American Bar Association
www.supremecourtpreview.org

No. 08-1224

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

Respondents.

BRIEF FOR RESPONDENTS

ROBERT A. LONG, JR.
ANN O'CONNELL
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, N.W.
Washington, DC 20004
(202) 662-6000

THOMAS P. MCNAMARA
Federal Public Defender
Eastern District of
North Carolina
G. ALAN DUBOIS
JANE E. PEARCE*
Assistant Federal Public
Defenders
ERIC J. BRIGNAC
LAUREN BRENNAN
Office of the Federal Public
Defender
150 Fayetteville Street, Ste 450
Raleigh, NC 27601
(919) 856-4236
**Counsel of Record*

October 28, 2009

Counsel for Respondents

QUESTION PRESENTED

Whether 18 U.S.C. § 4248, which authorizes indefinite civil commitment by the federal government of (1) "sexually dangerous" persons who are 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, exceeds Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.. i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES......................................vi

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT............................7

ARGUMENT 13

I. CIVIL COMMITMENT PURSUANT TO § 4248 OF INDIVIDUALS AT THE END OF A PRISON SENTENCE EXCEEDS CONGRESS'S POWERS. 13

A. No Enumerated Power Supports The Enactment of § 4248. 14

1. Section 4248 Is Unrelated To The Government's "Necessary And Proper" Authority To Prosecute And Punish Federal Crimes. 17

2. Congress Cannot Derive Broad Regulatory Authority From "Connections," "Interests," or "Special Relationships" That Are Unmoored From Enumerated Powers. 26

3. The Enumerated Powers That Underlie Federal Sex Crimes Do Not Justify § 4248. 30

B. Section 4248 Encroaches On The Authority Of The States And Is Therefore Not A "Proper" Executory Law. 35

1. Police And *Parens Patriae* Powers Are Not Proper "Ends" For Federal Government Regulation. 37

2. Section 4248 Undermines The Values Protected By The Constitution's Commitment To Federalism. 40

C. Section 4248 Represents An Unconstitutional Assertion Of Federal Power Without Analogy In History Or Current Practice 47

1. The History Of Federal Civil Commitment Demonstrates That The Government Lacks The Power To Commit Individuals At The End Of Their Prison Term. 48

2. The Government Cannot Justify § 4248 By Analogy To § 4246. 52

II. THE GOVERNMENT WAIVED ITS SEPARATE CHALLENGE TO MR. CATRON'S COMMITMENT. 55

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. Texas, 441 U.S. 418 (1979)............. 5, 38

Anaya v. Crossroads Managed Care System, Inc., 195 F.3d 584 (10th Cir. 1999)...................... 39

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 55

Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153 (1993) 55

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 15

Coleman v. Thompson, 501 U.S. 722 (1991)............ 42

Currie v. United States, 836 F.2d 209 (4th Cir. 1987) 24

Cutter v. Wilkinson, 544 U.S. 709 (2005) 56

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) 56

FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992) 45

Foucha v. Louisiana, 504 U.S. 71 (1992).................. 38

Frye v. Settle, 168 F. Supp. 7 (W.D. Mo. 1958)......... 19

Gonzales v. Raich, 545 U.S. 1 (2005)...... 16, 22, 31, 34

Greenwood v. United States, 350 U.S. 366 (1956).. *passim*

Gregory v. Ashcroft, 501 U.S. 452 (1991)........... 43, 44

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 43

Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972)... 38

Hinckley v. United States, 163 F.3d 647 (D.C. Cir. 1999)... 24

Horne v. Flores, 129 S. Ct. 2579 (2009) 46

Jackson v. Indiana, 406 U.S. 715 (1972).................. 19

Jones v. United States, 463 U.S. 354 (1983)............ 28

Kansas v. Hendricks, 521 U.S. 346 (1997) 23

Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960)... 7, 15

Kirkwood v. Harris, 229 F. Supp. 904 (W.D. Mo. 1964) 19

Lamb v. Hopkins, 492 A.2d 1297 (Md. 1985) 24

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)... 39

McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540 (1st Cir. 1996) 39

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) 16, 17, 21

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 44

New York v. United States, 505 U.S. 144 (1992) 13, 42, 45

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 53

Paschall v. North Carolina Department of Correction, 364 S.E.2d 144 (N.C. Ct. App. 1988) 24

Pavlick v. Harris, 222 F. Supp. 79 (W.D. Mo. 1963) 19

Printz v. United States, 521 U.S. 898 (1997) 35, 41, 43, 45

Reid v. Covert, 354 U.S. 1 (1957) 26

Rousey v. United States, 115 F.3d 394 (6th Cir. 1997) 24

Sabri v. United States, 541 U.S. 600 (2004) 14, 27

Seibel v. City and County of Honolulu, 602 P.2d 532 (Haw. 1979) 24

Shannon v. United States, 512 U.S. 573 (1994) 48

Smith v. Hope Village, Inc., 481 F. Supp. 2d 172 (D.D.C. 2007) 24

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 55

Sturdevant v. Settle, 192 F. Supp. 534 (W.D. Mo. 1961) 19

Tienter v. Harris, 222 F. Supp. 920 (W.D. Mo. 1963) 19

Tyler v. Harris, 226 F. Supp. 852 (W.D. Mo. 1964) 19

United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984) 19, 49, 50

United States v. Darby, 312 U.S. 100 (1941) 40

United States v. DeBellis, 649 F.2d 1 (1st Cir. 1981) 20

United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993) 2, 40

United States v. Hernandez-Arenado, 624 F. Supp. 2d 985 (S.D. Ill. 2008) 26

United States v. Husar, 859 F.2d 1494 (D.C. Cir. 1988) 2, 40

United States v. Lopez, 514 U.S. 549 (1995)..... *passim*

United States v. McCracken, 488 F.2d 406 (5th Cir. 1974) 48

United States v. Morrison, 529 U.S. 598 (2000) .... *passim*

United States v. Perry, 788 F.2d 100 (3d Cir. 1986) 29

United States v. Sahhar, 56 F.3d 1026 (9th Cir. 1995) 20, 21

United States v. Salerno, 481 U.S. 739 (1987) ... 10, 28

United States v. Shields, 522 F. Supp. 2d 317 (D. Mass. 2007) 26

United States v. Volungus, 599 F. Supp. 2d 68 (D. Mass. 2009) 56

United States v. Wilkinson, 626 F. Supp. 2d 184 (D. Mass. 2009)................................ 22, 32, 47

White v. Napoleon, 897 F.2d 103 (3d Cir. 1990)....... 39

Wieter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961) 19

Williams v. Illinois, 399 U.S. 235 (1970).................. 53

In re Winship, 397 U.S. 358 (1970)............................. 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 8, cl. 14 50

U.S. Const. art. I, § 8, cl. 17 50

U.S. Const. art. I, § 8, cl. 18 14

Act of July 13, 1866, ch. 179, § 2, 14 Stat. 93........... 52

Act of March 3, 1855, ch. 199, § 1, 10 Stat. 682 50

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587........ 1, 47

18 U.S.C. § 2243(a) 31

18 U.S.C. § 2252(a)(2) 2, 30, 31

18 U.S.C. § 3624(a) 24

18 U.S.C. § 4001(b) 22

18 U.S.C. § 4241(d) 1

18 U.S.C. § 4243(f) 2

18 U.S.C. § 4246 .... *passim*

18 U.S.C. §§ 4247(a)(5) 2

18 U.S.C. § 4247(a)(6) 1, 2

18 U.S.C. § 4248 .... *passim*

725 Ill. Comp. Stat. §§ 207/1 *et seq.* 41

Ariz. Rev. Stat. §§ 36-3701 *et seq.* 41

Cal. Welf. & Inst. Code §§ 6600 *et seq.* 41

D.C. Code § 24-301 24

Iowa Code §§ 229.1A *et seq.* 41

Kan. Stat. Ann. §§ 59-29a01 *et seq.* 41

Mass. Gen. Laws ch. 123A, §§ 1 *et seq.* 41

S.C. Code Ann. §§ 44-48-10 *et seq.* 41

Tex. Health & Safety Code Ann. §§ 841.001
et seq. 41

Wash. Rev. Code §§ 71.09.010 *et seq.* 41

MISCELLANEOUS

2 Annals of Cong. (Joseph Gales ed., 1791)............. 15

H.R. Rep. No. 96-1396 (1980)................................... 38

The Federalist No. 33 (Alexander Hamilton)..... 15, 36

The Federalist No. 51 (James Madison).................. 43

Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1971), *reprinted in* 3 The Founders Constitution (Philip B. Kurland & Ralph Lerner eds., 1987). 36

Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds., 1987). 16

Care of Insane Convict After Expiration of Term of Imprisonment, 35 Op. Att'y Gen. 366 (1927) 51

Commitment to Government Hospital for the Insane, 30 Op. Att'y Gen. 569 (1916) 51

Government Hospital for the Insane, 7 Op. Att'y Gen. 450 (1855) 50

Government Hospital for the Insane, 17 Op. Att'y Gen. 211 (1881) 51, 52

3 William Blackstone, *Commentaries* 38

Samuel Jan Brakel, John Parry & Barbara A. Weiner, The Mentally Disabled and the Law (3d ed. 1985) 39

Stephen Breyer, Active Liberty (2005) 44

Albert Deutsch, The Mentally Ill in America (2d ed. rev. 1949) 39

1 Stephen Dowell, A History of Taxation and Taxes in England (3d ed. 1965) 41

Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants,* 108 U. Pa. L. Rev. 832 (1960) 38

Gary Lawson & Patricia G. Granger, *The Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 Duke L.J. 267 (1993) 35

Henry J. Friendly, *Federalism: A Foreward,* 86 Yale L.J. 1019 (1977) 30

Laurence Tribe, 1 American Constitutional Law § 5-3 (3d ed. 2000) 35

Note*, Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code,* 64 Yale L.J. 1070 (1955) 39

Restatement (Second) of Torts § 319 .... 23, 27

Restatement (Third) of Agency § 2.04 27

18 U.S.C. § 4246 Commitments in the Eastern District of North Carolina: 2000 to the Present, The Zealous Advocate (Federal Public Defender, Eastern District of North Carolina), Fall 2009 Supp., *at* http://nce.fd.org/The%20Zealous%20AdvocateFall%202009%20Supplement-Review%20of%20§%204246%20Civil%20Commitment%20Cases%202000%20to%20the%20Present.pdf. 53

STATEMENT OF THE CASE

1. Section 4248. In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587. Section 302 of the Act authorizes the civil commitment of "sexually dangerous" persons. 18 U.S.C. § 4248. Section 4248 applies to (i) persons in the custody of the Bureau of Prisons (BOP), (ii) persons committed to the custody of the Attorney General under 18 U.S.C. § 4241(d) based on incompetence to stand trial, and (iii) persons against whom all criminal charges have been dismissed for reasons relating to their mental condition. *Id.* § 4248(a).

