No. 18-6374

IN THE
Supreme Court of the United States

WILLIAM CARL WELSH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Cato Institute, a nonpartisan public-policy research foundation dedicated to the principles of individual liberty, free markets, and limited government, respectfully submits this brief as *amicus curiae*.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

The Cato Institute is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability for law enforcement. Relevant here, the Cato Institute regularly files *amicus* briefs in this Court and courts throughout the country to ensure that individual liberty does not impermissibly give way to assertions of nonexistent federal powers.

This petition raises issues of serious and potentially far-reaching consequence for the proper operation of our constitutional order. The Federal Government cannot claim a civil-commitment authority under the Sex Offender Registration and Notification Act (SORNA) to detain indefinitely those persons whom it can neither lawfully charge with criminal activity nor convict. There is no generalized federal civil-commitment authority, detached from the commission of federal crimes. This Court should grant the petition and reestablish that bedrock limitation.

SUMMARY OF ARGUMENT

The Federal Government cannot exercise power it does not possess. Yet that is what the Government seeks to do here: Exercise a federal police power under the guise of SORNA, a law that already resides on the Constitution's outer edge. That troublesome statute has often required this Court's attention over its short life. It calls out again.

This case is the first time in the modern era that the Federal Government has successfully asserted a continuing power to civilly commit an individual who has been neither lawfully charged with nor convicted of a federal crime. Absent a lawful basis for federal custody, however, that power inheres in the several States. The Federal Government has no roving authority to initiate involuntary civil-detention proceedings. Supplanting the States' historic police powers in this manner offends their dignity as co-sovereigns, frustrates political accountability, and discourages state-level experimentation. Making matters worse, judicial review of the Federal Government's civil-commitment authority rests in the hands of a single federal appellate court, which has now written the Government a blank check to exercise the very type of "great substantive and independent power" that the Constitution denies it. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

Given that the Federal Government exceeded its powers in obtaining a civil-commitment order for Mr. Welsh, one would expect that some form of post-judgment relief would be available. The Federal Rules of Civil Procedure provide at least two avenues to correct the constitutional error: Rule 60(b)(4), which addresses final judgments that are "void" for lack of jurisdiction, and Rule 60(b)(5), which addresses final judgments that are based on "vacated" judgments or whose equitable calculus compels that the judgment be lifted. Both forms of relief were warranted—indeed, *necessary*—here. The Fourth Circuit's contrary conclusion was flawed several times over. Simply put: It cannot be that the Feder-

al Rules and our system of justice are so stunted that they would permit a constitutional violation to persist indefinitely, without any apparent cure.

The Federal Government's sole response is to say that in seeking to indefinitely confine Mr. Welsh, it acted to help protect the public. Pet. App. 10a. But the Federal Government's motives do not matter; what matters is whether the Federal Government acted pursuant to a power delegated to it by the People under our Constitution. And that question persists no matter how unpalatable we may find the underlying issue. "We must steel ourselves against passions, which contaminate the fountain of justice," explained Josiah Quincy II, co-counsel to John Adams in defending the British soldiers accused of perpetrating the Boston Massacre. "We must not forget, that we ourselves will have a reflective hour—an hour, in which we shall view things through a different medium—when the pulse will no longer beat with the tumults of the day—when the conscious pang of having betrayed truth, justice, and integrity, shall bite like a serpent and sting like an adder."[2] If we tolerate Federal Government overreach in the pursuit of noble-seeming ends, our collective liberties are all imperiled.

For the reasons below and those in the petition, the Fourth Circuit's consequential misstep warrants this Court's attention.

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[2] *Josiah Quincy's Opening for the Defense: 29 November 1770*, Founders Online, National Archives, *available at* https://bit.ly/2SQqTXN (last modified June 13, 2018).

ARGUMENT

I. THE FEDERAL GOVERNMENT LACKS AUTHORITY TO CIVILLY COMMIT A PERSON OVER WHOM IT NEVER HAD LAWFUL CUSTODY.

It is a foundational constitutional principle that the Federal Government exercises only certain limited and enumerated powers. *See generally* U.S. Const. art. I, § 8. An essential corollary is that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation." *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). These tenets are unbending—including when the subject of desired regulation is of social concern and the temptation to act may be strong. *See United States* v. *Morrison*, 529 U.S. 598, 618 (2000) ("Indeed, we can think of 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 and vindication of its victims." (emphasis added)). However salutary its motive, Congress simply cannot exercise an authority it does not possess.

