No. 21-_____

IN THE

Supreme Court of the United States

K.E.K.,

Petitioner,

v.

WAUPACA COUNTY,

Respondent.

On Petition for a Writ of Certiorari
to the Court Of Appeals of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute authorizing the government to extend an involuntary civil commitment without evidence of any recent acts indicating that the patient continues to be dangerous violates the 14th Amendment Due Process Clause on its face.

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PETITION FOR WRIT OF CERTIORARI

Petitioner K.E.K. respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Supreme Court.

OPINIONS BELOW

The Wisconsin Supreme Court's opinion is published at 2021 WI 9, 395 Wis. 2d 460, 954 N.W.2d 366. (App. 1a). The Wisconsin Court of Appeals's decision is unpublished and noted at 2019 WI App 58, 389 Wis. 2d 104, 936 N.W.2d 405. (App.41a).

JURISDICTION

The Wisconsin Supreme Court issued its decision on February 9, 2021. On March 19, 2020, this Court extended the deadline for any petition for writ of certiorari due after that date to 150 days from the date of the lower court judgment. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 51.20(1)(am), Wis. Stats., provides in pertinent part:

> If the individual has been the subject of inpatient treatment for mental illness, developmental disability, or drug dependency immediately prior

> to the commencement of the proceedings as a result of a voluntary admission, or commitment or protective placement order by a court under this section . . . the requirements of a recent overt act, attempt or threat to act under par. (a)2.a. or b., pattern of recent acts or omissions under par. (a)2.c. or e., or recent behavior under par. (a)2.d may be satisfied by showing a substantial likelihood, based on the individual's treatment record, that the individual would be a proper subject of commitment if treatment were withdrawn.

OVERVIEW

In a trilogy of cases this Court established that the 14th Amendment prohibits the government from committing a person for mental illness alone. She must also be dangerous. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). And even if her initial commitment complies with the 14th Amendment, it cannot continue absent findings of "current mental illness and dangerousness." *Foucha v. Louisiana*, 504 U.S. 71, 78 (1992); *see also Jones v. United States*, 463 U.S. 354, 368 (1983).

This case does not concern the definition of "mental illness" or "dangerousness." Those standards may vary from state to state. *Addington v. Texas*, 441 U.S. 418, 431 (1979). The issue is whether the government may continue an involuntary civil commitment without evidence of any recent conduct indicating dangerousness, however dangerousness is defined. There is broad disagreement among states and federal courts over this issue—especially in cases where the committed person has not been accused or convicted of a crime.

Some courts hold that to continue a commitment in compliance with the 14th Amendment the government must prove a recent overt act of dangerousness. Other

courts hold that the government must prove that if the person were released from commitment, she would, based on recent behavior (not necessarily an overt act), become dangerous in the near future. Wisconsin dispenses with recent acts altogether. It allows a commitment to continue based upon a prediction that the person "***might*** be dangerous ***if*** some ***future*** conditions are met." (App.35a-36a). (Emphasis in original).

A recent study reported that in the United States annual commitment rates per 1,000 persons with serious mental illness range from 0.23 (Hawaii) to 43.8 (Wisconsin). The average is 9.4. Wisconsin's rate is 190 times Hawaii's rate and almost 5 times the national average.[1] One explanation for this startling discrepancy might be that Wisconsin has a vastly larger percentage of residents who are both mentally ill and dangerous. Another possibility is that Wisconsin's definition of "***current*** dangerousness" is so lax that it falls below the constitutional minimum.

A civil commitment results in a "massive curtailment of liberty" and government "intrusions on personal security." *Vitek v. Jones*, 445 U.S. 480, 492 (1980)(quoted sources omitted). This Court has not addressed how, in compliance with the 14th Amendment, the government must prove ***current*** dangerousness. *See Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996)(observing that this Court has "not had the opportunity to consider the outer limits of a State's constitutional authority to civilly commit an unwilling individual"). Lower courts are split

[1] Substance Abuse and Mental Health Services Administration: *Civil Commitment and Mental Health Care Continuum: Historical Trends and Principles for Law and Practice* (2019) available at: https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf#page=12 (last visited 7/1/2021).

over the issue, resulting in disparate treatment of people with mental illness. This Court should resolve the dispute.

STATEMENT OF THE CASE

A. Circuit Court Proceedings.

In December 2017, the Waupaca County Circuit Court entered a 6-month Order of Commitment for the petitioner based on §51.20(1)(a)2.e. At the end of that commitment, the County petitioned to recommit her for 12 months pursuant to §51.20(1)(am), Wisconsin's alternate standard of dangerousness. The case was tried to the circuit court where 4 witnesses testified: (1) Dr. Marshall Bales, the court-appointed examiner, (2) Heather Van Kooy, the petitioner's social worker, (3) Colleen Barribeau, the manager of Evergreen, the group home where the petitioner was confined, and (4) the petitioner herself.

