PUBLIC VERSION—REDACTED

No. 19-____

IN THE

Supreme Court of the United States

OLIVER LEE WHITE,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Oliver White is incompetent. And the Federal Government now seeks to civilly commit him as a "sexually dangerous person" under the Adam Walsh Act for what would likely be the rest of his life. To obtain a commitment order, the Government must prove, among other things, that Mr. White "engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. § 4247(a)(5). Mr. White has never been convicted of any crime, so the Government would need to prove its case at a trial.

It is well-settled, though, that "the criminal trial of an incompetent person violates due process" because competency is the foundation for exercise of "those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (citations omitted). And it is equally well-settled that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards" in cases where the issue is whether a person committed a past act and the person's liberty is at stake. *In re Winship*, 397 U.S. 358, 365-366 (1970).

The question presented is:

Whether the Fifth Amendment's Due Process Clause forbids the civil-commitment trial of an incompetent person whose prior conduct is disputed.

PARTIES TO THE PROCEEDING

Oliver Lee White, petitioner on review, was the respondent-appellee below.

The United States of America, respondent on review, was the petitioner-appellant below.

RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. *White*, No. 19-6181 (4th Cir. June 18, 2019) (reported at 927 F.3d 257), *reh'g denied* (Aug. 16, 2019).

United States District Court for the Eastern District of North Carolina:

United States v. *White*, No. 5:17-HC-2162-D (E.D.N.C. Dec. 6, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Oliver Lee White respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion, Pet. App. 1a-18a, is reported at 927 F.3d 257. That court's opinion denying rehearing and rehearing en banc is not reported. Pet. App. 68a. The District Court's order granting Mr. White's motion for a competency hearing, Pet. App. 27a-37a, is reported at 340 F. Supp. 3d. 568, and that court's order denying the Government's motion for reconsideration, Pet. App. 38a-64a,

is reported at 348 F. Supp. 3d 571. The District Court's order dismissing the Government's Section 4248 certificate against Mr. White is unpublished but available at Pet. App. 65a-67a.

JURISDICTION

The District Court entered final judgment on December 6, 2018. Pet. App. 65a-67a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on June 18, 2019. Pet. App. 1a-18a. A timely petition for rehearing and rehearing en banc was denied on August 16, 2019. Pet. App. 68a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provisions are codified at 18 U.S.C. §§ 4241, 4246, 4247, and 4248, and are set forth fully in the Appendix. Pet. App. 69a-87a.

INTRODUCTION

Inherent in the Fifth Amendment's Due Process Clause are "those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf." *Cooper* v. *Oklahoma*, 517 U.S. 348, 354 (1996) (citations omitted). These fundamental rights do not evaporate in a civil, rather than criminal, proceeding if liberty is at stake and past conduct is at issue. *In re Winship*, 397 U.S. 358, 365 (1970). And competence is the bedrock for exercise of those rights. After all, if someone does not understand what is happening and cannot testify or assist his lawyer, those formalities provide no protection at all.

The Fourth Circuit abandoned these core due process principles and reversed the District Court's thorough and careful judgment, directing that court to conduct a civil-commitment hearing under the Adam Walsh Act against a presently incompetent person who has never been convicted of any crime and disputes the Government's allegation that he has ever committed acts of child molestation. It did so under the pretense that Mr. White would be adequately protected from a wrongful commitment by the very rights he is incompetent to exercise.

That decision cries out for this Court's review. *First*, the Fourth Circuit's decision is wrong and conflicts with this Court's precedents: The Court's review is needed to make plain that indefinite detention in a federal prison resulting from a fundamentally unfair trial is no more tolerable under a "civil" label than a "criminal" one. Where past conduct is at

issue, and liberty is at stake, competence is required. *Second*, the question presented has significant consequences for civil-commitment proceedings nationwide. As the Fourth Circuit hears nearly all civil-commitment appeals under the Adam Walsh Act, allowing its unprecedented decision to stand will settle this fundamental Fifth Amendment question once and for all. And state civil-commitment schemes may well look to that decision for guidance. *Third and finally*, this case presents an excellent vehicle to decide the question presented: Mr. White pressed his constitutional arguments at each stage of this case and both the District Court and Court of Appeals passed on them.

