

No. 08-1224

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., *et al.*

Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND NATIONAL
ASSOCIATION OF FEDERAL DEFENDERS AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

JUDITH H. MIZNER
NAT'L ASS'N OF FEDERAL
DEFENDERS
51 Sleeper St., 5th Floor
Boston, MA 02110
(617) 223-8061

JEFFREY T. GREEN*
RICHARD E. YOUNG
STEPHANIE P. HALES
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

JONATHAN HACKER
CO-CHAIR, AMICUS
COMMITTEE
NAT'L ASS'N OF CRIMINAL
DEFENSE LAWYERS
1660 L St., N.W., 12th FL
Washington, D.C. 20036
(202) 872-8600

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

Counsel for Amici Curiae

November 4, 2009

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	4
I. DEPRIVATIONS OF LIBERTY BASED ON HIGHLY UNCERTAIN, MISAPPLIED, OR ILL-FITTED SCIENCE LEAD TO ARBITRARY GOVERNMENT ACTION AND VIOLATE DUE PROCESS .	4
A. Section 4248 Leads to Arbitrary Government Action By Authorizing Indefinite Civil Commitment Based On Lowered Evidentiary Standards That Apply Broadly And Lack Meaningful Limitations.....	5
B. Section 4248 Rests On An Incorrect Assumption That The Individuals Who Will Commit Future Sex Offenses Can Be Identified Accurately	7
C. The Limitations And Flaws Of Prediction Science Render It Inadequate As A Basis For Prolonged Post- Conviction Detention Under Section 4248	11

TABLE OF CONTENTS—continued

	Page
II. SECTION 4248 FAILS TO PROVIDE THE PROCEDURAL SAFEGUARDS THAT THIS COURT FOUND TO BE ADEQUATE IN <i>KANSAS V. HENDRICKS</i> , AND THAT ARE INCLUDED IN COMMITMENT STATUTES IN OTHER STATES.....	18
III. SECTION 4248 IS VOID FOR VAGUENESS	25
A. Statutory Language	25
B. Regulations.....	29
CONCLUSION	31
APPENDIX, State SVP Statutes with Definitions of Terms Undefined in Section 4248.....	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979)	4, 13
<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	19, 20
<i>Begay v. United States</i> , 128 S. Ct. 1581 (2008).....	26
<i>Chevron v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	6
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	5, 9, 14, 15
<i>Davis v. United States</i> , 512 U.S. 452 (1994).....	3
<i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992).....	2, 4, 28
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	25
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	4, 13, 27
<i>Johnson v. Noot</i> , 323 N.W.2d 724 (Minn. 1982).....	9
<i>Kansas v. Crane</i> , 534 U.S. 407 (2002)	2, 26, 27
<i>Kansas v. Hendricks</i> , 521 U.S. 346 (1997).....	<i>passim</i>
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)....	25
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	26
<i>New York v. Rosado</i> , No. 250294, 2009 WL 1911953 (N.Y. App. Div. June 29, 2009) ..	16, 17
<i>Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia</i> , 524 F.3d 54 (1st Cir. 2008).....	6
<i>Morgan v. Woessner</i> , 997 F.2d 1244 (9th Cir. 1993).....	19, 20
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997).....	27
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	3
<i>United States v. Abregana</i> , 574 F. Supp. 2d 1123 (D. Haw. 2008).....	6

TABLE OF AUTHORITIES—continued

	Page
<i>United States v. Comstock</i> , 507 F. Supp. 2d 522 (E.D.N.C. 2007)	21
<i>United States v. Comstock</i> , 551 F.3d 274 (4th Cir. 2009)	21, 22
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	8
<i>United States v. Shields</i> , 522 F. Supp. 2d 317 (D. Mass. 2007)	22
<i>United States v. Williams</i> , 128 S. Ct. 1830 (2008)	25, 26, 27
<i>Willis v. Cockrell</i> , No. P-01-CA-20, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004)	10
<i>In re Winship</i> , 397 U.S. 358 (1970)	24

STATUTES AND CODES

18 U.S.C. § 4247	22, 25
18 U.S.C. § 4248	<i>passim</i>
Ariz. Rev. Stat. § 36-3701(7)	24
Ariz. Rev. Stat. § 36-3707	23
Cal. Welf. & Inst. Code § 6600(a)	24
Cal. Welf. & Inst. Code § 6604	23
Fla. Stat. § 394.912-13(2)	23, 24
725 Ill. Comp. Stat. 207	23, 24
Iowa Code § 229A.2(11)	24
Iowa Code § 229A.7	23
Kan. Stat. Ann. §§ 59-29a01 <i>et seq.</i>	<i>passim</i>
Mass. Ann. Laws Chapter 123A § 1	24
Mass. Ann. Laws Chapter 123A § 14	23
Minn. Stat. § 253B.01	23
Mo. Rev. Stat. § 632.480(5)	23, 24
N.D. Cent. Code § 25-03.3-01(8)	23
N.H. Rev. Stat. Ann. § 135-E:2	23, 24
N.J. Stat. Ann. § 30:4-27.26	23, 24

TABLE OF AUTHORITIES—continued

	Page
N.J. Stat. Ann. § 30:4-27.27(a)	23, 24
N.Y. Men. Hyg. Law § 10.03	23, 24
Neb. Rev. Stat. Ann. § 71-1203(1)	23, 24
Neb. Rev. Stat. Ann. § 83-174.01(1)	23, 24
S.C. Code Ann. § 44-48-30(1)	24
S.C. Code Ann. § 44-48-100.....	23
Tex. Health & Safety Code Ann. § 841.003.....	24
Tex. Health & Safety Code Ann. § 841.062.....	23
Va. Code Ann. § 37.2-900	23, 24
Wash. Rev. Code § 71.09.020(18).....	24
Wash. Rev. Code § 71.09.060	23
Wis. Stat. § 980.01(7)	24
Wis. Stat. § 980.05.....	23
28 C.F.R. § 549.90	6, 29
28 C.F.R. § 549.92	29
28 C.F.R. § 549.93	29
28 C.F.R. § 549.95	6, 7, 30

LEGISLATIVE HISTORY

H.R. Rep. No. 109-218 (2005)	7, 8
------------------------------------	------

SCHOLARLY AUTHORITIES

Erica Beecher-Monas & Edgar Garcia-Rill, <i>Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World</i> , 24 <i>Cardozo L. Rev.</i> 1845 (2003)....	10
John S. Carbone, “ <i>Into the Wonderland of Clairvoyance</i> ”: <i>Faulty Science and the Prediction of Future Dangerousness, in Malingering, Lies, and Junk Science in the Courtroom</i> (Jack Kitaeff ed., 2007)....	9