Mr. Welsh's case exemplifies what can happen when these principles are ignored: Mr. Welsh now faces the prospect of indefinite confinement in federal prison under the civil-commitment provision of the Adam Walsh Child Protection and Safety Act of 2006 (the "Walsh Act"), Pub. L. No. 109-248, tit. III, § 302, 120 Stat. 587, 619–622, despite the fact that the Federal Government never had a lawful basis to incarcerate him to begin with and despite the fact that he *already* "spent the last seven years in federal custody without a valid conviction." Pet. App. 15a.

This Court must not permit such a blatantly unconstitutional and unfair outcome. Because Congress has no authority to seek civil commitment for persons not already under the Federal Government's lawful custody, persons like Mr. Welsh—over whom custody has been asserted improperly from the outset—cannot be federally detained upon being released from their initial erroneous detention. The Fourth Circuit's decision suggests these historic limits on the Government's power are now up for grabs, at least when it comes to society's undesirables. That cannot be.

1. Civil commitment, by its nature, raises constitutional concerns in any context. This Court has long "recognized that civil commitment for any purpose constitutes a significant deprivation of liberty." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (citing *Jackson* v. *Indiana*, 406 U.S. 715 (1972)). Quite so. An order of civil commitment is a potentially lifelong sentence. The "power to commit persons against their will indefinitely" is thus chief among those "'civil' penalties" whose consequences "are routinely imposed and are routinely graver" than their criminal counterparts. *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part).

Various constitutional protections work together to limit the reach of civil commitments, including the prohibition on *ex post facto* laws, U.S. Const. art. I, §§ 9 & 10; the Fifth Amendment's protections against double jeopardy; and the Fifth and Fourteenth Amendments' guarantee of due process. These protections ensure that, when "so significant a restriction of an individual's basic freedoms is at issue," the State "cannot cut corners" but "must hew

to the Constitution's liberty-protecting line." *Kansas* v. *Hendricks*, 521 U.S. 346, 396 (1997) (Breyer, J., dissenting).

Our founding document's Federalism principles provide yet another "liberty-protecting line" to shield against the potential ills of civil commitment. The Constitution does not vest in the Federal Government a freestanding power to initiate involuntary detention proceedings: There is no "Civil Commitment Clause" in Article I. The Federal Government's authority to civilly commit is therefore limited to circumstances in which civil commitment is an extension of another, independent grant of federal authority. *See* The Federalist No. 39, at 245 (Madison) (Clinton Rossiter ed., 1961) (explaining that the Federal Government's "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); The Federalist No. 9, at 76 (Hamilton) (Clinton Rossiter ed., 1961) (similar).

In a series of cases culminating in the *Comstock* decision in 2010, this Court articulated limits to the Federal Government's civil-commitment power: Unless a person is "either charged with or convicted of any federal offense," the Federal Government lacks authority to seek his civil commitment. *United States* v. *Comstock*, 560 U.S. 126, 138 (2010) (individuals convicted of federal crimes may be civilly detained under the Walsh Act); *see Jones* v. *United States*, 463 U.S. 354, 370 (1983) (individual charged with federal crime and found not guilty by reason of insanity may be civilly detained); *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956) (individual indicted on federal charges and incompetent to stand

trial may be civilly detained); *cf. United States* v. *Kebodeaux*, 570 U.S. 387, 394–395 (2013) ("[T]he Necessary and Proper Clause * * * authorizes Congress, in the implementation of other explicit powers, to create federal crimes, to confine offenders to prison * * * and, where a federal prisoner's mental condition so requires, to confine that prisoner civilly after the expiration of his or her term of imprisonment."). The Government may not, however, "resort to civil commitment" "simply to protect the general welfare of the community at large." *United States* v. *Perry*, 788 F.2d 100, 110 (3d Cir. 1986).[3]

2. That the Federal Government has only narrow civil-commitment authority under the Constitution should come as no surprise. At base, civil commitment is a power premised on a sovereign's authority to protect the general welfare of their citizens; it is a classic example of the "police power." *See, e.g.*, *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (Marshall, C.J.); *see also Addington*, 441 U.S. at 426 (observing that Texas "has a legitimate interest under its *parens patriae* powers in providing care to its citizens"). But under our Constitution, the power to protect citizens' general welfare—the "po-