Dr. Bales testified that the petitioner suffered from schizophrenia, paranoid type, and he was quite impressed with her. (App.74a).

> Actually, plain and simple, she has not been re-hospitalized during the last number of months. She's had—she's been doing pretty well at this Evergreen [group home]. And other than she talks to herself a lot . . . she's been maintained on an outpatient basis, and she has not been dangerous over the last number of months, through any of the records I've seen. To her credit, and I was really impressed with that she has responded to treatment at least partially in, in my opinion. (App.75a).

Dr. Bales saw no evidence of suicidal or assaultive behavior in the petitioner's records. (App.87a-88a). He admitted that the petitioner was medication compliant during her initial commitment. He agreed that she could express a superficial understanding of the advantages and

disadvantages of accepting treatment and the alternatives. However, she did not accept that she was mentally ill, and in his opinion, she was not competent to make medication or treatment decisions. (App.77a-78a, 89a-90a).

Dr. Bales said that if the petitioner were released from commitment, her history suggests that she would not pursue voluntary treatment. (App.78a). She wanted to move to Illinois to be with her family, but he did not think she had any housing set up. (App.76a). He said: "I'm concerned that if she were off medications, which I believe she would stop them, and without stable housing, she would decompensate and become a proper subject for commitment, in my opinion, again." (*Id.*).

During her commitment, the petitioner was treated by Dr. Ambas, a psychiatrist who did not testify at the recommitment hearing. Dr. Bales admitted that he did not personally review Dr. Ambas's treatment records for the petitioner. He did not know that three months earlier Dr. Ambas had noted that her symptoms had stabilized, and she had improved to the point where "she may not need to have her commitment extended." (App.83a-84a).

Van Kooy testified that she had met with the petitioner a few times during her initial commitment, and the petitioner had been stable. She was not making threats of harm to herself or others. In March, her doctor changed her medication, and she began talking to herself more, but she did not engage in self harm or harm to others. (App.104a-107a, 109a-110a).

Van Kooy admitted that in the past, when the petitioner was not on medication, she took the initiative to seek help obtaining social security and government subsidized housing. She was able to get herself onto the Wisconsin Health Care system and to apply for Food Share. Van Kooy had never seen the petitioner malnourished, and

she had no medical concerns about her. (App.110a-112a). Van Kooy requested a recommitment because otherwise, based on her department's history of working with the petitioner, she would "no longer take her medications, become more unstable, and potentially a danger to herself as a result of that." (App.96a-97a).

Barribeau, Evergreen's manager, testified that she had never known the petitioner to be confrontational. (App.121a). From the time the petitioner was placed at Evergreen to the middle of March there were days when she did not display any symptoms at all. (App.124a). But even when the petitioner began talking to herself, she made no threats of harming herself. (App.125a).

Barribeau had never seen the petitioner "cheek" her medication. She always took it. In fact, 75% of the time the petitioner took her medication without being prompted to do so. (App.129a-130a).

The petitioner testified that she has a daughter, a mother and two sisters, and she wanted to live near them in Illinois. (App.136a-137a). She explained that she does better when she is closer to her family. (App.142a-143a). She has friends in Illinois and could stay with them until she got a job and a place of her own. (App.138a).

The petitioner explained why the doctor switched her medication. She said that the new medication helps her and that she would continue taking it:

> [T]he injectables . . . I think do affect me in a good way. The other drug, Your Honor, was making me wobble like this and shuffle my feet. It was physically affecting me, and that's why the doctor took it off of my chart to take.
>
> But I would stay on it, the injectables, once a month. And that's not really interfering with your

> life, you know, with work, and home and kids. (App.137a-138a).

Regarding the prior medication that caused side effects, she said: "I have no idea why anyone would want me to go back on such a horrible thing." (App.143a).

The petitioner assured the court: "I have no record of violence on any of—any state that I've lived in. So I—I'm not a danger to myself, I'm not a danger to others." (App.139a).

The circuit court recommitted the petitioner for 12 months. It held that under §51.20(1)(am) "the county doesn't have to show any recent acts of dangerousness." The county only had to show that if treatment were withdrawn the petitioner would be a proper subject of commitment, and the county met that burden. (App.155a-166a).

B. Appellate Court Proceedings.

The petitioner appealed and, among other things, argued that §51.20(1)(am) violated the 14th Amendment substantive due process on its face. The court of appeals rejected this claim. (App.41a).