Civil commitment proceedings under § 4248 are separate from any criminal proceedings as a result of which an individual is serving a sentence in federal prison. A civil commitment proceeding is assigned a new case number, is typically filed in a different district court, and involves a different factfinder (a judge rather than a jury), and a different burden of proof (clear and convincing evidence rather than proof beyond a reasonable doubt), than the initial criminal proceedings. To initiate civil commitment proceedings under § 4248, the Attorney General certifies an individual as a "sexually dangerous person."[1] Certification blocks the release of the person from federal custody for the

---

[1] A person is deemed "sexually dangerous to others" if 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).

duration of the § 4248 proceedings. If the government proves by "clear and convincing evidence" that the person "has engaged or attempted to engage in sexually violent conduct or child molestation and . . . is sexually dangerous to others," the person is civilly committed. *See* 18 U.S.C. §§ 4247(a)(5), (a)(6), 4248. After a person has been civilly committed, § 4248 directs the Attorney General to make "all reasonable efforts" to transfer responsibility for the person's custody, care, and treatment to an appropriate state authority. *Id.*[2] Section 4248 authorizes federal confinement for as long as the person remains "sexually dangerous." *Id.*

As of the date of the decision below, over 60 individuals had been certified as "sexually dangerous persons" under § 4248 in the Eastern District of North Carolina. With one exception, each of these individuals had already served all (or almost all) of his prison term. Pet. App. 6a n.3.

2. Respondents' Civil Commitments. In November 2006, six days before Respondent Graydon Comstock finished serving a federal prison sentence for possession of child pornography in violation of 18 U.S.C. § 2252(a)(2), the Attorney General certified him as a "sexually dangerous

[2] While a State has the option to take responsibility for the custody, care, and treatment of a committed individual, the federal government has the final say over whether to discharge the individual from custody, care, and treatment. 18 U.S.C. § 4248(e); *see also United States v. Husar*, 859 F.2d 1494, 1497 (D.C. Cir. 1988) (discussing the analagous discharge provision of 18 U.S.C. § 4243(f)); *United States v. Denny-Shaffer*, 2 F.3d 999, 1021 n.30 (10th Cir. 1993) (same).

person" under § 4248, blocking his release from prison. Almost three years later, Mr. Comstock remains confined at the Federal Correctional Institute in Butner, North Carolina (FCI-Butner).

The cases of Respondents Markis Revland, Thomas Matherly, and Marvin Vigil followed a similar course. The government certified each individual as a sexually dangerous person less than a month before he completed his term of imprisonment. Each remains in federal custody at FCI-Butner.

After Respondent Shane Catron was found not competent to stand trial, the government filed a "Certificate of Mental Disease or Defect and Dangerousness" under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate and substituted a certificate pursuant to § 4248. Throughout his competency study, the § 4246 certification process, and the initial period of his § 4248 certification, Mr. Catron was hospitalized at the Federal Medical Center in Butner, North Carolina. He is now incarcerated in the segregated housing unit of FCI-Butner.

3. The District Court's Opinion. On September 7, 2007, Judge W. Earl Britt of the Eastern District of North Carolina issued an opinion holding § 4248 unconstitutional on two separate grounds.

First, Judge Britt held that § 4248 is not a necessary and proper exercise of congressional authority. Pet. App. 24a. He noted that the congressional powers the government identified – "the power to criminalize and punish certain

conduct" and "the power to prosecute" – are not enumerated in the Constitution. *Id.* at 34a. Rather, those powers "are themselves necessary and proper exercises of power premised upon enumerated powers." *Id.* The court concluded that § 4248 could not be justified as a valid exercise of Congress's commerce power because "§ 4248 'contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce.'" *Id.* at 41a (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)).

In addressing the government's argument that § 4248 is justified by Congress's power to "prevent criminal conduct," Judge Britt observed that "[t]he federal government simply does not have broad power generally to criminalize sexually dangerous conduct and child molestation." Pet. App. 49a. He stated that "congressional enactment of the federal criminal laws is itself an exercise of power under the Necessary and Proper Clause." *Id.* at 50a. Judge Britt then noted that "[t]he power to criminalize certain circumscribed sexually violent behavior is not an 'enumerated power' upon which to premise the civil commitment of any potentially sexually dangerous persons as a 'necessary and proper' act." *Id.* at 51a. Judge Britt stated that "[c]onstruing the necessary and proper clause in this way would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place." *Id.*

Ultimately, the court held that "where there is absolutely no nexus between the findings required for commitment under § 4248 and the likelihood that any individual prisoner would commit a federal sex

crime, and where the vast majority of sexually violent conduct and child sexual abuse is regulated by state law, and where the commitment of mentally disordered sexually violent individuals is traditionally handled by state governments, the federal government has created a situation in which its commitment efforts are likely to solely prevent the commission of state criminal conduct." *Id.* at 52a.

Second, the court held that the "clear and convincing" standard of proof violates the due process rights of those subject to commitment under the statute. *Id.* at 24a. Relying on this Court's decisions in *In re Winship*, 397 U.S. 358 (1970), and *Addington v. Texas*, 441 U.S. 418 (1979), the court reasoned that "the complete loss of liberty for a potentially indefinite time period through federally-imposed confinement and the undeniable stigma associated with being labeled a 'sexually dangerous person' . . . demand that a committing judge be convinced beyond a reasonable doubt that the individual committed some act on which the label and the indefinite commitment are premised." Pet. App. 79a.

4. The Fourth Circuit's Opinion. The Fourth Circuit unanimously affirmed the district court's ruling. *Id.* at 3a. The court stated that "[i]n the exercise of their general police and *parens patriae* powers, the states have long controlled the civil commitment of the mentally ill," and noted that, "[u]nlike the states, the federal government has no general police or *parens patriae* power." *Id.* at 7a-8a.

The court of appeals observed that the United States defended the validity of § 4248 "largely by

direct reliance on the Necessary and Proper Clause," even though "that provision, by itself, creates *no* constitutional power." *Id.* at 8a. The provision authorizes a statute only when the government "show[s] that the statute is necessary to achieve ends within Congress's enumerated powers." *Id.* at 9a. The court concluded that § 4248 could not be sustained based on the Commerce Clause, which was the only enumerated power even hinted at by the United States. *Id.* at 9a-12a.

The Fourth Circuit rejected the government's argument that § 4248 was necessary and proper to its ability to establish and maintain a federal criminal justice and penal system. *Id.* at 13a. The court noted that "Congress may establish and run a federal penal system, as necessary and proper to the Article I power (usually the Commerce Clause) relied on to enact federal criminal statutes." *Id.* at 13a-14a. But the court found that "these 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 also rejected the government's argument that § 4248 is a necessary and proper exercise of its power to prevent "sex-related crimes." *Id.* at 15a. The court reasoned that "[c]onsistent with Congress's limited powers," federal statutes regulating sex crimes are limited to those affecting interstate commerce or involving some territorial connection to the United States. *Id.* The court concluded that "[b]ecause most crimes of sexual violence violate state and not federal law, many

commitments under § 4248 would prevent conduct prohibited *only* by *state law*," *id.* at 15a-16a (internal footnote omitted), and § 4248 therefore "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," *id.* at 16a.

Finally, the court rejected the government's argument that the Necessary and Proper Clause justifies § 4248 because it retains the "power to prosecute" all persons in its custody, noting that four of the five Respondents "have stood trial, been convicted, and fully served all federal prison sentences." *Id.* at 19a. Thus, no federal prosecution is being "frustrated," as it was in *Greenwood v. United States*, 350 U.S. 366 (1956). Pet. App. 20a.[3]

The United States petitioned for rehearing en banc, but no judge of the Fourth Circuit called for a poll, and the petition was denied. Pet. App. 96a.

SUMMARY OF THE ARGUMENT

1. The government seeks to defend § 4248 as a constitutional exercise of Congress's power under the Necessary and Proper Clause, but that Clause "is not itself a grant of power." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). Instead, it is "a *caveat* that the Congress possesses all the means necessary to carry out" its specifically enumerated powers. *Id.* (emphasis added). Section 4248 does not

[3] The government did not ask the Fourth Circuit to address the "unique challenge" to § 4248 raised by the fifth Respondent, so the Fourth Circuit declined to do so. *Id.* at 19a n.10. The Fourth Circuit also declined to address whether due process mandates the reasonable doubt standard for the factual determination. Pet. App. 4a n.1.

carry out any of Congress's enumerated powers, and therefore it is not authorized under the Necessary and Proper Clause.

a. i. The government characterizes § 4248 as an exercise of Congress's powers to enact criminal laws and operate a prison system. Those powers are not enumerated anywhere in the Constitution. Rather, they are justified as necessary and proper means of carrying out specific enumerated powers. Once the power to enforce a federal criminal law has been exhausted, further exercises of federal power are not "necessary and proper" to effectuating the enumerated power underlying that federal law. That power has been exhausted for Respondents Comstock, Revland, Matherly, and Vigil; they have completed their prison terms for their prior violations of federal law.

ii. In *Greenwood v. United States*, 350 U.S. 366 (1956), the Court upheld the civil commitment of an individual who had been charged with a federal crime but found incompetent to stand trial, concluding that the power to prosecute a federal offense had not been exhausted. Neither *Greenwood* nor the Necessary and Proper Clause authorizes indefinite civil commitment of individuals who have stood trial, been convicted, and served their federal prison sentence.