The Court should grant certiorari and reverse.

STATEMENT

A. Statutory Background

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 587, codified in relevant part at 18 U.S.C. §§ 4247-4248. One of the Adam Walsh Act's major innovations was Section 4248, which authorized the Federal Government to seek judicially ordered civil commitment of qualifying "sexually dangerous person[s]." Adam Walsh Act § 302(4), 120 Stat. 620. To be eligible for certification under Section 4248, a person must either be (1) in the legal custody of the Bureau of Prisons; (2) "committed to the custody of the Attorney General pursuant to section 4241(d)" because he is incompetent to stand trial; or (3) a person whose criminal charges have been dismissed "solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a).

If the Government properly certifies a person, a district court will hold a hearing at which the Government bears the burden to prove, by clear and convincing evidence, that the person is "sexually dangerous." *Id.* That "sexually dangerous" inquiry has three elements: *First*, has the person "engaged or attempted to engage in sexually violent conduct or child molestation" (the "prior-conduct" element)? *Second*, does he presently "suffer[] from a serious mental illness, abnormality, or disorder" (the "serious-illness" element)? *And third*, as a result of that serious mental illness, would he "have serious difficulty refraining from sexually violent conduct or child molestation if released" (the "volitional impairment" element)? 18 U.S.C. § 4247(a)(5), (a)(6); *see also United States* v. *Comstock,* 560 U.S. 126, 131 (2010).

At that hearing, a person "shall be represented by counsel," and if he cannot afford to retain adequate counsel, "counsel shall be appointed for him pursuant to section 3006A." 18 U.S.C. § 4247(d). The person against whom certification is sought "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." *Id.*

B. Procedural History

1. Mr. White's Intellectual Disability

Mr. White, also known as "Scooter," is a 31-year-old Native American man who is intellectually disabled. He has a full-scale IQ of 55 or 56. Pet. App. 133a. Mr. White was born prematurely in Crow Agency, Montana, and diagnosed with fetal alcohol syndrome. *Id.* at 125a. His mother abused alcohol and drugs

and was unable to care for him, so Mr. White was adopted when he was just five days old. *Id.* at 126a. In his adolescence, Mr. White suffered from physical and intellectual development delays, and he was enrolled in special-education classes. *Id.* Since his youth, he has received supplementary social security income, and he has never been gainfully employed. *Id.*

Assessments conducted in 2016 and 2018 confirmed the continuing nature of Mr. White's intellectual disability. [redacted]

Similarly, an evaluation in August 2018 found that Mr. White had limited attention, concentration, and memory. *Id.* at 127a. During that assessment, Mr. White struggled to choose between two answers when asked questions. *Id.* at 128a. And Mr. White displayed an inability to grasp the basics of his legal case: He did not understand the meaning of "innocent" and "guilty," the role of his defense attorney and the prosecutor, the basic definition of a crime, and whether or not he had a guardian ad litem, among other things. *Id.* at 128a-130a. A later evaluation, two months later, concluded that Mr. White suffers from a pervasive mental illness that renders him unable to understand the nature and consequences of the proceedings against him and to

assist properly in his defense. *Id.* at 131a-132a. The District Court credited that evaluation, explaining its findings in an oral ruling that spanned nearly thirty transcript pages. *Id.* at 116a-142a.

2. Prior Proceedings Against Mr. White

Mr. White has never been convicted of any crime, including sexually violent conduct or child molestation. He has, however, been so charged. In May 2009, the Federal Government charged Mr. White in the District of Montana with four counts of aggravated sexual abuse of a minor. *See id.* at 89a n.1. Those charges were dismissed without prejudice as part of a pretrial deferment agreement, which allowed him to remain under the care and supervision of his family. *See id.* at 89a n.1, 118a. In April 2012, the Government again charged Mr. White in the District of Montana, this time with four counts of abusive sexual contact with minors and two counts of attempted abusive sexual contact with minors in Indian country. *Id.* at 89a, 118a-119a. [redacted]