The petitioner raised the same issue in the Wisconsin Supreme Court. Relying primarily on *O'Connor* and *Foucha*, she argued that in order to continue a commitment, the 14th Amendment required the County to prove that she was currently dangerous. But §51.20(1)(am) explicitly relieves counties of proving recent acts or omissions at the recommitment stage.

In a 5-2 decision, a majority of the Wisconsin Supreme Court held that §51.20(1)(am) does not violate the 14th Amendment. The Court did not address *O'Connor*. It held that a county need not use recent acts or omissions to prove current or demonstrable dangerousness. "[N]o such

requirement appears in *Foucha,* nor has the Court ever required a specific type of evidence to prove current dangerousness." (App.17a). In the field of mental health, the Court lets legislatures define dangerousness. "As such, we decline to create from whole-cloth, a constitutional requirement that a county use recent acts or omissions at a commitment extension proceeding." (App.17a).

The majority said that it was bound by its decision in *Portage County v. J.W.K.*, 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509. (App.16a). *J.W.K*, ¶24, held that:

> Each extension hearing requires proof of <u>current</u> dangerousness. It is not enough that the individual was at one point a proper subject for commitment. The County must prove that the individual <u>is</u> dangerous. The alternate avenue of <u>showing</u> dangerousness under paragraph (am) does not change the elements or quantum of proof. It merely acknowledges that ***an individual may still be dangerousness despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness*** outlined in §51.20(1)(a)2a-e. (Underlined emphasis in original; bold italics supplied).

The majority held that because it has declared that "§51.20(1)(am) requires proof of current dangerousness, it satisfies the Due Process Clause's requirements." (App.19a).

Justice Dallet filed a dissent joined by Justice Karofsky. The dissent would declare §51.20(1)(am) "facially unconstitutional because it eliminates the constitutionally required showing of current dangerousness in favor of 'alternative' evidence that shows only that a person was or might become dangerous." (App.28a, 35a). Section 51.20(1)(am) "redefines 'is

dangerous' to mean ***might*** be dangerous ***if*** some ***future*** conditions are met." (App.35a-36a). (Emphasis in original).

The majority reasoned that §51.20(1)(am) simply "give[s] counties a more realistic basis by which to prove dangerousness." (App.23a). The dissent replied: "[T]here is nothing unrealistic about a standard of proof that requires evidence of current dangerous behavior to show that someone is currently dangerous. If the government has no such evidence, perhaps the committed individual, is, in fact, not currently dangerous." (App.37a-38a).

The dissent acknowledged that simply keeping a person committed was more expedient than "release, overt act, recommitment." (App.38a). "The Constitution, however, yields to neither good intentions nor expediency." (App.39a).

REASONS FOR GRANTING THE WRIT

I. Applicable Law.

A. The constitutional standard.

For the ordinary citizen, involuntary commitment produces a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). It results in a loss of freedom of movement and stigma. *Vitek*, 445 U.S. at 492 (citing *Addington*, 441 U.S. at 425-426). And because it usually entails compelled treatment, it also results in a loss of the historic "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Vitek*, 445 U.S. at 492 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

The government has the *parens patriae* power to provide care to mentally ill people who are unable to care for themselves. It also has the police power to protect the community from mentally ill people who are dangerous.

Addington, 441 U.S. at 426. But these powers have limits. Because civil commitments result in significant liberty deprivations, they must comply with both the procedural and substantive components of the 14th Amendment Due Process Clause. *Id*; *Foucha*, 504 U.S. at 80.

O'Connor established that the 14th Amendment prevents the government from committing a person for mental illness alone. O'Connor was diagnosed with paranoid schizophrenia and held in a mental hospital for 15 years. He repeatedly demanded release claiming that he was neither mentally ill nor dangerous. A jury agreed that he was not dangerous. The Court held:

> ***A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement***. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, ***there still is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.***

O'Connor, 422 U.S. at 575. (Emphasis supplied).

The Court explained that even if the person's "***original*** confinement was founded on a constitutionally adequate basis . . . it could not constitutionally continue ***after that basis no longer existed***." *Id*. (Emphasis supplied)(citations omitted).

Jones concerned the government's authority to commit a person found not guilty by reason of insanity indefinitely. The Court stressed that the 14th Amendment requires the nature and duration of a commitment to bear some reasonable relation to the purpose for committing the person. *Jones*., 463 U.S. at 368 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Therefore, a

commitment cannot continue once the person is no longer dangerous.

> The purpose of a commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or ***is no longer dangerous***.

Jones, 463 U.S. at 368 (citing *O'Connor*, 575-576). (Emphasis supplied).