TABLE OF AUTHORITIES—continued

	Page
Bernard Diamond, <i>The Psychiatric Prediction of Dangerousness</i> , 123 U. Pa. L. Rev. 439 (1975)	9
Marilyn Hammond, Comment, <i>Predictions of Dangerousness in Texas</i> , 15 St. Mary's L.J., 141 (1980).....	9
R. Karl Hanson, <i>Does Static-99 Predict Recidivism Among Older Sexual Offenders?</i> 18 Sexual Abuse: A Journal of Research and Treatment (2006).....	14, 15
R. Karl Hanson & Kelly E. Morton-Bourgon, <i>The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies</i> , 21 Psychological Assessment 1 (2009).....	12, 13, 14
Andrew Harris <i>et al.</i> , <i>STATIC-99 Coding Rules Revised—2003</i> (2003), available at http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf (last visited Nov. 2, 2009)	14
Wagdy Loza, <i>Predicting Violence and Recidivism Among Forensic/Correctional Population</i> , Arabpsynet eJournal (Nov.-Dec. 2004), available at http://www.arabpsynet.com/archives/op/OPj4.LOZAWagdy.PredictingViolence.pdf	13, 14
John Monahan, <i>A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients</i> , 92 Va. L. Rev. 391 (2006).....	16

TABLE OF AUTHORITIES—continued

	Page
John Monahan, <i>Structured Risk Assessment of Violence</i> , in <i>Textbook of Violence Assessment and Management</i> (R. Simon & K. Tardiff eds., 2008)	13
John Monahan <i>et al.</i> , <i>Violence Risk Assessment: The Law and the Science</i> , in <i>Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence</i> (2001).....	12
Stephen Morse, <i>Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law</i> , 51 S. Cal. L. Rev. 527 (1978).....	9
Alexander Scherr, <i>Daubert & Danger: The 'Fit' of Expert Predictions in Civil Commitments</i> , 55 Hastings L.J. 1 (2003).....	8, 10
Richard Wollert, <i>Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators</i> , 13 Psychol. Pub. Pol'y & L. 56 (2006).....	12

OTHER AUTHORITIES

American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (4th ed. 1994).....	28
Restatement (Third) of Torts: Liability for Physical Harm, Affirmative Duties, Duty to Third Persons Based on Special Relationship with Person Posing Risk § 41 (2005)	11
Static-99 FAQ, <i>at</i> http://www.static99.org/pdffdocs/faq.pdf ...	14, 17

INTEREST OF THE *AMICI CURIAE*¹

Amicus curiae, the National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus curiae, the National Association of Federal Defenders (“NAFD”), was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Together, *amici curiae* write to address important, additional issues of particular relevance to the defense bar, concerning the procedural failings of the statute at issue in this case. In *Kansas v. Hendricks*, this Court emphasized that forcible civil commitment may be undertaken only in “narrow circumstances” and that the constitutionality of such detention depends on the availability of “proper procedures and

¹ Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*’s intent to file this brief and have consented to its filing in letters on file with the Clerk’s office.

evidentiary standards.” 521 U.S. 346, 357 (1997). Although this Court narrowly concluded that the Kansas statute had sufficiently “strict procedural safeguards” to comport with due process requirements, *id.* at 368, 371, the statute now before the Court is dramatically different from the Kansas law. We therefore write not only in support of Respondents, but also in the spirit of Justice Kennedy’s caution that the Court’s holding in *Hendricks* might not withstand the test of time:

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

Hendricks, 521 U.S. at 373 (Kennedy, J., concurring).

SUMMARY OF THE ARGUMENT

This Court has upheld statutes that authorize the involuntary commitment of individuals only when they apply to individuals who are determined to be unable to control their behavior and thereby pose a threat to the public health and safety, and only if (1) the confinement takes place pursuant to proper procedures and evidentiary standards, (2) there is a finding of dangerousness either to one’s self or to others, and (3) proof of dangerousness is coupled with proof of mental illness. *Kansas v. Crane*, 534 U.S. 407, 409-410 (2002); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

Section 4248 fails to satisfy these fundamental requirements of due process in the civil commitment

context in at least three respects.² First, the lowered evidentiary threshold in the statute results in reliance on science and data that simply are not advanced enough to form the basis for detentions under § 4248. As Respondents point out, § 4248 is focused on preventing certain conduct that may happen at some future point. See Resp. Br. at 57 (quoting *United States v. Volungus*, 599 F. Supp. 2d 68, 76 n.9 (D. Mass. 2009)). Yet neither clinical predictions, nor actuarial assessments, nor any combination of the two has proven sufficiently accurate on a consistent basis to form the necessary legal foundation for the forcible, potentially indefinite detention authorized by § 4248. Such science may have a valid place in certain clinical contexts, but it is ill-suited and insufficiently accurate to meet the demands of due process required here.

Second, § 4248 applies more broadly and affords far weaker procedural process protections than the state statutory scheme narrowly upheld in *Hendricks*, 521 U.S. 346, or similar State laws.

Finally, as demonstrated both by the plain statutory text and by implementing regulations promulgated by the Bureau of Prisons (“BOP”), § 4248’s enforcement turns on unconstitutionally vague terms that invite discriminatory application and thereby render the statute effectively standardless and, as such, void.

² Although the government and Respondents have not raised all of the issues discussed herein in their respective briefs, this Court has long held that it will consider issues raised solely in an *amicus* brief, even though the issue was not presented in the petition for certiorari. *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

The sweeping nature of § 4248—in terms of the universe of individuals to whom it applies, the effectively unlimited types of evidence and behavior subsumed within its scope, and the dearth of procedural protections it affords—makes it a civil commitment statute that is “a mechanism for retribution or general deterrence,” precisely the outcome Justice Kennedy cautioned against. *Hendricks*, 521 U.S. at 373.

ARGUMENT

I. DEPRIVATIONS OF LIBERTY BASED ON HIGHLY UNCERTAIN, MISAPPLIED, OR ILL-FITTED SCIENCE LEAD TO ARBITRARY GOVERNMENT ACTION AND VIOLATE DUE PROCESS.

Generalized attempts to predict dangerousness for specific individuals lack the reliability necessary to form a basis for the indefinite civil detentions authorized by § 4248. Reliance on equivocal data leads to arbitrary government action, which violates due process. See *Foucha*, 504 U.S. at 80 (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”). “[W]e must be mindful that the function of legal process is to minimize the risk of erroneous decisions.” *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Mathews v. Eldridge*, 424 U.S. 335 (1976)); see also *Heller v. Doe*, 509 U.S. 312, 332 (1993) (fundamental to the prevention of unfair and mistaken deprivations is the need to ensure “the accurate determination of the matters before the court.”). Accordingly, this Court has held that due process is satisfied “[s]o long as the accuracy of the adjudication is unaffected,” *id.*, and has observed that the “known or potential rate of

error” of evidence bears on the question “whether the testimony’s underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993).

In the context of prediction science, such accuracy has not been demonstrated. Indeed, the opposite is true. The widespread use of such science in connection with § 4248 proceedings—owing in part to the statute’s relaxed evidentiary standard (see *infra*)—violates due process.

