

No. 16-1394

**In the
Supreme Court of the United States**

Kevin Scott Karsjens, et al.,
Petitioners,

v.

Emily Johnson Piper, et al.,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit

**MOTION AND BRIEF OF THE ASSOCIATION
FOR THE TREATMENT OF SEXUAL
ABUSERS AS AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

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**MOTION OF THE ASSOCIATION FOR THE
TREATMENT OF SEXUAL ABUSERS FOR
LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

The Association for the Treatment of Sexual Abusers (“ATSA”) respectfully moves this Court for leave to file a brief as amicus curiae in support of petitioners. Counsel of record for the parties received timely notice of amicus curiae’s intent to file this brief as required by this Court’s Rule 37.2(a). Counsel for petitioners filed a blanket consent to the filing of amicus curiae briefs with the Clerk. Counsel for respondents did not consent to the filing of this brief, necessitating the filing of this motion.

As explained in greater detail below, ATSA is an international, multi-disciplinary organization dedicated to preventing sexual abuse by providing treatment to individuals who sexually offend, promoting research that leads to the effective treatment and management of individuals who have sexually offended, and encouraging empirically-based public policy and prevention efforts. The 2,800 professional members of ATSA include leading researchers who study sexual abuse and effective treatment interventions, experts in the assessment, treatment, and management of individuals who sexually offend, and victims’ advocates. ATSA’s members work closely with public and private organizations—including prisons, probation departments, law enforcement agencies, victim advocacy groups, child protection services, prosecutors, public defenders, and state

legislatures—to enhance community safety through the prevention of sexual abuse.

Amicus curiae has a deep and abiding interest in the development of the law bearing on the assessment, treatment, and management of sexual offenders. ATSA submits this brief to share its unique perspective and expertise on the issues that should lead the Court to grant the petition and consider the constitutionality of Minnesota’s sex offender civil commitment system. It is imperative that the Court inform its constitutional decision-making with the current research addressing the reoffending risk of sexual offenders, the current understanding of the basis for civil commitment and other sexual offender legislation, and the current evidence and practices for effective treatment and management of individuals who have committed sexual offenses. Amicus curiae believes that the scientific and clinical expertise ATSA provides will promote sound constitutional decision-making and simultaneously ensure that sexual offender commitment systems fulfill their promise to reduce the risk of sexual offending and promote community safety.

Amicus curiae therefore respectfully requests that the Court grant leave to file the accompanying brief in support of petitioners.

Respectfully submitted.

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INTEREST OF THE AMICUS CURIAE

The Association for the Treatment of Sexual Abusers (“ATSA”) is an international, multi-disciplinary organization dedicated to preventing sexual abuse by providing treatment to individuals who sexually offend, promoting research that leads to the effective treatment and management of individuals who have sexually offended, and encouraging empirically-based public policy and prevention efforts. The 2,800 professional members of ATSA include leading researchers who study sexual abuse and effective treatment interventions, experts in the assessment, treatment, and management of individuals who sexually offend, and victims’ advocates. ATSA’s members work closely with public and private organizations—including prisons, probation departments, law enforcement agencies, victim advocacy groups, child protection services, prosecutors, public defenders, and state legislatures—to enhance community safety through the prevention of sexual abuse.

ATSA promotes the philosophy that empirically-based assessment, practice, management, and policies play a critical role in enhancing community safety, reducing the risk of sexual recidivism, protecting victims and vulnerable populations, transforming the lives of those caught in the web of sexual violence, and illuminating paths to prevent future sexual abuse. Consistent with its governing philosophy, ATSA promotes and advocates for sound research, effective evidence-based treatment practices, evidence-informed public policy, and collaborative community strategies that lead to the effective assessment, treatment, and management of individuals who have sexually

abused and to prevent sexual abuse and sexual violence.

ATSA publishes guidelines addressing the assessment, treatment, and management of adults and adolescents who have perpetrated sexual abuse. ATSA updated and published the “Adult Practice Guidelines” in 2014. In 2017, ATSA further updated the guidelines to address the assessment, treatment, and management of adolescents who have perpetrated sexual abuse. ATSA members are expected to adhere to these guidelines. In addition, many states have mandated that sex offender services follow ATSA’s guidelines.