Section 4248 proceedings are separate from the original criminal proceedings. They require a new factfinder to make new determinations about an individual's propensity for sexual violence, which may have nothing to do with the reason the individual is in BOP custody. Consequently, § 4248 proceedings are not justified by the enumerated power that gave rise to the initial lawful custody.

The break in the chain that connects the enumerated power that justified the initial lawful custody with post-sentence civil detention under § 4248 cannot be repaired by a "common law" duty of a custodian to protect others from those in his custody.[4] Common law duties cannot create federal power. The government has not, moreover, substantiated its theory that custodians have a duty to detain people after they have completed serving their term of imprisonment.

iii. Rather than linking post-sentence civil commitment under § 4248 to a power specifically enumerated in the Constitution, the government seeks to defend § 4248 based on its "special relationship" and "connections" with individuals in federal custody. But the Necessary and Proper Clause requires a nexus to a specific *enumerated power*, not to the individual being regulated. Many citizens have significant relationships with the federal government – as employees, recipients of federal benefits, and in other ways. If this Court were to hold that the Necessary and Proper Clause grants Congress general police powers over anyone with a "connection" to the federal government, the distinction between "what is truly national and what

---

[4] The question presented in this case refers to "persons who are in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences." Pet. i. Respondents will refer to these individuals as "post-sentence" individuals even though (1) many of them still have to serve the supervised release portion of their sentence and (2) the "in the custody of the Bureau of Prisons" language of § 4248 refers to a broader class of individuals than those at the end of a federal prison sentence. *See infra* n.9.

is truly local" would be obliterated. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

Similarly, a general federal "interest" in preventing state and federal crime does not justify detention under § 4248. This Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), holds that, for purposes of the Due Process Clause, a government interest in safety can sometimes outweigh an individual's liberty interest. *Salerno* did not consider a federalism challenge to the Bail Reform Act; however, a lower court did and correctly concluded that Congress may not authorize commitment to protect the general welfare of the community at large, but that the statute at issue in *Salerno* was limited to preventing specific federal crimes.

iv. The government does not attempt to defend § 4248 as a valid exercise of the commerce power, and it is not. Most sexually violent conduct violates state law rather than federal law, which is limited to sex offenses connected to interstate commerce or the territorial jurisdiction of the United States. This Court has "reject[ed] the argument that Congress may regulate noneconomic violent conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617. It has similarly rejected the argument that Congress can regulate broad swaths of noneconomic violent conduct because a *subset* of that conduct is within Congress's power to regulate. *Morrison* invalidated a federal statute that provided a civil remedy for state and federal crimes of violence against women because the statute "contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate

interstate commerce," and instead applied to "a wider, and more purely intrastate, body of violent crime." *Id.* at 613. The government nevertheless attempts to neutralize this Court's decisions in *Morrison* and *Lopez* by pointing to the "connection" between the federal government and persons subject to § 4248. For constitutional purposes, however, what matters is the connection between § 4248 and Congress's enumerated powers. Because that connection is not only attenuated but severed, § 4248 is unconstitutional.

b. Section 4248 is also an improper means of effectuating Congress's enumerated powers. Commitment and treatment of the mentally ill traditionally has been left to the States under their police and *parens patriae* powers, and there is "no better example of the police power than the suppression of violent crime." *Morrison*, 529 U.S. at 618. By encroaching on the States' core police and *parens patriae* powers, § 4248 interferes with the sovereignty of the States.

States are powerless to prevent the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices. Section 4248 takes no account of whether a State has decided not to adopt a special regime of preventive detention for sexually dangerous individuals, or to require that detention be justified by proof beyond a reasonable doubt, or to permit a particular individual to be treated and supervised in a less restrictive setting. Section 4248 thus conflicts with the values of federalism, including the liberty-promoting diffusion of sovereign power, encouragement of experimentation by State and local governments,

and promotion of political accountability and responsibility.

c. Section 4248 is not supported by historical analogy or current practice. The history of federal civil commitment reflects longstanding federal reluctance to interfere with the States' police and *parens patriae* powers. Congress repeatedly expressed doubts about the authority of the federal government to provide for the commitment of individuals acquitted of federal crimes on the basis of insanity. Congress and the Executive Branch authorized the federal government to play only a limited role, by providing for the care and treatment of the insane of the army and navy and the District of Columbia. For generations it was settled that a federal prisoner could not be detained following the completion of his term of imprisonment. Section 4248 is a marked departure from this historical practice.

The government portrays § 4248 as a "modest expansion of a settled framework for federal civil commitment," but the expansion is not modest and the framework is not settled. Section 4246 of title 18, the general civil commitment statute, has been applied primarily to individuals deemed incompetent to stand trial. The application of § 4246 to individuals whose term of imprisonment is about to expire – a rare occurrence under that statute but the norm under § 4248 – has never been considered by this Court. Moreover, in contrast to § 4246, § 4248 is not limited to individuals who have been hospitalized and certified as mentally ill, and it does not require the federal government to seek appropriate state care before pursuing federal commitment.

2. Respondent Shane Catron, unlike the other Respondents, was found incompetent to stand trial. In the court of appeals, the government did not ask that Catron be treated differently from the other Respondents, and the court of appeals declined to consider "finely drawn" relief that the government had not requested. Because the government waived this argument in the court of appeals, it should not be considered for the first time by this Court.

The government's argument would fail even if it were not waived. A commitment under § 4246 may result in restoration to competency and eventual prosecution, while a § 4248 commitment lasts as long as the individual is deemed to be sexually dangerous. Unlike in *Greenwood*, Catron's detention is for the purpose of preventing possible future crimes rather than preserving the government's power to prosecute him. The federal government cannot detain an individual indefinitely to prevent him from committing state law crimes.

ARGUMENT

I. CIVIL COMMITMENT PURSUANT TO § 4248 OF INDIVIDUALS AT THE END OF A PRISON SENTENCE EXCEEDS CONGRESS'S POWERS.

The Constitution establishes a federal government of limited powers. *New York v. United States*, 505 U.S. 144, 155 (1992). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607. The United States does not dispute these fundamental principles, but it contends that § 4248 is a valid exercise of Congress's power under

the Necessary and Proper Clause. This argument fails because § 4248 is neither necessary nor proper to effectuating any of Congress's enumerated powers.

The government cites only the Necessary and Proper Clause in the "Constitutional and Statutory Provisions Involved" section of its brief. *See* U.S. Br. 1-2. That Clause is not a standalone basis for federal legislation. Section 4248 does not aid Congress in executing the enumerated powers underlying the federal criminal laws, laws that have been fully enforced by the time post-sentence detention begins. Nor is federal regulation of the prospective, and primarily intrastate, conduct of individuals who have served their sentences necessary and proper to effectuating any of Congress's enumerated powers. In the absence of a relationship between § 4248 and a valid subject of federal regulation, the government asks this Court to uphold the statute based on the "special relationship" it has with individuals in federal custody. U.S. Br. 24. The government's approach finds no support in the Constitution or this Court's precedents. If adopted by this Court, this approach would grant the federal government "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

A. No Enumerated Power Supports The Enactment of § 4248.

The Necessary and Proper Clause confers legislative power only in conjunction with one or more of the federal government's enumerated powers. The Clause permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by

this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. By its terms, the Clause reaches only so far as is necessary and proper to achieve ends that are within the federal government's enumerated powers. *See Sabri v. United States*, 541 U.S. 600, 605 (2004). "The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 [of Article I of the Constitution]." *Kinsella*, 361 U.S. at 247 (1960); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936) ("[T]he powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers.").

The Framers understood that the Necessary and Proper Clause requires a connection between the means employed by Congress and one or more of the powers enumerated in the Constitution. Alexander Hamilton wrote that "[i]f there is anything exceptionable [about the Necessary and Proper Clause], it must be sought for in the specific powers, upon which this general declaration is predicated." The Federalist No. 33 (Alexander Hamilton). Similarly, James Madison explained that the Necessary and Proper Clause permits Congress to use means "incident to . . . the specified powers," but "condemn[s] the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power." 2 Annals of Cong. 1947, 1949 (Joseph Gales ed., 1791).

Madison, discussing the Necessary and Proper Clause during the debate on a bill to establish a Bank of the United States in the First Congress, decried the practice of linking remote implications together to form a "chain . . . that will reach every object of legislation, every object within the whole compass of political economy." *Id.* at 1949. Madison later wrote that "everything is related immediately or remotely to every other thing . . . consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other." Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 The Founders' Constitution 259 (Philip B. Kurland & Ralph Lerner eds., 1987). This Court reiterated Madison's sentiment in *Lopez*, holding that congressional attempts to pile "inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" is an unauthorized assertion of federal power. 514 U.S. at 567.

Throughout its history, this Court has required a connection between the asserted means and the enumerated constitutional power that is being effectuated. In evaluating the constitutionality, under the Necessary and Proper Clause, of the law creating the Bank of the United States in *McCulloch v. Maryland*, Chief Justice Marshall's opinion observes that the creation of a corporation "is never the end for which other powers are exercised, but a means by which other objects are accomplished." 17 U.S. (4 Wheat) 316, 411 (1819). The Court upheld the creation of the bank as an

"execution of those great powers on which the welfare of a nation essentially depends," including the enumerated powers to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." *McCulloch*, 17 U.S. (4 Wheat) at 408, 415; *see also Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) ("As Chief Justice Marshall wrote in *McCulloch v. Maryland*, even when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end.").