[3] Individuals charged or sentenced under the District of Columbia Code likely satisfy this constitutional rule. Congress possesses "exclusive" legislative authority over the District of Columbia, *see* U.S. Const. art. I, § 8, cl. 17; all crimes prosecuted under the D.C. Code are maintained in the name of the United States; and since 1997, Congress has directed that "D.C. offenders" be placed "into the legal custody of the Attorney General for the duration of [their] sentence[s]." *United States* v. *Savage*, 737 F.3d 304, 208 (4th Cir. 2013) (emphasis omitted) (approving of federal civil commitment over a D.C. offender under the Walsh Act).

lice power"—is reserved to the States. It is an intentional feature of our constitutional design that while the States may act to advance the health, safety, and morals of their residents, the Federal Government's powers are more confined. *See Comstock*, 560 U.S. at 153 (Kennedy, J., concurring) ("I had thought it a basic principle that the powers reserved to the States consist of the whole, undefined residuum of power remaining after taking account of powers granted to the National Government."); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745, 774–777 (2007) (proposals "to include in the new Constitution an 'internal police' limitation upon the national power" were rejected because history and past practice "clearly confirmed that internal police remained with the states").

Accordingly, the authority to order persons civilly committed for the general benefit of the public is left almost entirely to the States. It is "implausible to suppose—and impossible to support—that the Framers intended to confer" a similar power to the Federal Government "by implication." *Kebodeaux*, 570 U.S. at 402–403 (Roberts, C.J., concurring). Rather, as this Court has repeatedly made clear, the Federal Government's authority to seek civil commitment traces to its narrow authority to police and punish crimes, in effectuation of other Article I powers. That is all. *See Comstock*, 560 U.S. at 143 ("Congress' power to act as a responsible federal custodian" and potentially seek civil commitment "rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority.").

For people like Mr. Welsh, then, who have committed no federal crime yet end up erroneously detained by the Federal Government, the effects are both obvious and direct: If constitutional dictates are properly observed, such individuals cannot be subject to continued federal custody. Mr. Welsh was never lawfully charged with or convicted of a federal crime—under settled law today—and so there is no legitimate basis for the Federal Government to seek his civil commitment.

By allowing these constitutional guardrails to fall, in the manner the Fourth Circuit permitted, the Federal Government can now reach and involuntarily detain anyone who has the double misfortune of coming into federal custody—lawfully or not—and then being labeled a sexually dangerous person. That is not how this works. *See generally* Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349, 1372–73 (2001) ("The Federalists were chary about writing particular substantive values into the Constitution; instead, they sought to distribute power to different actors, creating a constructive tension from which—they hoped—liberty would emerge."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544 (1954) ("National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.").

3. SORNA does not upend this traditional arrangement. Congress enacted SORNA as part of the Walsh Act in 2006 in an unprecedented expansion of

the Federal Government's efforts to combat and deter sexually based offenses. *See generally* Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 746–756 (2016). Many of its expansionary aspects—including Section 4248's civil-commitment provisions—lie at (or arguably beyond) the outer edges of Congress's legislative authority. *See* Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 Geo. Wash. L. Rev. 993, 996 (2010) ("[S]ex offender registration and community notification laws * * * [address] an issue squarely within the historical police power authority of state governments, not the limited legislative aegis of Congress." (footnote omitted)).

Unsurprisingly then, the lower federal courts have struggled with how to assess SORNA in light of various constitutional principles, warranting this Court's attention on repeated occasions. *See, e.g.*, *Gundy* v. *United States*, 138 S. Ct. 1260 (2018) (certiorari granted to address whether SORNA's delegation of authority to the Attorney General violates the non-delegation doctrine); *Kebodeaux*, 570 U.S. 387 (whether Congress may retroactively require SORNA registration for persons previously convicted of federal offenses); *Comstock*, 560 U.S. 126 (whether Section 4248 civil commitments generally are necessary and proper for effecting powers vested in Congress); *see also United States* v. *Broncheau*, 645 F.3d 676, 687 (4th Cir. 2011) (Wynn, J., concurring) (what due-process limits apply to detention pending Section 4248 hearings). That the Federal Government has here claimed an unheralded civil-

commitment authority—in connection with a statute that *itself* represents a sweeping assertion of federal power—should give this Court pause twice over.

