No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following four individuals were parties in the court of appeals proceeding, which consolidated five cases from the district court: Shane Catron; Thomas Matherly; Markis Revland; and Marvin Vigil.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 14
Conclusion 30
Appendix A – Court of appeals opinion (Jan. 8, 2009) 1a
Appendix B – District court decision (Sept. 7, 2007) 22a
Appendix C – Court of appeals order (Mar. 10, 2009) 96a
Appendix D – Statutory provisions involved 97a

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 15
Babbitt v. *Youpee*, 519 U.S. 234 (1997) 15
Blodgett v. *Holden*, 275 U.S. 142 (1927) 15
Burroughs v. *United States*, 290 U.S. 534 (1934) 18
FCC v. *Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) 15
Gonzales v. *Carhart*, 550 U.S. 124 (2007) 15
Gonzales v. *Raich*, 545 U.S. 1 (2005) 28
Greenwood v. *United States*:
350 U.S. 366 (1956) 3, 14, 22, 23, 26, 29
219 F.2d 376 (8th Cir. 1955), aff'd, 350 U.S. 366 (1956) 22, 23
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) 28
Higgins v. *United States*, 205 F.2d 650 (9th Cir. 1953) .. 22

Cases—Continued: Page

Hinckley v. *United States*, 163 F.3d 647 (D.C. Cir. 1999) 21
Jinks v. *Richland County*, 538 U.S. 456 (2003) 18
Jones v. *United States*, 463 U.S. 354 (1983) 25
Kansas v. *Crane*, 534 U.S. 407 (2002) 7
Kansas v. *Hendricks*, 521 U.S. 346 (1997) 7
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 17, 18, 25
NEA v. *Finley*, 524 U.S. 569 (1998) 15
Pierce County v. *Guillen*, 537 U.S. 129 (2003) 15
Royal v. *United States*, 274 F.2d 846 (10th Cir. 1960) ... 30
Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 15
Sabri v. *United States*, 541 U.S. 600 (2004) 18
Smith v. *Hope Vill., Inc.*, 481 F. Supp. 2d 172 (D.D.C. 2007) 21
United States v. *Abregana*, 574 F. Supp. 2d 1123 (D. Haw. 2008) 15
United States v. *Carta*, 503 F. Supp. 2d 405 (D. Mass. 2007) 16
United States v. *Charters*, 863 F.2d 302 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990) 22
United States v. *Curry*, 410 F.2d 1372 (4th Cir. 1969) ... 30
United States v. *Dowell*, No. CIV-06-1216-D, 2007 WL 5361304 (W.D. Okla. Dec. 5, 2007) 15
United States v. *Edge Broad. Co.*, 509 U.S. 418 (1993) ... 15
United States v. *Lopez*, 514 U.S. 549 (1995) 20
United States v. *Morrison*, 529 U.S. 598 (2000) 15, 17

Cases—Continued: Page

United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 15
United States v. *S.A.*, 129 F.3d 995 (8th Cir. 1997), cert. denied, 523 U.S. 1011 (1998) 19
United States v. *Sahhar*, 56 F.3d 1026 (9th Cir.), cert. denied, 516 U.S. 952 (1995) 24, 25
United States v. *Salerno*, 481 U.S. 739 (1987) 20
United States v. *Shields*, 522 F. Supp. 2d. 317 (D. Mass. 2007) 15
United States v. *Steil*, 916 F.2d 485 (8th Cir. 1990) 22
United States v. *Tom*, 558 F. Supp. 2d 931 (D. Minn. 2008) 16
United States v. *Volungus*, No. 07-12060, 2009 WL 489838 (D. Mass. Feb. 27, 2009) 16
Wells v. *Attorney Gen.*, 201 F.2d 556 (10th Cir. 1953) 22, 24
White v. *Treibly*, 19 F.2d 712 (D.C. Cir. 1927) 22

Constitution, statutes, regulations and rules:

U.S. Const. Art. I 14, 15, 18, 19, 28
§ 8:
Cl. 1 17
Cl. 3 (Commerce Clause) 11, 17
Cl. 7 17
Cl. 17 17
Cl. 18 (Necessary and Proper Clause) 2, 11, 17, 18, 26
Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251 2

Statutes, regulations and rules—Continued: Page

Act of Aug. 7, 1882, ch. 433, 22 Stat. 330 2
Act of June 25, 1948, ch. 645, 62 Stat. 855
(18 U.S.C. 4241 *et seq.*) 4
18 U.S.C. 4241-4243 (1952) 4
18 U.S.C. 4241 ..... 4, 97a
18 U.S.C. 4241(d) 5, 10, 29, 30
18 U.S.C. 4243 ..... 4, 19, 28
Act of Sept. 7, 1949, ch. 535, 63 Stat. 686
(18 U.S.C. 4244 *et seq.*) 4
18 U.S.C. 4244-4248 (1952) 4
18 U.S.C. 4244 4
18 U.S.C. 4245 4
18 U.S.C. 4246 ..... *passim*, 100a
18 U.S.C. 4246(a) 4, 5, 28
18 U.S.C. 4247 ..... 5, 104a
18 U.S.C. 4247(a)(2) 8
18 U.S.C. 4247(a)(5) 6, 19
18 U.S.C. 4247(a)(6) 6, 19, 25
18 U.S.C. 4247(b)-(d) 5
18 U.S.C. 4247(d) 7
18 U.S.C. 4247(e)(1)(B) 8
18 U.S.C. 4247(e)(2) 8
18 U.S.C. 4247(g) 9
18 U.S.C. 4247(h) 9
Adam Walsh Child Protection and Safety Act of 2006,
Pub. L. No. 109-248, 120 Stat. 617 5
§ 301(a), 120 Stat. 617-618 (42 U.S.C. 16971(a)) 8

