No. 21-5034

IN THE
SUPREME COURT OF THE UNITED STATES

K.E.K.,

Petitioner,

v.

WAUPACA COUNTY, WISCONSIN,

Respondent.

On Petition for Writ of Certiorari
to the Wisconsin Supreme Court

RESPONDENT WAUPACA COUNTY'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether Wisconsin's Mental Health Act, Wis. Stat. Ch. 51—which for extension of an involuntary civil commitment requires a petitioning county to prove by clear and convincing evidence that an individual has a treatable mental illness and is dangerous to self or others—facially violates the Fourteenth Amendment's Due Process Clause.

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RESPONDENT WAUPACA COUNTY'S
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Section 51.20 of the Wisconsin Statutes ("Wis. Stat."), which is part of the state's Chapter 51 Mental Health Act, provides individuals with a set of substantive and procedural protections before they may be civilly committed for treatment and any time the commitment is extended thereafter. In doing so, the Wisconsin approach complies with constitutional limits on civil commitments as articulated by this Court.

In particular, in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court held that an individual's civil commitment, including his or her continued detention, must be based on a showing that the individual has a mental illness and is dangerous. *Id*. at 575. Subsequently, *Addington v. Texas*, 441 U.S. 418 (1979), elaborated on the due process protections required for an individual's civil commitment. *Id*. at 431–33.

Wisconsin, like other states, has followed these teachings, and the necessary protections were afforded to petitioner here. Its statutory system for civil commitment provides "treatment and rehabilitation services," to individuals proved to have a treatable mental illness and to be currently dangerous, through "the least restrictive treatment alternative appropriate to their needs." Wis. Stat. § 51.001. With respect to the requirement of dangerousness, Wisconsin and the states identified in the petition align in the respect important for due process—in requiring, for commitment (including community-based treatment), and any time

the commitment is extended thereafter, that an individual is dangerous to self or others.

There is no conflict warranting this Court's review.

COUNTERSTATEMENT OF THE CASE

To put this case in context, it is helpful to set forth (1) the Court's decision in *O'Connor v. Donaldson*, 422 U.S. 563 (1975); (2) Wisconsin's civil commitment statute, which is part of its Chapter 51 Mental Health Act; and (3) the circumstances involving petitioner.

1. This Court's Decision in *O'Connor v. Donaldson*. In *O'Connor*, the Court considered an individual who was involuntarily committed to a hospital placement and "kept in custody there against his will for nearly 15 years." 422 U.S. at 564. The particular Florida statute at issue "was less than clear in specifying the grounds necessary for commitment." *Id.* at 566–67.

More generally, in its decision, the Court discussed (though it did "need not decide") such matters as "when" and "by what procedures, a mentally ill person may be confined by the State." *Id.* at 573. In that discussion, the Court noted "the grounds, which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person," including "to prevent injury to the public [and] to ensure his own survival or safety." *Id.* at 573–74. It explained that "dangerous to himself" can include "foreseeable risk of self-injury or suicide, [or] . . . if, for physical or other reasons, [a person] is helpless to avoid the hazards of

freedom either through his own efforts or with the aid of willing family members or friends." *Id.* at 574 & n. 9.

It was continued inpatient detention (almost 15 years there) that was at issue in Mr. Donaldson's case. *Id.* at 575–76. The Florida statute contained "no judicial procedure whereby one still incompetent could secure his release on the ground that he was no longer dangerous to himself or others." *Id.* at 566–67 n.2. This was problematic, the Court explained, because "even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." *Id.* at 575. The Court determined that there is "no constitutional basis for confining [mentally ill] persons if they are dangerous to no one and can live safely in freedom." *Id.* It concluded that "a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Id.* at 576.

2. Civil Commitment Under Wisconsin Statutes Chapter 51. Wis. Stat. § 51.20 provides for the involuntary civil commitment of an individual for treatment. Its terms follow from legislative action after *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *extensive subsequent history omitted*, and *O'Connor*. "[C]h. 51 is used for short term treatment and rehabilitation intended to culminate with re-integration of the committed individual into society." *In re Commitment of Helen E. F.*, 2012 WI 50, ¶ 29, 340 Wis. 2d 500, 515, 814 N.W.2d 179, 187 (contrasting "ch. 55 to be used for long-term care").

The statute requires "the least restrictive treatment alternative," which can include community-based treatment or hospitalization. Wis. Stat. § 51.001(1). Chapter 51 provides that "[t]o protect personal liberties, no person who can be treated adequately outside of a hospital, institution, or other inpatient facility may be involuntarily treated in such a facility." Wis. Stat. § 51.001(2).