To the best of *amicus*'s knowledge, Mr. Welsh's Section 4248 commitment is the first time that the Federal Government in the modern era has ever asserted a continuing power to civilly detain, potentially indefinitely, a person for whom there was no lawful basis to federally charge, much less convict of a crime in the first place.[4] *See* Pet. App. 44a (noting the court was "unaware of another case" similar to Mr. Welsh's). That precedent is just that—precedent, for the next time this happens, and the time after that. And it will not be tested by any other court of appeals; only the Fourth Circuit hears these challenges. *See* Pet. 23. No doubt any perceived future threat of sexual violence is a serious concern. And no doubt ensuring the guarantees of liberty comes with certain trade-offs. "But the Constitution does not vest in Congress the authority to protect society from every bad act that might

[4] In its *Comstock* brief, the Solicitor General identified a few, narrow examples from the mid-19th and early 20th centuries of the Federal Government exercising "custody and treatment" over certain "categories of insane persons with whom the federal government had some special relationship" but who were not federal offenders—such as former military servicemen, or United States employees adjudged mentally infirm abroad. *See* U.S. Brief at 24–27, *Comstock*, 560 U.S. 126 (No. 08-1224). Those incidents have no bearing here. The constitutionality of those practices was never reviewed by this Court; virtually all of the federal statutes permitting for such forms of confinement have been "replaced," *id.* at 25; and even if there were an exception, Mr. Welsh does not have any comparable "special relationship" to the United States that could justify his indefinite civil confinement.

befall it." *Comstock*, 560 U.S. at 165 (Thomas, J., dissenting).

The divided panel opinion below purports to replace the constitutional division of authority between the Federal Government and the States with a freeform balancing test that weighs the liberty interests of individuals like Mr. Welsh against the public's general wellbeing. In other words, the Fourth Circuit would vest the Federal Government with a general police power that it lacks, in certain carefully curated cases (at least for now). No. The Constitution's Federalism provisions, and its enumerated powers for Congress under Article I, are not optional guidelines. Nor do they contain any sort of harmless-error exception. This Court should make clear that the Federal Government cannot be permitted to transgress its enumerated powers, full stop, regardless of the individual against whom that power would be exercised.

II. RELIEF UNDER RULE 60(b)(4) AND (5) IS NECESSARY.

Given that Mr. Welsh's civil-confinement order was premised on a constitutional violation—an assertion by the Federal Government of a nonexistent civil commitment authority—one would expect our justice system to afford Mr. Welsh some mechanism for relief. The system provides at least two such avenues: Relief from final judgment under both Rule 60(b)(4) and Rule 60(b)(5) of the Federal Rules of Civil Procedure. The Fourth Circuit's decision to the contrary is error of such magnitude that it warrants plenary review by this Court, or even summary reversal.

1. Under Rule 60(b)(4), a party can seek relief "from a final judgment" in instances where "the judgment is void." Fed. R. Civ. P. 60(b)(4). A judgment is "void," in turn, when it is based "on a certain type of jurisdictional error or on a violation of due process." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 271 (2010). That describes Mr. Welsh's situation exactly: The "custody of the Bureau of Prisons" provision in Section 4248(a) is a jurisdictional demand not satisfied here, because Mr. Welsh had not been convicted of a federal crime at the time the Federal Government sought his commitment (or ever). In other words, the Bureau of Prisons (BOP) *never* had lawful "custody" over Mr. Welsh, and the district court lacked jurisdiction to even preside over a commitment hearing. The resulting order is "void."

That Section 4248(a) imposes a jurisdictional condition follows from the text and structure of the Adam Walsh Act. "Only Congress may determine a lower federal court's subject-matter jurisdiction," *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004); accordingly, whether a statute imposes a jurisdictional requirement is a question of congressional intent. As this Court recently counseled, "the general approach to distinguish[ing] 'jurisdictional' conditions from claim-processing requirements or elements of a claim" involves discerning what Congress intended, making use of traditional tools of statutory construction. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161–162 (2010).