Statutes, regulations and rules—Continued: Page

§ 302(4), 120 Stat. 620
(18 U.S.C. 4248) ..... *passim*, 111a
18 U.S.C. 4248(a) 6, 7, 28
18 U.S.C. 4248(b) 7
18 U.S.C. 4248(c) 7
18 U.S.C. 4248(d) 7, 8, 28
18 U.S.C. 4248(e) 9
18 U.S.C. 4248(g) 6
18 U.S.C. 2241-2245 25
18 U.S.C. 2251 25
18 U.S.C. 3583 26
18 U.S.C. 3583(d) 27
18 U.S.C. 3583(e)(3) 27
28 C.F.R.:
Section 549.92 6
Section 549.93 6
Section 549.95 6
Sup. Ct. R. 10(c) 15

Miscellaneous:

Case of Insane Convict After Expiration of Term of Imprisonment, 35 Op. Att'y Gen. 366 (1927) 3
Commitment to Gov't Hosp. for the Insane, 30 Op. Att'y Gen. 569 (1916) 3
Government Hosp. for the Insane, 17 Op. Att'y Gen. 211 (1881) 3
Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 15

Miscellaneous—Continued: Page

H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1 (2005) 7
H.R. Rep. No. 1319, 81st Cong., 1st Sess. (1949) 4, 5
Restatement (Second) of Torts (1965) 21
S. Rep. No. 209, 81st Cong., 1st Sess. (1949) 4
United States Judicial Conference, *Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime* (1945) 3, 26

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 551 F.3d 274. The opinion of the district court (App., *infra*, 22a-95a) is reported at 507 F. Supp. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2009. A petition for rehearing was denied on March 10, 2009 (App., *infra*, 96a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, provides: "The Congress shall have Power * * * [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Relevant statutory provisions are reprinted in the appendix to this petition. App., *infra*, 97a-114a.

STATEMENT

This case involves a challenge to Congress's constitutional power to provide for court-ordered civil commitment of mentally ill, "sexually dangerous" persons in federal custody who have been found incompetent to stand trial on federal charges or who are nearing the expiration of their term of imprisonment after a criminal conviction. Congress authorized such commitment proceedings in 2006 by enacting 18 U.S.C. 4248, which was made part of a longstanding statutory framework of civil-commitment procedures applicable to persons in federal custody.

1. a. In the nineteenth century, federal statutes provided that federal prisoners who became insane while serving their sentences, or persons charged with offenses against the United States and in the actual custody of its officers, could be transferred to a federal mental hospital. See Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330. Those statutes were seen as vindicating "the duty of the United States to take care of convicts who may become

insane while in her custody." *Government Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 212-213 (1881) (emphasis omitted). In 1916, however, the Attorney General concluded that those statutes did not authorize the continued detention of a prisoner after his sentence had expired, because they did not provide for appropriate procedures (*i.e.*, "notice and proper hearing") to determine whether insanity warranted longer detention. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571; see also *Case of Insane Convict After Expiration of Term of Imprisonment*, 35 Op. Att'y Gen. 366, 369 (1927).

As a result, the Bureau of Prisons (BOP) was sometimes presented with the "serious problem" of "what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no state will assume responsibility for their custody." United States Judicial Conference, *Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime* 11 (1945) (*Judicial Conference Committee Report*).[1] In the late 1940s, "after long study by a conspicuously able committee, followed by consultation with federal district and circuit judges," the Judicial Conference proposed draft legislation to address the situation that arises when the federal government "'has lawful custody of a person whom it is not safe to let at large.'" *Greenwood* v. *United States*, 350 U.S. 366, 373, 374 (1956) (quoting *Judicial Conference Committee Report* 7).

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[1] The Judicial Conference Committee Report was reprinted in its entirety as an addendum to the government's court of appeals brief.

Congress responded, and since the late 1940s federal statutes have provided a comprehensive framework for the court-ordered civil commitment of various categories of persons in federal custody. See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)); Act of June 25, 1948, ch. 645, 62 Stat. 855 (18 U.S.C. 4241-4243 (1952)). Those categories include persons found to be mentally incompetent to stand trial (18 U.S.C. 4241); persons found not guilty by reason of insanity (18 U.S.C. 4243); and persons determined to be suffering from a mental disease or defect either before sentencing (18 U.S.C. 4244) or while imprisoned (18 U.S.C. 4245).

Those provisions also explicitly authorize civil-commitment proceedings against prisoners whose terms of imprisonment are about to end.[2] In its present form, 18 U.S.C. 4246 provides procedures for hospitalizing, *inter alia*, a person "in the custody of the Bureau of Prisons" whose term of incarceration "is about to expire" and who is found to "suffer[] from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. 4246(a). That provision was originally enacted to address problems posed by the "appreciable number" of federal prisoners

[2] The legislative history reinforces Congress's manifest intention in 1949 to provide statutory authority for "the continued restraint of [mentally incompetent persons] after their sentences expire." S. Rep. No. 209, 81st Cong., 1st Sess. 2 (1949) (letter from Peyton Ford, Assistant to the Attorney General); see also H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949) (referring to "the need for specific statutory authority to deal with those cases (*a*) where preexisting mental incompetency manifests itself only after commitment under sentence and (*b*) where such mental condition exists upon expiration of sentence, with no constituted authorities able or willing to assume custody, and outright release would be incompatible with public safety").

who, at the end of their terms, were not accepted by state institutions for "lack of legal residence in any State but who ought not, however, to be at large because they constitute a menace to public safety." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949).[3]