ATSA submits this brief as *amicus curiae* to share its unique perspective and expertise on the issues that, in our view, should lead the Court to grant the petition to consider the constitutionality of Minnesota’s sex offender civil commitment system. It is imperative that the Court inform its constitutional decision-making with the current research addressing the reoffending risk of sexual offenders, the current understanding of the basis for civil commitment and other sexual offender legislation, and the current evidence and practices for effective treatment and management of individuals who have committed sexual offenses. We believe that the scientific and clinical expertise ATSA provides will promote sound constitutional decision-making and simultaneously ensure that sexual offender commitment systems fulfill their

promise to reduce the risk of sexual offending and promote community safety.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

ATSA asks the Court to grant the petition to review the constitutionality of Minnesota's sex offender civil commitment system. For the reasons set forth in the petition, we believe this Court's review would provide crucial guidance on an important and recurring question of constitutional law, as well as aid states in their administration of sex offender civil commitment systems.

This brief, however, focuses its attention on an independent point: granting review here is necessary to take account of important advances in the empirical study of (1) rates of recidivism among sexual offenders, (2) effective assessment, treatment, and management of sexual offenders, and (3) factors that influence the effectiveness of treatment interventions.

It is crucial that the Court acknowledges the advances in our empirical understanding of offender's risk of sexual recidivism and effective treatment and management strategies that have been made since the Court last reviewed a sex offender civil commitment system. On the question of recidivism, results of recent comprehensive

¹ No counsel for a party authored this brief in whole or in part and no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in both cases received notice at least ten days prior to the due date of the intention of amicus to file this brief. Petitioners have filed a blanket consent to the filing of amicus curiae briefs with the Clerk. Respondents have not consented to the filing of this brief.

studies by the Department of Justice (among others) show that, as a criminal class, sex offenders pose a relatively low risk to reoffend. Importantly, these studies demonstrate that the reoffending risk is considerably lower than the rate assumed by the Court in some of its prior opinions. Moreover, the guidelines and standards of care governing the treatment of sexual offenders have changed to reflect advances in determining the characteristics of successful sex offender treatment programs. Empirical evidence demonstrates that with effective treatment, the rate of recidivism can be lowered substantially; and research shows that treatment programs that conform to certain general principles are effective in preventing future sexual violence and, thus, protecting the public.

These empirically-based advances provide the Court with a foundation on which to explore the constitutionality of Minnesota's sex offender civil commitment system. The petition for certiorari should be granted.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO CONSIDER THE CONSTITUTIONALITY OF MINNESOTA'S SEXUAL OFFENDER CIVIL COMMITMENT SYSTEM IN LIGHT OF THE EMPIRICAL EVIDENCE ON RECIDIVISM AND TREATMENT.

There have been substantial advances in the science behind sexual offender reoffending, treatment, and management that were not considered when this Court last reviewed the efficacy and constitutionality of civil commitment laws. Three of those advances bear directly upon this

case. Specifically, empirical evidence has deepened and broadened our understanding of (1) the known rate at which adult males who have been convicted of sex crimes, as a class, sexually reoffend, (2) the appropriate practices and procedures to include in treatment of adult males who have sexually offended, and (3) the factors that influence the effectiveness of treatment interventions for adult males who have committed sexual crimes. This Court's constitutional jurisprudence must take account of these important sources of evidence.

A. This Court Must Take Account of the Empirical Evidence on Reoffending.

First, a series of comprehensive studies have deepened and broadened our understanding of rates of recidivism, defined in the literature in terms of official criminal justice contact (e.g., rearrests and reconvictions), among sexual offenders. The evidence demonstrates that adult males who sexually offend are rearrested or reconvicted for subsequent criminal behavior at far lower rates than those of most other offenders. Further, the reoffending rate for adult males who have sexually offended is substantially lower than assumed by the Court when it last reviewed a sex offender civil commitment program in 2002.