Congress has not acted in furtherance of any of its enumerated powers in creating a scheme for preventively detaining individuals deemed "sexually dangerous." What the government cannot do to the people at large, it cannot do to a subset of the people based solely on its past or present contacts with them. Notwithstanding the "connections," "interests," and "special relationships" the government repeatedly invokes, it cannot escape the fundamental defect in § 4248: it is not necessary and proper to the execution of any enumerated power.

1. Section 4248 Is Unrelated To The Government's "Necessary And Proper" Authority To Prosecute And Punish Federal Crimes.

The government asserts that federal civil commitment of sexually dangerous individuals is related to "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." U.S. Br. 23. The

powers to enact criminal laws, provide for the operation of a penal system, and assume custodial responsibilities are not *enumerated* in Article I. Instead, each is a necessary and proper means of effectuating the powers that *are* enumerated in the Constitution. *See McCulloch*, 17 U.S. (4 Wheat) at 416-18. Post-sentence detention under § 4248, in contrast, is separate and distinct from the enforcement of the federal laws to which these enumerated powers gave rise.

a. So long as the federal government is enforcing laws that are validly enacted pursuant to an enumerated power, Congress is free to make laws necessary to that enforcement. Once the power to enforce that valid federal law has been exhausted, however, there is no longer an enumerated power to effectuate, and the Necessary and Proper Clause cannot justify further exercises of federal power.

This Court's decision in *Greenwood v. United States* illustrates this important principle. 350 U.S. 366 (1956). In *Greenwood*, the government asked this Court to recognize a federal civil commitment power based on "[t]he duty of the federal government to provide care and custody for incompetents lawfully under its control." Brief for the United States at 37-40, *Greenwood v. United States*, 350 U.S. 366 (1956). This Court declined to do so.

As the Court explained in *Greenwood*, "[t]he power that put [Greenwood] into [federal] custody – the power to prosecute for federal offenses – is not exhausted," and for that reason, his commitment was "auxiliary to incontestable national power." 350 U.S. at 375; *see also id.* at 375 ("We cannot say that federal authority to prosecute has now been

irretrievably frustrated."). *Greenwood* thus stands for the significant, but narrow, proposition that civil commitment can be a necessary and proper means to effectuate an unexhausted power to prosecute an individual for violating a federal criminal statute. *Greenwood*'s holding does not "appl[y] equally to a convicted prisoner who is otherwise due for release," U.S. Br. 36, because the government's power to enforce the underlying criminal law has been "exhausted," and therefore continued detention would not be "auxiliary" to any enumerated power. *Greenwood*, 350 U.S. at 375.[5]

Thus, as the Fourth Circuit stated, "*Greenwood* certainly did not approve the federal civil commitment of persons . . . who have stood trial, been convicted, and fully served all federal prison

---

[5] The government's expansive reading of *Greenwood* disregards the Court's express admonition that it "decide[d] no more than the situation before us presents and equally d[id] not imply an opinion on situations not now before us." 350 U.S. at 376; *see also Jackson v. Indiana*, 406 U.S. 715, 726 (1972) ("It is clear that the Government's substantive power to commit on the particular findings made in [the *Greenwood*] case was the sole question there decided."). The government's reading also disregards the decisions of the only federal court that regularly applied *Greenwood* in the wake of this Court's decision. That court consistently ordered the release of defendants who were judged to have no chance of becoming competent, on the ground that "the 'authority to prosecute [had become] irretrievably frustrated.'" *Pavlick v. Harris*, 222 F. Supp. 79, 81 (W.D. Mo. 1963) (quoting *Greenwood*, 350 U.S. at 375); *see also Kirkwood v. Harris*, 229 F. Supp. 904 (W.D. Mo. 1964); *Tyler v. Harris*, 226 F. Supp. 852 (W.D. Mo. 1964); *Tienter v. Harris*, 222 F. Supp. 920 (W.D. Mo. 1963); *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961); *Sturdevant v. Settle*, 192 F. Supp. 534 (W.D. Mo. 1961); *Frye v. Settle*, 168 F. Supp. 7 (W.D. Mo. 1958).

sentences." Pet. App. 19a; *see also United States v. Cohen*, 733 F.2d 128, 137 (D.C. Cir. 1984) (opinion of Scalia, J., for the en banc court) ("That issue was raised, but not resolved by the Supreme Court's decision [in *Greenwood*], which involved federal treatment of a defendant found not competent to stand trial on federal charges. The narrow basis on which the Court found such treatment permissible . . . was that until the federal charges had been disposed of, the individual was properly in the custody of the United States."). The government offers nothing to justify its reading of *Greenwood* as permitting a broad freestanding federal commitment power.

Similarly, the government's suggestion – that the power to impose a term of supervised release as part of a criminal sentence is analogous to § 4248 – lacks support. The power to impose and enforce supervised release is even more directly related to an enumerated power than the commitment at issue in *Greenwood*. As the government acknowledges, "the terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority." U.S. Br. 38. The government's "ability to take special measures to protect the public" through post-imprisonment supervision does not, as the government's brief implies, flow from its "distinct relationship" with prisoners, *see* U.S. Br. 38, but rather from its power to sentence criminals for violations of federal law. Section 4248, in contrast, embodies a freestanding civil commitment power

that is both broader in scope than and different in kind from a valid criminal sentence.[6]

b. Unlike a commitment linked to an unexhausted power to prosecute, commitment under § 4248 is temporally and causally distinct from the exercise of whatever enumerated power initially placed an individual in BOP custody. Congress, for example, has an enumerated "power 'to establish post-offices and post-roads.'" *McCulloch*, 17 U.S. (4 Wheat) at 417. The Necessary and Proper Clause authorizes Congress to "carr[y] into execution" that power by "punish[ing] those who steal letters from the post office, or rob the mail." *Id.* Such punishment has a direct nexus to Congress's exercise of a specific enumerated power by deterring individuals from engaging in specific conduct that frustrates the exercise of that power. And, necessary and proper to effectuating this underlying power, Congress can take measures to preserve the

---

[6] *United States v. DeBellis*, 649 F.2d 1 (1st Cir. 1981), and *United States v. Sahhar*, 56 F.3d 1026 (9th Cir. 1995), do not support the government's expansive view of *Greenwood*. Both involved individuals found *incompetent to stand trial*, and, like the defendant in *Greenwood*, within the government's unexhausted power to prosecute. *DeBellis*, 649 F.2d at 2; *Sahhar,* 56 F.3d at 1029-30 ("[The statute] thus is narrowly tailored to apply only to a particular concern of the federal government: dangerous persons charged with federal crimes but found incompetent to stand trial."). Mr. Sahhar was not an "insanity acquitee[]," U.S. Br. 37 because he was never tried and acquitted. Rather, the district court dismissed his indictment. *Sahhar*, 56 F.3d at 1028. The government dismisses indictments against individuals every day with an eye toward superseding them; no one would consider those individuals "acquitted" or the power to prosecute them exhausted.

government's ability to prosecute federal crimes, *see Greenwood*, 350 U.S. at 375-76; to impose sentences of imprisonment and supervised release on individuals who commit those federal crimes; to establish a Bureau of Prisons to detain such individuals; and to regulate the way in which these individuals serve their criminal sentences, *see, e.g.*, 18 U.S.C. § 4001(b) (vesting in the Attorney General the control and management of federal penal and correctional institutions).

The federal government does not, however, adopt a penal code, incarcerate individuals, establish a prison system, or regulate prison life because it has acquired a general police power based on its "special relationship" with persons in federal custody. Instead, Congress can enact such laws only because, and only to the extent that, it is effectuating one or more of its enumerated powers. A clear and unbroken connection exists between these aspects of the criminal justice system and the enumerated power that allowed Congress to enact the underlying federal criminal statute and to place an individual in BOP custody for violating it.

Civil commitment under § 4248, in stark contrast, is detached from the enumerated power that placed an individual in BOP custody in the first place. *Cf. Raich*, 545 U.S. at 38 (Scalia, J., concurring in the judgment) ("[T]he power [under the Necessary and Proper Clause] to enact laws enabling effective regulation of interstate commerce . . . extends only to those measures necessary to make the interstate regulation effective."). Section 4248 commitment proceedings are separate and distinct civil proceedings. They do not take place before the

district court that tried and sentenced the defendant for violating federal law. Instead, they require a new factfinder to make new determinations about an individual's propensity for sexual violence, which may have nothing to do with the reason the individual is in BOP custody. *See, e.g.*, *United States v. Wilkinson,* 626 F. Supp. 2d 184, 186 (D. Mass. 2009) (individual serving sentence for a firearms violation). Moreover, post-sentence § 4248 proceedings take place after the government's power to punish the underlying offense is exhausted. When the government commences a distinct civil proceeding for the post-sentence detention of an individual based on the concern that he will commit state law crimes in the future, its actions bear no cognizable relation to the enumerated power that gave rise to the initial lawful custody.[7]

c. Post-sentence detention under § 4248 represents a fundamental break in the chain that connects to the enumerated power giving rise to the original criminal prosecution. The government cannot supply the missing link in this chain by

---

[7] It is this separation between criminal detention and civil commitment that has allowed governments to relax certain criminal protections in committing mentally ill individuals. When this Court evaluated a state civil commitment statute in *Kansas v. Hendricks*, it determined that the statute survived constitutional scrutiny precisely because it was civil, not criminal, in nature. 521 U.S. 346, 368-69 (1997); *see also id.* at 373 (Kennedy, J., concurring) ("If . . . civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.").

pointing to the Second Restatement of Torts and asserting that its custodianship creates a "common law" duty not to release someone who may harm others. U.S. Br. 32 (quoting Restatement (Second) of Torts § 319 (1965)).

