No. 08-1224

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., ET AL.,

Respondents.

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

BRIEF FOR THE STATES OF KANSAS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress has 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.

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INTEREST OF THE *AMICI* STATES

The States have been the leader in the area of sex offender civil commitment programs, having established and defended the modern programs beginning in the early 1990s. Civil commitment of sex offenders is not a new or novel approach to providing long-term care and treatment to those suffering from mental abnormalities that make them dangerous, as well as protecting society from such individuals. In the 1930s, "sexual psychopath" laws were enacted to rehabilitate sex offenders. By the 1960s, more than half the States had such laws. Nathan James, et al., *Civil Commitment of Sexually Dangerous Persons* 5 (2008); *see also Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940) (rejecting due process and equal protection challenges to one such "sexual psychopath" law allowing for civil commitment).

In 1990, Washington became the first state to enact a second generation of sex offender civil commitment laws, sometimes referred to as "sexually violent predator acts." Wash. Rev. Code Ann. § 71.09.01 *et seq*. Kansas and other states soon followed suit. At least 21 states now have such programs. *See* Ariz. Rev. Stat. Ann. § 36-3701 *et seq.*; Cal. Welf. & Inst. Code § 6600 *et seq.*; Fla. Stat. Ann. § 394.910 *et seq*.; Ill. Comp. Stat. Ann. ch. 725, §205 *et seq*.; Iowa Code Ann. § 229A; Kan. Stat. Ann. § 59-29a01 *et seq*.; Mass. Gen. Laws Ann. ch. 123A; Minn. Stat. Ann. § 253B; Mo. Ann. Stat. § 632.480 *et seq*.; Neb. Rev. Stat. Ann. § 29-2923 *et seq*.; N.H. Rev. Stat. Ann. § 135-E:1 *et seq.*; N.J. Stat. Ann. § 30:4-82.4 *et seq*.; N.M. Stat. Ann. § 43-1-1 *et seq*.; N.Y. Mental Hyg. Law § 10.01 *et seq.*; N.D. Cent. Code § 25-03.3-01 *et seq*.; Or. Rev. Stat. Ann. § 426.510 *et seq*.; S.C. Code Ann. § 44-48-10 *et*

seq.; Tenn. Code Ann. § 33-6-301 *et seq*.; Tex. Health & Safety Code Ann. § 841.001 *et seq*.; Wis. Stat. Ann. § 980.01 *et seq*.

As of December 2004, almost 3,500 individuals had been committed in these state programs, at an annual nationwide cost of approximately $224 million. Washington State Institute for Public Policy, *Involuntary Commitment of Sexually Violent Predators: Comparing State Laws* 1 (2005). That works out to an average nationwide cost of $64,000 per year per committed individual (in 2004 dollars). Indeed, sex offender civil commitment programs are expensive to operate for several reasons. For one, they must be conducted in a secure facility given the reasons the offenders are receiving treatment. For another, the treatment provided to such individuals is long-term and behavioral or cognitive in nature; these individuals generally cannot be treated simply with a drug or prescription. Certainly, the sex offender civil commitment programs are much more expensive in general than operating a prison. That 21 states have nonetheless adopted such programs demonstrates the importance of state (and now federal) efforts to treat and rehabilitate such individuals prior to their release into society at large.

The first constitutional case involving these laws to reach the Court was *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *Hendricks*, the Court upheld the Kansas statute against substantive due process, double jeopardy, and *ex post facto* challenges, recognizing that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public

health." *Id*. at 371. A few years later, when addressing the Washington program, the Court again emphasized that states have "an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions." *Seling v. Young*, 531 U.S. 250, 262 (2001).[1]

Though the States do have a general interest in the proper interpretation of the Commerce Clause and the Necessary and Proper Clause, particularly because Congress may rely on those clauses to adopt legislation purporting to preempt state laws, *e.g., Gonzales v. Raich*, 545 U.S. 1 (2005), the States' interest in this case is unrelated to preemption considerations. Rather, the federal program at issue here (for prisoners about to be released from federal custody) is best viewed as *complementary* to state efforts in this area; the federal program in no way intrudes upon state prerogatives or interests.[2] Indeed, the operation of a federal sex offender civil commitment program may well contribute to the "laboratory of ideas", a concept the Court frequently has recognized as one of the important benefits of federalism.