A. Section 4248 Leads To Arbitrary Government Action By Authorizing Indefinite Civil Commitment Based On Lowered Evidentiary Standards That Apply Broadly And Lack Meaningful Limitations.

The commitment criteria of § 4248 and prior civil commitment statutes rest on the idea that the government may detain individuals who have a current illness that leads them to pose a danger to themselves or the community. See Pet. Br. at 18.³ In arguing its position, the government repeatedly refers to the class of individuals traditionally subject to civil commitment as “insane” or “mentally ill”, *e.g.*, Pet. Br. at 2-4, 17, 23-24, 26-29, 32-33, 36-39, 46—despite the fact that § 4248 authorizes commitment based on far less than “illness,” requiring only the

³ Notably, the government states that “civil commitment protects against the release of a person in government custody whose mental condition is *known* to pose a danger to the public.” Pet. Br. at 32 (emphasis added). Yet, as discussed herein, data regarding dangerousness predictions indicate that there is no way to *know* which individuals “pose a danger to the public”—particularly as a result of the person’s “mental condition.”

presence of an undefined condition termed “abnormality.” This is more than mere truncation on the Petitioner’s part, for although the term “mental abnormality” was deemed sufficient in *Hendricks*, the validity of that phrase in the civil commitment context was upheld narrowly and with much skepticism about imprecision and potential for overly broad or arbitrary application. 521 U.S. at 373 (Kennedy, J., concurring).

Moreover, final regulations promulgated by the BOP to implement the certification process required by § 4248⁴ add no meaningful specificity to the statute’s terms or evidentiary standards. In fact, they take the process in the opposite direction. For example, the regulations provide that the BOP “will consider *any* available information in its possession” for purposes of determining that an individual is a “sexually dangerous person.” 28 C.F.R. § 549.90(c) (emphasis added). Similarly, the BOP regulations disclaim any limitations on the evidence that can be used to determine that a person “will have ‘serious difficulty refraining from sexually violent conduct or child molestation if released.’” 28 C.F.R. § 549.95 (enumerating five types of evidence that BOP mental health professionals may consider, but noting that professionals “are not limited to” the types of evidence listed). Included as permissible evidence for

⁴ Courts may look at an agency’s interpretation of a statute for guidance, particularly where the agency is charged with administering the provision in question, as the BOP is in this case, and particularly where the regulations speak to ambiguities which Congress did not address in the statute itself. *United States v. Abregana*, 574 F. Supp. 2d 1123, 1144 (D. Haw. 2008); see also *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 57 (1st Cir. 2008).

these determinations is information “[e]stablished through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals” or by “[i]ndicating successful completion of, or failure to successfully complete, a sex offender treatment program.” 28 C.F.R. § 549.95(c), (e).

In its practical application, then, § 4248 creates a lowered evidentiary threshold that allows a person’s statements and interactions with mental health professionals in treatment to provide the basis for extending a prison sentence through the mechanism of civil commitment. Moreover, as discussed below, the broad expansion of allowable evidence also results in reliance on clinical predictions and actuarial tools that, while perhaps valid in certain clinical contexts, are neither accurate nor appropriate for purposes of predicting the future sexual dangerousness of *specific persons*.

B. Section 4248 Rests On An Incorrect Assumption That The Individuals Who Will Commit Future Sex Offenses Can Be Identified Accurately.

The underlying policy justification of § 4248 relies on the theory of recidivism—the idea that someone who has engaged or attempted to engage in a type of behavior in the past will repeat that behavior in the future. Legislative history shows that Congress subscribed to the theory of recidivism in drafting § 4248. See H.R. Rep. No. 109-218, pt. 1, at 22-23 (2005) (“Sex offenders have recidivism rates that often exceed those of other criminals.”). Notably, however, the recidivism rates Congress pointed to when crafting § 4248 were relatively low. Congress highlighted the Department of Justice’s most recent data, showing that, in a survey across fifteen states

in 1994, only 5.3% of 9,691 sex offenders released from prison were arrested for a new sex crime within three years of release, meaning that 94.7% of released sex offenders had *not* recidivated. *Id.*⁵ Further, as discussed *infra*, more recent data, including data from researchers who developed the actuarial tool most frequently used to predict dangerousness in the context of civil commitment proceedings, suggest that sex-offender recidivism rates are significantly lower than those reflected in older data, and that previously established statistical norms for estimates of recidivism risk are no longer valid.

The central question in cases under § 4248 is not one of statistics, but of *individuals*—how to determine which specific persons pose a danger to society due to a serious mental condition that results in the person having “serious difficulty in refraining” from certain conduct in the future. The tools used to predict sexual dangerousness in hearings under § 4248 are not designed to answer this question. They are designed to show only group patterns, not an individual’s behavior or capacity for self-control. “[P]redictions of danger lack scientific rigor,” and “[s]cientific studies indicate that some predictions do little better than chance or lay speculation, and even the best predictions leave substantial room for error about individual cases.” Alexander Scherr, *Daubert & Danger: The ‘Fit’ of Expert Predictions in Civil Commitments*, 55 *Hastings L.J.* 1, 2-3 (2003).

⁵ Moreover, much of the data cited by Congress in that report was generated from polygraph studies—a method of collecting data that the government itself has argued has significant error rates. *See United States v. Scheffer*, 523 U.S. 303, 310 (1998).

Although there is no dispute that mental health professionals can be helpful in assisting judges to understand individuals' mental states, literature and data from the past thirty years suggest that, when it comes to predicting which individuals will commit offenses in the future, professionals' predictions are neither accurate nor reliable for purposes of legal determinations affecting a person's liberty interests.⁶ See *Daubert*, 509 U.S. at 590 (“[T]he requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”); *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982) (“Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness. Accordingly, it is recommended that

⁶See, e.g., Marilyn Hammond, Comment, *Predictions of Dangerousness in Texas*, 15 St. Mary’s L.J., 141, 141-42 (1980) (“Reliance by the courts on testimony by psychotherapists may be misplaced, since the ability to accurately predict dangerousness has not been demonstrated.”); Stephen Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527, 600 (1978) (“In general, mental health professionals . . . [w]hen predicting violence, dangerousness, and suicide . . . are far more likely to be wrong than right.”); Bernard Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 444-45 (1975) (“There are a number of statistical studies which amply demonstrate that the predictions of dangerousness by psychiatrists are unreliable. . . . The findings so consistently demonstrate that psychiatrists over-predict dangerousness by huge amounts that the reports [of unreliability] must be taken seriously.”). See generally John S. Carbone, “*Into the Wonderland of Clairvoyance*”: *Faulty Science and the Prediction of Future Dangerousness*, in *Malingering, Lies, and Junk Science in the Courtroom* 533-73 (Jack Kitaeff ed., 2007).

courts no longer ask such experts to give their opinion of the potential dangerousness of any person.” (quoting a mental health professional expert witness)). “Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community, absent those individuals who routinely testify to, and profit from, predictions of dangerousness.” *Willis v. Cockrell*, No. P-01-CA-20, 2004 WL 1812698, at *34 n.275 (W.D. Tex. Aug. 9, 2004).