The government's asserted tort law "duty to control" is entirely circular. The duty applies only to persons that a custodian has a legal right to hold. *See Rousey v. United States*, 115 F.3d 394, 398 (6th Cir. 1997) ("[T]he defendant can incur a legal duty to control a person only when the defendant possesses (or at least can obtain) the *legal* power to control that individual." (emphasis added)); *Currie v. United States*, 836 F.2d 209, 212 (4th Cir. 1987) ("When a mentally ill person has been *lawfully* committed to an institution and the institution *has the right* and the power to continue to restrain him, a negligent failure to exercise the power . . . renders those responsible for the failure to exercise control properly subject to liability."); *see also Seibel v. City and County of Honolulu*, 602 P.2d 532, 534-38 (Haw. 1979) (no duty to control dangerous criminal defendant on conditional release pursuant to court order); *Lamb v. Hopkins*, 492 A.2d 1297 (Md. 1985) (no duty to control probationer who injured victim while driving under the influence); *Paschall v. N.C. Dep't of Corr.*, 364 S.E.2d 144, 146-47 (N.C. Ct. App. 1988) (no duty to continue detaining dangerous mentally ill patient after basis for his court-ordered commitment had lapsed).[8] And even if such a duty

[8] *See also* 18 U.S.C. § 3624(a) ("A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment . . . ."). The government fails (...continued)

exists at common law, it does not supply the missing link between § 4248 detention and the enforcement of an underlying federal law that has already been prosecuted. Common law duties do not override constitutional limitations.

As the court of appeals noted in this case, "[t]he fact of previous lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." Pet. App. 14a. Whatever legitimate power the federal government has over an individual by virtue of his status as a federal prisoner ends when he is no longer legitimately in federal custody, and with it ends the government's ability to effectuate the enumerated power supporting the original conviction.

---

to identify cases holding that the duty to control a prisoner continues after he is no longer lawfully in custody. *See Hinckley v. United States*, 163 F.3d 647, 648-49 (D.C. Cir. 1999) (patient lawfully committed under D.C. Code § 24-301); *Smith v. Hope Vill., Inc.*, 481 F. Supp. 2d 172, 177 (D.D.C. 2007) (inmate lawfully in custody of "community-based correctional facility").

Section 4248 itself belies the government's attempt to rely on an asserted tort duty to justify the statute. Section 4248(g) provides that if charges are dismissed against a person who has been committed as a "sexually dangerous person" under § 4248 for reasons not related to his or her mental condition (i.e., evidence is suppressed because of a Fourth Amendment violation), the government *must release* that individual from its custody. *See* 18 U.S.C. § 4248(g). That congressional directive to release a "sexually dangerous person" undermines the government's argument that § 4248 embodies a duty not to release dangerous persons from federal custody.

2. Congress Cannot Derive Broad Regulatory Authority From "Connections," "Interests," or "Special Relationships" That Are Unmoored From Enumerated Powers.

Because no causal chain links an enumerated power to post-sentence civil commitment under § 4248, the government attempts to rely on the "connections," "interests," and "special relationships" that it has with individuals "in the custody of the Bureau of Prisons." *See, e.g.*, U.S. Br. 19, 23, 44, 48. This line of argument fails because the Necessary and Proper Clause does not demand a nexus to federal "interests," "connections" or "special relationships"; it demands a nexus to an enumerated power. Section 4248's limitation to individuals "in the custody of the Bureau of Prisons" does not provide the required nexus to an enumerated power.[9] The Necessary and Proper Clause does not grant Congress a police power over individuals based solely on their connection with the federal government.

---

[9] The government has argued repeatedly that § 4248 applies to all persons "in the custody of the Bureau of Prisons" and is not restricted to individuals convicted of any federal crimes. As the Fourth Circuit noted, the government's position extends to "material witnesses, civil contempt detainees, and individuals in immigration detention," and is not even limited to cases where "custody is lawful." Pet. App. 14a n.7 (noting the government's position in *United States v. Shields*, 522 F. Supp. 2d 317 (D. Mass. 2007), and *United States v. Hernandez-Arenado*, 624 F. Supp. 2d 985 (S.D. Ill. 2008), *aff'd*, 571 F.3d 662 (7th Cir. 2009)).

a. The government argues that even when Congress has no power to regulate a particular activity, it may nonetheless regulate that activity when it is done by a person with "connections" to the federal government. The sweeping implications of this argument are not difficult to see. Indeed, this Court has already rejected the government's argument, noting that its results would be extreme. *See Reid v. Covert*, 354 U.S. 1, 20 (1957) (labeling as "extreme" the theory that, based on the Necessary and Proper Clause, Congress could "subject[] persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts").

The "connection" the federal government forms with the people in its custody is no more meaningful, in a constitutional sense, than the "connection" it forms with people who benefit from Social Security, Medicare, and Medicaid. But it would be an unduly expansive view of the Necessary and Proper Clause if the federal government were permitted to "criminaliz[e] fraud of any kind perpetrated on any individual who happens to receive federal welfare benefits." *Sabri*, 541 U.S. at 614 (Thomas, J., concurring in the judgment). The government's position in this case would permit Congress to go still farther, criminalizing simple assaults by or against current or former welfare or Social Security beneficiaries, or even detaining those individuals indefinitely for general safety purposes.

To take another example, the federal government employs a large number of individuals. The employer/employee relationship exhibits some of the characteristics of the jailor/prisoner relationship

that the government claims provides it with the power to enact § 4248. *Compare, e.g.*, Restatement (Third) of Agency § 2.04 (*respondeat superior*), *with* Restatement (Second) of Torts § 319 (duty of a custodian). Concerns similar to those raised above are equally applicable to this relationship.

Given the breadth of relationships the modern federal government forms, if the Necessary and Proper Clause creates a freestanding authority to regulate anyone with a "connection" to the federal government, "there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

b. The government's related argument that it may rely on a generic federal "interest" in justifying § 4248 is similarly unavailing. It asserts that the federal government's interest in crime prevention "has never turned on whether" state or federal crimes are concerned, and in support cites *United States v. Salerno*, 481 U.S. 739 (1987). U.S. Br. 47. The government's reliance on *Salerno* is misguided and epitomizes the basic error that runs throughout its defense of § 4248 – dependence on sources that assume rather than prove the existence of federal power. In *Salerno*, this Court did not consider a federalism challenge to the Bail Reform Act. Instead, the *Salerno* Court held that, for due process purposes, a government interest in safety can in some circumstances outweigh an individual's liberty interest. The government makes a fundamental error by confusing the "governmental interest" in a due process challenge with the *enumerated power* it

must point to in demonstrating that its actions are authorized by the Constitution.[10]

Although the Court did not address a federalism challenge to the Bail Reform Act in *Salerno*, the Third Circuit Court of Appeals did confront such a challenge, and it addressed the distinction the government now seeks to elide. On the due process question, the Third Circuit reached the same conclusion that this Court ultimately reached in *Salerno*. *See United States v. Perry*, 788 F.2d 100, 113 (3d Cir. 1986). But in deciding whether Congress had the *power* to enact the Bail Reform Act, the Third Circuit held that "Congress may not . . . authorize commitment simply to protect the general welfare of the community at large," and that commitment must be "necessary and proper to the exercise of some specific federal authority." 788 F.2d at 110. The court concluded that Congress had authority to enact the pre-trial detention statute at issue only because it was "aimed at preventing the specific harm to the community proscribed by the four designated [federal] statutes." *Id.* at 111.[11] In

---

[10] The Government commits this same error in relying on *Jones v. United States*, another due process case. *See* 463 U.S. 354 (1983). Jones was prosecuted in the District of Columbia, found not guilty of by reason of insanity, and civilly committed by the government. *Id.* at 359-60. He raised a due process challenge to the length of his commitment and the processes used to keep him committed. *Id.* *Jones* assumes that the power over the person exists and addresses only the procedural requirements for commitment; it did not consider the basis of the government's commitment power.

[11] The statute at issue in *Greenwood* also contained a specific reference to federal interests. *See Greenwood*, 350 U.S. at 368 (noting that statute authorized commitment at expiration of (...continued)

marked contrast to the government's approach here, the Third Circuit appropriately distinguished a due process challenge from a federalism challenge and recognized, as to the latter, that the government has no "interest" unmoored from its enumerated powers that allows it to exercise a police power – even over individuals already in the criminal justice system. Where, as here, a federal commitment statute does not further the enforcement of a federal law that has already been fully enforced, and does not regulate future conduct within Congress's power to regulate, the assertion of generic federal "connections" and "interests" cannot save it.

3. The Enumerated Powers That Underlie Federal Sex Crimes Do Not Justify § 4248.

Despite what has been described as a "knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern," Henry J. Friendly, *Federalism: A Foreward*, 86 Yale L.J. 1019, 1027 (1977), the government has not attempted to justify § 4248 as a valid exercise of Congress's power to regulate interstate commerce, or any other enumerated power. This case, therefore, is not primarily about the scope of the Commerce Clause.

---

criminal sentence if prisoner is insane and there is "a probable danger to the officers, property, or other interests of the United States"). Section 4248, unlike the statutes at issue in *Greenwood* and *Perry*, contains no such specific connection to a federal interest.

Rather, it is about how far the Necessary and Proper Clause extends when the law at issue lacks a sufficient nexus to any enumerated power.

Moreover, § 4248 is not a valid exercise of the commerce power. Most crimes involving sexually violent conduct violate state law rather than federal law. Federal statutes regulating sex offenses either specifically require a connection to interstate commerce, *see, e.g.*, 18 U.S.C. § 2252(a)(2), or are limited to the territorial jurisdiction of the United States, *see, e.g.*, *id.* § 2243(a). *See* Pet. App. 15a-16a n.8 (noting that in 2004, States had in their custody approximately 153,800 prisoners convicted of rape or other sexual assault, which is approximately equal to the total number of persons in federal prison for all crimes). Nor could it be otherwise, as this Court has "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617.[12] Section 4248 has neither limitation, and, by targeting "sexual dangerousness" generally, seeks to prevent conduct that federal law does not and cannot constitutionally reach.

---

[12] In *Gonzales v. Raich*, this Court upheld the federal regulation of homegrown marijuana as within Congress's commerce power, "because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 19. Unlike the regulation of homegrown marijuana, a fungible commodity indistinguishable from the marijuana marketed in interstate commerce, regulation of the prospective intrastate behavior of a former prisoner is not "a necessary part of a larger regulation." *Id.* at 40 (Scalia, J., concurring in the judgment).