Mr. White, through his attorneys, requested a competency examination. Doctors examined Mr. White in May 2013 and concluded that he lacked a rational and factual understanding of the charges and proceedings brought against him and could not assist in his defense. *Id.* at 119a. Four months later, doctors at Federal Medical Center ("FMC") Butner evaluated Mr. White and concluded that his mental condition would not create a substantial risk of bodily injury to another person or serious damage to the property of another if he were released. *Id.* The

District of Montana dismissed the charges against Mr. White and released him to his family's care. *Id.*

Three years later, the Government charged Mr. White in the District of Montana with aggravated sexual abuse of a child and attempted sexual abusive contact with a child. *Id.* at 30a. The district court once again ordered Mr. White to be evaluated to determine whether he was competent to stand trial. *Id.* Once again, a medical evaluator concluded that he was not. *Id.* at 31a. In January 2017, the district court found Mr. White to be incompetent. *Id.* at 34a. Then in July 2017, Bureau of Prisons evaluators determined that he did not suffer from a mental disease or defect such that his release would create a substantial risk of bodily injury or serious damage to property. *Id.* at 31a. The District of Montana held a hearing on December 1, 2017, and agreed. *Id.* at 33a. That same day, the court dismissed the criminal charges against Mr. White without prejudice. *Id.*

3. The Government Tries To Commit Mr. White Under Section 4248

In August 2017, the Government filed a certificate against Mr. White under the Adam Walsh Act in the United States District Court for the Eastern District of North Carolina. *Id.* at 31a. In that certificate, the Government cited the then-pending—but ultimately dismissed—charges against Mr. White as the basis for Section 4248's prior-conduct element. *Id.* The Government also pointed to allegations "that between 2007 through 2014, [Mr. White] engaged in several acts of abusive sexual contact/sexual assault/child molestation against several minors under the age of 12 years." *Id.* The certificate iden-

tified no convictions for sexually violent conduct or child molestation. *Id.* at 31a-32a.

Psychologists once again evaluated Mr. White's competency and again noted his intellectual disability, with two evaluators questioning his capacity to understand and meaningfully participate in civil-commitment proceedings. *Id.* at 32a-33a. Several months later, Mr. White's attorneys successfully moved for appointment of a guardian ad litem in light of his diminished capacity. *Id.* at 33a-34a.

In December 2017, Mr. White moved to dismiss the certificate against him or, in the alternative, to hold a competency hearing. *Id.* at 33a. [redacted] The magistrate judge to whom the motion was referred, without reaching Mr. White's constitutional claim, recommended that the motion be denied because "Section 4248 itself specifically allows certification of a person as a sexually dangerous person 'who [has] been committed to the custody of the Attorney General pursuant to section 4241(d).' " *Id.* at 23a (quoting 18 U.S.C. § 4248(a)).

The Honorable James C. Dever III of the Eastern District of North Carolina declined to accept the magistrate judge's memorandum and recommendation and, on September 11, 2018, ordered that a competency hearing be held. *Id.* at 35a-37a. The

Government moved for reconsideration, which the District Court denied. *Id.* at 38a-64a. In its denial of reconsideration, the District Court reasoned that, as a matter of constitutional avoidance and the court's supervisory authority, a threshold competency requirement applies to persons in federal custody who contest all three elements of Section 4248, including the prior-conduct element. *Id.* at 39a-49a. Absent such a requirement, the District Court held that proceeding against Mr. White without a competency determination, as the Government urged, would violate the Due Process Clause of the Fifth Amendment. *Id.* at 49a.