In *Foucha*, this Court applied *O'Connor* and *Jones* to strike down a Louisiana statute because it allowed the government to continue the commitment of an insanity acquittee, who was no longer mentally ill, until he could demonstrate that he was not dangerous to himself or others. The Court held that to continue confining the acquittee, the government had to initiate an adversarial commitment proceeding and prove by clear and convincing evidence that he was both mentally ill and "demonstrably dangerous" to the community. *Foucha*, 504 U.S. at 81. It held: "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of ***current*** mental illness and dangerousness." *Id*. at 79. (Emphasis supplied).

B. Wisconsin's commitment scheme.

Chapter 51 of the Wisconsin statutes governs civil commitment proceedings. In 1972, a three-judge panel of the Eastern District Court of Wisconsin declared that Chapter 51 violated due process in part because it allowed the government to commit a person simply because of mental illness. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D.

Wis. 1972).[2] The panel held that the government must also prove that the person is imminently dangerous "based upon a recent overt act, attempt or threat to do substantial harm to oneself or another." *Id.* at 1093-1094. *Lessard* launched a national trend toward the enactment of stricter commitment criteria. *Outagamie County v. Michael H.*, 2014 WI 127, ¶26, 359 Wis. 2d 272, 856 N.W.2d 603.

In response to *Lessard*, the Wisconsin legislature repealed and rewrote Chapter 51. For an initial civil commitment, the current version of the statute requires the government to prove that the person it seeks to commit is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous under one of five standards of dangerousness. Wis. Stat. §51.20(1)(a)1 and 2.a-e.

Each of the five standards requires the government to establish a substantial probability that a mentally ill person "is dangerous" based on some form of recent conduct.[3] Examples include recent threats or attempts at suicide, violence, or homicide; patterns of recent acts or omissions indicating impaired judgment; recent acts or omissions showing an inability to care for oneself; or an inability to make treatment or medication decisions combined with recent acts or omissions indicating that

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[2] The full cite is *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on procedural grounds;* 414 U.S. 473 (1974); *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on procedural grounds*, 421 U.S. 957 (1975); 413 F. Supp. 1318 (E.D. Wis. 1976). This Court did not overrule *Lessard*'s substantive holding. The original order was modified to add specificity and then reinstated. *Outagamie County v. Michael H.*, 2014 WI 127, ¶25 n.19, 359 Wis. 2d 272, 856 N.W.2d 603.

[3] *See* the full text of the statute at App.160a-161a.

without treatment she will deteriorate to the point of harming herself.

If the government proves the three required elements, the circuit court may initially commit the person for up to 6 months. Wis. Stat. §51.20(13)(g)(1).

To continue a person's commitment, the government must start a new commitment proceeding. It must again prove that the person is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. However, to establish dangerousness at the recommitment stage, the government may either proceed under one of the 5 standards for an initial commitment above or it may satisfy an "alternate" standard of dangerousness. Under the alternate standard, the government is relieved of proving any recent acts. Instead, it may satisfy the recent acts requirement by proving that the person will become dangerous in the future if treatment is withdrawn.

> ***The requirements of a recent overt act, attempt or threat to act under par. (a)(2)a. or b., pattern of recent acts or omissions under par. (a)2.c. or e., or recent behavior under par. (a)2. d.*** may be satisfied by showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject of commitment if treatment were withdrawn.

Wis. Stat. §51.20(1)(am). (Emphasis supplied). If the government satisfies the three requirements for a recommitment, the court may extend the person's commitment for up to 12 months. Wis. Stat. §51.20(13)(g)(1). There is no limit on the number of times the government may recommit a person.

II. State High Courts and Federal Courts of Appeals Are Divided on the Question Presented.

A. At least two jurisdictions hold that the 14th Amendment requires proof of a recent overt act to continue a commitment.

The Iowa Supreme Court interpreted a state statute which defined the term "serious mental impairment" as the condition of a person with mental illness who lacks the ability to make hospitalization or treatment decisions and who:

> a. Is likely to physically injure the person's self or others if allowed to remain at liberty without treatment; or b. Is likely to inflict serious emotional injury on members of the person's family or others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment.

B.A.A. v. Chief Medical Officer, Univ. of Iowa Hospitals, 421 N.W.2d 118, 119 (IA 1988).

The Chief Medical Officer argued that when a person seeks release from commitment, a less stringent standard should apply. The patient should still be considered "seriously mentally impaired" even though no longer dangerous, as long as he is still mentally ill and in need of treatment. *Id.* at 121. The Iowa Supreme Court rejected this argument based on *O'Connor*: "persons who have been committed because they were dangerous must be released once that condition passes." *Id* at 124. The court explained:

> It seems reasonable to us that if dangerousness is required as a condition for the original commitment to meet due process requirements, it

> should be required for continued involuntary hospitalization and treatment. We cannot accept "the theory that [the] state may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a trade-off." *Id*, at 124.