The government does not seriously dispute that § 4248 seeks to prevent conduct of purely local concern. Instead, it tries to shift the Court's focus by noting that § 4248 regulates *some* conduct appropriately within the reach of federal power. *See* U.S. Br. 48 (observing that "sexually dangerous" offenses involving interstate travel or federal territorial jurisdiction are within the federal power to regulate).

Precisely the same was said about the Violence Against Women Act found unconstitutional in *Morrison*. That statute created a civil remedy for "crime[s] of violence motivated by gender," and defined "crime[s] of violence" as those "that would come within the meaning of State *or Federal* offenses described in section 16 of Title 18." *Morrison*, 529 U.S. at 605-06 (quoting 42 U.S.C. § 13981(d)(1)-(2)) (emphasis added). In striking down the statute, the Court noted that it "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce," and that Congress instead "elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime." *Id.* at 613; *see also Lopez*, 514 U.S. at 561 ("[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.").

Section 4248's possible relation to federal crimes is even more infirm than the relationship at issue in *Morrison*. *Morrison* applied to actual violence against women rather than predictions about future sexual violence. Moreover, in *Morrison*,

Congress made "numerous findings" about the impact of gender-motivated violence on interstate commerce. 529 U.S. at 614. In enacting § 4248, Congress made no legislative findings about the effect that federal civil commitment of violent sex offenders would have on interstate commerce or on any other area within the sphere of Congress's enumerated powers. *See United States v. Wilkinson,* 626 F. Supp. 2d 184, 190 (D. Mass. 2009) (noting the government's concession that there were "no Congressional findings regarding the effects of prisoners who are potentially sexually violent or dangerous on interstate commerce"); *cf. Lopez*, 514 U.S. at 562 (noting that "neither [§ 922(q)] nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone" (citation omitted)). It is merely post-hoc speculation, not the predictive judgment of Congress, that the conduct § 4248 seeks to prevent will be to any substantial degree conduct that Congress has the power to regulate.

The government attempts to distinguish *Lopez* and *Morrison* by arguing that the problem with the statutes in those cases was the lack of assurance that "the conduct to be regulated in an individual case" had "a direct, as opposed to attenuated, connection with a proper subject of federal regulation." U.S. Br. 43. The government then makes an unwarranted leap by arguing that § 4248 does not present this problem because it applies only to individuals who are in BOP custody, and so there is "nothing attenuated about the connection between the federal government and *the persons to whom Section 4248*

may be applied." U.S. Br. 44 (emphasis added). There may not be anything attenuated about the connection between the federal government and its prisoners, but there is something quite attenuated – disconnected, in fact – about the link between the conduct regulated by § 4248 and an enumerated federal power.

A jurisdictional nexus, by definition, must connect Congress's asserted authority *to an enumerated power*. Although Congress limited § 4248's reach to those "in the custody of the Bureau of Prisons," that limitation does not remedy the lack of a connection to an enumerated power. As discussed above, § 4248 does not relate to the enumerated power that placed the individual in BOP custody, nor does it relate to anything that the individual did while in BOP custody. The "in the custody of the Bureau of Prisons" language in § 4248 does not operate as a jurisdictional nexus. It is a limitation, but not a constitutionally meaningful one.

The government attempts to convert Congress's limited power to criminalize narrow forms of sexual violence into a general power to regulate all sexual violence, including acts which violate no federal criminal statute and which would not be constitutionally permissible targets of a federal prosecution. This Court has rejected previous congressional attempts to "pile inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *cf. Raich*, 545 U.S. at 65 (Thomas, J., dissenting) (just as allowing Congress to regulate intrastate, noncommercial activity under the

Commerce Clause would confer on Congress a general police power over the Nation, "[t]his is no less the case if Congress ties its power to the Necessary and Proper Clause"). This Court should reject Congress's attempt to do so here.

B. Section 4248 Encroaches On The Authority Of The States And Is Therefore Not A "Proper" Executory Law.

Not only is § 4248 not "necessary" to the execution of any enumerated power, but it is also not "proper." *See Printz v. United States*, 521 U.S. 898, 923-24 (1997). "[A] 'proper' executory law must respect the system of enumerated federal powers: executory laws may not regulate or prohibit activities that fall outside of the subject areas specifically enumerated in the Constitution." Gary Lawson & Patricia G. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 285 (1993); *accord* Laurence Tribe, 1 American Constitutional Law § 5-3 (3d ed. 2000) ("The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power neither conflicts with external limitations – such as those of the Bill of Rights and of federalism – *nor renders Congress's powers limitless*." (emphasis added)).

Hamilton spoke of the Necessary and Proper Clause's propriety test as follows: "The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it was founded. Suppose . . . [Congress] should

attempt to vary the law of descent in any State; would it not be evident that . . . it had exceeded its jurisdiction and infringed upon that of the State? Suppose again that upon pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction . . . which its constitution plainly supposes to exist in the State governments?" The Federalist No. 33 (Alexander Hamilton).

In both cases, Hamilton concluded that the Constitution invalidated the hypothetical law in question not because its means were too remotely connected to its ends, but rather because its means encroached on the jurisdiction of state governments. Later, Hamilton wrote that "[t]here is also this further criterion which may materially affect the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality . . . ." Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1971), *reprinted in* 3 The Founders Constitution 250 (Philip B. Kurland & Ralph Lerner eds., 1987). Thus, Hamilton concluded that Congress may not create a corporation "for superintending the police of the city of Philadelphia because they are not authorized to regulate the police of that city," but it may create a corporation "in relation to the collection of taxes, or to the trade with foreign countries . . . because it is the province of the federal government to regulate those objects . . . ." *Id.*

In seeking to commit "sexually dangerous" persons in BOP custody, Congress encroaches on the States' police and *parens patriae* powers. In assuming these core state functions, § 4248 disrespects the sovereignty of the States and undermines bedrock constitutional values. For these reasons, § 4248 is not "proper" within the meaning of the Necessary and Proper Clause.

1. Police And *Parens Patriae* Powers Are Not Proper "Ends" For Federal Government Regulation.

Like the purely state matters of which Hamilton spoke, police and *parens patriae* powers are exercised by the States rather than the federal government. "The Constitution . . . withhold[s] from Congress a plenary police power." *Lopez*, 514 U.S. at 566; *see also id.* at 580 (Kennedy, J., concurring) ("[A]t the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *Morrison*, 529 U.S. at 618 n.8 ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the federal government an unlimited license to regulate. . . . Moreover, the principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history."). There is "no better example of the police power, which the Founders denied the National Government and reposed in the States,

than the suppression of violent crime." *Morrison*, 529 U.S. at 618.

Section 4248 not only attempts to suppress violent crime, but does so by interfering with another core area of traditional state concern: civil commitment of the dangerous and mentally ill. The *parens patriae* power, which supports the sovereign's role as "'the general guardian of all infants, idiots, and lunatics,'" is a "function of the King [that] passed to the States." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) (quoting 3 William Blackstone, *Commentaries* *47). "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979); *see also Foucha* v. *Louisiana*, 504 U.S. 71, 96 (1992) (Kennedy, J., dissenting) ("In the civil context, the State acts in large part on the basis of its *parens patriae* power to protect and provide for an ill individual.").

As a committee of the House of Representatives noted in refusing to expand the federal role in civil commitment, "[c]ommitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority." H.R. Rep. No. 96-1396, at 561

(1980), *quoted in Cohen*, 733 F.2d at 137.[13] The historical record bears out this conclusion, *see* Samuel Jan Brakel et al., The Mentally Disabled and the Law 22 (3d ed. 1985); Albert Deutsch, The Mentally Ill in America 137-41 (2d ed. rev. 1949), and courts have long recognized it. *See generally* Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 Yale L.J. 1070, 1070 n.2 (1955) (collecting cases).[14]

Because civil commitment falls squarely within the realm of traditional state police and *parens patriae* powers – not proper "ends" for federal regulation – § 4248 violates the "propriety" limitation of the Necessary and Proper Clause. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Congress's assertion of federal power through § 4248 takes it far from the powers enumerated in the

---

[13] *See also* Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 836 (1960) ("A state can subject any mentally ill person to an involuntary civil commitment, a power which stems from Chancery's exercise of the doctrine of *parens patriae*. . . . The Constitution, however, nowhere gives the federal government general commitment power over the insane, and prior to the 1949 statute the absence of any federal legislation or judicial assertion of such power bears out the assumption that *parens patriae* powers are reserved to the states.").

[14] *See also Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 590-91 (10th Cir. 1999); *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 547 (1st Cir. 1996); *White v. Napoleon*, 897 F.2d 103, 112 (3d Cir. 1990).

Constitution, and infringes on the core domain of the States.

2. Section 4248 Undermines The Values Protected By The Constitution's Commitment To Federalism.

The government insists that § 4248 respects the "etiquette of federalism," because it allows States to "assume responsibility" for the indefinite detention of individuals the Attorney General considers sexually dangerous. U.S. Br. 44-45. *But see United States v. Darby*, 312 U.S. 100, 114 (1941) ("[Congressional] power can neither be enlarged nor diminished by the exercise or non-exercise of state power."). This assumption of responsibility does not, however, provide the States with – or divest the federal government of – any real power over their citizens. *Cf. United States v. Husar*, 859 F.2d 1494, 1497 (D.C. Cir. 1988) (per curiam) ("Congress, we think it plain, did not intend that the relocation of an [insanity] acquittee would give him a state pass to freedom on terms any less stringent than those imposed by federal law."); *see also United States v. Denny-Shaffer*, 2 F.3d 999, 1021 n.30 (10th Cir. 1993) (following *Husar*). For the States, therefore, § 4248 presents the following choice: indefinitely detain your citizens that the federal government has deemed dangerous, or the federal government will

indefinitely detain them itself. That is no real choice at all.[15]

Posing such a false choice is hardly respectful of the "etiquette of federalism." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Although the federal government does "not . . . direct[] the State to enact a certain policy" by "formal command," it respects state law enforcement prerogatives only when the State is in line with federal policy, and thus "the intrusion is nonetheless significant." *Id.* While § 4248 permits a State to detain its citizens itself, the federal government usurps true policymaking discretion. *See Printz*, 521 U.S. at 928 ("leav[ing] no 'policymaking' discretion with the States . . . worsens the intrusion upon state sovereignty"). Some States have determined that the balance between liberty and security is best struck by applying a "beyond a reasonable doubt" standard, and thus do not allow detention based on a showing only of "clear and convincing evidence" of sexual dangerousness.[16] Other States have not found it necessary or

---

[15] It is instead a "Morton's Fork," like the illusory choice that King Henry VII's tax collector Morton offered English subjects: live in luxury and be taxed heavily because you must have money to spare, or live in poverty and be taxed heavily because you must have money saved. *See* 1 Stephen Dowell, A History of Taxation and Taxes in England 200 (3d ed. 1965).

