidivism vary dramatically by sample group and there is no standardized procedure for making sample group assignment, Dr. Sjolinder’s findings cannot be verified. This makes the validity and reliability of Galen’s Static-99R score intrinsically unsound.

Dr. Sjolinder gave Galen a score of 5 on the Static-99R. The Static 99-R is scored out of ten items. A score of 4 to 5 is considered an “above average risk.”⁵¹

⁵⁰ Leslie Helmus et al., *2016 Static-99R Booster Session: Overview of New Manual*, <https://www.gifrinc.com/wp-content/uploads/2016/10/Static-99R-Booster-SLIDES.pdf> (last visited Nov. 2, 2020); *Static-99R Coding Rules* at 13.

⁵¹ *Static-99R Coding Rules* at 12.

Three out of five total points Dr. Sjolinder gave Galen on the Static-99R are particularly problematic. (Tr. 236:1–3, Oct. 08, 2019.).

Dr. Sjolinder gave Galen one point for being between 18 and 34.9 years old at the age of his first release. In doing so, she effectively aged him backwards because Galen was 35 at the time of trial, would have been older when released following his technical probation violation, and was 36 at the time of his disposition hearing and supervised release. (Tr. 243:11–17, Oct. 08, 2019.) Dr. Sjolinder is misusing the Static-99R and dismissing the science behind the instrument: crime declines with age. Her usage of the instrument in this way is precisely the reason why experts concluded that Static-99R could not be applied to an offender whose release date was more than two years ago.⁵² At the trial in 2019, Galen was much more than two years past the release date in 2012, and no longer like the sample group Static-99R was based on. Due to this fact alone, it is fundamentally unsound and unfair to manipulate Static-99R criteria to force a conclusion about Galen’s recidivism risk, let alone a propensity for violence, that has no basis in current facts or past experience.

Dr. Sjolinder gave Galen one point for not having cohabitated with a partner for two years. As discussed above, the Static-99R cohabitation criteria disproportionately affect gay men because same-sex couples have a significantly

⁵² Cauley, *supra* note 11, at 23.

lower rate of cohabitation in comparison to heterosexual couples.⁵³ In addition, Galen had been in the community for only four years and was on the sex offender registry. (Tr. 251:3–252:5, Oct. 08, 2019.) Cohabitation is extremely difficult for individuals on the sex offender registry because they routinely struggle with finding compliant housing and must also overcome the stigma of being on the registry to attain housing.⁵⁴ In Galen’s case, he must have had to cohabit for at least one half of his time in the community to satisfy this criterion. These facial errors and blatant anti-gay bias indicate that a score of 2 or 3 would be closer to accurate even on this faulty tool. Finally, the scoring of the Static-99R is also generally controversial because the instrument does not allow for consideration of individualized mitigating protective factors that would decrease the risk of offending. In Galen’s case, some of these factors are social support, lack of substance abuse, and positive peer association.

The way that the Commonwealth used the concept of grooming further highlights its determination to punish Galen for his sexual orientation. Researchers have confirmed that the concept of grooming should not be used in forensic

⁵³ Lau, *supra* note 28, at 973.

⁵⁴ Jill S. Levenson, *Restricting Sex Offender Residences: Policy Implications*, A.B.A. Hum. Rts. Mag., Spring 2009, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/restricting_sex_offender_residences_policy_implications/.

settings because most *Daubert* factors disfavor it.⁵⁵ The *Daubert* factors are: (a) Whether a theory can be or has been tested; (b) Whether the theory has been subjected to peer review and publication; (c) Whether there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and (d) Whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 (1999).⁵⁶ Without reliable principles and methods even to define, let alone detect, grooming, high rates of false negatives/positives are inevitable. The testimony of the prosecution’s witnesses Dr. Sjolinder and Detective Sloan, who did not articulate or apply any clear, consistent concept of grooming to the facts of the case, demonstrates this problem.

While Paul Weisser (hereinafter “Paul”) found his communications with Galen “harmless,” Dr. Sjolinder and Detective Sloan dogmatically found their communication to be acts of grooming. (Tr. 64:7–10, Oct. 02, 2019.) Their conclusion only underscores the basis of the consensus that normal adult/adolescent interactions can be difficult to distinguish from grooming; the only difference between the two is the intent of the adult: whether the behavior aims to increase the likelihood of abuse. Galen’s communications with Paul cannot

⁵⁵ Bennett & O’Donohue, *supra* note 38, at 974.