The Iowa Supreme Court later considered the release of a man 17 years after he was found not guilty by reason of insanity for a brutal murder. *State v. Huss*, 666 N.W.2d 152 (IA 2003). The acquittee argued that he was entitled to release because he was no longer dangerous under *Jones* and *Foucha*. *Id.* at 161. The State countered that because he had been confined in a controlled environment, the lack of recent acts was less relevant to the question of dangerousness. *Id.* at 162.

The Iowa Supreme Court held that "to meet constitutional muster in the civil commitment context, we have long held that the threat the patient poses to himself or others be evidenced by a ***'recent overt act, attempt or threat.***'" *Id.* at 161. (Emphasis supplied). The court held: "In the absence of a finding by the district court that Huss has committed a recent overt act of substantial harm to himself or another, continued commitment under Rule 2.22(8)(b) can simply not be justified." *Id* at 163.

In 1976, the U.S. District Court for Hawaii declared that parts of the state's commitment statute violated the 14th Amendment as applied by *O'Connor* and *Lessard*. *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976). Regarding a person's right to periodic redeterminations of the basis for confinement, the court held that "the basis for the need for continued hospitalization [or commitment] must be the same as required for an original confinement.

This clearly follows from the holding of *O'Connor v. Donaldson*." *Id*. at 1134.

The court retained jurisdiction while the Hawaii legislature amended the statute. Then it struck down the amended statute because the new dangerousness standard failed "to require the finding of a recent act, attempt or threat of imminent and substantial danger before commitment may occur." *Suzuki v. Alba*, 438 F. Supp. 1106, 1110 (D. Hawaii 1977)(citing *Humphrey* and *Lessard*). On appeal, the 9th Circuit affirmed. Citing *Lessard*, it held that it is unconstitutional to commit a person who does not pose an imminent danger as evidence by a recent overt act, attempt or threat. *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980). Under Hawaii's current statute, a person must be discharged once he no longer satisfies the criteria for an initial commitment. HI. Stat. §334-60.2 (involuntary hospitalization criteria); §334.76(b)(patient shall be discharged when she no longer satisfies §334-60.2).

B. At least two jurisdictions hold that the 14th Amendment requires consideration of current or recent behavior to continue a commitment.

Wyoming defines "mental illness" as a disorder that causes a person to be dangerous to himself or others and require treatment. *In re R.B.,* 2013 WY 15, ¶21, 294 P.3d 24 (2013)(citing §25-10-101(a)(ix)(defining mental illness). R.B. had a history of opiate dependence and depression. He was emergently detained as a suicide risk and hospitalized involuntarily. *Id*. ¶4. After he was detoxified and stabilized on medication, the state hospital sought to discharge him, but the county objected and requested continued hospitalization because R.B. had been repeatedly detained for the same problems, hospitalized, and then released. *Id*. ¶6, ¶36.

The Wyoming Supreme Court held that due process limits the duration of involuntary hospitalization. "Once a patient 'has recovered his sanity or is no longer dangerous,' he is entitled to release." *Id.* ¶22, ¶35 (citing *Jackson* and *Jones*). It acknowledged that if released, R.B. might again suffer from periods of mental illness requiring emergency detention in the future, but that was not a basis for continuing his commitment.

> Nonetheless, there is no legal basis for continuing involuntary hospitalization based on a possibility that a patient who is not currently mentally ill as that term is defined by statute will in the future become ill again based on his past behavior. If further episodes occur, the patient's liberty may be restrained through involuntary hospitalization only upon proof of mental illness by clear and convincing evidence, not on the basis of speculation.

Id., ¶37.

In Vermont, a court may order a mentally ill person to undergo compulsory outpatient treatment through an order for nonhospitalization. *In re P.S.*, 167 Vt. 63, 702 A.2d 98 (1997). When a court revoked P.S.'s order for nonhospitalization and issued an order for hospitalized treatment, P.S. argued, based on *O'Connor*, that the government had to prove his dangerousness at the time of the revocation hearing. The Vermont Supreme Court held that the government must comply with *O'Connor* and *Foucha* at all stages of the commitment process. *Id.*, 702 A.2d at 103. However, the government need not wait for the person to become dangerous to intervene. "[W]e see no constitutional barrier to using a predictive dangerousness standard where the patient is receiving adequate treatment, as the statute requires, and the State has

evidence of the result of withdrawal of that treatment." *Id.* at 105.