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[1] The Court has decided one other case involving a state sex offender civil commitment law. *See Kansas v. Crane*, 534 U.S. 407 (2002).

[2] The States do not address the second aspect of the Question Presented, regarding Congress' authority to civilly commit sexually dangerous persons who have been found mentally incompetent to stand trial, though the Court's decision in *Greenwood v. United States*, 350 U.S. 366 (1956), appears to resolve that question in Congress' favor.

The federal program also serves the same purpose as the state sex offender civil commitment laws, namely treating dangerous sex offenders with mental abnormalities until it is safe to release them into the general public. Because of both the nature of the treatment required and the particular security concerns involved, these programs are expensive to operate. Until the federal program was enacted, the States were shouldering this burden alone.

The federal program makes an important contribution by treating at least some of the persons in federal custody who are dangerous and mentally abnormal sex offenders. Although federal law expressly permits—even encourages—the transfer of federal inmates to state custody for sex offender treatment if the States are willing to accept such persons, the States generally could not and would not want to absorb federal offenders into the existing state programs for a variety of reasons. Thus, the States and the federal government share a strong interest in seeing complementary and effective federal and state programs operate.

SUMMARY OF THE ARGUMENT

The federal sex offender civil commitment program established pursuant to 18 U.S.C. § 4248 does not in any way intrude upon traditional state police powers. Nor does the federal program in any way impede or disrupt state sex offender civil commitment programs. To the contrary, the federal government's efforts complement and further the purposes of the States' programs for dealing with sexually dangerous offenders. Indeed, the federal law preserves and promotes federalism (1) by expressly allowing states to

take custody of sex predators upon their release from federal custody if the states so desire (though states are never required to do so), and (2) by providing grants to assist states in creating and enhancing their own sex offender civil commitment programs. Simply put, § 4248 is a model of cooperative state and federal efforts; the statute neither imposes a federal mandate on unwilling states nor does it preempt any of the States' traditional police powers.

Section 4248 can be sustained as an exercise of Congress' enumerated powers over interstate commerce and federal territories. There is no dispute that federal laws prohibiting the possession and distribution of child pornography or making sexual abuse a crime when it occurs in federal territories, for example, are legitimate exercises of Congress' enumerated powers. If Congress has enumerated powers to criminalize such conduct, it necessarily has the power to imprison, commit, treat and attempt to rehabilitate those who commit such offenses. Moreover, there is a legitimate federal interest in not releasing dangerous and mentally abnormal sex offenders in federal custody into society without care and treatment, irrespective of what federal offenses brought those persons into federal custody. The ease with which modern day sex offenders can utilize the internet and interstate travel to commit sexually violent offenses further demonstrates that Congress has enumerated powers that support the enactment of 18 U.S.C. § 4248.

At a minimum, the Necessary and Proper Clause provides a constitutional basis for the enactment of § 4248. Under that Clause, the test is simply whether a congressional enactment is a rational and

appropriate means for effectuating an enumerated power. Section 4248 satisfies that test because the nexus between sex offender civil commitment and the enforcement of numerous federal laws prohibiting a variety of sexual misconduct is clear. Civil commitment of sexually dangerous federal prisoners will prevent the commission of future federal crimes by these same offenders. The connection between federal sex offender civil commitment and federal interests is more than rational here; it is quite direct and strong.