The procedural safeguards for commitment hearings under that statutory framework are set out in 18 U.S.C. 4247. They include provisions for a court-ordered psychiatric or psychological examination, representation by counsel (including appointed counsel), and the opportunity to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses who appear at the hearing. 18 U.S.C. 4247(b)-(d).

b. The longstanding civil-commitment regime for persons in federal custody was amended and supplemented by Title III of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 617. That Act added 18 U.S.C. 4248, which expressly authorizes the federal government to seek the court-ordered civil commitment of certain "sexually dangerous person[s]" already in its custody. § 302(4), 120 Stat. 620. In particular, Section 4248 applies to persons who are in the custody of the BOP, who have been committed to the custody of the Attorney General because they have been determined to be mentally incompetent to stand trial or to undergo post-release proceedings, or who have had all criminal charges against them dismissed solely for reasons relat-

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[3] Section 4246 also applies to persons who have been committed to the Attorney General's custody pursuant to Section 4241(d) (*e.g.*, those who have been charged with federal offenses but found incompetent to stand trial), and persons against whom criminal charges have been dismissed solely for reasons related to their mental condition. 18 U.S.C. 4246(a).

ing to their mental condition.[4] 18 U.S.C. 4248(a). A commitment proceeding under Section 4248 is initiated when the Attorney General, the Director of the BOP, or one of their designees or delegees, certifies to the federal district court for the district in which the person is confined that he "is a sexually dangerous person." *Ibid.*

The statute defines a "sexually dangerous person" as someone "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. 4247(a)(5). A person is defined by the statute to be "sexually dangerous to others" if he "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6).[5]

Once the government has initiated a commitment proceeding in federal district court by filing a certificate

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[4] If the government concludes that a person in its custody is sexually dangerous but all charges against him have been dismissed "for reasons *not related* to [his] mental condition," continued detention by the federal government is not authorized under Section 4248. 18 U.S.C. 4248(g) (emphasis added). Instead, the person shall be promptly released to a state official "for the purpose of institution of State proceedings for civil commitment," or—if the Attorney General receives notice from the States in which the person is domiciled or was tried that they will not assume responsibility for him—the person shall be released outright. *Ibid.*

[5] Although they were not in effect when this case began, the BOP has adopted regulations that further define "sexually violent conduct" and "child molestation," and provide a nonexclusive list of evidence that may be considered in "determining whether a person will have 'serious difficulty in refraining from sexually violent conduct or child molestation if released.'" 28 C.F.R. 549.92, 549.93, 549.95.

of sexual dangerousness, the statute "stay[s] the release" of the respondent from federal custody "pending completion of procedures contained in [Section 4248]." 18 U.S.C. 4248(a). Those procedures include an opportunity for the district court to order a psychiatric or psychological examination (to be followed by the filing of a report with the court), and a mandatory district court "hearing to determine whether the person is a sexually dangerous person." 18 U.S.C. 4248(a), (b) and (c). At the hearing, the respondent "shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him." 18 U.S.C. 4247(d); see 18 U.S.C. 4248(c). The respondent must be given "an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. 4247(d). At the hearing, the government has the burden of proving "by clear and convincing evidence that the person is a sexually dangerous person."[6] 18 U.S.C. 4248(d).

If the district court finds, after the hearing, that the government has carried its burden of proving sexual dangerousness, it must commit the respondent to the custody of the Attorney General. 18 U.S.C. 4248(d). At that point, "[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment." *Ibid.* To that end, "[t]he Attorney General shall

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[6] The legislative history reflects Congress's intention that the standards for commitment be "substantively similar to those approved" in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *Kansas* v. *Crane*, 534 U.S. 407 (2002). See H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 29 (2005).

make all reasonable efforts to cause such a State to assume such responsibility."[7] *Ibid.*

> If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—
>
> (1) such a State will assume such responsibility; or
>
> (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;
>
> whichever is earlier.

18 U.S.C. 4248(d).[8]

During the time a person is committed pursuant to Section 4248, the director of the facility in which he is committed must "prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). Those reports are to be "submitted to the court" that ordered the commitment. *Ibid.* The director must also inform the committed person of "any rehabilitation programs that are available" in the facility. 18 U.S.C. 4247(e)(2). If the director determines that the committed person "is no

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[7] The Adam Walsh Act also authorizes the Attorney General to award federal grants to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." § 301(a), 120 Stat. 617-618 (42 U.S.C. 16971(a)).

[8] A "suitable facility" is defined as one that "is suitable to provide care or treatment given the * * * characteristics of the defendant." 18 U.S.C. 4247(a)(2).

longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, [the director] shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment." 18 U.S.C. 4248(e). The court must then either order the person's discharge or hold a hearing to determine whether he should be released and, if so, under what conditions. *Ibid.* Even if the director has not determined that a committed person is no longer sexually dangerous, that person's "counsel" or "legal guardian may, at any time during [that] person's commitment" (except during the first 180 days after a court has determined that commitment should continue) "file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged" from the federal facility. 18 U.S.C. 4247(h). The statute also states that it does not preclude a committed person from "establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. 4247(g).