A United States Department of Justice study followed 9,691 individuals convicted for sexual crimes and released from state prisons in 1994 for a period of three years after their release.² The results of this study indicate that of those individuals who

² Patrick A. Langan et al., U.S. Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (Carolyn Williams & Tom Hester eds., 2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

had sexually offended and were released, 5.3% were rearrested for a new sexual crime and 3.5% were convicted of a new sexual crime within the three year window.³ The study broke down the statistics further based on the crimes originally committed. Five percent of those convicted of rape were rearrested for a new sexual crime and 5.5% of sexual assault convicts were rearrested within the three year follow-up period.⁴ Of those who had served time for child molesting, 5.1% were rearrested and 3.5% were reconvicted for a new sexual crime, not necessarily against a child, in the three-year follow-up period.⁵ The study showed similar results for those convicted of statutory rape, with 5% rearrested and 3.6% reconvicted of sexual crimes within the three-year window.⁶

With respect to sexual crimes against children, this same study showed that of all sexual offenders released in 1994, 2.2% were rearrested for a sexual crime against a child within three years.⁷ Among those released after serving prison time for child molesting, 3.3% were rearrested for a sex crime against a child within three years; 1.4% of persons

³ *Id.* at 1–2.

⁴ *Id.* at 24. Rape is defined as: forced sexual intercourse including both psychological as well as physical force. Forced sexual intercourse includes vaginal, anal or oral penetration by the offender(s). Sexual Assault is defined as: a wide range of victimizations, separate from rape or attempted rape. These crimes include attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. *Id.* at 3–4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1.

convicted for rape were rearrested for a sex crime against a child within three years.⁸

The same study was part of a larger investigation of 272,111 individuals released from state prisons.⁹ The report indicated that adult males released after serving time for rape or other sexual assaults had *lower* rates of rearrest and reconviction for criminal behavior generally when compared to *all* other criminal populations, with the exception of those released after serving time for homicide.¹⁰ Although the data show that those released from prison after serving time for rape are more likely to be rearrested for a rape charge compared to the general criminal population, only 2.5% of those released after serving time for rape were rearrested on a subsequent rape charge.¹¹ In absolute terms, non-sexual offenders accounted for many more subsequent rape rearrests compared to those who were released after serving time for rape.¹²

Additional studies and meta-analyses have been published over the last twenty years. In an investigation of sixty-one studies and over 29,000 sex offenders, the authors found a 13.4% overall sexual recidivism rate, measured as arrests or convictions for a sexual crime, over an average follow-up time of four to five years.¹³ In an update of

⁸ *Id.* at 31.

⁹ Patrick A. Langan & David J. Levin, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1994* (2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

¹⁰ *Id.* at 8.

¹¹ *Id.*

¹² *Id.* at 9–10.

¹³ R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *J. Consulting & Clinical Psychol.* 348, 350–51 (1998).

this review, which included eighty-two studies, the authors found a 13.7% sexual recidivism rate with an average follow-up time of five to six years.¹⁴

Finally, a study of four states—New Jersey, Minnesota, Florida, and South Carolina—funded by the United States National Institute of Justice, found that 5.1% of the 1,789 men released from prison after serving time for sexual crimes were rearrested for a new sexual crime within five years and 10.2% were rearrested for a new sexual crime within ten years.¹⁵ The ten-year rates ranged from 7.5% in South Carolina to 13.7% in Florida.¹⁶ The ten-year sexual rearrest rate in Minnesota was 12%.¹⁷

While the above data are based on detected offenses and, thus, underestimate the true level of recidivism, this body of empirical research still demonstrates that sexual reoffending is a relatively low-rate behavior.

More important yet, additional studies show that reoffending risk is not a static characteristic. As an individual ages, risk for reoffending decreases.¹⁸

¹⁴ R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 *J. Consulting & Clinical Psychol.* 1154, 1156 (2005).

¹⁵ Kristen M. Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 *Sexual Abuse: J. Res. & Treatment* 722, 731 (2016).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Howard E. Barbaree et al., *The Development of Sexual Aggression Through the Life Span: The Effect of Age on Sexual Arousal and Recidivism Among Sex Offenders*, 989 *Annals N.Y. Academy Sci.* 59, 69 (2003); R. Karl Hanson, *Recidivism and*

Research has found that older age at release is correlated with a lower risk of reoffending.¹⁹ Further, if an individual has been offense free in the community for ten years, there is no difference between the reoffending risk posed by an individual classified as “high risk” (based on actuarial measures) and an individual classified as “low risk.”²⁰

B. The Court Should Consider Available Guidelines for Sex Offender Treatment.

Second, the past twenty years have seen significant advancements in the creation of evidence-based guidelines addressing the assessment and treatment of sexual offenders.

The ATSA published its latest guidelines for the assessment, treatment, and management of male adult sexual abusers in 2014.²¹ These guidelines provide evidence-based guidance on best practices in the treatment of sexual abusers.