Here, Section 4248(a)'s plain language, coupled with its role within the Walsh Act, make "clear[ ]" that Congress' goal was for Section 4248(a) to pro-

vide "a threshold limitation on [the] statute's scope [that] shall count as jurisdictional." *Id.* at 161 (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515–516 (2006)). First, Section 4248(a) itself speaks in jurisdictional language—it uses the word "custody" twice, which is a concept that, like jurisdiction, connotes the power to exercise control over a subject. Second, Section 4248(a)'s purpose within the Walsh Act is to set an outer limit on who *can* be ordered civilly committed by a federal court, if other individualized factors are met. The Section describes three such categories of people: (1) individuals "in the custody of the Bureau of Prisons"; (2) individuals who have "been committed to the custody of the Attorney General pursuant to [18 U.S.C. §] 4241(d)"; or (3) individuals "against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a). For qualifying persons, the statute goes on to say, *if* the Attorney General certifies the person as sexually dangerous, and *if* "the court finds by clear and convincing evidence" that the person is sexually dangerous after an individualized hearing, *then* "the court shall commit the person." *See id.* § 4248(b)–(d). Section 4248(a) therefore plays a gatekeeping function: It "delineat[es] the classes of cases * * * and the *persons* * * * falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455 (emphasis added). That is a quintessentially "'jurisdictional'" function. *Id.*

Section 4248(a) also appears in a separate part of the Walsh Act from the provisions setting forth the substantive elements of being a "sexually dangerous person." *Compare* 18 U.S.C. § 4248(a) (describing the

individuals for whom federal civil commitment orders can be sought), *with id.* § 4247(a)(5)–(6) (defining someone as a "sexually dangerous person" if he "has engaged or attempted to engage in sexually violent conduct or child molestation and who * * * 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"). This Court has twice held that where a statute sets forth substantive elements in one place and jurisdictional-sounding requirements in another, that distinction is meaningful. *See Reed Elsevier*, 559 U.S. at 164 (concluding that the Copyright Act's registration requirement was a claim-processing rule in part because it was "located in a provision 'separate' from those" concerning subject-matter jurisdiction); *Arbaugh*, 546 U.S. at 515 (concluding that Title VII's 15-employee provision was an element of a claim rather than a jurisdictional condition in part because it "appears in a separate provision" from jurisdictional specifications).

Moreover, reading Section 4248(a) *not* to impose a jurisdictional prerequisite to a federal court's authority to adjudicate federal civil-commitment motions would create grave constitutional concerns. Non-jurisdictional rules can be "forfeited or waived"; a party's failure to satisfy them does not necessarily deprive the court of "power to hear a case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). In *Arbaugh*, for instance, the defendant's "failure to speak to" Title VII's "covered employer" requirement "prior to the conclusion of the trial" resulted in waiver of the issue, in turn "preclud[ing] vacation of the

$40,000 judgment" against him. 546 U.S. at 510–511. If Section 4248(a)'s "custody of the Bureau of Prisons" provision were of the same type, it would mean that the Federal Government could freely obtain civil-commitment orders where it actually *lacked* lawful "custody" in the first place, if the defense was waived, or raised too late. This case proves the point. The result would be that the Federal Government could act beyond the limits recognized in *Comstock*, and secure civil commitment against people over whom it definitively lacks any custodial authority. *But see* 560 U.S. at 131 (the federal civil-commitment power derives from the federal "power to punish"). This Court should avoid reading Section 4248(a) to allow for such a result. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (unconstitutional readings of statutes are disfavored).

The Fourth Circuit's decision denying Rule 60(b)(4) relief has another problematic—and indeed dangerous—element. The court held that even if Section 4248(a) is jurisdictional, its requirements were amply satisfied because everyone *believed* BOP custody over Mr. Welsh to be proper at the time. In other words, by the court's logic, as long as everyone was acting in good faith *in the past*, indefinite civil commitment *now* is permissible. It makes no difference (by the Fourth Circuit's account) that today, all parties concede that Mr. Welsh was not convicted of a federal crime and that the BOP's custody over him was never actually lawful. *See* Pet. App. 8a.

That extraordinary holding defies not only the Federalism principles discussed above, it also defies basic notions of liberty and due process as well as fundamental tenets about federal-court jurisdiction.