2. a. This case comprises five civil-commitment proceedings that were initiated by the United States in the District Court for the Eastern District of North Carolina.[9] The United States instituted proceedings against each of the five respondents pursuant to Section 4248 in November and December 2006. At that time, respondents Comstock, Revland, Matherly, and Vigil were each about to complete a prison term in BOP custody, which

[9] The cases were not formally consolidated in the district court, but the court issued one opinion addressing what it called "substantially identical" motions to dismiss in all five cases. App., *infra*, 25a n.3. The court of appeals consolidated the cases on the same day that the government's appeals were docketed. See 07-7671 Docket entry No. 11 (4th Cir. Nov. 29, 2007).

was to be followed by a three-year period of supervised release. App., *infra*, 24a-25a & n.2. Respondent Vigil had been sentenced to a 96-month term of imprisonment after pleading guilty to one count of sexual abuse of a minor; respondents Comstock, Revland, and Matherly had been sentenced, respectively, to 37-month, 60-month, and 41-month terms of imprisonment after pleading guilty to one count each of possession of child pornography. *Ibid.*

The fifth respondent, Catron, was indicted in 2004 on four counts of aggravated sexual abuse of a minor under the age of 12 and one count of abusive sexual conduct, but he was found incompetent to stand trial. He was committed pursuant to 18 U.S.C. 4241(d) for treatment and evaluation to determine whether he was likely to attain capacity to proceed to trial in the foreseeable future. After concluding that respondent Catron could not be restored to competency and that he would be dangerous to others if released, the government initiated civil-commitment proceedings against him under 18 U.S.C. 4246. The Adam Walsh Act was then enacted, and the government concluded, in light of Catron's history and diagnoses, that it would be more appropriate for him to be committed under Section 4248. Accordingly, the government withdrew the Section 4246 certificate and filed a certificate pursuant to Section 4248. See 5:06-HC-2202-BR Docket entry No. 1 (E.D.N.C. Nov. 13, 2006).

b. Each of the five respondents moved to dismiss his civil-commitment proceeding on various constitutional grounds. On September 7, 2007, the district court granted their motions to dismiss in a single opinion. App., *infra*, 22a-95a.

The district court rejected respondents' arguments that were predicated on the proposition that Section

4248 commitment proceedings are criminal rather than civil, App., *infra*, 29a-32a, but it held Section 4248 unconstitutional on its face on two grounds. First, it held that Section 4248 is beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause. The court reasoned that to sustain the statute under those Clauses "would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place," because a person's tendency to engage in sexually dangerous acts does not show a "likelihood" that he "will commit a *federal* crime." *Id.* at 51a, 53a. The court sought to distinguish Section 4248 from 18 U.S.C. 4246—which also authorizes commitment of mentally ill persons whose release would create a substantial risk of bodily injury or property damage—in part on the ground that Section 4246 requires the Attorney General to certify that no suitable state arrangements are available *before* initiating federal commitment proceedings, while Section 4248 requires an inquiry into suitable state arrangements only after commitment has occurred. App., *infra*, 63a-72a. The court concluded that Section 4248's provision on that score failed to incorporate sufficient "deference to the states' police and *parens patriae* powers." *Id.* at 68a.

Second, the district court held that Section 4248 violates the requirements of procedural due process, because it requires the government to prove the commission of prior acts or attempts to engage in sexually violent conduct or child molestation by "clear and convincing evidence," rather than beyond a reasonable doubt. *Id.* at 76a-93a.

The district court stayed implementation of its order pending the government's appeal. App., *infra*, 94a; 5:06-

HC-2195-BR Docket entry No. 40 (E.D.N.C. Nov. 26, 2007).

3. The court of appeals affirmed. App., *infra*, 1a-21a. It held that Section 4248 is unconstitutional on its face because it exceeds Congress's enumerated powers "to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law." *Id.* at 3a-4a. The court did not reach respondents' other constitutional challenges to the statute. *Id.* at 4a n.1.

a. The court of appeals rejected the government's contention that Congress was constitutionally authorized to enact Section 4248 incident to the government's undisputed authority to operate the federal criminal-justice and penal systems and to assume custodial responsibilities for its prisoners. App., *infra*, 13a. The court acknowledged that "Congress may establish and run a federal penal system," and that "consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sentences." *Id.* at 13a-14a. But the court concluded that those "powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." *Id.* at 14a. The court further declared that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." *Ibid.* The court quoted the district court's conclusion that custody is not a basis for commitment "*after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute

federal offenses is exhausted," and "where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize." *Id.* at 14a-15a (quoting *id.* at 76a). The court of appeals acknowledged that respondents "Comstock, Matherly, Vigil, and Revland remain subject to supervised release," but it did not consider that remaining sentence under federal jurisdiction to be a sufficient basis for Congress to provide for their civil commitment. The court reasoned that the United States "has no unexhausted power to prosecute a *former* federal prisoner simply because he *could* violate a term of his supervised release." *Id.* at 19a n.11.

The court of appeals recognized that the circumstances of respondent Catron's case "differ greatly" from those of the other respondents, since the finding that he was incompetent to stand trial meant that the federal government's prosecutorial powers were unexhausted. App., *infra*, 18a-19a n.10. While the court expressly noted that Catron's commitment under Section 4246 "would lie within [the federal government's] constitutional authority," it did not explain why the same unexhausted prosecutorial power could not justify detention under Section 4248. *Ibid.* Instead, the court declined "to bifurcate [his] unique challenge to § 4248" because, it said, "no party" had asked "for such 'finely drawn' relief." *Ibid.*

b. The court of appeals also rejected the government's contention that the civil-commitment procedures further a legitimate government interest in preventing future federal offenses related to sexual assault, molestation, and pornography. App., *infra*, 15a-18a. The court recognized that the federal government has the power to take reasonable steps to prevent federal

crimes. But it concluded that Section 4248 "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," because it "targets 'sexual dangerousness' generally" and "many commitments under § 4248 would prevent conduct prohibited *only* by *state law*." *Id.* at 15a-16a. The court observed that the total number of federal prisoners is small compared to state prisoners, and that the number of prisoners in state custody for rape or other sex assaults is much larger than the number in federal prisons for sexual crimes. *Id.* at 15a n.8.