Crucial to the District Court's analysis were its determinations that Mr. White is incompetent, that he challenged all three elements of Section 4248, and that he "face[d] the prospect of indefinite commitment" if successfully certified. *Id.* at 47a-49a. The court reasoned that competency is constitutionally required in criminal proceedings, and that Mr. White's Section 4248 certification resembled a criminal proceeding because it involved a "massive curtailment of liberty" based on the determination of prior unlawful conduct. *Id.* at 45a (citation omitted). The District Court also concluded that competence was a constitutional prerequisite to the Government's attempts to commit Mr. White because Mr. White—unlike previous respondents in Section 4248 proceedings—factually contested the prior conduct of which he had been accused. *Id.* at 48a. Because Mr. White had never been convicted of nor proven to have committed a qualifying offense under the Adam Walsh Act, the Government would have to put on evidence of prior conduct. *Id.* at 48a-50a. But Mr. White's ability to challenge this evidence would be

severely curtailed because he lacked the capacity to understand the proceedings "or to participate rationally in his defense." *Id.* at 49a. Without the ability *ever* to understand his case or participate in his defense because of his incompetence, the District Court reasoned that Mr. White faced the risk of a lifetime in federal custody—a prospect that would run afoul of this Court's decision in *Jackson* v. *Indiana*, 406 U.S. 715 (1972), and related precedents. *Id.*

The District Court subsequently held a competency hearing, in November 2018, at which a psychologist and Mr. White's guardian ad litem testified to his lack of competence and inability to assist counsel in defending against allegations of past misconduct. *Id.* at 105a-108a, 135a-139a. In addition, Mr. White's guardian ad litem testified that he had "no personal knowledge" of the events that would be at issue in a trial of the prior-conduct element and could not "shed any light on historical facts or data" that might bear on that issue. *Id.* at 108a. At that hearing, the District Court observed that the case was the first time, in the 184 Section 4248 proceedings that had been brought in the Eastern District of North Carolina, in which the Government sought to proceed to a hearing against an incompetent person who contested all three elements of Section 4248 in the absence of a prior criminal conviction. *Id.* at 114a-115a. The court also asked:

> So just so I'm clear, if we changed the facts of this case and you had an individual who was like Petitioner Theon Jackson [of *Jackson* v. *Indiana*], a mentally defective deaf mute with a mental level of a preschool child who could not

> read, write, or otherwise communicate except through limited sign language, who had been charged but never convicted of two acts of attempted sexual violence, and it would be the Government of the United States' position that that person could be committed under the Adam Walsh Act?

Id. at 109a. The Government, eventually, answered "yes." *Id.* at 110a.

On December 6, 2018, the District Court announced its ruling, finding that Mr. White was not competent and holding, as a matter of statutory interpretation, that the Government's Section 4248 proceeding could not go forward. *Id.* at 139a. In the alternative, the court held that even if the Adam Walsh Act permitted the trial and commitment of an incompetent person in Mr. White's circumstances, that it would violate due process to conduct such a trial. *Id.* at 140a.

The Government appealed and, on June 18, 2019, the United States Court of Appeals for the Fourth Circuit reversed. *Id.* at 18a. Without addressing constitutional avoidance, the Fourth Circuit held that Section 4248 does not include a competency requirement. *Id.* at 10a. The Fourth Circuit also ruled that the Government could proceed against Mr. White under Section 4248 despite his incompetence, using the balancing test set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Recognizing the weightiness of Mr. White's liberty interest and that his "mental incompetency does indeed present him with a challenge in responding to the government's case," the Fourth Circuit nonetheless concluded that

the risk of an erroneous deprivation of his liberty was "substantially and adequately mitigated by the broad array of procedures required for a § 4248 commitment," including the right to counsel, the right to subpoena, confront, and cross-examine witnesses, and the clear-and-convincing standard of proof. Pet. App. 15a-16a.

Mr. White petitioned for rehearing or rehearing en banc; both were denied. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION BREAKS WITH THIS COURT'S DUE PROCESS PRECEDENTS THAT REQUIRE COMPETENCY IN CASES WHERE HISTORICAL CONDUCT IS DISPUTED AND LIBERTY IS AT STAKE

The Fourth Circuit directed the District Court to conduct a "trial" against an incompetent person where past conduct is disputed and liberty is at stake. That decision cannot be reconciled with the Fifth Amendment or with this Court's due process precedents.

It is axiomatic that forcing an incompetent defendant to stand trial violates due process because it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Cooper*, 517 U.S. at 367 (citation omitted). Competence is critical in adversarial proceedings because it dictates "(1) 'whether' the defendant has 'a rational as well as factual understanding of the proceedings against him' and (2) whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable

degree of rational understanding.' " *Indiana* v. *Edwards*, 554 U.S. 164, 170 (2008) (citation and emphasis omitted).