As observed in a recent article,

The sharpest critiques find that mental health professionals perform no better than chance at predicting violence, *and perhaps perform even worse*. . . . [W]e might predict that no court would admit predictive opinions under *Daubert* or *Frye*. Yet . . . courts have shown an extraordinary receptiveness to such opinions, admitting and relying on them in their commitment decision-making.

Scherr, *supra*, at 2-3 (emphasis added). Accord Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 *Cardozo L. Rev.* 1845, 1847-55 (2003) (“[L]ay people can predict future dangerousness as well as medical experts. . . . Although the testimony of clinicians about future dangerousness offers little more than that of an astrologer, such clinical testimony is pervasive, and courts persist in circumventing any inquiry into the

scientific validity of expert future dangerousness predictions.”).⁷

Petitioner points to the Restatement (Second) of Torts as authority for a custodian’s duty to third parties when the custodian “takes charge of a person who is likely to cause harm if not controlled.” Pet. Br. at 32. Yet the Restatement (Third) of Torts contains a caution about the high error rate of data regarding experts’ ability to determine “who is likely to cause harm”: “Even with relatively sensitive tests for dangerousness, a substantial number of false positives occur because of the low base rate of dangerousness among the patient population.” Restatement (Third) of Torts: Liability for Physical Harm, Affirmative Duties, Duty to Third Persons Based on Special Relationship with Person Posing Risk § 41 (2005). What these, and numerous other commentaries, studies, and judicial opinions, indicate, is that the science of predicting sexual dangerousness is too limited to serve as a predicate for civil commitment under a statute as sweeping as § 4248.

C. The Limitations And Flaws Of Prediction Science Render It Inadequate As A Basis For Prolonged Post-Conviction Detention Under Section 4248.

Mental health professionals’ predictions of dangerousness come from one or both of two types of assessments: (1) assessments based on clinical

⁷ Compare Resp. Br. at 53 (“[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.” (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)) (emphasis in original)).

judgment, and (2) assessments based on actuarial instruments developed primarily over the most recent decade. See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 *Psychological Assessment* 1, 3 (2009). Available and recent data show, however, that for accurate predictions of dangerousness neither of these methods is sufficient alone—nor are they materially better together.

First, when clinicians are asked to subjectively make a judgment whether a sexual offender will reoffend, such clinical judgment is wrong between 72% and 93% of the time. Richard Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarials Are Used to Identify Sexually Violent Predators*, 13 *Psychol. Pub. Pol’y & L.* 56, 58 (2006). These prediction rates are far worse than blind chance—and far below what due process demands. Another study asked psychiatrists and nurses in psychiatric emergency rooms to predict future dangerousness in the patients they examined. In that study, only about half (53%) of the patients deemed at risk of violence in fact became violent. John Monahan *et al.*, *Violence Risk Assessment: The Law and the Science*, in *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* 3, 5 (2001). Thus, clinicians’ predictions of dangerousness were as likely to be incorrect as correct.

These recent data are consistent with those noted by the American Psychiatric Association (APA) in its 1996 *amicus* brief filed in *Kansas v. Hendricks*. There, the APA noted that “the research literature shows that mental health professionals can generally make sound expert predictions of violence only as

matters of probabilities, which are ‘rarely above 50%’ and often substantially less.” Brief for American Psychiatric Association as Amicus Curiae in Support of Leroy Hendricks, *Kansas v. Hendricks*, 521 U.S. 346, 1996 WL 469200, at *18 (citing Grisso & Appelbaum, *Is It Unethical To Offer Predictions of Violence?*, 16 Law & Hum. Behav. 621, 626 (1992)).

This Court also has recognized the limitations of expert psychiatric/psychological predictive testimony. See *Addington*, 441 U.S. at 429 (“Given the lack of certainty and the fallibility of psychiatric diagnoses, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”); see also *Heller*, 509 U.S. at 323-24 (“Manifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions. . . . It is therefore no surprise that psychiatric predictions of future violent behavior by the mentally ill are inaccurate.”).

Second, actuarial tools fare no better than clinical predictions in terms of predicting which individuals will recidivate. Actuarial tools are diagnostic assessments that ask an offender a number of questions in order to understand how many “recidivism risk factors” an offender exhibits, and how the offender’s “score” compares to a sample group of offenders. See generally John Monahan, *Structured Risk Assessment of Violence*, in *Textbook of Violence Assessment and Management* (R. Simon & K. Tardiff eds., 2008); Hanson & Morton-Bourgon, *supra*. Although many researchers emphasize the improved rates that actuarial assessments often demonstrate as compared to clinicians’ judgment in the absence of such tools, see, e.g., Wagdy Loza, *Predicting Violence and Recidivism Among*

Forensic/Correctional Population, Arabpsynet eJournal (Nov.-Dec. 2004), available at <http://www.arabpsynet.com/archives/op/OPj4.LOZAWagdy.PredictingViolence.pdf>, these improvements are modest and do not raise the accuracy rates of sexual dangerousness predictions to a level adequate to satisfy due process. Dr. Loza, for example, noted that in the context of violent recidivism the use of an actuarial tool raised prediction accuracy rates to 53% (or, 47% *inaccuracy*), up from a mere 40% accuracy through clinical judgment alone. *Id.* This is yet more evidence that the science of predicting future dangerousness yields, at best, a 50-50 chance of inaccuracy and is therefore too limited in design and function to fulfill the uses to which it is put under § 4248. See *Daubert*, 509 U.S. at 591 (noting that “scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes”).

For example, the Static-99, one of the most widely used actuarial tools available, see Hanson & Morton-Bourgon, *supra*, at 1, results in a “score” but, critically, does not and cannot measure an individual’s risk of reoffending. Static-99 FAQ, at <http://www.static99.org/pdfdocs/faq.pdf> (“For the recidivism risk estimates, evaluators should be careful to mention that the estimates are group averages and the risk presented by the offender may be higher or lower depending on factors not measured by Static-99.”).⁸ Rather, it merely associates an individual with a group sharing certain characteristics. R. Karl Hanson, *Does Static-99*

⁸ “[An] interview with the offender is not necessary to score the STATIC-99.” Andrew Harris *et al.*, STATIC-99 Coding Rules Revised—2003, at 3 (2003), available at http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf (last visited Nov. 2, 2009).

Predict Recidivism Among Older Sexual Offenders?
18 *Sexual Abuse: A Journal of Research and Treatment* 343 (2006) (noting that Static-99 uses only static, historical factors, and does not directly measure the enduring psychological traits that are presumed to motivate sexual offending).