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional an important Act of Congress that was adopted to protect the public against the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to others. The court erroneously rejected Congress's judgment that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore necessary and proper—component of Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers and to punish persons convicted of violating those laws by committing them to federal custody. Although the decision below is the first court of appeals decision specifically to address the question of the constitutionality of 18 U.S.C. 4248, its reasoning is difficult to reconcile with this Court's decision in *Greenwood* v. *United States*, 350 U.S. 366 (1956), and with decisions of other courts of appeals. Review of the court of appeals' constitutional holding therefore is warranted.

1. On numerous occasions, when a court of appeals has held an Act of Congress unconstitutional, this Court

has granted a writ of certiorari, even in the absence of a circuit conflict. See, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *Pierce County* v. *Guillen*, 537 U.S. 129 (2003); *United States* v. *Morrison*, 529 U.S. 598 (2000); *NEA* v. *Finley*, 524 U.S. 569 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993); *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); see also Eugene Gressman et al., *Supreme Court Practice* 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional * * *, certiorari is usually granted because of the obvious importance of the case."). That practice is consistent with this Court's recognition that "declar[ing] an Act of Congress unconstitutional * * * is the gravest and most delicate" of judicial tasks. *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). It is also consistent with this Court's own rules, which provide that certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Although the decision in this case is the first from a court of appeals to address the constitutionality of Section 4248 (see App., *infra*, 3a), the substantiality and recurring nature of the question is shown by a division among district court opinions. Four district court decisions have upheld the statute as a valid exercise of Congress's Article I powers. See *United States* v. *Abregana*, 574 F. Supp. 2d 1123, 1129-1134 (D. Haw. 2008); *United States* v. *Dowell*, No. CIV-06-1216-D, 2007 WL 5361304, at *2-*7 (W.D. Okla. Dec. 5, 2007); *United*

States v. *Shields*, 522 F. Supp. 2d 317, 325-326 (D. Mass. 2007), appeal pending, No. 09-1330 (notice of appeal filed Mar. 11, 2009); *United States* v. *Carta*, 503 F. Supp. 2d 405, 407-408 (D. Mass. 2007). Two district court decisions—aside from the one in this case—have found the statute to be beyond Congress's powers. The decision of the District of Minnesota in *United States* v. *Tom*, 558 F. Supp. 2d 931 (2008), is on appeal before the Eighth Circuit, No. 08-2345 (argued Mar. 12, 2009). And the recent decision of the District of Massachusetts in *United States* v. *Volungus*, No. 07-12060, 2009 WL 489838 (Feb. 27, 2009), is stayed pending possible appeal (Docket entry No. 34 (Feb. 27, 2009)).

Review of the Fourth Circuit's decision in this case is also especially appropriate in light of the geographic distribution of the proceedings that the government has initiated under Section 4248. The most suitable BOP facility for evaluating and treating sex offenders is located at the Federal Correctional Complex in Butner, North Carolina. As a result, most of the persons who have been certified as sexually dangerous under Section 4248 are housed there, and the great majority of all Section 4248 certificates (both before and after the district court's decision in this case) have been filed in the Eastern District of North Carolina.[10] Thus, in the absence of further review by this Court, the Fourth Circuit's decision will largely nullify Section 4248 for the foreseeable future.

2. In holding Section 4248 unconstitutional on its face, the court of appeals peremptorily concluded that

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[10] The BOP has certified 95 persons under Section 4248, and proceedings remain pending against 88 of them. Of those 88 proceedings, 77 (including those of the five respondents in this case) were certified in the Eastern District of North Carolina.

Congress is without any power to provide for the court-ordered civil commitment of dangerous, mentally ill persons beyond the duration of their prison sentences, regardless of the threat they pose to public safety. Deeming the government's special responsibilities as custodian to be irrelevant, the court analyzed the civil-commitment authority under Section 4248 as if it were being asserted without reference to respondents' status as federal inmates (four of whom were also, as part of their original criminal sentences, subject to terms of supervised release following their incarceration). Proceeding on the erroneous premise that respondents are indistinguishable from members of the public at large, the court concluded that this case is not meaningfully different from *United States* v. *Morrison*, 529 U.S. 598 (2000), because the federal government has no general authority to regulate sexually violent conduct.

The court of appeals' reasoning marks a substantial departure from the uniform judicial recognition that the government's authority over persons lawfully in federal custody stands on a different footing than its powers regarding the general population. Pursuant to its power under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress has carried into execution various of its enumerated powers—*e.g.*, to lay and collect taxes, to regulate interstate commerce, to establish post offices, and to exercise jurisdiction over federal territories and enclaves, *id.* Cls. 1, 3, 7 and 17—by enacting criminal statutes prohibiting and punishing certain conduct. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 416-418 (1819) (locating Congress's power to punish most federal crimes in the Necessary and Proper Clause). Congress's power to do so necessarily encompasses the power to imprison or otherwise provide

for the custody or supervised release of offenders. The initiation of proceedings for the court-ordered civil commitment of a person who has come into the custody and care of the United States for violation of federal criminal laws, when such a person is mentally ill and dangerous, is a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners. Thus, it too is within Congress's powers.

a. The Necessary and Proper Clause vests in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." When Congress legislates in furtherance of a legitimate end, its choice of means is accorded broad deference. See *Sabri* v. *United States*, 541 U.S. 600, 605 (2004) (explaining that *M'Culloch* v. *Maryland* established "review for means-ends rationality under the Necessary and Proper Clause"); see also *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."); *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.").

b. As described above (see pp. 2-5, *supra*), most of the statutory provisions establishing the federal government's civil-commitment authority date from the late 1940s. Those provisions were specifically intended, among other things, to allow the federal government to provide for the custody of mentally ill persons beyond the expiration of their federal prison sentences, or (in cases in which prosecution was thwarted by reason of mental illness) beyond the point when it is expected that a prosecution for a federal offense will occur. See 18 U.S.C. 4243, 4246.