⁵⁶ Note, however, that Virginia did not adopt the Daubert test. Va. Code. Ann. § 8.01-401.

be characterized as grooming under the most commonly used interpretations of that concept.

As discussed, while there is no universally-accepted definition of grooming, studies show two functional commonalities among proposed definitions: 1) inappropriate behavior on the part of the prospective abuser, and 2) the function of this inappropriate behavior is to increase likelihood of abuse. In Galen's case, the witnesses were unable to point to any behavior that can be fairly characterized as inappropriate. Nothing remotely sexual ever happened in conversations or in in-person interactions between Galen and Paul. (Tr. 74:17–83:16, Oct. 02, 2019.)

Detective Sloan himself admitted that conversations that never go to a sexual theme should be excluded from being termed as grooming. (Tr. 100:05–15, Oct. 03, 2019.) Even so, Dr. Sjolinder, determined to find grooming, cherry-picked at Galen's compliments towards Paul, Galen's boasting of his purchases, and their communications over secured messaging apps. (Tr. 147:05–165:11, Oct. 07, 2019.) She argued that flattery and boasting served to gain Paul's trust and the usage of messaging apps was a means to isolate Paul from his parents, with the purpose of preparing him for sexual abuse. (Tr. 147:05–165:11, Oct. 07, 2019.) Relying entirely on a reading of the text messages, Dr. Sjolinder concluded that Galen's communications were not in pursuit of platonic friendship but were intended to prepare Paul for abuse.

Galen and Paul’s communications were never sexual and messaging apps, even secure ones, are commonly used by young people. Paul testified that Galen was “bad” at using messaging apps and could hardly be said to have been instructed about their use by Galen. (Tr. 90:11–23, Oct. 02, 2019.) Galen disclosed to Paul that he had been labeled a sex offender, which would put Paul on alert if Galen had any intent to sexually abuse him. (Tr. 106:15–108:02, Oct 02, 2019; Tr. 199:04–200:22, Oct 03, 2019.) At trial, Galen’s adult friends and colleagues testified that flattery and boasting is typical of Galen’s interactions with them. (Tr. 37:3–39:10, 55:14–57:2, 72:18–73:5, Oct 10, 2019.) In effect, Galen treated Paul like an adult friend of his. These facts point to Galen’s lack of sexual interest in Paul and his intent to maintain a platonic friendship. While acknowledging that there was nothing that could be characterized as sexual in Galen’s text communications, the OAG argued that his texting “ultimately *could lead to additional predatory behavior*, making him more likely to engage in sexually violent acts.”⁵⁷ With the total absence of predatory behavior in this case, the OAG’s case is unsupported speculation.

⁵⁷ *In the Matter of Commonwealth of Virginia v. Galen Michael Baughman*, Arlington Circuit Court, Judge Fiore presiding, Hearing Transcript, May 10, 2018, at 15 [hereinafter “Transcript”]. Following these comments, the judge suggested to counsel for Galen that his giving a young man a ride home to change from his funeral clothes was “grooming behavior” on Galen’s part, even though there was no allegation that Galen had said or done anything remotely inappropriate,

At a hearing on May 10, 2018, it became clear that the expert conclusions and bases for those conclusions, deemed insufficient for civil commitment in the OAG’s 2009 civil commitment petition, are essentially the same as those of Dr. Sjolinder, who was retained only after the initial expert concluded that SVP status and civil commitment was not warranted in Galen’s current case.⁵⁸ The OAG appears to believe that once a gay man has been convicted of a sex offense, any communication with another young man, regardless of the nature or content, constitutes “grooming” of a future sex partner.⁵⁹ The patently homophobic assumptions in this instance should not be the basis for concluding that a young man is an SVP, subjecting him to indefinite confinement or supervision.

B. THE EVIDENCE OF LONG-STANDING BIAS AGAINST GAY MEN AND LESBIANS IN FEDERAL AND VIRGINIA LAW SHOULD NOT BE IGNORED IN DETERMINING WHETHER BIAS AGAINST PEOPLE SUCH AS MR. BAUGHMAN INFORMS DETERMINATION OF WHETHER THEY ARE SVPS.

The last two decades saw great legal strides in recognition of the rights of gay men and lesbians by the U.S. Supreme Court in cases such as *Bostock v. Clayton County*, 590 U.S. ____ (2020); *Obergefell v. Hodges*, 576 U.S. 644 (2015); and *Lawrence v. Texas*, 539 U.S. 558 (2003). However, the relative recency of

because, as the judge put it, “well, but grooming sometimes takes a while.” Transcript at 15–16, 21–22.