Further, the Static-99 does not—and cannot—distinguish between those at risk of reoffending due to choice, as opposed to a lack of volitional control. Yet assurance that civil commitment decisions would be made on the basis of deficient behavioral control, not as a mechanism for retribution or general deterrence, was precisely what this Court relied on to conclude that the statute at issue in *Hendricks* did not run afoul of due process. *Hendricks*, 521 U.S. at 360 (finding that Hendricks’s “*admitted lack of volitional control*, coupled with a prediction of future dangerousness” sufficed for due process purposes) (emphasis added); *id.* at 358 (discussing aspects of the Kansas statute that “serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control,” and focusing on the criterion that the person’s mental condition “makes it difficult, if not impossible, for the person to control his dangerous behavior”); *id.* (describing valid civil commitment statutes as those that “narrow[] the class of persons eligible for confinement to those who are unable to control their dangerousness”); *id.* at 375 (Breyer, J., dissenting) (“Hendricks’ abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and *highly unusual inability to control his actions.*”) (emphasis added). The use of actuarial tools is utterly irrelevant to this critical question. See *Daubert*, 509 U.S. at 591-92 (“Expert testimony which does not

relate to any issue in the case is not relevant and, ergo, non-helpful.”).

At least one court has found that the Static-99 is inadmissible for proving the “mental abnormality” prong of sexual dangerousness. *New York v. Rosado*, No. 250294, 2009 WL 1911953, at *9 (N.Y. App. Div. June 29, 2009) (“[T]here are . . . drawbacks and inadequacies in the STATIC-99. It is only moderately accurate for the use intended.”); *id.* at 15 (“Most significantly, the respondent’s two experts agreed with the petitioner’s three experts that the STATIC-99 does not assess volitional impairment . . . [and] cannot tell you whether a specific individual is volitionally impaired.”). Like assessments based on clinical judgments, “in predicting whether an individual is more likely than not to recidivate consistent with the group’s percentage rate of recidivism, ‘the STATIC-99 cannot do much better than a coin flip.’” *Id.* at *9 (quoting Berlin, Galbreath, Geary, McGlone, *The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence*, 15 *Sexual Abuse: A Journal of Research and Treatment* 377, 381 (2003)); see also John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 *Va. L. Rev.* 391, 407 (2006) (summarizing a recent review of court-ordered pre-trial risk assessments, which found that only 39% of the defendants rated by clinicians as having a “medium” or “high” likelihood of being violent to others were reported to have committed a violent act during a two-year follow-up—meaning 61% of medium- to high-risk predictions were incorrect).

In fact, the Static-99 was recently revised by its own creators because they determined that, “[i]n more recent samples, the sexual recidivism rates

were lower than the rates observed in the original developmental samples.” See Static-99 FAQ, *supra*. The tool’s authors are now collecting and analyzing data to try to create new norms. In the meantime, however, experts testifying at sexual dangerousness hearings under § 4248 have continued to use the admittedly outdated Static-99 norms—and their *overpredictions* of recidivism risk—as a basis for their evaluations and opinions.⁹ As noted in *Rosado*, the Static-99 developers recently stated that

[s]exual and violent recidivism rates per Static-99 score are significantly lower in our data than they were in the samples used to develop the original Static-99 norms (reported in Harris, Phenix, Hanson, & Thornton, 2003). Even though we have yet to finish our analyses, the evidence is sufficiently strong that we believe the new norms should replace the original norms.

2009 WL 1911953, at *20 (quoting Hanson, Helmus & Thornton, *Reporting Static-99 in Light of New Research on Recidivism Norms* (Feb. 2009)). Actuarial tools, while perhaps informative for clinical

⁹ See, e.g., Transcript of Proceedings (Day 2), at 10, 19, 44, 50-51, *United States v. Carta*, No. 07-12064-JLT (D. Mass. Feb. 10, 2009) (testimony of Dr. Amy Phenix, noting the new data yet explaining her reliance on Static-99 and its original norms for purposes of assessing Mr. Carta’s risk of recidivism). Additionally, Dr. Hanson and his colleagues have developed the Static-2002, which “represents a conceptual overhaul to the Static-99,” in which two items were dropped, six were added, and questions now represent five scales intended to account for dynamic factors such as age, persistence of sexual offending, deviant sexual interests, relationship to victims, and general criminality. Static-99 FAQ, *supra*. However, experts conducting evaluations for purposes of Section 4248 continue to use and tout the “widely accepted” nature of the Static-99.

purposes, do not provide an adequate basis for the potentially indefinite detention of specific individuals.

While the infirmity of the evidence most often used to enforce § 4248 is patent, that does not mean that there exists no evidence that could support a finding of future dangerousness under proper evidentiary standards. Evidence stemming from convictions and a specific, individualized diagnosis of lack of control, for example, might serve to prove beyond a reasonable doubt that further incarceration is warranted. What is clear, however, is that the broad application of § 4248 as applicable to all persons in the custody of the BOP regardless of the basis for that custody, and the lax evidentiary standards of the statute, have in fact resulted in reliance upon evidence that simply cannot measure up to any legal yardstick of reliability. Coupled with its further procedural and vagueness failings as described below, § 4248 cannot survive scrutiny under this Court's due process precedents.

II. SECTION 4248 FAILS TO PROVIDE THE PROCEDURAL SAFEGUARDS THAT THIS COURT FOUND TO BE ADEQUATE IN *KANSAS V. HENDRICKS*, AND THAT ARE INCLUDED IN COMMITMENT STATUTES IN OTHER STATES.

1. The government attempts to depict § 4248 as similar to, and a logical outgrowth of, the statute upheld in *Hendricks*, 521 U.S. 346. See Pet. Br. at 39 (“*Like the similar state legislation, the . . . Adam Walsh Act created a form of civil commitment specifically focused on individuals with a mental illness. . . .*”) (emphasis added). However, a careful comparison of the two statutes reveals that § 4248 provides significantly less due process protection than the Kansas statute in five important respects.

First, § 4248 fails to mandate a pre-hearing psychiatric or psychological examination. The Kansas statute required that all individuals subject to initial commitment be given a psychiatric or psychological examination. Kan. Stat. Ann. § 59-29a05(d) (1994) (“If [a probable cause] determination is made, the judge *shall* direct that person be taken into custody and the person *shall* be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator.”) (emphasis added). Section 4248, on the other hand, provides only that a court “*may* order . . . a psychiatric or psychological examination of the defendant.” 18 U.S.C. § 4248(b) (emphasis added). Thus, § 4248(b) leaves the issue of such an evaluation to the discretion of the district court—which, if it decides not to require an evaluation, can proceed directly to a hearing and make a determination regarding sexual dangerousness without any evaluation of the individual’s mental condition having been conducted.