Moreover, competence is crucial where, as in this case, historical conduct is disputed. In such a case, "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf." *Cooper*, 517 U.S. at 354 (citation omitted). And these due process protections apply regardless whether proceedings are nominally criminal or civil. *See Winship*, 397 U.S. at 365-366 ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile [delinquency proceedings].").

The Fourth Circuit's holding runs contrary to those tenets. Moreover, it fails to reconcile this Court's prior precedents in civil-commitment cases and fails on its own reasoning. It cannot stand.

A. The Fourth Circuit's Decision Fails to Reconcile This Court's Precedents in *Addington* and *Winship*

The Fourth Circuit's decision does not square with this Court's prior precedents regarding due process in civil cases generally and in civil-commitment cases specifically.

This Court has acknowledged that civil commitment involves a "massive curtailment of liberty, * * * and in consequence requires due process protection." *Vitek* v. *Jones*, 445 U.S. 480, 491-492 (1980) (internal quotation marks and citations omitted); *see also*

Addington v. *Texas*, 441 U.S. 418, 425, 428 (1979). And Congress recognized that civil-commitment proceedings under the Adam Walsh Act thus require significant procedural protections, comparable to those provided in criminal cases: Under 18 U.S.C. § 4247(d), an Adam Walsh Act respondent has the right to counsel (and counsel will be appointed if he is financially unable to obtain adequate counsel), and he must also "be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. § 4247(d).

The question then, as always, is what process is due. This Court's decisions in *Winship* and *Addington* provide the answer.

Although juvenile delinquency proceedings are nominally civil and not criminal, this Court explained in *Winship* that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." 397 U.S. at 365-366. And it held that due process required application of the "beyond a reasonable doubt" standard of proof in juvenile delinquency proceedings because, as in a criminal prosecution, "[t]he accused * * * has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id.* at 363. This high standard reflects our Nation's insistence on taking liberty only from those proven culpable: "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Id.* at 363-364.

Then in *Addington*, this Court considered the application of *Winship*'s due process principles to a Texas civil-commitment scheme that required proof that the respondent (1) "is mentally ill," (2) "is mentally incompetent," and (3) "requires hospitalization in a mental hospital for his own welfare and protection or the protection of others." 441 U.S. at 420. That scheme had no prior-conduct element, however, critically differentiating it from *Winship*. Because "the initial inquiry * * * is very different from the central issue in either a delinquency proceeding or a criminal proceeding," the Court declined to apply the "beyond a reasonable doubt" standard. *Id.* at 429. Unlike criminal or delinquency proceedings, a Texas jury was not required under the statute to determine "a straightforward factual question—did the accused commit the act alleged?" *Id.* Instead, it was tasked with evaluating "the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* at 429 (emphasis omitted).

Although this case addresses the impact of incompetence rather than the applicable standard of proof, the reasoning of *Winship* and *Addington* is nonetheless instructive. The Adam Walsh Act, like juvenile delinquency proceedings, *does* require proof of prior conduct. And as to that element, the question is exactly the same as it was in *Winship*: "did the accused commit the act alleged?" What is more, the likelihood of a wrongful commitment is compounded in Mr. White's case, where the burden of proof is less burdensome than in criminal cases *and* the respondent is fundamentally incapable of understanding the proceedings or assisting his counsel.

Taken together, *Winship* and *Addington* recognize that more process is due when there is an adjudication of historical facts at issue that could lead to a loss of liberty. That is precisely what is at stake for Mr. White, whose commitment under the Adam Walsh Act turns, in large part, on whether he did or did not commit the acts of child molestation of which he has been accused. Not only is that question determinative of the first, prior-conduct element, it also establishes the relevant facts upon which the second and third elements—namely, whether Mr. White suffers from a serious mental disorder and is sexually dangerous as a result—must depend. Thus, more process—particularly the protection of competence to stand trial—must attach in Mr. White's case. The Fourth Circuit's holding, subjecting an incompetent person to such a trial, does not square with this Court's precedents.