Finally, the rationale and the result in *Greenwood v. United States*, 350 U.S. 366 (1956), demonstrate that Congress has the constitutional authority to enact § 4248. Because § 4248, like the federal law at issue in *Greenwood*, authorizes the civil commitment of persons properly in federal custody who suffer from mental abnormalities making them dangerous to others and to federal interests, the reasoning of *Greenwood* controls here. In fact, the federal government's lawful claim over the person to be civilly committed is even stronger under § 4248 than it was in *Greenwood*, where the mentally incompetent person had only been charged with federal offenses, but had not been tried, convicted and sentenced. At a minimum, it is necessary and proper that the federal government be able to civilly commit dangerous, mentally abnormal persons lawfully in federal custody, as the Court's decision in *Greenwood* certainly implies.

ARGUMENT

I. SECTION 4248 RESPECTS FEDERALISM.

Importantly, from the States' perspective, the federal program at issue in this case in no way

intrudes on traditional state police power prerogatives. To the contrary, the States view the federal program as complementing and expanding the States' efforts to treat mentally abnormal and dangerous offenders while also protecting the public.

In no respect does the federal program intrude on the States traditional police powers. Nothing in § 4248 prevents a state from adopting and implementing its own civil commitment program for sexually dangerous individuals. Further, if for some reason (which is not apparent to the States), a particular state wanted to take custody of a sexually dangerous offender about to be released from federal custody, § 4248 specifically provides for federal / state cooperation. In particular, the Attorney General is to "make all reasonable efforts" to place an individual committed under the federal law in the care of his or her home state or the state of original prosecution. 18 U.S.C. § 4248(d). If a state at any time agrees to take such a person, the Attorney General is to defer and transfer custody to the state. *Id*. The Adam Walsh Act also directs the Attorney General to make grants to states for "the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." 42 U.S.C. § 16971(a).

With respect to sex offender civil commitment, Congress has acted only in ways that respect federalism, choosing an overarching policy of federal and state cooperation. Thus, federal law creates in essence a right of first refusal for the States, and only utilizes grants (rather than a threat of withdrawal of federal funds, *cf. South Dakota v. Dole*, 483 U.S. 203 (1987)), to encourage states to adopt their own sex offender civil commitment programs. With such

limited and respectful provisions, there is no crossing of any line between federal authority and traditional state police powers, nor is there any failure to respect the States' sovereignty.

One of federalism's core benefits is to allow the states to act as policy laboratories in which novel and differing approaches to challenging societal problems can be tested for the ultimate benefit and improvement of government and society. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000); *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Far from stifling the States as laboratories, the federal program in this case itself participates in the marketplace of ideas, creating the potential for new and additional knowledge and insights into the best methods for treating sexually dangerous and mentally abnormal individuals. The narrow scope of the federal program and Congress' cooperative approach to the problem of dangerous and mentally abnormal sex offenders in federal custody ensure that any threats to federalism and the States' prerogatives are minimal, if not nonexistent here.

Furthermore, there are very practical reasons to prefer a system that includes a federal sex offender civil commitment program rather than relying solely on the state programs. One such reason is the significant cost of operating legitimate and effective programs, a cost that far exceeds typical prison costs. Another reason is that, because only 21 states have such programs, either those states alone would have to absorb all commitment candidates from the federal system, or the other 29 states would be compelled to start programs, or persons in federal custody

designated for release in any of those 29 states would simply have to be let go, with no possibility of civil commitment for continuing care and treatment. The States find none of those options attractive.

Another practical consideration is that the class or classes of sexually dangerous persons likely to be committed to the federal program may vary from those committed to the state programs. To the extent that § 4248 commitments deal with individuals who have committed federal crimes, the federal program may well be better able to accommodate and treat the particular abnormalities and needs of those individuals. Some state programs, on the other hand, may be unsuited to assume custody of the types of individuals § 4248 addresses. Sex offenders are not fungible, and indeed suffer from a variety of mental abnormalities and personality disorders, some of which may well be more or less prevalent in the federal prison population than in the various state prison populations.

The federal program thus is fully consonant with the States' strong interest in the civil commitment and treatment of sexually violent offenders suffering from mental abnormalities that make them a continuing danger. Striking down the federal program would cause the loss of an important cooperative program *without any resulting benefit* to federalism's core principles or the interests of the States.