In *Ake v. Oklahoma*, this Court held that when a criminal defendant “has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial,” constitutional due process guarantees require that the state provide indigent defendants with “access to a psychiatrist’s assistance.” 470 U.S. 68, 74 (1985). Although the Adam Walsh Act is not a criminal law directly within the purview of *Ake*,¹⁰ the justifications underlying

¹⁰ Although *Ake* was decided under the Due Process Clause of the Fourteenth Amendment, courts have repeatedly recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments should be applied and interpreted in the same manner when two situations present identical questions “differing only in that one involves a proscription against the federal government and the other a proscription against the

that decision are equally applicable to § 4248 commitment hearings—and mandate that an inmate be given a psychiatric or psychological examination by an evaluator of the inmate’s designation prior to the hearing. As the Court recognized in *Ake*, individuals have a “uniquely compelling” liberty interest “in the accuracy of the . . . proceeding that places the individual’s life or liberty at risk.” *Id.* at 78. When the government has made the defendant’s mental condition a relevant issue, the assistance of a psychiatrist or psychologist of the defendant’s designation “may well be crucial to the defendant’s ability to marshal his defense.” *Id.* at 81.

Second, § 4248 fails to provide individuals with important trial rights available under the Kansas statute. Whereas the latter required that the state prove its case beyond a reasonable doubt, § 4248 imposes the less demanding standard of “clear and convincing evidence.” Compare Kan. Stat. Ann. § 59-29a07, with 18 U.S.C. § 4248(d) (2006). The Kansas statute also guaranteed individuals facing commitment two other important trial rights absent in § 4248: the right to a jury trial and the right to “review documentary evidence presented by the State.” *Hendricks*, 521 U.S. at 353 (citing Kan. Stat. Ann. §§ 59-29a06-07); see 18 U.S.C. §§ 4248(c)-(d), 4247(d).

Third, § 4248 sweeps far more broadly than the Kansas statute, demonstrating that it is an unconstitutional “mechanism for retribution or general deterrence,” *Hendricks*, 521 U.S. 373 (Kennedy, J., concurring), rather than a mechanism for treatment of mental illness. § 4248 applies to *any*

States.” See, e.g., *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993).

person in the custody of the BOP, or who has been committed to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d), or “against whom all criminal charges have been dismissed solely for reasons relating to the [person’s] mental condition.” 18 U.S.C. § 4248(a). By contrast, the Kansas statute applied only to persons previously “convicted of or charged with” at least one of twelve specifically-defined sexually violent offenses. Kan. Stat. Ann. § 59-29a02(a); see *Hendricks*, 521 U.S. at 364 (“[T]he Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals.”).

This difference in scope is particularly significant in light of the fact that less than two percent of federal convictions are for the combined categories of violent sexual offenses, “obscene material,” and “non-violent sex offenses.” See *United States v. Comstock*, 551 F.3d 274, 282 n.8 (4th Cir. 2009) (citing Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of Federal Justice Statistics*, 2003, at 62 tbl.4.2 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf>). As a result, § 4248 authorizes certification and potential commitment of a significant number of persons with no criminal history of sexual misconduct, such as “individuals . . . serving time for bank robbery, mail fraud, tax evasion, [or] drug dealing.” *United States v. Comstock*, 507 F. Supp. 2d 522, 557 (E.D.N.C. 2007). Section 4248, unlike the Kansas statute, therefore can be applied to individuals who have never even been charged with, much less convicted of, a crime, such as material witnesses under the supervision of the Attorney General. See Resp. Br. at 26 n.9.

Fourth, the statute upheld in *Hendricks* contained time limitations for the trial or hearing that have no counterpart in § 4248.¹¹ As the Fourth Circuit noted, the lack of timing guidelines in § 4248 may account for the fact that most individuals committed pursuant to that section in North Carolina and Massachusetts “had already served all, or almost all, of [their] prison term when the Attorney General certified [them] for [] additional confinement.” *Comstock*, 551 F.3d at 278 n.3.

Fifth, § 4248 permits certification without a demonstration of probable cause with respect to an individual’s sexual dangerousness. See 18 U.S.C. § 4248(a); see also *United States v. Shields*, 522 F. Supp. 2d 317, 334 (D. Mass. 2007); compare *Hendricks*, 521 U.S. at 352 (citing Kan. Stat. Ann. § 59-29a05). Indeed, § 4248 allows an individual to be certified—and his release thus automatically stayed—regardless of what justification, if any, supports the certification.

Taken together, these differences demonstrate that § 4248 fails to provide the procedures and evidentiary standards that this Court cited as the basis of its conclusion in *Hendricks* that the Kansas statute met

¹¹ Compare Kan. Stat. Ann. §§ 59-29a03-04, 06 (1994) (providing that the custodian of an individual suspected to be a sexually violent predator must notify prosecuting attorneys “60 days prior” to the individual’s release, that prosecutors must file a petition seeking commitment “within 45 days” of receipt of such notification, and that a trial must be held “[w]ithin 45 days after the filing of a [prosecutor’s] petition”), with 18 U.S.C. §§ 4248(a)-(c). Section 4248, merely provides that if the District Court orders an examination pursuant to Section 4248(b), that order triggers a series of time limitations on the period during which the individual may be committed for purposes of conducting the examination. See 18 U.S.C. § 4247(b) (2006).

due process requirements. *Id.* at 357. Moreover, because § 4248 reaches a considerably broader class of individuals than the Kansas statute, it is not limited to the “narrow circumstances” at issue in *Hendricks*. *Id.* For those reasons alone, the result below should be affirmed.

2. In addition to these procedural shortcomings, § 4248 also provides significantly less protection under its evidentiary standard than most other state laws authorizing civil commitment of sexually violent persons (“SVP laws”). Of the nineteen currently enacted state SVP laws applicable to adults, more than half require proof beyond a reasonable doubt prior to commitment.¹² Moreover, a significant majority of the states that use the “clear and convincing” standard require proof of a prior conviction, guilty plea, or finding of innocence by reason of mental defect for sexual misconduct prior to commitment.¹³ This additional prerequisite moves the “clear and convincing” evidence standard much closer to a requirement of proof beyond a reasonable doubt. Regardless of whether it is permissible to require only “clear and convincing” evidence of the presence of a “serious mental illness, abnormality, or

¹² See Ariz. Rev. Stat. § 36-3707; Cal. Welf. & Inst. Code § 6604; 725 Ill. Comp. Stat. 207/35; Iowa Code § 229A.7; Kan. Stat. Ann. § 59-29a08; Mass. Ann. Laws ch. 123A § 14; S.C. Code Ann. § 44-48-100; Tex. Health & Safety Code Ann. § 841.062; Wash. Rev. Code § 71.09.060; Wis. Stat. § 980.05.