Several important components of ATSA’s guidelines inform the constitutional issues presented in this case. First, the guidelines reinforce the importance of individualized, assessment-driven

Age: Follow-up Data from 4,673 Sexual Offenders, 17 J. Interpersonal Violence 1046, 1056 (2002).

¹⁹ Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The “Aging” Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 Just. Q. 827, 848–49 (2009).

²⁰ See R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. Interpersonal Violence 2792, 2800 (2014) (comparing the ten-year sexual recidivism rates for low- and high-risk offenders).

²¹ Ass’n for the Treatment of Sexual Abusers, *Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sexual Abusers* (2014).

treatment services.²² People who offend sexually are a highly diverse group with different criminal histories, patterns of behavior, motivations for offending, and risk of reoffending. To maximize effectiveness of treatment, these individualized factors must be identified and addressed. Second, the guidelines focus treatment on research-supported changeable risk factors that are linked to sexual and non-sexual recidivism.²³ It is essential that treatment addresses the thoughts, fantasies, feelings, and behaviors that are related to the individual's sexual offending behavior. Third, the guidelines recognize the importance of fostering engagement and internal motivation.²⁴ Although people who offend are often mandated into treatment, external motivators are often insufficient for producing long-term change. An individual's engagement and motivation are therefore important to maximize treatment effectiveness. Fourth, the guidelines emphasize that the criteria for successful treatment completion and treatment progress be clearly communicated and regularly assessed.²⁵ Fifth, the guidelines underscore that to maximize its effectiveness, treatment must be tailored to individual differences such as language, comprehension, cognitive development and abilities, as well as mental health functioning and motivation to change.²⁶

In addition to these guidelines, the ATSA has developed a set of documents that provide information about important aspects of civil

²² *Id.* at 32.

²³ *Id.* at 35.

²⁴ *Id.* at 38.

²⁵ *Id.* at 33, 40.

²⁶ *Id.* at 42.

commitment and how civil commitment programs fit within a comprehensive system for sex offender management.²⁷ The documents emphasize the importance of reentry services as part of a civil commitment program.²⁸ Reentry services are most effective when they facilitate community integration by providing social support and encouraging individual accountability.²⁹ One such empirically-based program is Circles of Support and Accountability, which has been implemented for high-risk sex offenders released from prison in Canada,³⁰ the United Kingdom,³¹ and a number of

²⁷ Ass'n for the Treatment of Sexual Abusers & Sex Offender Civil Commitment Programs Network, *Civil Commitment: If It Is Used, It Should Be Only One Element of a Comprehensive Approach for the Management of Individuals Who Have Sexually Abused* (2015), <http://www.atsa.com/sites/default/files/%5BCivil%20Commitment%5D%20In%20Context.pdf>.

²⁸ *Id.* at 5.

²⁹ See Robin J. Wilson et al., *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 *Sexual Abuse: J. Res. & Treatment* 412, 424 (2009) (describing the empirical support for Circles of Support and Accountability).

³⁰ *Id.* at 416.

³¹ Andrew Bates, *Circles South East: The First 10 Years 2002–2012*, 58 *Int'l J. Offender Therapy & Comp. Criminology* 861, 864 (2013).

states in the United States, including Minnesota,³² Oregon,³³ and Vermont.³⁴

Finally, as this Court has repeatedly recognized, it is a central tenet of mental health care that psychiatric treatment of individuals facing involuntary hospitalization must be provided in the least restrictive environment in which such individuals can safely and effectively be provided

³² Grant Duwe, *Can Circles of Support and Accountability (COA) work in the United States? Preliminary Results from a Randomized Experiment in Minnesota*, 25 *Sexual Abuse: J. Res. & Treatment* 143, 146 (2012).

³³ *Communities of Support and Accountability (CoSA): Criminal Justice Ministries with EMO*, Ecumenical Ministries Or., <http://www.emoregon.org/cosa.php> (last visited June 21, 2017).