⁵⁸ Transcript at 21–22.

⁵⁹ This characterization of Galen’s emails clearly had an impact on the judge, who in colloquy with counsel for Galen flatly states, “The reason why he is here is because he was grooming a 16-year-old.” Transcript at 83.

these landmark decisions underscores the extent to which homophobia is woven into the fabric of our institutions, and homophobic sentiment remains present in public opinion, legislation, and case law in the United States. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 548 U.S. ____ (2018) (holding that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause); *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (finding First Amendment protects homophobic protestors picketing at a gay veteran's funeral from liability for intentionally inflicting emotional distress on the family of the deceased).

In *Bowers v. Hardwick*, which was still the governing law when Galen was first arrested, the U.S. Supreme Court held that a law criminalizing consensual, private sex between two gay men was constitutional. 478 U.S. 186, 190 (1986). The Court refused to find a fundamental right at issue, instead narrowly construing it as “the right for homosexuals to engage in acts of consensual sodomy,” and cited “ancient roots” for the prohibition for sodomy. *Id.* *Bowers* is the embodiment of how legislated morality represents the enforcement of the majority’s preferences over the rights of the minority.

In 2003, the Supreme Court struck down *Bowers*, stating that “its continuance as precedent demeans the lives of homosexual persons.” *Lawrence*,

539 U.S. at 566. The Court further recognized that the stigma caused by laws that criminalize LGBT people “is not trivial” and “is an invitation to subject [LGBT] persons to discrimination both in the public and in the private spheres.” *Id.* at 575. The *Lawrence* Court was clear that “*Bowers* was not correct when it was decided, and it is not correct today.” *Id.* at 578. Yet Virginia did not act to repeal its criminal sodomy laws until 2014 — eleven years later.⁶⁰ That repeal likely happened only because of a ruling by the U.S. Court of Appeals for the Fourth Circuit that Virginia’s “Crimes Against Nature” anti-sodomy provision, which prohibited anal and oral sex, was unconstitutional. *Macdonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

Even after *Lawrence*, Virginia courts found that the application of Virginia’s criminal sodomy statute to public sexual conduct “does not implicate the more narrow liberty interest upheld in *Lawrence*.” *Tjan v. Commonwealth*, 46. Va. App. 698, 701 (Va. Ct. App. 2005). These kinds of laws have been disproportionately used against gay men, thereby effectuating the criminal legal system’s bias and stigma against gay men. In *Tjan*, the plaintiff acknowledged affirmatively to an undercover officer that he wanted to perform oral sex in one of the stalls of a

⁶⁰ Va. Code Ann. § 18.2-361 (2014); *An Act to amend and reenact §§ 17.1-275.12, 18.2-67.5:1, 18.2-346, 18.2-348, 18.2-356, 18.2-359, 18.2-361, 18.2-368, 18.2-370, 18.2-370.1, 18.2-371, and 18.2-374.3 of the Code of Virginia, relating to sodomy; penalties*, ch. 794 (Va. 2014), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0794>.

public restroom. *Id.* at 698. He was indicted with “commanding, entreating or otherwise attempting to persuade another to commit a felony,” specifically, “Crimes Against Nature.” *Id.* at 699. The plaintiff could not be charged or convicted of an actual “Crime Against Nature” because he never engaged in sex with the officer, so the state targeted him in a tangential way. This tendency to charge and prosecute gay men but not heterosexual men reflects the criminal system’s homophobic assumption that gay men are sexual predators.

This homophobic bias is embodied in a series of cases with suspiciously identical facts. *See, e.g., Singson v. Commonwealth*, 46 Va. App. 724, 725 (Va. Ct. App. 2005) (upholding conviction and constitutionality of “Crimes Against Nature” statute against gay defendant who offered to orally copulate undercover officer in a public bathroom).⁶¹ Indeed, *Tjan* is only one in a long history of cases where police target gay men. *See, e.g., Pedersen v. City of Richmond*, 254 S.E.2d 95 (Va. 1979) (holding that solicitation law was constitutional and noting that officer was part of the “Selective Enforcement Unit in . . . ‘a known area for

⁶¹ Police in Roanoke, Virginia used similar entrapment methods against gay men. However in these cases the men were acquitted of charges of soliciting undercover police officers for oral sex, after juries heard arguments that the undercover officers had been the ones who had pursued the topic of sex during their conversations in the park. While the legal outcome was different, the targeting by police remains the same. Amnesty Int’l, *Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual and Transgender People in the U.S.* 35 n. 138 (2015), available at <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>.

homosexuals.”’); *Branche v. Commonwealth*, 489 S.E.2d 692 (Va. Ct. App. 1997); *DePriest v. Commonwealth*, 537 S.E.2d 1 (Va. Ct. App. 2000).