[16] At least nine States have made such a choice. *See* Ariz. Rev. Stat. §§ 36-3701 *et seq.*; Cal. Welf. & Inst. Code §§ 6600 *et seq.*; 725 Ill. Comp. Stat. §§ 207/1 *et seq.*; Iowa Code §§ 229.1A *et seq.*; Kan. Stat. Ann. §§ 59-29a01 *et seq.*; Mass. Gen. Laws ch. 123A, §§ 1 *et seq.*; S.C. Code Ann. §§ 44-48-10 *et seq.*; Tex. Health & Safety Code Ann. §§ 841.001 *et seq.*; Wash. Rev. Code §§ 71.09.010 *et seq.*

appropriate to adopt any special regime for the detention of sexually dangerous individuals, relying instead on longstanding provisions for the supervision of the mentally ill.[17] Even if a State has adopted a regime similar to § 4248, it may be convinced that one of its citizens can be prevented from violating state laws through outpatient therapy and careful supervision. States are nevertheless powerless to prevent the federal government from detaining their citizens under § 4248, even if the detention is contrary to the States' own policy choices. This is "declination of responsibility," U.S. Br. 46, only on the assumption that the States are not entitled to make their own policy choices in areas of local concern.

Section 4248 violates not only the "etiquette" of federalism but the underlying values it serves. Federalism, "the unique contribution of the Framers to political science and political theory," *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring), is concerned with more than respect for the States as coequal sovereigns. It embodies long-recognized constitutional commitments, which are undermined by Congress's attempt to regulate the future intrastate behavior of individuals.

First, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S.

---

[17] Twenty-nine States have no statute similar to § 4248. *See* Kansas Amicus Br. 8 ("[O]nly 21 states have such programs [as § 4248]").

722, 759 (1991) (Blackmun, J., dissenting)); *see also Morrison*, 529 U.S. at 616 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power."); *Printz*, 521 U.S. at 921 ("This separation of the two spheres is one of the Constitution's structural protections of liberty."); *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."); The Federalist No. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

This case implicates the Constitution's intertwined commitments to liberty and federalism. "'In our society liberty is the norm,' and [preventive detention] 'is the carefully limited exception.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (quoting *Salerno*, 481 U.S. at 755). Whether Respondents' indefinite detention violates the Fifth Amendment's Due Process Clause,[18] it

[18] Although not at issue before this Court, Respondents argued successfully before the district court that § 4248's "clear and (...continued)

indisputably burdens their liberty interests, and does so through an unprecedented extension of federal power. Yet § 4248 imposes this burden for the purpose of preventing state law crimes, even if the State concerned would choose not to detain its citizen. In such a situation, mandating detention, but allowing the State to do the actual detaining itself, is not consonant with the Framers' liberty-promoting vision of federalism.

Second, our system of federalism enables individual States to serve as laboratories for new and experimental social policies. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Not only does federalism foster experimentation, but it enhances the ability of individual citizens to engage in the democratic enterprise and craft local solutions to local problems. *See Gregory*, 501 U.S. at 458 (federalism "increases opportunity for citizen involvement in democratic processes"); Stephen Breyer, Active Liberty 57 (2005) ("[F]ederalist principles secure decisions that rest on knowledge of local circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate novel social and economic experiments." (internal quotation marks omitted)). Of course, as with violence against women and guns in schools, "it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy" to permit sex crimes to occur. *Lopez*, 514 U.S. at 581. But as with most

---

convincing" standard violates the Fifth Amendment. The Fourth Circuit did not reach that issue.

complicated matters of local policy, "considerable disagreement exists about how best to accomplish that goal." *Id.*; *see also* Breyer, *supra*, at 58 ("[D]ifferent communities may place different weights upon . . . benefits and costs. These differences suggest that citizens in different local communities may come up with different answers to the same basic questions . . . .").

Section 4248, like the federal law punishing possession of a gun in a school zone in *Lopez*, "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). If Texas, in regulating its own internal affairs, determines that an alternative policy regarding potentially "sexually dangerous persons" serves its interests in rehabilitation and crime-prevention, this Court should regard it not as a "declination of responsibility," U.S. Br. 46, but rather a worthwhile experiment in democratic self-governance.

Third, federalism promotes good governance by ensuring "two distinct and discernable lines of political accountability." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). "Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). When these lines become blurred, States are "put in the position

of taking the blame for [a federal policy's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930; *see also New York*, 505 U.S. at 169 ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not [appropriately] pre-empted by federal regulation.").

The acquiescence of some law enforcement officers of some of the States in this expansion of federal power does not ameliorate the undermining of these constitutional protections. As the government concedes, "[t]he boundaries of Congress's Article I powers do not expand or contract on the basis of States' acquiescence or objection." U.S. Br. 45 n.17 (citing *Raich*, 545 U.S. at 29); *see also Morrison*, 529 U.S. at 661 (Breyer, J., dissenting) ("[A]ttorneys general in the overwhelming majority of States (38) supported congressional legislation" on gender-motivated violence.).

The defense of § 4248 offered by Kansas and other states actually underscores the need for judicial vigilance. Kansas warns that absent § 4248, "29 states would be compelled to start [detention] programs, or persons in federal custody designated for release in any of those 29 states would simply have to be let go." Kansas Amicus Br. 8-9. In other words, these States would be required to make a policy decision in the exercise of their police power. The fact that some state law enforcement officials support federal intervention to achieve "objectives that could not be achieved through the ordinary democratic process" in their States, *Horne v. Flores*, 129 S. Ct. 2579, 2593 n.3 (2009), highlights the

threat this case presents to the federalist values of political accountability and democratic self-governance.[19]

C. Section 4248 Represents An Unconstitutional Assertion Of Federal Power Without Analogy In History Or Current Practice.

The Fourth Circuit correctly held that § 4248 represents an unconstitutional assertion of federal power because it does not effectuate any of Congress's enumerated powers and is incompatible with the purpose and structure of federalism. The government glosses over these constitutional problems by devoting much of its brief to chronicling the history of detention by the federal government

---

[19] Recognizing that § 4248 is supported by no federal power and undermines core federalism values does not prevent the federal government from working cooperatively with the States to help them solve their local problems. As the Fourth Circuit noted, the government "can notify state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law." Pet. App. 20a. The government can also "wield its spending power to encourage state action." *Id.*; *see* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, § 301 (authorizing "grants to jurisdictions for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons"). And the government may also use supervised release to address its policy concerns. *See Wilkinson,* 626 F. Supp. 2d at 193-94 ("[I]f no state were willing to deal with a prisoner believed by the Bureau of Prisons to be sexually dangerous, the Department of Justice could request a hearing on the first day of the defendant's Supervised Release and ask the court to alter the conditions of Supervised Release to protect against that perceived danger." (citing 18 U.S.C. § 3583(e)(2); Fed. R. Crim. P. 32(c)(1))).

and comparing § 4248 to 18 U.S.C. § 4246. The government's argument misapprehends the historically limited role of the federal government in this area. In doing so, the government side-steps the core issue presented in this case: whether Congress has power under Article I to impose "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." Pet. App. 14a.

1. The History Of Federal Civil Commitment Demonstrates That The Government Lacks The Power To Commit Individuals At The End Of Their Prison Term.

The government seeks to portray § 4248 as a "modest expansion of a settled framework for federal civil commitment of dangerously mentally ill persons in federal custody." U.S. Br. 39. The history of federal civil commitment reveals just the opposite. The expansive powers asserted by § 4248 depart sharply from the longstanding federal reluctance by all branches of the federal government to interfere with the States' police and *parens patriae* powers in this area. Generations of legislative, executive, and judicial practice have consistently rejected such an exercise of federal power.

The district court noted that "[p]rior to 1984, Congress expressed doubt, on a number of occasions, about its authority to provide for the federal commitment of individuals acquitted on the basis of insanity." Pet. App. 60a; *see also Shannon v. United*

States, 512 U.S. 573, 577 (1994); *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974).

Other courts have also emphasized this congressional reluctance. In *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (en banc), then-Judge Scalia reviewed the legislative history of civil commitment schemes for insane defendants, which reflected concern that federal civil commitment would unconstitutionally intrude on the power of the States, noting that "Congress on a number of occasions considered providing for the commitment, nationwide of federal defendants acquitted on grounds of insanity." *Id.* at 137-38. The opinion refers to a "well-considered analysis by the House Judiciary Committee of the major concern leading to rejection" of such federal commitment:

> The Committee recognizes that the Federal government is one of specifically enumerated powers. State governments, on the other hand, may act in any given area unless specifically prohibited by the Constitution. Commitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority. . . .
>
> . . . .
>
> In view of these considerations, the Committee believes that a Federal procedure for the commitment of the dangerously mental[ly] disturbed would

> constitute an inappropriate interference with the balance of Federal and State powers. . . . The Committee thus believes that the care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.