II. CONGRESS HAS POWER TO ENACT § 4248.

A. Congress Has Power Directly Under The Commerce Clause And Its Plenary Power Over Federal Territories To Regulate Offenders In Federal Custody.

Congress had the authority under the Necessary and Proper Clause to enact § 4248, but it also had such authority directly under its enumerated powers, an alternative basis for upholding the law. There is no dispute that Congress may legislate to regulate both persons who move in interstate commerce and the instrumentalities and channels of interstate commerce. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 558 (1995) ("Congress may regulate the use of the channels of interstate commerce"; "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (same); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (same). Pursuant to the commerce power, Congress has criminalized the sexual exploitation of children and the possession and distribution of child pornography. 18 U.S.C. §§ 2251, 2252, 2252A, 2260.

Nor is there any doubt that Congress has plenary authority over federal territories. *See* U.S. Const. Art. IV, sec. 3 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States"); *see United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 13 (1957)). Pursuant to this

express power, Congress has criminalized sexual abuse in U.S. territories. 18 U.S.C. §§ 2241-2244.

There is no dispute that the federal criminal laws cited above are within Congress' enumerated powers. Indeed, any person convicted of federal crimes and in federal custody already has a proven propensity to affect federal interests over which Congress has plenary authority. Furthermore, once such persons are validly in federal custody, the federal government has a legitimate federal interest in not releasing any dangerous and mentally abnormal sex offender into society without further care and treatment. Importantly, the federal interest exists irrespective of the precise federal offenses such persons may have committed in the past.

This Court has recognized that sex offenders present special challenges. *See, e.g., McKune v. Lile*, 536 U.S. 24, 32 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.") Given the high recidivism rate among sex offenders, it is reasonably likely that such offenders will commit a federally prescribed offense once they are free to enter the channels and utilize the instrumentalities of interstate commerce. Accordingly, the federal government has both a vested interest in and the authority to regulate such persons in order to prevent the future commission of federal crimes.

Furthermore, given increasing restrictions on where released sex offenders may live, as well as the demonstrated problems with maintaining accurate and current sex offender registries (often because offenders move without notifying authorities), it is beyond doubt

that many offenders will move across state lines following their release from federal custody. For these very reasons, Congress has created a national sex offender registry and notification system to track and monitor the locations of released sex offenders. The interstate aspects of protecting the public from dangerous and mentally abnormal sex offenders simply cannot be ignored. Certainly, the close connection with interstate commerce justifies a sex offender civil commitment program for the care and treatment of such offenders in federal custody.

Therefore, the federal program is a valid exercise of Congress' power under the Commerce Clause and its plenary power over federal territories, because the federal program is rationally related to reducing crimes against undisputed federal interests, by providing long term care and treatment for a particular class of persons with a proven record of committing sex crimes. Indeed, federal offenders with a propensity to commit sex crimes are never more than a drive across state lines, a commercial airline flight, or most easily and commonly the click of a computer mouse, away from committing future federal sex offenses. *Cf. Gonzales v. Raich*, 545 U.S. 1, 33, 40 (2005) (Scalia, J., concurring) ("As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market"); *United States v. Tom*, 565 F.3d 497, 506 (8th Cir. 2009).[3]

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[3] Additionally, in upholding § 4248 against constitutional challenge, the Eighth Circuit observed that "many, if not most, federal sex offenders are . . . incarcerated outside the state of their domicile or the state in which they are convicted." 565 F.3d at 506. Given that fact, the Eighth Circuit opined that "it is not

B. Section 4248 Is A Proper Exercise Of Congress' Powers Under The Necessary And Proper Clause Because It Is A Rational and Appropriate Means For Effectuating Congress' Enumerated Powers.