Chapter 51 provides for an original involuntary commitment and, where proved to be necessary, its extension. "Each [initial commitment and extension of commitment] order must independently be based upon current, dual findings of mental illness and dangerousness." *In re Commitment of J.W.K.*, 2019 WI 54, ¶ 21, 386 Wis. 2d 672, 690, 927 N.W.2d 509, 518–19.

a. An original action for involuntary commitment for treatment commences with the filing of a petition for examination with the local circuit court. A petitioning county must show that an individual is mentally ill, drug dependent, or developmentally disabled and is a "proper subject for treatment." Wis. Stat. § 51.20(1)(a)1. And it must establish that the individual is dangerous. Wis. Stat. § 51.20(1)(a)2.

Dangerousness can be proved by showing that the individual is: a danger to himself or herself, as manifested by "recent threats of or attempts at suicide or serious bodily harm," Wis. Stat. § 51.20(1)(a)2a; a danger to harm others as described under Wis. Stat. § 51.20(1)(a)2b; of "such impaired judgment . . . that there is a substantial probability of physical impairment or injury" to self or others,

Wis. Stat. § 51.20(1)(a)2c; or "unable to satisfy basic needs for nourishment, medical care, shelter, or safety," Wis. Stat. § 51.20(1)(a)2d.

The showing may also be made under what is often called "the fifth standard" (reflecting the statutory sequence). This standard requires (among other things) the following:

> a substantial probability, *as demonstrated by both the individual's treatment history and his or her recent acts or omissions*, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions.

Wis. Stat. § 51.20(1)(a)2e (emphasis added). *In re Commitment of Dennis H.*, 2002 WI 104, ¶¶ 30, 40, 255 Wis. 2d 359, 380–81, 385, 647 N.W.2d 851, 860–61, 863, upheld the fifth standard as constitutional because "[t]he legislature has thus defined dangerousness . . . by reference to a threat to the individual's fundamental health and safety *and* a loss of the ability to function independently or control thoughts or actions." (Emphasis in original.)

The circuit court reviews the petition for commitment and may issue a detention order in appropriate circumstances. Wis. Stat. § 51.20(2). An individual who has been detained pursuant to such an order must be afforded notice of the right to counsel at the public's expense, the right to contact family, the right to a probable cause hearing within 72 hours of detention to determine whether probable

cause exists to believe the allegations asserted in the petition, the right to a jury trial, and the standards for commitment. Wis. Stat § 51.20(2), (3), (7).

In making a determination at the probable cause hearing and all subsequent junctures, a court must consider alternatives to inpatient treatment, such as community-based treatment. It must decree the least restrictive treatment method available to meet the needs of the individual. *See* Wis. Stat. § 51.20(1m); *see also* Wis. Stat. § 51.001.

If the court finds that probable cause exists to believe that the individual has a mental illness that is treatable and that the individual is dangerous, the court orders a final commitment hearing within 14 calendar days of the initial detention. Wis. Stat. § 51.20(7)(c), (10)(c). The court may choose to release the individual before the final hearing and may impose conditions for release. Wis. Stat. § 51.20(8)(a). Alternatively, the court, considering the needs and condition of the individual, may order the individual to remain detained pending the final hearing. Wis. Stat. § 51.20(8)(b).

The individual is examined by two court-appointed physicians with "specialized knowledge." Wis. Stat. § 51.20(9)(a)1. At least 48 hours prior to the final hearing, the individual or individual's attorney may request that the final hearing be before a jury, which will consist of six people. Wis. Stat. § 51.20(11)(a). A valid jury verdict requires agreement from five of the six jurors. Wis. Stat. § 51.20(11)(b).1

[1] Chapter 51 affords a number of procedural rights only to the individual, not the county, in addition to the jury trial. For example, only the individual (or his or her

In the event of a jury verdict or (where no jury) a finding by the judge that the petitioning county has proved the requirements under Wis. Stat. § 51.20(1)(a) by clear and convincing evidence, the court will order treatment for a period not to exceed six months. Wis. Stat. § 51.20(13)(a)3, (e), (g)1. Treatment may be inpatient or community-based, as needed by the individual and directed by the court. Wis. Stat. § 51.20(13)(a)3, (dm).

If the court orders inpatient treatment, such treatment must be "in the least restrictive manner consistent with the requirements of the subject individual in accordance with a court order designating the maximum level of inpatient facility." Wis. Stat. § 51.20(13)(c)2. The county department providing treatment is also required to place the individual in "the treatment program and treatment facility that is least restrictive of the individual's personal liberty, consistent with the treatment requirements of the individual." Wis. Stat. § 51.20(13)(f).

If inpatient care is not required but commitment is appropriate, the court will order community-based treatment. Wis. Stat. § 51.20(13)(a)3. The county department providing for the individual's treatment must arrange for the least restrictive treatment without court oversight. Wis. Stat. § 51.20(13)(c).