B. The Fourth Circuit's Decision Assumes An Incompetent Person Will Be Protected By The Very Rights He Cannot Exercise Because of His Incompetence

The Fourth Circuit's decision is dangerously wrong for another reason: The panel reached the absurd result that that an incompetent person challenging Section 4248's prior-conduct element is adequately protected against an erroneous commitment by the very rights he is incompetent to exercise.

The Court of Appeals correctly began with the familiar framework of *Mathews* v. *Eldridge*. Under the *Mathews* test, the first factor considered is "the private interest that will be affected." 424 U.S. at 335. Next is the "risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards." *Id.* Finally, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

The Fourth Circuit rightly described Mr. White's interest as "extraordinarily weighty." Pet. App. 14a. But it was wrong in its analysis of the two remaining factors.

As to the second factor, the risk of erroneous deprivation here is substantial. Section 4248's prior-conduct element requires the Government to prove, by clear and convincing evidence, that a respondent has engaged in or attempted to engage in sexually violent conduct or child molestation. Without an underlying conviction, the Government must present evidence to meet its burden. And a respondent may then put on evidence or argument of his own to rebut the Government's. Recognizing as much, and to ensure a meaningful adversarial process, the Adam Walsh Act provides that a respondent is entitled to counsel, and that he will have the "opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. § 4247(d). But Mr. White, unlike all previous persons the Government has sought to take to a commitment trial, cannot do any of those things because of his incompetence. He cannot answer basic questions of historical fact, and he has no understanding of how the legal system works. He cannot suggest potentially fruitful lines of investigation or cross-examination. And he cannot testify. These problems

cannot be solved by a guardian ad litem, who can neither provide factual information to the court or to Mr. White's attorneys nor access Mr. White's memories.

The Fourth Circuit turned a blind eye to this fundamental problem, calling it merely "a challenge." Pet. App. 15a. It remarkably concluded that it was "difficult to conceive of circumstances" where Mr. White would be wrongfully committed under this one-sided process. *Id.* at 17a. That was so, in its view, because Mr. White retained the right to counsel, the right to subpoena, confront, and cross-examine witnesses, and the Government would need to prove each element by clear and convincing evidence.

But the Fourth Circuit's recitation of ordinarily availing safeguards ignores a crucial issue: Competence is a prerequisite to exercise any of these rights and necessary to give content to their protection. *See Cooper*, 517 U.S. at 354. In short, without competence, the procedural safeguards of a hearing are powerless to protect Mr. White.

The Fourth Circuit paid no mind to this Court's admonition in *Cooper* that competence is fundamental and included *no* analysis of how these procedural safeguards would be enough to mitigate the erroneous deprivation that Mr. White specifically faces. While "substitute procedural safeguards" can satisfy the second *Mathews* factor in appropriate circumstances, safeguards must still ensure "fundamental fairness" and "significantly reduce the risk of an erroneous deprivation of liberty." *Turner* v. *Rogers*, 564 U.S. 431, 447 (2011); *see id.* at 449 (suggesting safeguards under due process may be heightened "in

an unusually complex case"). Those safeguards all assume a baseline level of competence. When, as here, the relevant prior conduct is disputed, they are not enough, for several reasons.

Mr. White's lack of competence bears on his ability—or rather inability—to avail himself of these protections. Mr. White's attorneys must rely on him to provide his account of events and explain any alibis or other potential defenses. [redacted] The appointment of a guardian ad litem cannot cure this problem, as his guardian cannot step into Mr. White's shoes to provide historical information. *Id.* at 108a.

When a respondent is incompetent and cannot aid in his defense, as here, the result is a lopsided hearing without effective adversarial testing of historical fact. Simply put, Mr. White cannot defend against the Government's accusations on the facts, no matter how many lawyers or guardians ad litem he is appointed.