The Necessary and Proper Clause allows Congress to legislate when the law is a rational and appropriate means for effectuating an enumerated power. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *id*. at 34-38 (Scalia, J., concurring); *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819). Almost seventy years ago, the Court held that

> [Congress] may choose means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the

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unreasonable to assume that upon completion of any prison term convicted sex offenders will travel outside of the state of incarceration, and may well have the intent to commit a federally prescribed sex offense." *Id*. If the Eighth Circuit's implicit factual premise is correct, that federal offenders will be released in the state of their incarceration (as opposed to being returned to their home state or state of conviction before being released), then *Tom* identifies yet another reason that interstate travel by released offenders seems likely and gives Congress authority to regulate their release.

> accomplishment of some purpose within an admitted power of the national government.

United States v. Darby, 312 U.S. 100, 121 (1941).

Only four years ago, the Court reaffirmed the rule of *Darby*, holding that when a federal law is challenged as beyond the scope of the Necessary and Proper Clause, a reviewing court asks simply whether Congress had a rational basis to believe that the challenged law was "reasonably adapted" to the execution of an enumerated power. *Raich*, 545 U.S. at 22. Stated another way, the question is whether Congress rationally concluded that § 4248 was reasonably adapted to effectuating laws enacted pursuant to Congress' enumerated powers. *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004); *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *id*. at 603, 607 (Souter, J., dissenting); *id*. at 617 (Breyer, J., dissenting); *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964).

If so, the law is within Congress' power to enact. Because the civil commitment of sexually dangerous federal prisoners whose sentences are about to expire is a means reasonably adapted to the legitimate end of preventing future violations of federal laws enacted pursuant to Congress' enumerated powers, as explained below, the Necessary and Proper Clause authorizes § 4248.

Pursuant to the commerce power, Congress has criminalized the sexual exploitation of children and the possession and distribution of child pornography. 18 U.S.C. §§ 2251, 2252, 2252A, 2260. Pursuant to its plenary power over federal territories, Congress has criminalized sexual abuse in U.S. territories. 18 U.S.C. §§ 2241-2244. There is no dispute that these laws are validly enacted pursuant to Congress' enumerated powers.

Section 4248 is part of the Adam Walsh Act, in which Congress created a comprehensive scheme to make already-existing federal sex crime laws more effective:

> Congress enacted the Adam Walsh Act in order to [sic] "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, [and] to promote Internet safety...." 120 Stat. at 587. Its legislative history makes clear that the Act was designed to be a "comprehensive bill to address the growing epidemic of sexual violence against children" and to "address loopholes and deficiencies in existing laws." H.R.Rep. No. 109-218, pt. 1 (2005). A Senate sponsor described the Act as "the most comprehensive child crimes and protection bill in our Nation's history." 152 Cong. Rec. S8012-02 (daily ed. July 20, 2006) (statement of Sen. Hatch). Among other measures, the Act strengthens federal criminal penalties for sexually exploitive and violent crimes against children, *see, e.g.,* § 206, 120 Stat. at 613 (codified as amended at 18 U.S.C. § 2241 (2006)), establishes a National Sex Offender Registry, *see* § 119, 120 Stat. at 596

> (codified at 42 U.S.C. § 16919 (2006)), and creates the civil commitment procedures at issue [in *Tom*], *see* § 302, 120 Stat. at 620-22 (codified at 18 U.S.C. § 4248 (2006)).

United States v. Tom, 565 F.3d 497, 499 (4th Cir. 2009).

In *Tom*, the Eighth Circuit pointed out that § 4248 is located in Title 18 of the United States Code, which "contains a vast number of criminal statutes enacted to give effect to Congress's enumerated powers, including those proscribing various sex offenses." 565 F.3d at 502. In similar contexts "Congress has determined that providing for civil commitment of persons in a variety of circumstances is necessary and proper to the functioning of federal criminal laws." *Id.* at 504 (citing 18 U.S.C. § 4241 (civil commitment of defendant unfit to stand trial), § 4243 (civil commitment of persons found not guilty by reason of insanity), § 4244 (commitment of persons sentenced to maximum period for offense committed), § 4245 (commitment of prisoner suffering from mental disease), § 4246 (commitment beyond prescribed incarceration period for prisoners whose release would create a substantial risk of bodily injury to another person or serious damage to the property of another)).