Again, the Fourth Circuit's approach would basically jettison the limits on the federal civil-commitment power recognized in *Comstock*. From a liberty perspective, it would mean that people whom the Federal Government had no business detaining could nonetheless remain confined indefinitely, because a mistake of law or of fact can give way to perpetual incarceration. Under the Fourth Circuit's rationale, a person wrongfully convicted of a federal crime, sentenced, and exonerated years later could be subject to indefinite civil commitment under the Walsh Act—as long as the BOP was acting in good faith when it exercised "custody" in the past. Indeed, arguably *any* individual transferred to BOP for some permissible period of time could now be a candidate for perpetual civil confinement—including a person temporarily taken into custody on suspicion that he is undocumented but who turns out to be a citizen. *See United States* v. *Hernandez-Arenado*, 571 F.3d 662 (7th Cir. 2009) (government sought Walsh Act confinement for an Immigration and Customs Enforcement detainee housed in a BOP facility). From a federal-court-jurisdiction perspective, the Fourth Circuit's approach defies the established rule that because jurisdictional limits are "a restriction on federal power," the "consent"—or beliefs—"of the parties is irrelevant." *Ins. Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This Court should not sanction these consequences, which are both unconstitutional and unconscionable. It should grant certiorari (or summarily reverse) to make clear that Section 4248(a) imposes a jurisdictional prerequisite, one satisfied only when the BOP exerts custody on the basis of an actual federal criminal conviction or charge. Once you

sever the connection between the federal civil-commitment power and an actual federal crime, you open Pandora's Box to any and all of the above outcomes—and beyond.

2. For related reasons, Mr. Welsh is independently entitled to relief under Rule 60(b)(5). That rule provides for relief where the challenged order "is based on an earlier judgment that has been reversed or vacated," or where "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Both alternative prongs are satisfied in circumstances like Mr. Welsh's. The judgment committing him was "necessarily" based on his now "vacated" SORNA conviction, because "'the BOP would not have had legal custody' over [Mr.] Welsh at the time of the civil commitment hearing" in the absence of that conviction. Pet. App. 16a (citing the record). Likewise, the "equitable" balance under Rule 60(b)(5) is amply satisfied, because the vacatur of Mr. Welsh's underlying conviction was "a significant change * * * in law"—so significant, in fact, that it deprived his commitment order of any jurisdictional or constitutional foundation. *Rufo* v. *Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992). In *Agostini* v. *Felton*, this Court observed that "[a] court errs when it refuses to modify an injunction," where "'significant changes in law or facts'" mean "'what it has been doing has been turned * * * into an instrument of wrong.'" 521 U.S. 203, 215 (1997) (quoting *Sys. Fed. No. 91, Ry. Emps. Dep't* v. *Wright*, 364 U.S. 642, 647 (1961)). There could be no better application of that observation than to this case. As Judge Thacker put it, "detaining * * * a citizen who never should have been in federal custody * * * is not only inequitable,

it is offensive to the most basic tenets of justice." Pet. App. 21a.

III. STATES SHOULD PLAY THE PRIMARY ROLE IN CIVIL-COMMITMENT DECISIONS.

"The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one." *Bond* v. *United States*, 564 U.S. 211, 220–221 (2011) (internal quotation marks omitted). "The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.* at 221. State sovereignty antedates the Constitution; the expansive residual power of the several States is part of the bargain they struck on entering the Union and ceding certain limited, defined authority to the Federal Government. *E.g.*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 72 (1996).

These principles are also true when it comes to civil commitment, including of individuals with potentially dangerous sexual propensities. In the Walsh Act itself, Congress recognized that the States play an active role in this space. A key provision "properly accounts for state interests" by requiring the Attorney General to "inform the State in which the federal prisoner 'is domiciled or was tried' that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual." *Comstock*, 560 U.S. at 143–144 (citing 18 U.S.C. § 4248(d)). It further requires that the prisoner must be immediately released from federal custody when

the State decides to "assume [such] responsibility." *Id.* at 144–145 (quoting 18 U.S.C. § 4248(d)).

But when, as here, a prisoner does not fall within the Government's lawful custody, these already fragile federalism safeguards disappear. The States must take—and long have taken—primary responsibility for the difficult and delicate task of constructing civil-commitment regimes for sex offenders. *Jackson*, 406 U.S. at 733–735 & nn.10-13 (recognizing and discussing different States' approaches to civil commitment); *see also Greenwood*, 350 U.S. at 375. After all, as discussed above, "[t]he power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people." *Kebodeaux*, 570 U.S. at 413 (Thomas, J., dissenting); *accord Carr* v. *United States*, 560 U.S. 438, 452 (2010) ("[I]t is notable that the federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement.").