Id. (footnote omitted) (bracketed material in original) (quoting H.R. Rep. No. 96-1396, 559, 561 (1980)); Pet. App. 61a-62a. Thus, Congress has long recognized the constitutional problems inherent in federal civil commitment of the mentally ill and did not contemplate a wholesale federal power over all individuals with whom the federal government "has a special relationship." U.S. Br. 23.

Similarly, the creation of St. Elizabeth's Hospital, relied upon by the government, U.S. Br. 24-29, does not provide support for § 4248. *See* Act of March 3, 1855, ch. 199, § 1, 10 Stat. 682 (establishing a "Government Hospital for the Insane," whose object would be "the most humane care and enlightened curative treatment of the insane of the Army and Navy of the United States, and of the District of Columbia."). It is within Congress's power to regulate the armed forces and the District of Columbia. *See* U.S. Const. art. I, § 8, cl. 14, 17. Creating the hospital filled a gap in an area of undisputed federal authority allowing mentally ill military personnel and District residents to receive treatment that was otherwise lacking.

Contrary to the government's current position, the Attorney General interpreted the statute narrowly, to avoid overstepping this limited role. *See Gov't Hosp. for the Insane*, 7 Op. Att'y Gen. 450, 451 (1855) (reasoning that if non-residents were

admitted to the Hospital "all the indigent insane from all parts of the United States, nay, of the world might be brought [to the Hospital]"). Limited interpretations of the scope of the federal government's role in this area continued after St. Elizabeth's founding. *See Gov't Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 212 (1881) ("[T]he States are expected to make [such provision] for the insane persons residing within their borders . . . no reason can be suggested why an insane resident of Texas should be brought and maintained [in the District of Columbia]" by the federal government).

In 1916, Attorney General Gregory opined that a federal prisoner could not be detained for reasons of insanity following the completion of his term of imprisonment. The Attorney General found that the purpose of the relevant commitment statute "was to secure proper treatment for insane persons 'during the term of their imprisonment' – not to prolong that imprisonment." *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916).

Attorney General Gregory pointed out that, although an individual may be entitled to be discharged at the completion of his term of imprisonment, after his release "like any other citizen, he [would be] subject to the insanity laws and processes of the State, Territory, or district wherein he might be found and accused of insanity." *Id.* Attorney General Sargent later confirmed that view, noting "an intention on the part of Congress to provide for the care of the insane convict only during the term of imprisonment." *Care of Insane Convict*

After Expiration of Term of Imprisonment, 35 Op. Att'y Gen. 366, 368 (1927).

In sum, the federal government has long limited its role in the mental health field to individuals over whom it has plenary control and only for so long as it has legitimate control over them.[20] There is no historical precedent for a broad federal civil commitment authority. To the contrary, the historical record shows great reluctance on the part of the federal government to undertake civil commitment due to the serious constitutional questions it raises.

2. The Government Cannot Justify § 4248 By Analogy To § 4246.

The government relies on a comparison of § 4248 to § 4246, the general federal civil commitment statute, arguing that Congress's new

[20] The federal government has also limited civil commitment to individuals whose mental illness occurred as a direct result of the federal government's relationship with that individual. Congress limited the extension of custody at St. Elizabeth's for individuals outside of the District of Columbia or the armed forces to indigent recent retirees who had become insane "from causes which arose during and were produced by [military] service." Act of July 13, 1866, ch. 179, § 2, 14 Stat. 93, 94. And the original focus of federal civil commitment of prisoners was 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, 212-13 (1881). Thus, federal civil commitment has traditionally focused on activity that occurred while an individual was under federal control or that resulted from the government's relationship with that individual. Section 4248, in contrast, focuses on conduct that occurred before entry into BOP custody and predictions about conduct that may occur after BOP custody.

detention regime is merely a "modest expansion of a settled framework for federal civil commitment." U.S. Br. 39. Even if that were so, it would not diminish this Court's responsibility to ensure that the expansion passes constitutional muster. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970))). However, the expansion here is not modest, and the framework is not settled.

Section 4246 and its predecessor have, since 1949, authorized commitment of three classes of individuals who are already hospitalized: (i) those deemed incompetent to stand trial for a federal crime, (ii) those against whom federal charges have been dismissed due solely to mental illness, and (iii) those whose criminal term of imprisonment is set to expire. By far the most significant number of people detained under § 4246 is the first group – individuals deemed incompetent to stand trial.[21] This Court has concluded that the federal government has the power to commit these individuals based on its

---

[21] Since 2000, 104 individuals have been committed in the Eastern District of North Carolina under § 4246. 88 of those individuals (84.6 percent) were committed because they were incompetent to stand trial. *See 18 U.S.C. § 4246 Commitments in the Eastern District of North Carolina: 2000 to the Present*, The Zealous Advocate (Federal Public Defender, Eastern District of North Carolina), Fall 2009 Supp., *at* http://nce.fd.org/The%20Zealous%20AdvocateFall%202009%20Supplement-Review%20of%20§%204246%20Civil%20Commitment%20Cases%202000%20to%20the%20Present.pdf.

unexhausted power to prosecute. *See Greenwood*, 350 U.S. at 375-76.

Commitment under § 4246 of individuals whose term of imprisonment is about to expire, on the other hand, remains an unsettled question. *See* Pet. App. 46a n.11 ("This court has not located a Supreme Court case specifically addressing the constitutionality of [§ 4246]."). If that statute is ever properly challenged before this Court, its application to post-sentence commitment may fall. Regardless of whether that day might come, the government cannot now establish the constitutionality of § 4248 by analogy to a different statute whose constitutionality has not been decided.

Moreover, the government is incorrect that § 4248 is only a "modest expansion" of federal civil commitment power. The district court, in properly declining to reach the constitutionality of a statute not before it, noted the expansiveness of § 4248 as compared to § 4246. "The very narrow group of people to whom § 4246 applies and the many restrictions within § 4246 recognizing the authority and reserved powers of state governments highlight the broad applicability, the breadth of purpose, and the extension of federal power represented by § 4248." Pet. App. 72a. Section 4248 was a conscious effort to expand the reach of federal civil commitment to people who would not have traditionally been considered mentally ill under § 4246. U.S. Br. 7 n.4 (citing H.R. Rep. No. 109-218, at 29, 54 (2005)). It applies to anyone in BOP custody rather than individuals already hospitalized and certified as mentally ill by the director of the facility, *see* Pet. App. 68a-69a, and it does not require

the government to seek appropriate state care *before* commitment, *see id.* at 69a.

For these reasons, whatever the ultimate constitutionality of § 4246 in this setting, the statute is more circumscribed than § 4248. *Id.* Despite the government's assertions, § 4248 is an *immodest* expansion of an *unsettled* framework.

II. THE GOVERNMENT WAIVED ITS SEPARATE CHALLENGE TO MR. CATRON'S COMMITMENT.

One respondent, Shane Catron, was found incompetent to stand trial before the government could prosecute him for his alleged criminal offenses. The government initially moved to commit Mr. Catron pursuant to § 4246, but it later withdrew its § 4246 petition and certified him pursuant to § 4248.

Before the court of appeals, the government did not make a separate argument with respect to Mr. Catron or ask that he be treated differently from the other Respondents. The Fourth Circuit properly declined to consider an outcome the government had not sought, noting that when the parties do not ask for such "finely drawn" relief, a court should not embark on such a course. Pet. App. 19a (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31 (2006)).

Because the government waived this argument before the court of appeals, and the court of appeals specifically declined to address it, this Court should decline to do so as well. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (noting that argument "was not raised below, [so] it is

waived"); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well." (internal citation omitted)). This Court's practice of declining to consider issues that were waived in the courts below not only discourages bait-and-switch litigation tactics, but also implements the principle that "[t]his Court . . . is one of final review, 'not of first view,'" and therefore does not decide questions that were not decided by the court of appeals. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

Even if the government's new argument concerning Mr. Catron were not waived, it would still fail. Like the defendant in *Greenwood*, Mr. Catron is currently incompetent to stand trial, and the government has an unexhausted power to enforce federal law against him. *See Greenwood*, 350 U.S. at 375. Unlike the defendant in *Greenwood*, however, Mr. Catron's detention is not directed to preserving this power. *Greenwood* permitted commitment "until the accused shall be mentally competent to stand trial," *id.* at 368 n.2 (quoting 18 U.S.C. § 4246 (1956)), because such commitment was intended to treat the disease that stood as an obstacle to enforcing federal law, and was thus "auxiliary" to that enforcement. *Id.* at 375. But *Greenwood* did not hold that any individual who may be detained for that purpose may also be detained for any other purpose. Section 4248 is not a means to preserving the government's power to prosecute Mr. Catron, but is instead a means to prevent violent crime.

Whereas § 4246 commitment may result in the restoration to competency and eventual prosecution of the committed individual, § 4248 commitment is not focused on restoration and prosecution. *See United States v. Volungus*, 599 F. Supp. 2d 68, 76 n.9 (D. Mass. 2009) ("[Section 4248] authorizes such a person to be held not because of the federal interest in the prosecution of a past offense, but because of the possibility of an as yet uncommitted future offense."). Indeed, although incompetence triggers Mr. Catron's detention, as long as he continues to be deemed "sexually dangerous," he may be detained even if he is restored to competence. *See* 18 U.S.C. § 4248(d). Although the government could have committed Mr. Catron in order to preserve its ability to prosecute him, *see id.* § 4246, it cannot constitutionally detain him simply to prevent him from committing state law crimes. *See supra* I.A.3.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT A. LONG, JR.
ANN O'CONNELL
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, N.W.
Washington, DC 20004
(202) 662-6000

THOMAS P. MCNAMARA
Federal Public Defender
Eastern District of
North Carolina
G. ALAN DUBOIS
JANE E. PEARCE*
Assistant Federal Public
Defenders
ERIC J. BRIGNAC
LAUREN BRENNAN
Office of the Federal Public
Defender
150 Fayetteville Street, Ste 450
Raleigh, NC 27601
(919) 856-4236

October 28, 2009

**Counsel of Record*

Counsel for Respondents