More recently, the Vermont Supreme Court clarified that this does not permit the government to continue an order for nonhospitalization because the person is likely to need treatment "at some point in the future (however distant)." That would raise serious constitutional concerns. *In re T.S.S.,* 2015 VT 55, ¶26, 199 Vt. 157, 121 A.3d 1184. "[P]eople who do not pose an imminent danger to themselves or others" have the right "to make decisions about the most personal matters, even if those decisions are deemed by others to be profoundly ill-advised." *Id.*, ¶27. This interpretation of the nonhospitalization statute "best balances the constitutional rights of individuals with the State's valid interest in protecting individuals and the public." *Id.*

The Vermont Supreme Court vacated the nonhospitalization order for T.S.S. because it was unknown when he would deteriorate to the point of becoming a "person in need of treatment," which Vermont defines as a person who poses a danger to himself or others. *Id.*, ¶4, ¶¶29-30. The court acknowledged that a pattern of rapid deterioration and return to "person in need of treatment" status might support the continuation of outpatient treatment. But in determining what weight to give such a pattern the court should consider among other things, "the recency of the pattern." *Id.* ¶30. T.S.S. last posed a danger to himself in 2003. He discontinued treatment n 2008 and was not under compulsory treatment again until 2012. This pattern did not prove that, without

treatment, he was likely to become a "person in need of treatment in the near future." *Id.*, ¶31.[4]

C. At least two jurisdictions hold that recent overt acts are not required for an initial or a continuing commitment.

The Second Circuit Court of Appeals addressed the constitutionality of New York's commitment scheme in *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). Part of New York's statute authorized the involuntary commitment of a person with mental illness "for which care or treatment in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such treatment." *Id.* at 972. Relying on *O'Connor,* the appellants argued that "due process requires a finding of a substantial and present risk of serious physical harm as evidenced by recent overt conduct." *Id.*

The Second Circuit began by reviewing *Scopes v. Shah*, 59 A.D.2d 203, 398 N.Y.S.2d 911 (1977), which addressed whether New York's statute satisfied *O'Connor*. *Scopes* held that substantive due process requires that while the continued confinement of a person must be based on a finding of dangerousness, it does not require a finding of a recent overt act. *Id.,* 59 A.D.2d at 206.

> Although we are aware of several cases which have required a finding that the threat of

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[4] *See also In re S.M.*, 2017 PA Super 396, 176 A.3d 927, 931 (2017). For a person to be committed based on danger to self or others, Pennsylvania's statute requires the government to prove conduct within the past 30 days. *Id.,* 176 A.3d at 931. To recommit a person, the government may instead show conduct during the patient's most recent hospitalization. *Id.* at 938. *S.M.* did not analyze *O'Connor*, *Jones*, or *Foucha.*

> substantial harm be evidenced by a recent overt act, attempt or threat (*Doremus v. Farrell*, D.C., 407 F. Supp. 509; *Lynch v. Bazley*, D.C., 386 F. Supp. 378; *Lessard v. Schmidt*, D.C., 349 F. Supp. 1078), we are of the opinion that such a requirement is too restrictive and not necessitated by substantive due process. ***The lack of any evidence of a recent overt act, attempt, or threat, especially in cases where the individual has been kept continuously on certain medications, does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others. Therefore, we conclude that the lack of any such evidence is not fatal to a finding that an individual is in need of continued confinement.***

Id., 59 A.D. at 206. (Emphasis supplied).

The Second Circuit held that New York's statute, as interpreted by *Scopes*, satisfied the constitutional minimum. *Project Release*, 722 F.2d at 973. It agreed that *O'Connor* does not require a recent overt act of dangerousness and the addition of such a requirement would not serve to reduce erroneous confinements. *Id.* The Second Circuit observed that "the role of overt acts bearing on the issue is hotly debated." *Id.* Numerous courts across the country had "considered the question of whether due process requires overt conduct such as evidence of dangerousness. Some courts have found such a requirement constitutionally mandated while others have

not." *Id*. at 973.[5] It reviewed those cases and held that New York's civil commitment scheme "meets minimum due process standards without the addition of an overt act requirement. *Id*. at 974.

D. At least one jurisdiction holds that this Court has never clearly established that the 14th Amendment requires current dangerousness.

The Fifth Circuit recently addressed a Louisiana insanity acquittee's claim that his continued confinement in a mental health facility based on his ongoing schizophrenia and his potential dangerousness violated substantive due process. *Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017). Because the acquittee challenged his continued confinement through a federal habeas petition, he had to show that the state court's decision was contrary to "clearly established" supreme court law. *Id*. at 246. Citing *Jones* and *Foucha*, the acquittee argued that "there is a 'temporal component' to the preconditions of mental illness and dangerousness. Specifically, . . . the Court's holdings require ***continuing*** illness and dangerousness, meaning confinement must end when either condition is resolved." *Id*. at 247. (Emphasis in original).