That the Government has to prove *also* the serious- illness and volitional-impairment elements is no answer either. The Government's burden to prove allegations of past conduct is neither a foregone conclusion nor a technicality, *see, e.g.*, *United States* v. *Revland*, No. 5:06-HC-02212, 2011 WL 6749814, at *4 (E.D.N.C. Dec. 23, 2011) (concluding that the Government had failed to prove the prior-conduct element by clear and convincing evidence when relying on disputed, inconsistent, and years-old

accusations and unreliable self-reported treatment information). And the reliability of experts' opinions about the existence or non-existence of a serious mental illness or a volitional impairment is rooted entirely in their correct understanding of the underlying facts; where those facts are disputed in a lopsided proceeding, the constitutionality of the whole enterprise crumbles.

The availability of post-commitment "correction" mechanisms under Section 4248 cited by the Fourth Circuit is similarly unavailing to prevent an erroneous deprivation of Mr. White's liberty. These *ex post* measures are wholly inadequate to prevent the *ex ante* deprivation of Mr. White's most fundamental liberty interest in freedom from government custody. Moreover, for someone like Mr. White, his lifelong incompetence renders the possibility of moving to discharge his commitment and proving that he is no longer dangerous a nullity; with no chance of gaining or re-gaining competence, he will never be able to complete the treatment program at FMC Butner or meaningfully petition for his release. In fact, Mr. White's incompetence creates the risk that he will be committed indefinitely—a prospect that would be in direct contravention of this Court's admonition that civil-commitment statutes would not "survive constitutional scrutiny if interpreted to authorize indefinite commitment." *Jackson*, 406 U.S. at 733; *see also Foucha* v. *Louisiana*, 504 U.S. 71, 83 (1992) (rejecting "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others").

Finally, as to the third *Mathews* factor—the Government's interest—the Fourth Circuit took that

interest as given because "the government has an 'important and substantial interest in delivering mental health care to sexually dangerous persons who are in federal custody and [in] protecting the public from such individuals.' " Pet. App. 15a (quoting *id.* at 61a and citing *Addington*, 441 U.S. at 426). But this conclusion presupposes that Mr. White *is* sexually dangerous when the underlying allegations have never been resolved by a factfinder, cannot fairly be resolved by a factfinder now, and are very much a live issue today.

Moreover, while the Government does indeed have a substantial interest in committing actually "sexually dangerous" individuals, it has other means outside of Section 4248 proceedings to do so in appropriate cases. Apart from civil commitment under 18 U.S.C. § 4246, which is ordinarily available for those in federal custody who are presently dangerous to others, analogous state-law commitment mechanisms may also be employed. *See, e.g.*, Mont. Code Ann. § 53-20-121, *et seq.* (providing for the "involuntary treatment" of people who are "seriously developmentally disabled"); *id.* § 53-21-121, *et seq.* (providing for the commitment of people "suffering from a mental disorder"). Indeed, when federal authority is in doubt, the States, which retain their general police powers, are best situated to tailor an appropriate civil-commitment mechanism. *See Bond* v. *United States*, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

II. THE QUESTION PRESENTED HAS SIGNIFICANT CONSEQUENCES FOR CIVIL-COMMITMENT PROCEEDINGS NATIONWIDE.

When the Federal Government "wishes to subject a citizen to indefinite civil commitment," it is exercising an awesome power to deprive a person's most basic liberty interest. *See Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1231 (2018) (Gorsuch, J., concurring). While that power is imbued with "civil attributes," its "practical effect," as here, "may be to impose confinement for life." *Kansas* v. *Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring).

The Fourth Circuit has now held—for the first time—that the Government has the power to civilly commit an incompetent person it views as "sexually dangerous" who has merely been *accused* of prior misconduct, when that person can neither understand the proceedings against him nor assist his counsel in his defense. That ruling is especially important because the Fourth Circuit hears nearly all Adam Walsh Act cases: The Bureau of Prisons has designated Federal Correctional Institution Butner as the institution for all federal detainees, like Mr. White, who are facing commitment under Section 4248. *See* Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5394.01, Certification and Civil Commitment of Sexually Dangerous Persons 15 (2016).[1] *See, e.g.*, Pet. App. 48a n.4 ("The United States District Court for the Eastern District of North Carolina has resolved 184 Adam Walsh Act

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

Cases."); Petition for Writ of Certiorari at 16 n.10, *United States* v. *Comstock*, 557 U.S. 918 (2009) (No. 08-1224), 2009 WL 907847 ("The BOP has certified 95 persons under Section 4248, and proceedings remain pending against 88 of them. Of those 88 proceedings, 77 * * * were certified in the Eastern District of North Carolina.").[2] The decision below will, as a practical matter, bind all persons like Mr. White facing future Section 4248 proceedings.