Individuals subject to an involuntary commitment order may appeal. Wis. Stat. § 51.20(15). The individual also has a right to request reexamination or that the court change the order of commitment at any time. Wis. Stat. § 51.20(16).

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attorney) may seek an adjournment of the proceedings, Wis. Stat. §§ 51.20(7)(a), (10)(e); select one of the two court-appointed physicians to conduct an examination as required, Wis. Stat. § 51.20(9)(a)2; or request an additional independent, non-court-appointed physician to conduct a third examination, Wis. Stat. § 51.20(9)(a)3.

When an order has been entered, the county is required to review and alter an individual's treatment plan as necessary to provide treatment continuously in the least restrictive setting possible. Wis. Stat. § 51.20(13)(f). The county may move an individual from a more restrictive treatment setting to a less restrictive treatment setting at any time. Wis. Stat. § 51.20(13)(g)3.

b. Twenty-one days prior to the expiration of the initial six-month maximum commitment period, the county must file with the court an evaluation of the individual along with a recommendation regarding extension of the commitment. Wis. Stat. § 51.20(13)(g)2r. The county may petition the court to extend the commitment of an individual for an additional maximum time period of one year. Wis. Stat. § 51.20(13)(g)1, 2r, 3. If an extension of commitment is recommended, the court will proceed with an extension of commitment hearing. Wis. Stat. § 51.20(13)(g)3.

In this process, the individual has all the same rights as in an initial commitment process, including the right to counsel, the right to an independent examination, the right to a jury trial, and the requirement that the county prove by clear and convincing evidence that the individual has a treatable mental illness and is dangerous. Wis. Stat. § 51.20(13)2r, 3.

The court continues the commitment only if it determines that the individual [1] "is a proper subject for commitment as prescribed in sub. (1)(a)1. [i.e., is mentally ill, drug dependent, or developmentally disabled and is a 'proper subject for treatment']" and [2] is dangerous such that the individual "evidences the

conditions under sub.(1)(a)2. [viz., 'evidences a substantial probability of physical harm to himself or herself as manifested by . . . recent threats of or attempts at suicide or serious bodily harm' or 'evidences a substantial probability of physical harm to other individuals' in certain demonstrated ways] or (am) or is a proper subject for commitment as prescribed in sub. (1)(ar)." Wis. Stat. § 51.20(13)(g)3.

Specifically as to dangerousness under (am), if an individual has had community-based treatment for mental illness or inpatient treatment for mental illness, "the requirements of a recent overt act, attempt, or threat to act . . . may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." Wis. Stat. § 51.20(1)(am). *See In re Condition of W.R.B.*, 140 Wis. 2d 347, 351, 411 N.W.2d 142, 143 (Ct. App. 1987) ((1)(am) seeks to "avoid" the "vicious cycle of treatment, release [from treatment], overt act, recommitment").

3. Petitioner K.E.K.'s Circumstances. A jury decided on December 8, 2017, that Waupaca County had proved by clear and convincing evidence that petitioner was in need of involuntary commitment as an individual with a treatable mental illness and dangerous under Wis. Stat. § 51.20(1)(a)2e, the fifth standard, and the circuit court entered an order to that effect. Pet. 42a. The order directed that petitioner be treated, in part, on an inpatient basis for a time period not to exceed thirty days. (Wis. Sup. Ct. Record Entry ("R.") 34.) As part of that original commitment order, petitioner was "prohibited from possessing any firearm" unless

petitioner sought a change from the court. (R. 34–36.) The original commitment under Wis. Stat. § 51.20(1)(a)2e and the medication order under Wis. Stat. § 51.61(1)(g)3 are not challenged in this case.

Petitioner was moved from inpatient treatment on or before January 8, 2018, and continued in community-based treatment. *See* Wis. Stat. § 51.20(13)(g)2da. In light of petitioner's behaviors, *see* Pet. 117a–118a, the county (respondent here) filed a petition for extension of the commitment on May 22, 2018. Pet. 42a–43a. Petitioner was represented by counsel and elected to have the matter heard by the judge, not a jury. Pet. 45a.

The county assumed the burden of proving by clear and convincing evidence that petitioner had a mental illness, that the illness could be treated, and that petitioner was dangerous. The court examiner, Dr. Marshall Bales, whom the circuit court found to be an "expert in the area of psychiatry," testified that petitioner suffered from a paranoid type of schizophrenia, which is treatable. Pet. 73a–74a. As to dangerousness, Dr. Bales testified that petitioner did not believe that she had a mental illness, showing "a distinctive lack of insight into her mental illness," and that "that impedes her treatment in general." Pet. 76a. The doctor testified that "what she did keep expressing was that she's not mentally ill." Pet. 77a. He further opined that her medications have a "therapeutic value" and that petitioner would "almost certainly stop her medications" without a court order. Pet. 76a, 78a. Dr. Bales testified that, as a consequence, he believed petitioner would leave her supervised housing setting, and that she "would decompensate and

become a proper subject for commitment, in my opinion, again." Pet. 76a. Petitioner did not present evidence from an independent examining psychiatrist or any other witness besides her own testimony.