Section 4248 supplements those provisions by addressing a specific kind of significant threat to public safety: sexual dangerousness manifested in both prior conduct and a present "mental illness, abnormality, or disorder" that will result in a "serious difficulty in refraining from sexually violent conduct or child molestation" if the inmate is released. 18 U.S.C. 4247(a)(5) and (6). Section 4248 also allows federal commitment proceedings to be initiated before the State of the inmate's domicile or the State in which he was tried have been asked whether either wishes to assume custody of the inmate upon release from federal custody. Neither of those modifications to long-established civil-commitment regimes exceeds the legitimate scope of Congress's Article I powers.

One purpose of civil-commitment statutes is "to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees," and in superintending proceedings under those statutes, the courts assume "an awesome responsibility to the public to ensure that a clinical patient's release is safe." *United States* v. *S.A.*, 129 F.3d 995, 999, 1000 (8th Cir. 1997) (citation and internal quotation marks omitted) (holding

that Section 4246 authorizes the commitment of a juvenile offender beyond his scheduled release date), cert. denied, 523 U.S. 1011 (1998). While it is true that the federal government has no "plenary police power," *United States* v. *Lopez*, 514 U.S. 549, 566 (1995), that accepted proposition does not call into question the United States' distinct and legitimate interest in protecting the public from threats posed by persons who have been charged with and in many cases convicted of federal crimes and who therefore are already properly in its custody. That legitimate interest of the United States is present whether or not the threatened conduct by a person in its custody would be an independent violation of federal criminal (or noncriminal) law. See *United States* v. *Salerno*, 481 U.S. 739 (1987) (holding that pretrial incarceration of persons under federal indictment was justified by the pendency of certain charges combined with the threat those individuals posed to public safety); *id.* at 747, 750, 755 (referring to Congress's "legitimate" interest in "preventing danger to the community"; Congress's interest in preventing "dangerous acts in the community"; Congress's concern about a person who "presents a demonstrable danger to the community"; "society's interest in crime prevention"; and every government's "concern for the safety and indeed the lives of its citizens").

Congress has provided for the Attorney General to assume custody of such a person—and thereby to assume the responsibility of protecting the public from him and of providing for his supervision, treatment, and care while he is serving a federal sentence. In 2006, as in 1949, Congress permissibly concluded that it is also appropriate—and therefore necessary and proper—to assume the further responsibility of protecting the pub-

lic from such a person if he is shown to be mentally ill and a danger to society, and to provide for his supervision, treatment, and care—where the most relevant States decline to do so—rather than simply to release the person into society at large.

There is nothing anomalous about such a special solicitude regarding the release of a potentially dangerous person who has been under one's custody and control. The civil-commitment statutes are consistent with the common-law understanding that a custodian may incur responsibilities to third parties when it takes charge of a person who is likely to cause harm if not controlled. See Restatement (Second) of Torts § 319, at 129 (1965) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."); *Hinckley* v. *United States*, 163 F.3d 647, 656 (D.C. Cir. 1999) (noting that that principle provides strong incentives for mental hospitals to act responsibly in authorizing their patients' releases); *Smith* v. *Hope Vill., Inc.*, 481 F. Supp. 2d 172, 197-199 (D.D.C. 2007) (holding that the duty is not extinguished upon an inmate's release from facility). Congress could legitimately conclude that in the circumstances presented here the actions of the federal government should be guided by similar principles of custodial responsibility.

The civil-commitment statutes also further the government's legitimate goal of providing care for persons over whom it has exercised control and for whom it has assumed responsibility. In that capacity, the government's role "is not that of punitive custodian of a fully competent inmate, but benign custodian of one legally

committed to it for medical care and treatment—specifically for psychiatric treatment." *United States* v. *Steil*, 916 F.2d 485, 488 (8th Cir. 1990) (quoting *United States* v. *Charters*, 863 F.2d 302, 312 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990)); see also *White* v. *Treibly*, 19 F.2d 712, 713 (D.C. Cir. 1927) (holding that the Secretary of the Navy had statutory jurisdiction to civilly commit a former naval officer, noting that his "care and protection" were a "concern and duty of the government").

c. The court of appeals' decision in this case appears to be the first appellate decision to address Congress's constitutional power to provide for the continued commitment in federal custody of mentally ill persons convicted of federal crimes, beyond the expiration of their prison terms. The court of appeals' rationale, however, is difficult to square with this Court's decision in *Greenwood* v. *United States*, *supra*. In *Greenwood*, this Court upheld—as "plainly within congressional power under the Necessary and Proper Clause"— Congress's power to authorize the federal government to commit someone who has been found incompetent to stand trial, even when it appears that there will never be a trial to determine whether he committed a federal offense. 350 U.S. at 375.

Greenwood resolved a conflict between the Eighth Circuit's decision in that case, *Greenwood* v. *United States*, 219 F.2d 376 (8th Cir. 1955) (en banc), aff'd, 350 U.S. 366 (1956), and earlier rulings of the Ninth and Tenth Circuits. The Tenth Circuit majority in *Wells* v. *Attorney General*, 201 F.2d 556 (1953), followed by the Ninth Circuit in *Higgins* v. *United States*, 205 F.2d 650 (1953), had concluded that the indefinite commitment of an incompetent pretrial detainee who would never be

tried impermissibly invaded powers reserved to the States. This Court rejected that limited view of federal authority, and sustained the indefinite commitment of pretrial detainees under the statutory predecessor to 18 U.S.C. 4246, even when—in view of the detainee's medical condition—it was highly unlikely that a trial would ever take place. *Greenwood*, 350 U.S. at 375.[11]