Under the federal statute, a "sexually dangerous person" is defined as "a person 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) (emphasis added). The phrase "sexually dangerous to others" is itself defined to mean "that the person 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). To effect civil commitment under § 4248, the government must prove that the individual is a "sexually dangerous person" by clear and convincing evidence. 18 U.S.C. § 4248(d).

Applying rational basis review, the Eighth Circuit upheld § 4248 in *United States v. Tom*. Quoting *M'Culloch v. Maryland*, 17 U.S. at 420-21, the court recognized that the Necessary and Proper Clause "confers upon Congress 'the right to legislate on that vast mass of incidental powers which must be involved in the constitution' lest the Constitution be rendered 'a splendid bauble." The *Tom* court held that because Congress had the enumerated power to criminalize and punish the conduct of which Tom was guilty, it had "the ancillary authority under the Necessary and Proper Clause to provide for his civil commitment." 565 F.3d at 503-05. "The nexus between [the commitment] statutes and the enforcement of duly authorized federal criminal laws is evident. In each case the operation of the underlying federal criminal law would be frustrated without the related civil commitment provision." *Id.* at 504.

Indeed, as the *Tom* court pointedly observed:

> A propensity to engage in sexually violent conduct or child molestation can hardly be disassociated from the likelihood that a person may commit other types of sex related crimes that fall within federal jurisdiction, such as those involving internet child pornography, *see* 18 U.S.C. § 2252, or the use of the internet to

> solicit sexual activity from a minor, *see* 18 U.S.C. § 2422(b).

565 F.3d at 506. Therefore, "§ 4248 appears to be 'aimed at preventing the specific harm to the community proscribed by the [federal sex crime] statutes.'" *Tom*, 565 F.3d at 506 (internal citations omitted); *see also United States v. Shields*, 522 F. Supp. 2d 317, 326 (D. Mass. 2007) ("The civil commitment of those already in federal custody who, as a result of a mental condition, will likely commit sexually violent crimes does have a rational relation to congressional authority to proscribe and prevent such conduct."); *United States v. Dowell*, No. CIV-06-1216-D, 2007 WL 5364304, at *6 (W.D. Okla. Dec. 5, 2007) (same, quoting *Shields*).

The 21 existing state sex offender civil commitment programs—held constitutional in *Kansas v. Hendricks*, 521 U.S. 346 (1997)—are further conclusive proof that sex offender civil commitment programs are rational and appropriate means for furthering the purposes of the criminal laws. The federal program and the state programs are all intended, through therapy and rehabilitative treatment, to reduce the probability that sex offenders suffering from mental abnormalities will commit further federal and state offenses upon their release. *See Lile,* 536 U.S. at 32 ("'[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. 'Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals.'"). The federal program, like the state programs, promises to reduce the number of future

federal sex crimes committed by those who would otherwise be released without further care and treatment.

From a constitutional perspective, it makes no difference that the state laws authorizing such programs may rely upon general state police powers while Congress must rely upon enumerated powers and the Necessary and Proper Clause to enact § 4248. The rational basis that exists for concluding that § 4248 is reasonably adapted to effectuating the enumerated powers of Congress is all that is needed to sustain the law under the Necessary and Proper Clause.

C. The Rationale And The Result In *Greenwood v. United States*, 350 U.S. 366 (1956), Demonstrate That Congress Has The Constitutional Authority To Enact § 4248.