³⁴ Kathryn J. Fox, *Civic Commitment: Promoting Desistance Through Community Integration*, 18 *Punishment & Soc'y* 68, 74 (2016).

services.³⁵ Adherence to this principle requires scheduled risk assessments to determine whether an individual's behavior can be managed at a lesser level of restrictive placement.³⁶ Such assessments focus on any changes made to those factors related to risk (such as age and community support), as well

³⁵ See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (“[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”); *Addington v. Texas*, 441 U.S. 418, 426–27 (1979) (“[E]very person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement.”); *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (“The alternative course of treatment or care should be fashioned as the interests of the person and of the public require in the particular case. Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection.”). See generally Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 *Psychiatry* 30, 38–39 (2010) (“In deciding *O'Connor v. Donaldson*, *Addington v. Texas*, and *Lake v. Cameron*, the Court . . . established a right to treatment in the least restrictive environment for patients facing hospitalization against their will.”).

³⁶ Dennis M. Doren, *Evaluating Sex Offenders: A Manual for Civil Commitment and Beyond* 4 (2002) (“There are essentially two stages during which assessments are mandated by sex offender civil commitment laws. . . . The second stage pertains to the reassessments of people who have already been committed, to see if their commitment status should be altered, either by being moved to a lesser restrictive environment (e.g., into the community under supervision) or by being fully discharged from their commitment.”).

as treatment progress in areas such as risk management, and social functioning.³⁷

C. The Court Should Consider Factors that Influence the Effectiveness of Treatment Interventions.

Third, there have been several recent studies and meta-analyses demonstrating the effectiveness of sex offender treatment when certain factors are considered in developing and implementing a treatment plan.

Several reviews and meta-analyses have reached positive conclusions regarding the effectiveness of treatment of sex offenders. One study found that sex offenders who received treatment showed reductions in sexual recidivism of around 40% compared to those who did not receive treatment.³⁸ A second study reported similar reductions in reoffending rates for offenders participating in treatment.³⁹ A recent meta-analysis

³⁷ *See id.* at 29, 31 (describing two national standards for sex offender civil commitment assessments that focus on recidivism risk by looking at “the relevant dimensions”—such as the “potentially separate recidivism dimensions of sexual deviance and antisocial/violent personality traits”—or “the best available actuarial instruments that have been validated as risk predictors”).

³⁸ *See* R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 *Crim. Just. & Behav.* 865, 877 (2009) (describing the results of the studies); *see also* Friedrich Lösel & Martin Schmucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 *J. Experimental Criminology* 117, 135 (2005) (explaining how—with similar observed absolute differences in Hanson’s and his colleague’s 2009 study—the reduction in sexual recidivism is around 40%).

³⁹ Lösel & Schmucker, *supra* note 38.

also found a significant, albeit more modest, effect for treatment: the authors demonstrated that treated sexual offenders had a relative reduction in reoffending of 26.3%.⁴⁰ Although the current research has been challenged to complete more random assignment studies,⁴¹ the current literature supports the conclusion that when specific principles are respected, the treatment for those adult males who have sexually offended is a promising intervention for the reduction of sexual recidivism.

A separate body of research addresses the specific principles that lead to effective therapeutic interventions associated with reductions in recidivism. This research demonstrates that effective treatment programs tailor intervention to (1) the risk posed by the offender, (2) his criminogenic needs, that is the factors that led to criminal behavior, and (3) the factors that improve his responsiveness to treatment. Applying these three elements—risk, need, responsivity—during interventions results in significant reductions in reoffending.⁴² Each element recognizes the importance of tailoring a treatment program to an offender’s individual characteristics:

- Risk Principle: The risk principle

⁴⁰ Martin Schmucker & Friedrich Lösel, *The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations*, 11 J. Experimental Criminology 597, 610 (2015).

⁴¹ See generally Michael C. Seto et al., *Good Science and Progress in Sex Offender Treatment Are Intertwined: A Response to Marshall and Marshall (2007)*, 20 Sexual Abuse: J. Res. & Treatment 247, 247–254 (2008) (advocating for the use of random assignment studies).

⁴² D.A. Andrews & James Bonta, *The Psychology of Criminal Conduct* 395 (Ellen S. Boyne ed., 5th ed. 2010).

determines how much treatment an offender should receive, with higher risk offenders needing more intense levels of interventions and follow-up.