Petitioner's case manager, who saw petitioner about once a month, testified that, "no," petitioner does not have "insight into having a mental illness" and that, without involuntary treatment, petitioner would "no longer take her medications, become more unstable, and potentially become a danger to herself as a result of that." Pet. 96a, 99a. The case manager observed, "[t]here was a point during this past six months when she was doing better than she is right now. But at this point, I believe she's better than she was six months ago." Pet. 97a. The manager at the supported living house focused on the "past six, eight weeks [and] things have declined from when she first came." Pet. 118a. As the manager explained, petitioner herself took her medication 75 percent of the time and still was having hallucinations, including "a lot more talking to herself over her shoulder" and "accus[ing] others of harassing her." Pet. 118a–119a, 129a–130a.

On June 6, 2018, the court determined that, "at this point," there should be an extension of petitioner's commitment for a period of twelve months in the community with treatment conditions. Pet. 66a–67a, 156a–157a. Based on its findings, the court entered an order for involuntary medication and treatment. Pet. 156a.

Petitioner appealed, asserting that the state law, Wis. Stat. § 51.20(1)(am), providing for extension of commitment, is unconstitutional on its face and as

applied, on account of vagueness and as a violation of due process, and that the medication order was entered on insufficient evidence. Pet. 42a–43a. The Court of Appeals affirmed the circuit court orders, determining that the statute is not lacking in clarity: the extension of commitment statute required the same test as that of the initial commitment, and "Wis. Stat. 51.20(1)(am) must be read together with the initial commitment paragraph § 51.20(1)(a)." Pet. 49a–51a. The Court of Appeals expressly rejected petitioner's argument that "a petitioner [for involuntary commitment, such as a county] 'is relieved of proving dangerousness at all.'" Pet. 52a.

The Court of Appeals further determined that the statute does not violate substantive due process: the statute requires a finding of "current dangerousness," as the "government must prove that there is a substantial probability or a substantial likelihood that subject individuals will harm themselves or others in the absence of treatment." Pet. 56a. Finally, the Court of Appeals determined that the statute as applied here was satisfied and that the medication order was supported. Pet. 59a–60a, 64a–65a.

Petitioner sought review of the Court of Appeals' decision only with respect to the extension of commitment statute, Wis. Stat. § 51.20(1)(am). Pet. 3a. She argued that it was facially and as-applied unconstitutional under due process "because the statute does not require a sufficient showing of current dangerousness as exhibited by recent acts of dangerousness." Pet. 3a.

The Wisconsin Supreme Court granted review and subsequently affirmed. It rejected petitioner's due process arguments, finding that the extension of commitment provision "require[s] a showing of mental illness and current dangerousness": namely, "Section 51.20(1)(am) provides an alternative path to prove current dangerousness provided the evidence demonstrates 'a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.'" Pet. 5a (quoting the statute). ""The County must prove the individual "*is* dangerous."" Pet. 16a (quoting *J.W.K.*, 2019 WI 154, ¶ 24, 386 Wis. 2d at 692, 927 N.W.2d at 520 (itself quoting the statute)) (emphasis in *J.W.K.*). The state supreme court further decided that the extension of commitment statute does not violate equal protection because it is supported by a "rational basis." Pet. 5a. The court declined to consider petitioner's as-applied challenges, which it determined to be sufficiency-of-the-evidence challenges. Pet. 26a.

The petition here challenges Wis. Stat. § 51.20 on facial due process grounds.

REASONS FOR DENYING THE PETITION

I. The Question Presented Is Moot as to Petitioner.

The issue litigated is moot with respect to petitioner, and, therefore, this case is not a proper vehicle for its consideration by this Court. Article III restricts federal courts to "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).[2] There must be a "live" issue as to the petitioner,

[2] The Wisconsin Court of Appeals noted that petitioner's appeal of the extension of commitment "and medication and treatment orders appears to be moot," although the

id. at 479 (internal quotation marks omitted), and the parties (including petitioner) must have a "legally cognizable interest in the outcome," *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). This is a matter of jurisdiction. *Lewis*, 494 U.S. at 477.