The systematic and purposeful targeting of gay men by the criminal legal system is unfortunately not unique to Virginia.⁶² Particularly after World War II, state and local governments enacted a wide range of laws designed to discriminate against LGBT people, including sodomy laws targeting same-sex sexual conduct, civil commitment for “sexual deviants,”⁶³ and many others.⁶⁴ Police departments and other law enforcement agencies enforced those laws. For example, Washington, D.C. averaged 1,000 arrests of gay men and lesbians per year and Philadelphia reached 1,200 arrests per year.⁶⁵ The criminal legal system was used to psychologically terrorize LGBT people in Virginia, and across the country.⁶⁶

⁶² See generally Brief of Nat'l Ctr. for Lesbian Rights as Amicus Curie in Support of Appellant, *Brome v. Cal. Highway Patrol*, 44 Cal. App. 5th 786 (Cal. Ct. App. 2020) (No. A154612).

⁶³ Christopher Agee, *The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950-1972* 74 (2014); Brief of Professors of History as Amici Curiae in Support of Petitioners, *Lawrence v. Texas* 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350, at *10.

⁶⁴ Brief of Professors of History, *supra* note 63, at *10.

⁶⁵ *Id.* at *19.

⁶⁶ Agee, *supra* note 63, at 76. See, e.g., Jakob Cordes, *Documentary Sheds Light on History of Richmond Gay Community*, VPM NPR News (June 23, 2020), <https://vpm.org/news/articles/14378/documentary-sheds-light-on-history-of-richmond-gay-community> (noting that “many gay men [in Richmond] were subject to police intimidation, which could include the threat of arrest and public identification in prominent newspapers”).

In addition to being targeted in criminal proceedings, gay men and lesbians have been disadvantaged in Virginia family law as well. Virginia's animosity to same-sex marriage is particularly instructive.⁶⁷ State recognition of same-sex marriage was first prohibited by statute in 1975.⁶⁸ Recognition of same-sex marriages performed in other states was prohibited in 1997,⁶⁹ and civil unions were banned in 2004.⁷⁰ Apparently finding that insufficient, voters went so far as to approve a constitutional amendment reinforcing the existing laws in 2006.⁷¹ Although *Obergefell* recognized that same-sex couples have a fundamental right to marry in 2015, Virginia did not formally repeal its laws banning same-sex marriage until this year.⁷² Section 15-A of the Virginia Constitution, which defines valid or recognized marriages as "only a union between a man and a woman," is

⁶⁷ See generally *The Freedom to Marry in Virginia*, Freedom to Marry Campaign, <http://www.freedomtomarry.org/states/virginia> (last visited Nov. 2, 2020); *Timeline on Same-Sex Marriage and Virginia*, Richmond Times Dispatch (Published Feb 16, 2014; Updated Sept. 19, 2019), https://richmond.com/news/virginia/government-politics/timeline-on-same-sex-marriage-and-virginia/article_34cee40b-c322-5f74-a6e9-96a274629e31.html.

⁶⁸ Va. Code Ann. §§ 20-45.2, 20-45.3, *repealed* by Acts 2020, cc. 75 and 195, cl. 1, and c. 900, cl. 2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Va. Const. art. I, §15-A. The text of the ballot proposition is available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+SB526ER+pdf>.

⁷² *An Act to repeal §§ 20-45.2 and 20-45.3 of the Code of Virginia, relating to same-sex marriages; civil unions*, ch. 75 (Va. 2020); Chris Graham, *Virginia Ban on Same-Sex Marriage, Civil Unions Repealed*, Augusta Free Press (Mar. 3, 2020), <https://augustafreepress.com/virginia-ban-on-same-sex-marriage-civil-unions-repealed/>.

still there.⁷³ A 2016 attempt to repeal it failed.⁷⁴ Although no longer enforced, the fact that Virginia’s Constitution to this day bans same-sex marriage reflects Virginia’s long hostility to the rights of its gay and lesbian citizens.