¹³ See Fla. Stat. § 394.912-13(2); Mo. Rev. Stat. § 632.480(5); Neb. Rev. Stat. Ann. §§ 83-174.01(1), 71-1203(1); N.H. Rev. Stat. Ann. § 135-E:2; N.J. Stat. Ann. §§ 30:4-27.26, 30:4-27.27(a); N.Y. Men. Hyg. Law §§ 10.03(f)-(g); Va. Code Ann. § 37.2-900. *But see* Minn. Stat. § 253B.01(7a), (18c) (requiring only prior “harmful sexual conduct”); N.D. Cent. Code § 25-03.3-01(8) (imposing a similar prior conduct requirement).

defect,” such a standard is plainly insufficient with respect to § 4248’s predicate element of the person having previously “engaged or attempted to engage in sexually violent conduct or child molestation,” as such conduct is deviant and typically criminal in nature. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

Indeed, regardless of their standards of proof, sixteen of the nineteen current state SVP laws may be applied *only* to individuals who have previously been found guilty of sexual misconduct, or who have either pled guilty to such charges or been found innocent by reason of mental defect.¹⁴ A seventeenth state, Kansas, restricts its current statute to individuals “convicted of or charged with” one of thirteen sexually violent offenses. Kan. Stat. Ann. § 59-29a02(a). Thus, nearly 90% of current state SVP laws, including the Kansas statute narrowly upheld by this Court in *Hendricks*, apply to a smaller, more targeted population than does § 4248, which applies to any individual in the custody of the BOP or the Attorney General, regardless of whether those individuals have been convicted of or charged with prior sexual misconduct. See 18 U.S.C. § 4248(a).

¹⁴ See Ariz. Rev. Stat. § 36-3701(7); Cal. Welf. & Inst. Code § 6600(a); Fla. Stat. § 394.912-13(2); 725 Ill. Comp. Stat. 207/5(f); Iowa Code § 229A.2(11); Mass. Ann. Laws ch. 123A § 1; Mo. Rev. Stat. § 632.480(5); Neb. Rev. Stat. Ann. §§ 83-174.01(1), 71-1203(1); N.H. Rev. Stat. Ann. § 135-E:2; N.J. Stat. Ann. §§ 30:4-27.26, 30:4-27.27(a); N.Y. Men. Hyg. Law §§ 10.03(f)-(g); S.C. Code Ann. § 44-48-30(1); Tex. Health & Safety Code Ann. § 841.003; Va. Code Ann. § 37.2-900; Wash. Rev. Code § 71.09.020(18); Wis. Stat. § 980.01(7).

III. SECTION 4248 IS VOID FOR VAGUENESS.

Numerous terms in § 4248—including “sexually violent conduct,” “child molestation,” “serious illness, abnormality or disorder,” and “serious difficulty”—are so insufficiently defined as to leave interpretation to the whim of the enforcer. The resulting vagueness invites an impermissible “standardless sweep” driven by the predilections of the enforcement body against disfavored persons. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citing *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). That deficiency, by itself, renders § 4248 unconstitutional.

A. Statutory Language.

A statute violates the Due Process Clause when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 128 S. Ct. 1830, 1835 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Under that standard, § 4248 is plainly void for vagueness.

For purposes of § 4248, 18 U.S.C. § 4247 defines a “sexually dangerous person” as one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others,” and who suffers from a “serious mental illness, abnormality, or disorder” such that he would “have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(5)-(6) (2006). However, Congress provided no definitions for several vague terms in this statutory provision. For example, neither “sexually violent conduct” nor “child molestation” is defined. Thus, a “person of ordinary intelligence”

would not know what offenses fall within those definitions.¹⁵

Section 4248 is also void for vagueness because it uses the nebulous term “serious difficulty,” which on its face recalls quintessential void-for-vagueness terms, such as “annoying” and “indecent,” that call for “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”¹⁶ *Williams*, 128 S. Ct. at 1846 (citing

¹⁵ Determining the meaning of the word “violent” in itself has proven to be a difficult task for this Court, lower courts, and administrative agencies, confirming that the phrase “sexually violent conduct” is far from clear. In fact, even when Congress has enacted statutes which (in contrast to Section 4248) have provided definitions of phrases invoking the words “violent” or “violence,” this Court, lower courts, and administrative agencies have been sharply divided about the meaning of those words and phrases. *See Begay v. United States*, 128 S. Ct. 1581 (2008) (demonstrating substantial division between the majority, concurring, and dissenting opinions as to whether driving under the influence of alcohol (“DUI”) is a “violent felony” for purposes of sentencing under the Armed Career Criminal Act); *see also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (highlighting the various court and agency interpretations of the phrase “crime of violence,” as defined in 18 U.S.C. § 16, with regard to whether DUI is a “crime of violence” for purposes of deportation under § 237(a) of the Immigration and Naturalization Act).

¹⁶ Congress may have decided to use the term “serious difficulty” because this Court adopted the “serious difficulty” standard in its decision in *Crane*, 534 U.S. 407, leaving it for lower courts to interpret the standard in future cases. However, the Due Process Clause requires that when Congress uses a term in a statute, the term must be sufficiently precise to provide the public with sufficient notice of what actions are covered by the statute. The failure of a statute to meet that requirement renders it void for vagueness. *See Williams*, 128 S. Ct. at 1846. Court decisions, by contrast, often strategically rely on imprecision. *See Crane*, 534 U.S. at 413 (“[T]he Constitution’s safeguards of human liberty in the area of mental

Coates v. Cincinnati, 402 U.S. 611, 614 (1971)); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-71 & n.35 (1997). Vagueness is all the more problematic here because, judging the level of difficulty with which persons will be able to refrain from certain conduct is a perilous exercise in predicting human behavior—inaccurate fortune-telling that threatens to confine preventatively based on conjecture and prejudice. See *Heller*, 509 U.S. at 324 (“[P]sychiatric predictions of future violent behavior by the mentally ill are inaccurate.”); *supra* Part I.

This Court has noted that “[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.” *Crane*, 534 U.S. at 412 (quoting American Psychiatric Association, Statement on the Insanity Defense 11 (1982), reprinted in G. Melton, J. Petrila, N. Poythress, & C. Slobogin, *Psychological Evaluations for the Courts* 200 (2d ed. 1997)). Without any statutory guidance as to what constitutes a “serious difficulty,” the public (and the BOP) is ill-equipped to “distinguish twilight from dusk.” The Constitution prohibits a statute that invites such speculative and subjective judgments. See *Williams*, 128 S. Ct. at 1846.

Section 4248’s linkage of the term “serious difficulty” with “serious mental illness, abnormality or disorder” further compounds the vagueness of the statute. The authors of the DSM-IV specifically caution that “a DSM-IV diagnosis does not carry any necessary implication regarding the individual’s degree of control over the behaviors that may be

illness and the law are not always best enforced through precise bright-line rules.”).

associated with the disorder.” American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at xxiii (4th ed. 1994) (“DSM-IV”).

Finally, the phrase, “serious mental illness, abnormality, or disorder” in itself is vague and, again, is not defined in the Adam Walsh Act. Because Congress failed to define these terms, a person of ordinary intelligence would be unable to determine what “illnesses,” “disorders,” and “abnormalities” they cover. For example, it is unclear whether “abnormality or disorder” includes an antisocial personality. This Court has specifically held that such a disorder is not the sort of “mental illness” that may constitutionally serve as the basis for a *parens patriae* civil commitment. *Foucha*, 504 U.S. at 75-84. Nonetheless, the terms “abnormality” and “disorder” seemingly encompass such a personality disorder—and numerous additional “abnormalities” and “disorders” that are common in many persons and that are insufficient as a basis for extending a person’s criminal sentence by way of civil commitment.