Here, there is no "live" issue for petitioner, where the challenged order of involuntary commitment treatment has expired, nor is there a "legally cognizable interest" remaining. The challenged civil commitment order became effective on June 6, 2018, and extended for a period of 12 months (June 6, 2019). Pet. 66a–67a. The order thereupon expired. Petitioner stipulated to an additional six-month commitment extension, in community-based treatment, on May 31, 2019, and a new order was entered. The county did not petition to extend this six-month extension order. That involuntary commitment order expired on December 6, 2019.

Nor does petitioner have a continuing "personal stake." The extension of petitioner's commitment under the order is over. *See* Pet. 66a–67a. For mootness to be defeated, there must be "exceptional situations" where an issue is "capable of repetition yet evading review." *Lewis,* 494 U.S. at 481 (internal quotation marks omitted). Namely, petitioner must show that "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be

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parties did not "address the issue," and the court proceeded to decide the merits of the case. Pet. 44a n.3. Wisconsin does not have a prohibition, similar to Article III, against the consideration of moot cases. *See In re Condition of C.M.B.*, 165 Wis. 2d 703, 715, 478 N.W.2d 385, 389–90 (1992) (in a Chapter 51 case, agreeing with the parties that "this case is moot" but electing to "nevertheless decid[e] the issue raised in this appeal," simply "because the issue is likely to arise again").

subjected to the same action again." *Id*. (internal quotation marks omitted) (quoting a case itself quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

In *Weinstein*, this Court found mootness where Bradford had been released from parole. 423 U.S. at 148. As the Court explained, "[f]rom that date forward it is plain that [Bradford] can have no interest whatever in the procedures followed by petitioners in granting parole." *Id.* Petitioner's case has the same Article III defect. The extension of commitment order at issue has expired. Petitioner has been released. Petitioner would not be "subjec[t] to the same action again," *cf. id.* at 149, because, as the Wisconsin Supreme Court explained in *J.W.K.*, 2019 WI 54, ¶ 21, 386 Wis. 2d at 690, 927 N.W.2d at 518–19, any "subsequent order" is not "impact[ed]" by "the sufficiency of the evidence supporting prior orders." Likewise, vacating a subsequent extension order would have no operative effect on the original order. *In re Commitment of S.L.L.*, 2019 WI 66, ¶ 40, 387 Wis. 2d 333, 370, 929 N.W.2d 140, 158.

Petitioner argues that a civil commitment has "personal and legal consequences for an individual." Pet. 25. To overcome mootness, however, petitioner must show an effect flowing from the extension of commitment order. There is no "curtailment of liberty" (Pet. 25, internal quotation marks omitted) of petitioner based on the June 2018 extension order, which has expired. The accompanying medication order expired as well. Pet. 44a. Initial commitment and extension of commitment proceedings can be petitioned by the individual to be closed, and the records from those proceedings are confidential. Wis. Stat.

§ 51.20(12); § 51.30(3) (records generally closed). A prohibition against petitioner's having a firearm has been in place since the original order of commitment; it remains in place until petitioner seeks relief from that original order from the circuit court. *See* Wis. Stat. § 941.29. The extension of commitment order, then, is not the genesis of this legal restriction. Petitioner mentions that commitment may have financial consequences and an effect on travel privileges (Pet. 26–27), but it is incumbent on petitioner to show continuing effects of the extension of commitment, not the original commitment. Petitioner has not done so.

II. The State and Federal Courts Identified by Petitioner Are Not in Conflict Over the Need for Recent Acts to Establish Dangerousness Under *O'Connor*.

Petitioner's asserted conflict does not withstand closer review. Most importantly, the courts cited are aligned in requiring a showing that an individual *is* dangerous to self or others. For some of the identified instances, petitioner erroneously relies on older state high court and federal cases that do not address current state statutory provisions. For others, petitioner misses that these courts, too, are permitting current dangerousness to be proved to courts by looking at deterioration in an individual's condition and a substantial probability that the person will deteriorate further if treatment is not continued.

Wisconsin permits, as a method of establishing proof for an initial civil commitment, a determination (under the fifth standard, quoted earlier) that "mental illness renders [a person] incapable of making informed medication decisions and makes it substantially probable that, without treatment, disability or

deterioration will result, bringing on a loss of ability to provide self-care or control thoughts or actions." *Dennis H.*, 2002 WI 104, ¶¶ 33, 40, 255 Wis. 2d at 382, 385, 647 N.W.2d at 863. The Wisconsin Supreme Court upheld the constitutionality of the fifth standard, concluding it "fits easily within the *O'Connor* formulation." *Id.*