Before 2000, whether a parent was in a same-sex relationship was also an important consideration in determining custody. *See Bottoms v. Bottoms*, 249 Va. 410, 413 (1995) (finding mother to be unfit, stating that conduct inherent in lesbianism is punishable as a felony and that living daily under conditions stemming from active lesbianism practice in the home imposes a burden upon a child). Although *Lawrence* resulted in less severe consequences for gay and lesbian parents, subsequent cases still reflect homophobic sentiments. *See A.O.V. v. J.R.V.*, Nos. 0219-06-4, 0220-06-4, 2007 WL 581871 (Va. Ct. App. Feb. 27, 2007) (finding visitation restrictions imposed to limit the children’s exposure to father’s gay lifestyle were not an abuse of discretion); *Sirney v. Sirney*, No. 0754-07-4, 2007 WL 4525274 (Va. Ct. App. Dec. 27, 2007) (finding visitation restriction of “no overnight stays by person to whom mother is not married but is involved in romantic, sexual relationship while the children are visiting” not a limitation upon mother’s same-sex relationship despite ban on gay marriage).

⁷³ Va. Const. art. I, §15-A.

⁷⁴ S.J. Res. 2, *Proposing the repeal of Section 15-A of Article I of the Constitution of Virginia, relating to marriage* (Va. 2016), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SJ2&161+sum+SJ2>.

The government may not subject gay people or any other group to special limitations simply “to make them unequal to everyone else.” *See Romer v. Evans*, 517 U.S. 620, 635 (1996). It is illegitimate for a state to enact distinctions justified only by “animus toward the class [that the distinction] affects.” *Id.* at 632. Whether couched as morality, fear, political expediency, or bias, mere negative attitudes alone are not a legitimate basis for punishing one group but not others for the same conduct. *Id.* at 634–35 (1996); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Yet Galen is being punished for conduct much more harshly than an equally situated heterosexual man would be. It shocks the conscience that, in the absence of any new offense, Galen has been found to be, under Virginia’s civil commitment law, one of the most dangerous men in the state. Indeed, it is impossible to imagine such vigorous pursuit of a heterosexual man for non-sexual texts to a young person living in another state. Homophobia is infused in the Static-99R assessment and the psychologist’s application of the assessment to Galen. *See* Section VI.A.2 *supra*. Homophobia is infused in the experts’ reliance on the vague and unscientific concept of grooming. *See* Section VI.A.3 *supra*. The injustice suffered by Galen here is one among many criminal and civil discriminations that the LGBTQ community has suffered in Virginia in the last two decades.

VII. CONCLUSION

Although there has been a shift in public opinion and law concerning gay men and lesbians, anti-gay hostility and bias remains common in contemporary American society. This hostility can be seen in the OAG's characterization of Galen and his communication with Paul, and the drive to label and confine him as an SVP based entirely on texting and a technical probation violation. Galen's SVP finding is a product of weak science and homophobia. For the foregoing reasons, *amici* respectfully submit that this Court should accept the petition for appeal based on the clear errors identified in the petition, vacate the judgment, and direct the circuit court to dismiss the proceeding with prejudice.

Dated: November 9, 2020

Respectfully submitted,

/s/ Cary Citronberg
Cary Citronberg (VSB 81363)
Zwerling/Citronberg, PLLC
114 North Alfred Street
Alexandria, VA 22314-3011
Phone: 703-684-8000
Fax: 703-684-9700
Email: cary@zwerling.com

Anne Kelsey (*Pro hac vice* pending)
Center for HIV Law & Policy
147 Prince Street
Brooklyn, NY 11201
Phone: 212-430-6733
Fax: 212-430-6734
Email: akelsey@hivlawandpolicy.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

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 brief was electronically filed with the Clerk of Court using the VACES CM/ECF system and served electronically via email, upon:

Counsel for Appellant

Jonathan S. Jeffress
Emily Voshell
William Zapf (*pro hac vice* pending)
KaiserDillon PLLC
1099 14th Street NW, 8th Fl. West
Washington, DC 20005
Phone: 202-640-2850
Email:
jjeffress@kaiserdillon.com
evoshell@kaiserdillon.com
wzapf@kaiserdillon.com

Counsel for Appellee

Erin Dugan Whealton
Senior Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
Phone: 804-225-2369
Fax: 804-692-1098
Email: ewhealton@oag.state.va.us