In the decision below, the court of appeals regarded *Greenwood* as irrelevant to the question of Congress's authority to provide for the commitment of persons beyond the end of their prison terms, based on the Court's observation in that decision that the federal government's "power to prosecute" Greenwood was "not exhausted"—because it remained possible, if only theoretically, that Greenwood might at some point be tried. App., *infra*, 18a-19a (quoting *Greenwood*, 350 U.S. at 375). But *Greenwood*'s reference to the government's unexhausted power to prosecute did not represent, as the court of appeals wrongly inferred, an affirmative limitation on federal authority. To the contrary, the Court specifically rejected the contention that the government's authority depended on its actual ability to prosecute Greenwood. *Greenwood*, 350 U.S. at 375. Indeed, as other courts have continued to recognize (see pp. 19-22, *supra*), the primary purpose of the commitment statutes is not to facilitate prosecution but to protect the public and provide care to the person over whom the federal government already has lawfully exercised control. See, *e.g.*, *Greenwood*, 219 F.2d at 387 ("The national government has the undoubted right * * *

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[11] See also *Greenwood*, 350 U.S. at 372 (noting psychiatric report's conclusion that Greenwood "will probably require indefinite hospitalization to insure his own safety and that of society").

generally to do whatever reasonably and lawfully can be done to protect society against [federal] offenders.").

In that context, the *Greenwood* Court's reference to an "unexhausted" power to prosecute echoed the language of the dissenting opinion in *Wells*, which had explained that "when the federal government has taken one into lawful custody, under the exercise of valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person," it also assumes a "duty to adequately care and provide for" that person if he is found to be insane. 201 F.2d at 561 (Huxman, J., dissenting). By recognizing the risk posed by an insane detainee's release and justifying indefinite commitment even when such a person will likely not be tried, *Greenwood* did not place beyond Congress's power any ability to address the same threats posed by other persons (like most of respondents here) who have not only been indicted but also convicted of federal crimes and imprisoned by the federal government.

The court of appeals' reasoning is also inconsistent with the Ninth Circuit's decision in *United States* v. *Sahhar*, 56 F.3d 1026, cert. denied, 516 U.S. 952 (1995), which involved the extended commitment of a person found incompetent to stand trial. In *Sahhar*, the court rejected the contention that the government's legitimate interest in commitment could last no longer than the maximum sentence permitted for the federal crime for which the defendant had been indicted. In upholding the defendant's "potentially indefinite commitment" against a substantive-due-process challenge, the court explained that "civil commitment of a dangerous and mentally ill person [was justified] because he was in *federal* custody, not because he was in *pretrial* custody.

The fact that an indictment is no longer in place is irrelevant to the governmental interests at stake." *Id.* at 1028, 1029; see also *ibid.* (citing *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee may continue to be detained, without regard for his "hypothetical maximum sentence," because no "correlation between severity of the offense and length of time necessary for recovery" is required)). As this Court has explained, ongoing civil commitment legitimately "rests on [a detainee's] continuing illness and dangerousness." *Jones*, 463 U.S. at 369.

In light of those principles, Congress could reasonably determine that it is "appropriate"—and therefore "necessary and proper" under *M'Culloch*, *supra*—to protect private persons from sexually dangerous, mentally ill persons whom the federal government has taken into its custody. Moreover, as in *Greenwood*, *Sahhar*, and *S.A.*, that authority need not be limited to what might have been justified by the original ground for federal jurisdiction over the individual.[12] Instead, the government's power depends upon the present threat posed by someone who is mentally ill when his federal prison sentence is about to end. Otherwise, Congress would

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[12] Although many of the criminal acts that sexually dangerous persons might be expected to commit would violate state law, federal law also criminalizes many acts that constitute the "sexually violent conduct" or "child molestation" associated with the definition of "sexually dangerous" under 18 U.S.C. 4247(a)(6). For example, when acts of sexual abuse occur within the special maritime and territorial jurisdiction of the United States—as was the case with the offenses that caused respondents Vigil and Catron to be in federal custody (App., *infra*, 25a n.2)—they violate federal criminal law. See, *e.g.*, 18 U.S.C. 2241-2245. So too can sexual exploitation of a minor or solicitation of a minor to engage in prostitution or sexual activity, when the internet or interstate travel is involved. See, *e.g.*, 18 U.S.C. 2251.

have been powerless to solve—in both 1949 and 2006—the serious problem presented when the federal government "has lawful custody of a person whom it is not safe to let at large." *Greenwood*, 350 U.S. at 374 (quoting *Judicial Conference Committee Report* 7).

3. The court of appeals concluded that Section 4248 is not necessary and proper to the operation of the federal criminal-justice and penal system because it impermissibly infringes upon the "broad powers" reposed in States pursuant to "their well-settled police and *parens patriae* powers to pursue civil commitment under state law." App., *infra*, 20a-21a. That conclusion, however, was based upon erroneous assumptions about the range of legitimate federal power and about the extent of the alleged intrusion on the States.

a. The court of appeals principally rejected the government's Necessary and Proper Clause argument on the ground (App., *infra*, 13a-15a) that "broad powers" over inmates—which the federal government concededly "possesses * * * over persons *during* their prison sentences"—fully revert from the federal government to the States the moment the inmates' federal prison terms expire. *Id.* at 14a. But that purported dichotomy is a false one. Indeed, it is contradicted by the typical terms of federal criminal sentences, which often provide (as in this case) that a term of imprisonment will be followed by a period of "supervised release."[13] See generally 18 U.S.C. 3583.