The States have shown that they are up to this challenge. Individual States may choose whether and how to craft their own civil-commitment schemes for sexually dangerous persons.[5] To date,

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[5] To be clear, *amicus* takes no position as to whether the majority of jurisdictions that do not use civil commitment to involuntarily detain potentially future sex offenders reflects a preferable policy judgment. Nor does *amicus* take a position as to the propriety of any particular civil-commitment scheme adopted by the minority of jurisdictions that do. *Amicus*'s point is that the States are the sole Sovereigns in our constitutional hierarchy that may have the power to civilly commit a person whom the Federal Government can neither lawfully charge nor convict.

twenty States and the District of Columbia have done so, adopting a range of approaches. *See* Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 Okla. L. Rev. 619, 621 & n.7 (2015). A recent study shows that these States have civilly committed approximately 5,000 individuals. *Id.* at 653. Other States, however, do not use their civil-commitment authority in this way, sometimes pointing to the high costs of civil-detainment facilities, questions surrounding their efficacy, and statistical evidence showing sharp declines in recidivism rates with age. *Id.* at 655–658 & n.241.

These different solutions show federalism at work. "The use of civil commitment for sexual offenders has generated considerable debate in legal and clinical professions, and it continues to be debated even among professionals who work with and conduct research on sexual offenders." Bd. of Directors, *Civil Commitment of Sexually Violent Predators*, Ass'n for the Treatment of Sexual Abusers (Aug. 17, 2010).[6] Each State must weigh the empirical evidence and competing policy priorities to develop the best approach. And ultimately, it is for the People, acting through their elected representatives, to debate this issue in the democratic process.

The Fourth Circuit's decision, however, allows the Federal Government to supplant that debate in the absence of any valid federal interest, depriving individual States, and the Nation as a whole, of the benefits of horizontal federalism. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice*

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[6] *Available at* https://bit.ly/2RALmyl.

Interconnectedness, 154 U. Pa. L. Rev. 257, 265 (2005) ("[F]aced with an increasingly mobile citizenry, states have even more reason to be mindful of how their fellow sovereigns handle criminal offenders, despite the challenges often presented and the competitive impulses frequently marking interstate relations." (footnotes omitted)). And its decision also disrupts the opportunity for States to cooperate with one another through voluntary compacts, to ensure that individuals who commit certain crimes in one State, serve their time, and then move to another State, are subject to ongoing supervision (if the home State desires such) and potentially civil commitment if warranted. There are already frameworks for States to cooperate in this manner—such as the Interstate Compact on Adult Offender Supervision, to which all 50 States are parties today—and the States are amply capable of deepening or adjusting those arrangements.

The potential federalism implications here are especially pronounced because judicial review of Section 4248 orders is currently concentrated in a single federal appellate court. That outcome is not mandated by statute; it is a result of the Executive Branch's decision to process the federal civil commitment of *all* sexually dangerous persons through one federal correctional institution in North Carolina. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5394.01, Certification and Civil Commitment of Sexually Dangerous Persons 15 (2016).[7] Absent this Court's review, what may now seem like a tolerably minor encroachment on State

[7] *Available at* https://bit.ly/2qCIV2I.

authority could mark just the next step in the ever-expanding federalization of criminal and quasi-criminal law.

This Court often uses its certiorari power, in the absence of split authority, to review the decisions of courts that are alone responsible for specific areas of law. *See, e.g.*, *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018) (addressing authority of specialized military proceedings in the Court of Appeals for the Armed Forces); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) (review of patent appeals vested exclusively in the Federal Circuit); *Boumediene* v. *Bush*, 553 U.S. 723 (2008) (review of Combatant Status Review Tribunals vested exclusively with the D.C. Circuit); *Hinck* v. *United States*, 550 U.S. 501 (2007) (review of interest-abatement claims vested exclusively in the Tax Court); *Shaw* v. *Reno*, 509 U.S. 630 (1993) (review of injunctions under the Voting Rights Act vested exclusively in the District for the District of Columbia).

It should do so here.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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