Vermont is a state that petitioner appears to present as being on a conflicting path, Pet. 17–19, but this is incorrect. In *In re T.S.S.*, 2015 VT 55, ¶ 30, 199 Vt. 157, 172, 121 A.3d 1184, 1194, the court looked at whether the individual would "become a person in need of treatment 'in the near future.'" It determined that the state must show that "if treatment is discontinued, there is a substantial probability that in the near future the person's condition will deteriorate *and* in the near future the person will become a person in need of treatment." *Id.* ¶ 16, 199 Vt. at 165, 121 A.3d at 1189. The state supreme court allowed that it would look at (and did in the case of T.S.S.) the current condition of the individual, but could consider also "the substantial probability that the person will become a person in need of services in the near future if a [commitment order] is discontinued." *Id.* ¶ 30, 199 Vt. at 172, 121 A.3d at 1194. "'[T]he recency of the pattern'" (Pet. 18, quoting the Vermont decision) was *among* the factors a court should consider. *Id.* The court stated that the government "does not have to wait until a person actually becomes dangerous to intervene and [it] can remain on guard against a revolving door syndrome." *Id.* ¶ 27, 199 Vt. at 171, 121 A.3d at 1193 (internal quotation marks omitted).

The considerations discussed by the Vermont Supreme Court when looking at an individual "in need in the near future" are in line with the considerations in Wisconsin. *See, e.g., J.W.K.*, 2019 WI 54, ¶ 24, 386 Wis. 2d at 692, 927 N.W.2d at 520. *See also* Pet. 23a ("the emphasis is on the attendant consequence to the patient should treatment be discontinued") (internal quotation marks omitted). In particular, the Wisconsin statute allows for extension upon a showing of "a substantial likelihood . . . that the individual would be a proper subject for commitment if treatment were withdrawn," (for the words just indicated by ellipses) "*based on the subject individual's treatment record*." Wis. Stat. § 51.20(1)(am) (emphasis added).

So, in fact, both of these jurisdictions require an appropriate finding of current dangerousness for an individual to be initially committed or for extension of commitment, and the decision of the Wyoming Supreme Court in *In re R.B.*, 2013 WY 15, ¶ 35, 294 P.3d 24 (Wyo. 2013), discussed at Pet. 16–17, is similarly not to the contrary. The Wyoming Supreme Court emphasized that an individual cannot remain involuntarily hospitalized where the individual is no longer mentally ill or considered dangerous. *Id.*, ¶ 35, 294 P.3d at 34. The dicta quoted by petitioner (Pet. 17) are consistent with this understanding. The court went on to resolve the question before it by finding that the head of hospital or medical professionals (not the county) had authority under Wyoming Statute § 25-10-116(b) to consider discharge of the individual from hospitalization. 2013 WY 15, ¶ 45, 294 P.3d at 35–36. No conflict arises from this case.

Petitioner suggests Iowa for a conflict (Pet. 14–15), but does not note the current statute. As of July 1, 2018, Iowa's Chapter 229, which governs "Hospitalization of Persons with Mental Illness," defines a "seriously mentally impaired" person as someone who meets any one of a number of criteria, including (for a new provision) the following:

> d. Has a history of lack of compliance with treatment and any of the following apply:
>
> (1) Lack of compliance has been a significant factor in the need for emergency hospitalization.
>
> (2) Lack of compliance has resulted in one or more acts of serious physical injury to the person's self or others or an attempt to physically injure the person's self or others.

Iowa Code § 229.1(20). Yet the statute additionally appears to require, for involuntary hospitalization, that the person be one who "presents a danger to self or others." Iowa Code § 229.6(2)a. In all events, the case cited by petitioner, *State v. Huss*, 666 N.W.2d 152 (Iowa 2003), is not a holding that Iowa's current statute is unconstitutional on account of its approach to recent acts in the context of civil commitment (and thus does not conflict with Wisconsin's upholding of its own statute).

For a similar reason, petitioner cannot succeed with the argument (Pet. 15–16) that federal decisions about Hawaii's civil commitment statute create a conflict. Here, too, petitioner looks to an earlier version of the statute, Haw. Rev. Stat. §§ 334-1, 334-60.2, 334-121, governing mental illness, and an older case, *Suzuki v. Yuen,* 617 F.2d 173 (9th Cir. 1980), in advancing the argument that a recent overt act is needed as part of Hawaii's requirements for civil commitment.

However, a more recent Hawaii case, *In re Doe*, 78 P.3d 341 (Haw. Ct. App. 2003), discusses how the state's statutory framework has moved with "emerging social service models" and now includes as possible grounds for civil commitment that an individual is "gravely disabled" or is "obviously ill"—the latter being defined, in relevant part, as "'a condition in which a person's current behavior and previous history of mental illness, if known, indicate a disabling mental illness, and the person is incapable of understanding that there are serious and highly probable risks to health and safety in refusing treatment.'" *Id.* at 362, 364–65 (quoting Haw. Rev. Stat. § 334-1).