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[5] The Second Circuit compared *Colyar v. Third Judicial Dist. Court for Salt Lake County*, 469 F. Supp. 424, 434 (D. Utah 1979)(overt act not required); *United States ex rel. Mathew v. Nelson*, 461 F. Supp. 707, 710 (N.D. Ill. 1978)(three-judge court)(same); and *Scopes*, 59 A.D.2d at 206 (same) with *Suzuki v. Alba*, 438 F. Supp. at 110, *aff'd in part, rev'd in part, dismissed in part sub nom*, *Suzuki v. Yuen*, 617 F.2d at 178 (overt act required); *Stamus v. Leonhardt*, 414 F. Supp. 439, 451 (S.D. Iowa 1976)(same); *Doremus v. Farrell*, 407 F. Supp. 509, 514-515, 517 (D. Neb. 1975)(three-judge court)(same); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974)(three-Judge court)(overt act required); *Lessard*, 349 F. Supp. at 1093 (three-judge court)(same).

The State responded that *Foucha*'s references to dangerousness "represent mere dicta rather than 'clearly established' federal law." The word "current" modifies only "mental illness" and not "dangerousness." Furthermore, "*Jones*, *Foucha*, and *O'Connor v. Donaldson* do not address, let alone clearly establish, any temporal act of dangerousness." *Id*. at 248.

The Fifth Circuit agreed with the State that this Court "has not explicitly addressed how a state may make its dangerousness determination; indeed, in *Jones* the Court indicated that the dangerousness finding is predictive in nature and the government is permitted to protect against 'potential dangerousness' of NGBRI acquittees." *Id.*

III. The Wisconsin Supreme Court's Decision Is Wrong.

The Wisconsin Supreme Court holds: "To satisfy due process, the government must prove that the individual is both mentally ill and ***currently*** dangerous by clear and convincing evidence. *See Foucha*, 504 U.S. at 81." (App.18a). In the English language, the word "current" means "occurring in or existing in the present time."[6] But §51.20(1)(am) permits the government to continue a person's commitment without evidence that she is dangerous in the present time. The statute explicitly relieves the government of having to prove any recent conduct. The government may continue the commitment of a person who is stable based upon a prediction of what might happen at some point in the future. The Wisconsin Supreme Court has simply affixed the label "current" to a statute that requires a prediction of future dangerousness.

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[6] https://www.merriam-webster.com/dictionary/current (last visited 6/25/21).

Justice Dallet's dissenting opinion explained the flaw in the statute:

> The problem with relying on future conditional language in §51.20(1)(am) is compounded by the fact that the five standards of dangerousness are already predictions about future behavior. Each standard is based on a "substantial probability" that harm will occur. What saves the five standards from being unconstitutional in the initial commitment context is that each requires evidence of a recent act or omission that evinces dangerousness. *See* §51.20(1)(a)2. Section 51.20(1)(am) dispenses entirely with that recent-act-or-omission requirement, allowing it to be "satisfied" with future speculation, thus layering uncertainty on top of uncertainty while never proving that an individual is in fact dangerous right now.
>
> Section 51.20(1)(am)'s reliance on the individual's treatment record likewise does not establish proof of current dangerousness. An individual's treatment record will always include some past event of dangerous behavior; otherwise, the individual could not have been committed in the first place. But in the commitment extension context, if the government's only evidence of dangerousness is that which led to the initial commitment, then it has no evidence of current dangerousness . . . And without evidence of current dangerousness, an individual cannot be involuntarily committed.

(App.36a-37a)(citing *J.W.K.*, ¶21, ¶24; *Foucha*, 504 U.S. at 77-78).

The majority posits that allowing the government to prove current dangerousness without evidence of recent conduct is necessary to prevent the "revolving door" phenomenon of treatment, release, overt act,

recommitment. (App.23a). But when the government may recommit without evidence of recent conduct, the door is all but locked. The government may continually recommit a person even though his last dangerous act occurred years earlier.

In fact, as demonstrated by the petitioner's case, a stable person who is currently medication compliant, and who agrees to continue taking medication because it makes her feel better without the "horrible" side effects caused by earlier medication, can be recommitted because at some unknown point in the future she might stop or switch medications and again become dangerous.

In *Foucha*, the confinement of person who committed aggravated burglary and illegal discharge of a firearm could not continue absent a finding of current mental illness and dangerousness. In Wisconsin, the commitment of a person who did not commit a crime, who is stable, who is medication-compliant, but who rejects her court-appointed doctor's diagnosis, may continue without evidence of current or recent dangerous behavior. Under *O'Connor*, *Jones*, and *Foucha*, §51.20(1)(am) is unconstitutional on its face.

IV. The Question Presented Is Important to the Administration of Justice.

This Court has said that when the legislature undertakes to act in areas fraught with medical and scientific uncertainties, courts should be cautious not to rewrite their legislation. *Jones*, 463 U.S. at 365 n.13; *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). This does not give the states carte blanche in setting substantive standards for civil commitments. They may vary from state to state, but they must meet the constitutional minimum. *Addington*, 441 U.S. at 431.