The unconstitutionally vague nature of these statutory terms is confirmed by the fact that virtually all of the states with SVP statutes provided, in contrast to § 4248, statutory definitions of key terms.

The Kansas statute upheld by this Court defines, for example, the terms “sexually violent predator,” “mental abnormality,” “likely to engage in repeat acts of sexual violence,” “sexually motivated,” and “sexually violent offense.” Kan. Stat. Ann. §§ 59-29a01 *et seq.* The fact that Kansas and numerous other states have attempted to define these terms reflects a recognition on their part that the terms, by themselves, are not sufficiently specific to withstand constitutional scrutiny.

B. Regulations.

In November 2008, the BOP issued final regulations relating to the certification of persons as sexually dangerous under § 4248. See 28 C.F.R. § 549.90 *et seq.*, issued in final form at 73 Fed. Reg. 70278 (Nov. 20, 2008). Rather than ameliorate the vagueness problems with § 4248, however, the BOP regulations only make them worse—and heighten the potential for abuse of discretion and discriminatory enforcement by the authorities that administer the statute. At least three examples are apparent.

First, the BOP’s regulations define “child molestation” as including “sexual exploitation” of minors. 28 C.F.R. § 549.93. Yet the regulations do not specify what types of conduct constitute “exploitation,” thus introducing another vague and undefined term rather than clarifying the meaning of “molestation.” Further, “exploitation,” unlike “molestation,” typically includes non-contact as well as contact offenses, meaning that the regulatory definition simultaneously enhances both the vagueness and the overbreadth of § 4248.

Second, although § 4247 uses the term “sexually violent conduct,” the BOP regulations define that term to include actions that arguably are not “sexually violent,” such as threats of force and threats “that the victim, or any other person, will be harmed,” regardless of whether the “force” or “harm” constitutes sexually violent conduct. See *id.* § 549.92(a)-(b).

Third, the BOP regulations define “serious difficulty in refraining from sexually violent conduct or child molestation if released” to encompass factors that involve neither of these types of conduct. The regulations provide that, in considering whether an

inmate has such “serious difficulty,” the BOP may consider “indicators of inability to control conduct, such as . . . (1) Offending while under supervision; (2) Engaging in offense(s) when likely to get caught; (3) Statement(s) of intent to re-offend; or (4) Admissions of inability to control behavior.” *Id.* § 549.95. In other words, the regulations allow the BOP to consider any indicators of inability to refrain from committing any offense, regardless of whether the offense is sex-related, in determining whether an inmate will have “serious difficulty” in refraining from sex-related conduct in the future. This is clearly the type of arbitrary enforcement that the void-for-vagueness doctrine is designed to prevent. The BOP regulations, in short, only provide further confirmation that § 4248 is unconstitutionally vague.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JUDITH H. MIZNER
NAT'L ASS'N OF FEDERAL
DEFENDERS
51 Sleeper St., 5th Floor
Boston, MA 02110
(617) 223-8061

JEFFREY T. GREEN*
RICHARD E. YOUNG
STEPHANIE P. HALES
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

JONATHAN HACKER
CO-CHAIR, AMICUS
COMMITTEE
NAT'L ASS'N OF CRIMINAL
DEFENSE LAWYERS
1660 L St., N.W., 12th FL
Washington, D.C. 20036
(202) 872-8600

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

Counsel for Amici Curiae

November 4, 2009

* Counsel of Record

APPENDIX

The following States include, in their commitment statutes, definitions of terms identical or similar to terms used in 18 U.S.C. § 4248: Arizona (A.R.S. § 36-3701 *et seq.*, defining “sexually violent person”); California (Cal. Welf. & Inst. Code § 6600 *et seq.*, defining “sexually violent predator” and “diagnosed mental disorder”); Colorado (C.R.S.A. § 16-11.7-101 *et seq.*, defining “sex offender”); Florida (Fla. Stat. § 394-910 *et seq.*, defining “sexually violent predator,” “likely to engage in acts of sexual violence,” and “mental abnormality”); Illinois (725 ILCS 207/40, defining “mental disorder,” “sexually violent offense,” and “sexually violent person”); Iowa (Iowa Code § 226.1 *et seq.*, defining “likely to engage in predatory acts of sexual violence,” “mental abnormality,” “sexually motivated,” “sexually violent offense,” and “sexual predator”); Kansas (Kansas Stat. Ann. § 59-29a02, defining “sexually violent predator,” “mental abnormality,” and “sexually violent offense”); Massachusetts (ALM GL ch. 123A §§ 1, *et seq.* (defining “mental abnormality,” “personality disorder,” “sexual offense,” and “sexually dangerous person”)); Minnesota (Minn. Stat. §§ 253B.01 *et seq.*, defining “sexual psychopathic personality” and “sexually dangerous person”); Missouri (Mo. R.S. §§ 632.480 *et. seq.*, defining “mental abnormality,” “predatory,” “sexually violent offense,” and “sexually violent predator”); Nebraska (Neb. R. Stat. Ann. §§ 71-1201 *et seq.*, defining “mentally ill” and “dangerous sex offender”); New Hampshire (N.H. R. Stat.. Ann. §§ 135-E:1 *et seq.*, defining “mental abnormality,” “sexually violent offense,” and “sexually violent predator”); New Jersey (N.J. Stat. Ann. § 30:4-27.1 *et seq.*, defining “mental abnormality,” “sexually violent offense,” and

“sexually violent predator”); New York (NY CLS Men. Hyg. §§ 10.01 *et seq.*, defining “dangerous sex offender requiring confinement” and “mental abnormality”); North Dakota (N.D. Cent. Code § 25-03.3.01 *et seq.*, defining “sexually dangerous individual” and “sexually predatory conduct”); South Carolina (S.C. Code Ann. § 44-48-10 *et seq.*, defining “sexually violent predator,” “sexually violent offense,” “mental abnormality,” and “sexually motivated”); Texas (Tex. Health & Safety Code § 841.001, defining “sexually violent predator,” “repeat sexually violent offender,” and “behavioral abnormality”); Virginia (Va. Code Ann. § 37.2.900 *et seq.*, defining “sexually violent predator,” “mental abnormality” or “personality disorder,” and “sexually violent offense”); Washington (Wash. Rev. Code § 71.09.060 *et seq.*, defining “sexually violent predator,” “mental abnormality,” “personality disorder,” and “sexually violent offense”); Wisconsin (Wis. Stat. § 980.01 *et seq.*, defining “sexually violent person,” “serious child sex offender,” “sexually motivated,” and “sexually violent offense”).