Conversely, low risk offenders are in need of little to no interventions.⁴³

- Need Principle: Interventions for persons engaging in criminal behavior must focus on the individual factors that led to their criminal behavior (i.e., their criminogenic needs).⁴⁴
- Responsivity Principle: Interventions must be individualized to the extent that client characteristics are taken into consideration (e.g., learning style, motivation, intellectual abilities, etc.).⁴⁵

Research investigating the effectiveness of corrections-based interventions for men who have committed sexual crimes has concluded that interventions are most effective when they adhere to all three risk-needs-responsivity principles, and that programs are incrementally more effective as they adhere to more of the principles.⁴⁶

As noted above, when describing the ATSA's Practice Guidelines, the risk principle, the need principle, and the responsivity principle are based on individually tailored interventions and treatment plans.⁴⁷ Assessment, therefore, must take into consideration the individual factors that influence the commission of sexual offending behavior. These

⁴³ *Id.* at 47–48.

⁴⁴ *Id.* at 49.

⁴⁵ *Id.* at 49–52.

⁴⁶ Hanson et al., *supra* note 38, at 881, 884.

⁴⁷ *See supra* note 22 and accompanying text.

factors are likely to change over time and as an individual moves through a long-term intensive treatment program. Thus, specific assessments of this nature must be conducted on a regular basis.

D. This Court Must Continue To Take Account of Empirical Evidence in Constitutional Decision-making.

As this Court engages in constitutional decision-making, we urge the Court to take account of these sources of empirical evidence. Particularly where, as here, the rights of a disfavored group are at issue, it is important that the Court act with due care to ensure that unsupported conclusions and outmoded stereotypes do not supplant facts and evidence.

As this Court has recognized, the extent to which a state policy furthers a legislative objective (under any standard of review) “is an empirical question.”⁴⁸ And in a number of recent constitutional decisions, this Court has relied heavily on carefully sourced bodies of empirical evidence.⁴⁹

This case presents an excellent vehicle to apply the same rigorous evidence-based approach to

⁴⁸ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–29 (2010); *Bartnicki v. Vopper*, 532 U.S. 514, 530–31 (2001).

⁴⁹ See, e.g., *Packingham v. North Carolina*, No. 15-1194, 2017 WL 2621313, at *5 (U.S. June 19, 2017); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2311–12 (2016) (relying on extensive empirical evidence demonstrating that two Texas abortion regulations failed to protect women’s health); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (relying on psychological guidelines to explain society’s understanding that “sexual orientation is both a normal expression of human sexuality and immutable”); *Hall v. Florida*, 134 S. Ct. 1986, 1993–95 (2014) (relying on extensive medical evidence to guide states’ discretion in determining intellectual disability).

a long-neglected area of constitutional law. This Court's past decisions examining sexual offender legislation have, unfortunately, relied on sources that derived their information from public discourse—not from the empirical literature. For example, this Court called the risk of recidivism posed by sex offenders “frightening and high[,]”⁵⁰ relying on a prior opinion asserting that “the rate of recidivism of untreated offenders has been estimated to be as high as 80%.”⁵¹ Numerous commentators have criticized these conclusions, pointing out that the 80% figure originated in an article in *Psychology Today*, which, in turn, failed to cite any evidence in support of its conclusion.⁵² As noted above, the recidivism rates for sexual offenders have consistently been found to be well below that frighteningly high estimate. In a similar vein, this Court has not yet had an opportunity to

⁵⁰ *Smith v. Doe*, 538 U.S. 84, 103 (2003).

⁵¹ *McKune v. Lile*, 536 U.S. 24, 33 (2002).

⁵² See Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 B.C. L. Rev. E-Supplement 34, 39 (2017) (noting the percentage was “not supported by any empirical evidence” and opining it would be “scientifically improper to believe it has broader applicability”); Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. Times (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html> (“The basis for much of American jurisprudence and legislation about sex offenders was rooted in an offhand and unsupported statement in a mass-market magazine, not a peer-reviewed journal.”); Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495, 498–99 (2015) (“[T]he article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism.”).

examine the emerging guidelines and evidence on the efficacy of sexual offender treatment programs.⁵³

Careful and impartial review of the empirical evidence in constitutional decision-making is essential in discharging this Court's solemn duty to review "[l]egislation imposing special disabilities" upon disfavored groups, and crucial in standing guard against "the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."⁵⁴ Unfortunately, discourse regarding sex offender management and treatment has often been dominated by fear and misinformation and not by the accumulating empirical evidence. Amicus curiae hopes that the information provided here will help the Court in considering the important constitutional questions raised in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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⁵³ See *supra* Sections I.C–D.

⁵⁴ See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

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