In *Greenwood v. United States*, 350 U.S. 366 (1956), the Court decided that the federal government has the constitutional authority to civilly commit a person in federal custody pending trial on federal charges when that person is determined to be mentally incompetent. The Court held that such commitment, "and therefore the legislation authorizing commitment," involved "an assertion of authority auxiliary to incontestable national power," and was "plainly within congressional power under the Necessary and Proper Clause," of the Constitution. *Id.* at 375. Because § 4248, like the law at issue in *Greenwood*, authorizes the civil commitment of persons properly in federal custody and who suffer from a mental abnormality making them dangerous to others, § 4248 is a legitimate exercise of

Congress' authority under the Necessary and Proper Clause.

The rationale and result in *Greenwood* fully support the constitutionality of § 4248, notwithstanding that a program like the one presently before the Court was not at issue in that case. Both the situation in *Greenwood* (pretrial commitment of a mentally incompetent defendant) and the situation presented here involve persons (1) lawfully in federal custody (2) who suffer from mental infirmities and (3) who continue to present a danger to society and federal interests. The same rationale that justified federal civil commitment in *Greenwood* is applicable in this case, namely that the federal government is "faced with the practical situation that it has lawful custody of a person whom it is not safe to let at large." 350 U.S. at 374.

In fact, the federal government's lawful claim to the person in custody is, if anything, much *stronger* in the current case, where the person has been duly convicted of one or more federal offenses, presumably has exhausted direct appeals and post-conviction remedies, and is coming to the end of a federal sentence of imprisonment. In *Greenwood*, the mentally incompetent defendant had not been convicted of a federal offense, had not been tried, had not taken a direct appeal or pursued post-conviction remedies, and had not served a federal sentence.

Where the federal government has lawful custody of an individual who is both dangerous and suffering from a mental abnormality, the federal government cannot be constitutionally powerless to provide for the commitment, care, and treatment of that person until

such time as he no longer poses a threat to society and federal interests. As the Court recognized in *Greenwood*, the federal government has the authority to define federal crimes related to its enumerated powers, to establish penalties for violations, and to take custody, try, and sentence violators of those laws. Necessarily, then, Congress must also have the auxiliary authority to regulate the release of those persons lawfully in federal custody, as the Court held in *Greenwood*.

Indeed, "legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." *United States v. Darby*, 312 U.S. 100, 121 (1941); *see also Everard's Breweries v. Day*, 265 U.S. 545, 559-60 (1924) ("Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but . . . may adopt any means . . . which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution."); *Ruppert, Inc. v. Caffey*, 251 U.S. 264, 299-301 (1920) (from express constitutional powers flow implied supporting powers).

In recognizing the connection between preventing the commission of federal crimes and the civil commitment of dangerous and mentally abnormal sex offenders about to be released from federal custody, the Eighth Circuit in *Tom* relied in part on *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986). *Perry* concerned Congress' power to enact a law that

provided for the pretrial commitment of persons indicted for various federal drug crimes. *See* 18 U.S.C. § 3142(e).

The *Perry* court upheld that federal law under the Necessary and Proper Clause, relying on *Greenwood*, which the Third Circuit held "teaches . . . that the federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority." 788 F.2d at 110. Applying that concept to pretrial commitments, the Third Circuit construed the federal statute at issue in *Perry* as intended to prevent the commission of additional federal drug crimes while the person awaits trial. Accordingly, the *Perry* court held that "because Congress has the power to proscribe the activities in question, it has the ancillary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence." *Id*. at 111.

Both the pretrial commitment law at issue in *Perry* and § 4248 are narrowly targeted to apply only to individuals likely to commit future federal crimes if released without care and treatment. Just as the law at issue in *Perry* furthered the purposes of federal drug laws by preventing the commission of future drug crimes, § 4248 targets a group most at risk of committing future federal sex offenses upon their release if they are not given the proper care and treatment.

In sum, the rationale and the result in *Greenwood* demonstrate that § 4248 is both necessary and proper to give full effect to federal criminal laws enacted pursuant to Congress' enumerated powers.

CONCLUSION

Section 4248 serves, rather than undermines, federalism, and Congress has the power to enact such a law. Accordingly, the judgment below must be reversed.

Respectfully submitted.

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