These states' decisions (and statutory frameworks) are in line with Wisconsin, and with the cases identified by petitioner as *not* requiring a recent overt act for civil commitment. *See* Pet. 19–20.

All of these cases are consistent with the criteria set forth by this Court in *O'Connor*, which requires proof of mental illness and proof of "dangerousness" and recognizes that the latter may be shown by "dangerousness to others" or "dangerous[ness] to self," which includes "foreseeable risk of self-injury or suicide, or . . . for physical or other reasons [an individual] is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends." *Id.* at 574 & n. 9. To be sure, these cases speak, as did the Court in *O'Connor*, in some way to likelihood or to risk or to probability. However, this makes sense given that "civil commitment proceedings . . . attempt to divine the future from the past." *Foucha v. Louisiana*, 504 U.S. 71, 97 (1992) (Kennedy, J.,

dissenting) (contrasting criminal cases such as the one then before the Court and thus dissenting on other grounds).

The Court need not impose a particular test of dangerousness—whether "a recent overt act, attempt or threat," Pet. 15 (internal quotation marks omitted), or some other formulation—for involuntary civil commitments of individuals. Rather, this Court should stay the course that it has charted. Consider, in addition to the requirements of *O'Connor* (which Wisconsin has followed), the decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Court there rejected a challenge to a state's civil commitment statute. In turning aside Hendricks's argument that the Kansas act at issue fell constitutionally short because it spoke of "mental abnormality," whereas (in his characterization) the Court's "earlier cases dictate a finding of 'mental illness' as a prerequisite for civil commitment," this Court explained thus: "we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes." *Id.* at 358–59. The Court stressed that, "[r]ather, we have traditionally left to legislatures the task of defining terms of a medical nature that have legal significance." *Id.* at 359.

Similarly here. Petitioner unnecessarily seeks to adopt a particular nomenclature that would engraft a recent act requirement onto the evidence of dangerousness. The guidelines of *O'Connor* have been adequate to the task at hand and are followed by Wisconsin and other states.

III. The Wisconsin Supreme Court's Decision Is Correct and, Contrary to Petitioner's Claim, Does Not Present A Question "Important to the Administration of Justice" for This Court's Review.

Wisconsin's involuntary civil commitment statute complies with constitutional mandates and produced an appropriate decision in petitioner's case. As suggested by the overview in part 2 of the Counterstatement of the Case, Wisconsin's statute requires the county to prove that the individual has a treatable mental illness and *is* dangerous. *See, e.g., In re Commitment of D.J.W.*, 2020 WI 41, ¶ 34, 391 Wis. 2d 231, 247, 942 N.W.2d 277, 285. The Wisconsin Supreme Court emphasized in its decision below that "Section 51.20(1)(am) . . . requires a showing of mental illness and current dangerousness, as due process demands." Pet. 14a.

In essence, petitioner wants dangerousness proved differently—imposing the requirement of a recent act. This is not required by the Court's decisions. In *O'Connor*, while the Court stated that dangerousness must be established, it noted that "contemporary statutes" set forth grounds that include "dangerous[ness] to himself," which (in the statute implicated in that case) included "foreseeable risk of self-injury or suicide, or [where] for physical or other reasons [an individual] is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends." *Id.* at 573–74 & n. 9. Similarly, *Foucha* speaks of "current mental illness and dangerousness," 504 U.S. at 78, but does not speak to a recent act.

The county proved that petitioner had a mental illness; that the mental illness was treatable; and, *at that time*, that petitioner was dangerous. Specifically,

as the county sought an extension of commitment, it proceeded under Chapter § 51.20(13)(g)3:

> Upon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs (10) and (13). If the court determines that the individual is a proper subject for commitment as prescribed in sub. (1)(a)(1) and evidences the conditions under sub. (1)(a)(2) or (am) . . . it shall order judgment to that effect and continue the commitment.

This standard first requires that the circuit court make a finding that the individual is "mentally ill" (or drug dependent or developmentally disabled) and "a proper subject for treatment." But more is required: the individual must "evidenc[e] the conditions under sub(1)(a)2 or (am)." Wis. Stat. § 51.20(13)(g)3.

These provisions, subsections (1)(a)2 or (am) of section 51.20, require that the county establish an individual *is* dangerous. Under section 51.20(1)(am), the county proceeds as follows:

> If the individual has been the subject of inpatient treatment for mental illness . . . immediately prior to commencement of the proceedings as a result of . . . a commitment or protective placement ordered by a court under this section . . . , or if the individual has been the subject of outpatient treatment for mental illness . . . immediately prior to commencement of the proceedings as a result of a commitment ordered by a court under this section . . . , the requirements of a recent overt act, attempt or threat to act under par.(a) 2a or b, a pattern of recent acts or omissions under par. (a) 2c or e, or recent behavior under para. (a) 2d may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

Wis. Stat. § 51.20(1)(am).