Indeed, the Government now appears poised to take advantage of the Fourth Circuit's expansion of Section 4248, allowing for the indefinite commitment of those whom the Government cannot constitutionally imprison for the same underlying conduct. The lower burden of proof in civil-commitment proceedings creates an obvious incentive to forgo criminal proceedings in these circumstances in favor of securing indefinite federal custody over those accused under Section 4248.

In a potential harbinger of this expanded authority, the Government recently filed a Section 4248 certificate against another incompetent federal detainee, Sean Michael Wayda. *See* Certification of a Sexually Dangerous Person and Petition, *United States* v. *Wayda*, No. 5:19-HC-2172-BO (E.D.N.C. June 11, 2019), Dkt. 1 (Section 4248 certificate dismissed on other grounds).

The effects of the Fourth Circuit's holding reverberate further still: Persons facing analogous State commitment determinations will feel this lowered due-process threshold too. To date, twenty States

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[2] *Available at* https://bit.ly/33QFc39.

and the District of Columbia have enacted some form of civil commitment for sex offenders, *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), and there are approximately 5,400 people civilly committed as sex offenders nationwide. *See* Maurice Chammah, *What To Do With Violent Sex Offenders*, The Marshall Project (2017)[3]; *see also* Monica Davey, *States Struggle With What To Do With Sex Offenders After Prison*, N.Y. Times (Oct. 29, 2015) (reporting that that there have been "more than 700 sex offenders" committed in Minnesota alone in the past two decades, but "not one of" them "has actually gone home").[4] Given the recent reemergence of commitment statutes for sex offenders nationwide, these or other jurisdictions may rely on the Fourth Circuit's opinion to similarly expand the scope of their own statutes, either through legislative change or judicial gloss. Thus, if that decision is permitted to stand, incompetent persons in jurisdictions nationwide could face the prospect of "trials" for past conduct in which they cannot meaningfully participate or assist in their own defense.

This Court's review is warranted to ensure that due process is meticulously observed for all persons, especially those whom society is least inclined to protect.

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[3] *Available at* https://bit.ly/2Bvg8mp.

[4] *Available at* https://nyti.ms/2P6xpdA.

III. THIS CASE IS AN EXCELLENT VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is an excellent vehicle to decide the question presented, for several reasons.

First, the due process challenge raised in this petition was pressed and passed upon by the District Court and by the Fourth Circuit. *See* Pet. App. 19a-26a, 65a-67a, 1a-18a; *see also id.* at 68a.

Second, resolution of the question presented will be outcome-determinative. All agree that Mr. White is incompetent, and that there is no realistic possibility that he will ever gain competency. All further agree that initiating criminal process against Mr. White, who is thus unable to meaningfully assist in his own defense, would violate his Fifth Amendment rights. The only dispute is whether the Government can nonetheless seek to civilly commit Mr. White by proving prior misconduct as a factual matter in an adversarial setting with a lower burden of proof. Absent this Court's review, that reinstated proceeding will move forward, exposing Mr. White to a lifetime of commitment premised on accusations of prior misconduct that he cannot—and will never be able to—meaningfully contest.

And third, no further percolation is likely because the effective centralization of Section 4248 proceedings in the Eastern District of North Carolina will insulate the Fourth Circuit's holding—and, thus, the Government's newly minted authority to civilly commit incompetent persons accused but never convicted of prior sex offenses—from future review.

This Court routinely grants review of legal questions effectively left to a single lower court's judgment when a direct split of authority is unlikely to emerge. *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 to resolve a critical question, cleanly presented, about the scope of the due process guaranteed by the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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