The conditions associated with supervised release routinely extend far beyond the kinds of regulations that the federal government could impose on members of the

[13] As noted above, four of the respondents in this case will be subject to three-year terms of supervised release once they are released from physical custody. App., *infra*, 24a, 25a n.2.

general population, including the requirement "that the defendant not commit another Federal, *State, or local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphasis added). A violation of those conditions can result in revocation of supervised release and a return to federal prison. 18 U.S.C. 3583(e)(3). That statutory framework belies the court of appeals' conclusion that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." App., *infra*, 14a; cf. *id.* at 15a-16a ("[M]any commitments under § 4248 would prevent conduct prohibited *only* by *state law*. Section 4248 thus sweeps far too broadly to be a valid effort to prevent *federal* criminal activity."). The terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority. But they nevertheless underscore the United States' distinct relationship with federal convicts, as well as its ability to take special measures to protect the public from harm that might result from the release of those convicts, even when that harm might arise from conduct that would often be beyond federal regulatory power.

b. The court of appeals also erred in characterizing Section 4248 as an impermissible intrusion on the States' own powers of civil commitment. Adverting briefly (App., *infra*, 19a) to a point made at greater length in the district court's opinion (*id.* at 63a-67a), the court of appeals contrasted Section 4248 with Section 4246, the constitutionality of which was sustained by this Court as to the petitioner in *Greenwood*. Only the latter provision, both of the lower courts noted, requires the federal government to exhaust potential arrangements for state

custody *before* initiating federal commitment proceedings against a federal inmate who is about to be released.[14] Compare 18 U.S.C. 4246(a), with 18 U.S.C. 4248(a).

Of course, Section 4248, like the provisions enacted in 1949, provides for ongoing federal custody and treatment only when no suitable state arrangements are available. See 18 U.S.C. 4248(d). It cannot be of constitutional significance whether the States of the inmate's domicile or trial are consulted before or after the federal government has undertaken to prove in court that a person in federal custody is in fact sexually dangerous. As an initial matter, it plainly imposes less of a burden on a State to ask it to accept custody of someone whose sexual dangerousness has already been adjudicated than it does to ask the State to decide on initiating its own commitment proceedings against someone who has been in federal custody, perhaps for years, and about whom the State may well know next to nothing.

Similarly, the State's discretionary decision whether to assume custody cannot determine whether a federal commitment proceeding falls within Congress's powers. The exercise of Article I powers does not depend on a State's approval. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 29 & n.38 (2005); see also *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).[15] If

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[14] Notwithstanding the contrast with Section 4246, the timing of state involvement under Section 4248 is not novel. The government need not certify the lack of suitable arrangements for state custody before seeking a court-ordered commitment under 18 U.S.C. 4243 of a person who has been found not guilty only by reason of insanity.

[15] In the context of civil-commitment decisions, the history of *Greenwood* itself makes clear that the federal government is not required to defer to state determinations of sanity for persons over whom it has

an action is appropriate under the Necessary and Proper Clause, the federal government need not defer to a State or ask for its permission.

4. Finally, in holding Section 4248 unconstitutional in the case of respondent Catron (App., *infra*, 18a n.10), the court of appeals invalidated an application of the statute that survives scrutiny even under that court's own erroneous view of Congress's authority.

Catron was deemed incompetent to stand trial after being charged with four counts of aggravated sexual abuse of a minor under the age of twelve and one count of abusive sexual conduct, and he was in custody under 18 U.S.C. 4241(d) when he was certified as sexually dangerous under Section 4248. The court of appeals recognized that, even under its circumscribed reading of *Greenwood*, Congress's assertion of authority over persons in Catron's situation would be proper because there was still an "unexhausted" power of federal prosecution. App., *infra*, 19a n.10 (noting that commitment under Section 4246 "would lie within [the government's] constitutional authority"). The court nevertheless declared: "Because no party asks us to bifurcate Catron's unique challenge to § 4248, we decline to do so." *Ibid.* The court of appeals' premise that the government did not separately defend custody under Catron's different cir-

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jurisdiction. In *Greenwood*, after commencing commitment proceedings, the federal district court transferred Greenwood to a state facility. 350 U.S. at 371. The State then concluded that Greenwood was *not* insane and released him. *Ibid.* Greenwood was re-arrested under a federal indictment. *Ibid.* In ordering Greenwood's indefinite commitment, the federal court did not consider itself limited or bound by the State's ruling, and this Court did not suggest that it was required to defer to the state court's sanity determination or that the federal government had violated principles of federalism by indefinitely committing a person deemed sane by the State. *Id.* at 371-372.

cumstances is incorrect. Catron's case was one of five separate cases that the court of appeals consolidated for purposes of appeal, and the government's briefs included separate discussions of the constitutionality under *Greenwood* of Section 4248 as applied to "individuals, like respondent Catron, found incompetent to stand trial and committed to federal custody under § 4241(d)." Gov't C.A. Br. 37 (capitalization modified); see also *id.* at 37-41; C.A. Reply Br. 20.

The court of appeals thus erred in ordering that Catron's case be dismissed on a constitutional ground (*i.e.*, the alleged exhaustion of the federal prosecution power) that the court itself recognized was inapplicable to the Section 4248 proceeding against Catron.[16] Cf. Resp. C.A. Br. 56 ("[T]he federal government's power to prosecute, as described in *Greenwood*, remains solely for Catron."). That invalidation of civil-commitment proceedings under Section 4248 for persons found incompetent under Section 4241(d) likewise should be reviewed and reversed by this Court.

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[16] The district court suggested (App., *infra*, 37a & n.7) that Greenwood's case was distinguishable from respondent Catron's because the older statute required a "potential harm to the 'interests of the United States.'" As the government argued below (Gov't C.A. Br. 40), that rationale conflicts with decisions correctly construing the older statute as authorizing commitment when "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States* v. *Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969) (citing *Royal* v. *United States*, 274 F.2d 846, 851-852 (10th Cir. 1960)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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