When lower courts construe a substantive due process standard incorrectly, this Court will clarify the standard.

For example, this Court held that to commit a sexually violent predator, substantive due process requires the government to prove his inability to control his dangerousness. *Hendricks*, 521 U.S. at 360. When lower courts interpreted this standard too strictly, this Court granted certiorari and clarified for lower courts that substantive due process does not require the government to prove total or complete lack of control. *Kansas v. Crane*, 534 U.S. 407, 411 (2002).

The "current dangerousness" requirement for continuing a commitment needs similar clarification. In some jurisdictions the government must satisfy it with recent overt acts of dangerous behavior. In others it requires prediction of future dangerous behavior based on some recent behavior. Wisconsin allows the government to continue a commitment without any evidence of recent conduct at all. A substantive due process standard that is so flexible that it prevents continued commitments without evidence of recent acts in some states while allowing continual recommitments without recent acts in other states is no standard at all.

It is vitally important for the Court to clarify the "current dangerousness" standard because a commitment has significant, far-reaching personal and legal consequences for the individual.

First, and most obviously, a commitment results in a "massive curtailment of liberty," *Humphrey*, 405 U.S. at 509. Whether the person is confined to a mental hospital or a group home, the government controls her doctors and social workers, where she lives, whom she associates with, and what she is allowed to do.

Second, a commitment often comes with an order for involuntary medication which overrides the person's 14th Amendment right to refuse antipsychotic medications that may alter her thinking and cause irreversible side effects, including death. *Washington v. Harper,* 494 U.S. 210, 229-230 (1990).

Third, the findings required for a commitment—mental illness and dangerousness—"can engender adverse social consequences to the individual. Whether we label this phenomenon 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." *Addington*, 441 U.S. at 426.

Fourth, when a person is initially committed, she loses her 2nd Amendment right to bear arms. *Marathon County v. D.K.*, 2020 WI 8, ¶¶24-25, 390 Wis. 2d 50, 937 N.W.2d 901 (citing 18 U.S.C. §921(a)(3) and (4) and §922(g)(4)). She must petition for a return of those rights. In deciding whether to grant the petition, the court must consider her record and reputation for dangerousness, which will be influenced by one or more recommitments. Wis. Stat. §51.20(13)(cv)1m.a-b.

Fifth, each commitment or recommitment can be used against the person in future commitment proceedings. Wisconsin expressly authorizes the release of commitment court records without a person's consent for use in future proceedings under Chapters 51 (civil commitments), 971 (criminal commitments for incompetency and acquittal for not guilty by reason of insanity cases), 975 (commitment for sex crimes), and 980 (sexually violent person commitments). *See* Wis. Stat. §51.30(3)(b)-(bm).

Sixth, commitments can have financial consequences for the person. In Wisconsin, for each commitment or recommitment, the Department of Health

Services may collect the cost of institutionalization, care, supplies and services from the person, her spouse, or parents, if it determines that they are able to pay. Wis. Stat. § 46.10(2)-(3). *Jankowski v. Milwaukee County*, 104 Wis. 2d 431, 440, 312 N.W.2d 45 (1981)(reversing order to pay costs of care where commitment was illegal).

Commitments can even restrict a person's travel options. The Transportation Security Administration will deny TSA Pre-check status to a person who has "either been adjudicated as lacking mental capacity or is involuntarily committed to a mental health facility.[7]

The last time this Court considered the dangerousness standard for the civil commitment of an ordinary citizen—one who is neither accused nor convicted of a crime—appears to have been *O'Connor* itself. Given the fundamental liberties at stake in a commitment and the array of consequences flowing from a commitment, it is time for this court to clarify the "current dangerousness" standard.

V. This Case Is an Excellent Vehicle for Deciding the Question Presented.

This case arises on direct review. The petitioner presented her constitutional challenge to §51.20(1)(am) to the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

This case does not involve a factual dispute over the petitioner's behavior toward herself or others at the time of her recommitment hearing. All the county's witnesses admitted that during her initial commitment, the

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[7] *See* Disqualifying Offenses and Other Factors | Transportation Security Administration (tsa.gov) (last visited 6/23/21).

petitioner was not dangerous to herself or others, and she was compliant with treatment.

The question presented is outcome determinative. If this Court reverses the Wisconsin Supreme Court's decision, the circuit court's recommitment order will also be reversed. There will be no need for further proceedings.

CONCLUSION

For the forgoing reasons, the Court should grant this petition for writ of certiorari.

Dated this 2nd day of July, 2021.

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