This statutory provision expressly makes the county's showing subject to para. (a)2, which itself requires a showing of *current* dangerousness. The Wisconsin

Supreme Court below explained that Wis. Stat. 51.20(1)(am) "works in combination with the five standards of dangerousness." Pet. 13a. This was not a new holding: As it explained in 2019, noting the linkage of section 51.20(1)(am) with § 51.20(1)(a), "[t]he dangerousness standard is not more or less onerous during an extension proceeding; the constitutional mandate that the County prove an individual is both mentally ill and dangerous by clear and convincing evidence remains unaltered." *J.W.K.*, 2019 WI 54 ¶¶ 23, 24, 386 Wis. 2d at 692, 927 N.W.2d at 519.

The basis for (am) is legitimate: "This paragraph recognizes that an individual receiving treatment may not have exhibited any recent overt acts or omissions demonstrating dangerousness because the treatment ameliorated such behavior, but if treatment were withdrawn, there may be a substantial likelihood such behavior would recur." *J.W.K.*, 2019 WI 54 ¶ 19, 386 Wis. 2d at 689, 927 N.W.2d at 518. In such a circumstance, the individual remains currently dangerous. This approach is consistent with this Court's guidance in *O'Connor* and with the Due Process Clause more generally.

Petitioner seeks to advance a facial challenge against the Wisconsin statute on substantive due process grounds. The "substantive [due process] component . . . bars certain arbitrary, wrongful government actions." *Foucha,* 504 U.S. at 80 (internal quotation marks omitted). Wisconsin's Chapter 51 does not run afoul of this bar. Looking to dangerousness, the Wisconsin statute, for example, considers whether the discontinuation of treatment would result in the individual requiring

treatment again, as just described. In petitioner's situation, the need for continued involuntary treatment included her inability to acknowledge that she had a mental illness and the substantial probability that, without such insight, she would discontinue treatment. As was noted by the concurrence in *O'Connor*, 422 U.S. at 579 (Burger, C.J., concurring), "one of the few areas of agreement among behavioral specialists is that an uncooperative patient cannot benefit from therapy and that the first step in effective treatment is acknowledgment by the patient that he is suffering from an abnormal condition."

The Court in *Foucha*, 504 U.S. at 79, explained that "[d]ue process requires that the nature of the commitment bear some reasonable relation to the purpose for which the individual is committed." Here, where the extension of the commitment continued to be community-based treatment, that relation to the foregoing purpose existed.

The involuntary commitment statute, as part of the Wisconsin's Mental Health Act, is well-supported in its existence and terms, given the state's "legitimate interest under its police and parens patriae powers in protecting society and the mentally ill." *Dennis H*, 2002 WI 104, ¶¶ 5, 9, 255 Wis. 2d at 369, 370, 647 N.W.2d at 855. The Mental Health Act seeks to provide treatment in the least restrictive environment that will lead to rehabilitation. *See, e.g.,* Wis. Stat. § 51.001; *Helen E. F.*, 2012 WI 50, ¶ 13, 340 Wis. 2d at 507, 814 N.W.2d at 183 (rehabilitation is goal of Chapter 51 treatment). With particular attention to civil commitments, the Wisconsin Court of Appeals has explained that the "clear intent

of the legislature in amending sec. 51.20(1)(am) was to avoid the 'revolving door' phenomena [whereby] . . . because the patient was still under treatment, no overt acts occurred and the patient was released from treatment only to commit a dangerous act and be recommitted." *W.R.B.*, 140 Wis. 2d at 351, 411 N.W.2d at 143. *See also* Wis. Stat. § 51.001 ("unified system of prevention of such conditions and provision of services which will assure all people in need of care access to the least restrictive treatment alternative appropriate to their needs").

Petitioner is wrong in maintaining that Wisconsin and other states have given themselves "carte blanche" (Pet. 24) to conduct civil involuntary commitments. States have worked to create statutory frameworks to meet the needs of their citizens in constitutionally compliant ways to treat mental illness. "We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing." *Heller v. Doe*, 509 U.S. 312, 333 (1993) (internal quotation marks omitted). Wisconsin's statute utilizes community-based treatment and sometimes inpatient commitment,[3] but only where a county proves the need for such a civil commitment because an individual has a treatable mental illness and is dangerous.

[3] Petitioner cites commitment statistics (Pet. 3), but the underlying statistical data do not make clear whether other responding states include commitments based on community-based treatment or are strictly reporting inpatient treatment. Both are used in Wisconsin, with community-based treatment the more-often used.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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