NO. _____

IN THE
Supreme Court of the United States

JAMES VANDIVERE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in the wake of the Supreme Court's decision in *United States v. Comstock,* 560 U.S. 126 (2010) authorizing civil commitments pursuant to the Adam Walsh Act, 18 U.S.C. § 4248, (the "Act"), the lower courts have dramatically departed from the usual course of judicial procedure by impermissibly shifting the burden of proof from the Government to a citizen-detainee at a release hearing brought under 18 U.S.C. § 4247(h) without any statutory basis for doing so?

Whether the lower courts' shifting of the burden to the citizen detainee seeking release from civil commitment – an important question of federal law not yet decided by the Supreme Court -- violates *Foucha v. Louisiana,* 504 U.S. 71 (1992), and *Kansas v. Hendricks,* 521 U.S. 346 (1997)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner James Vandivere respectfully petitions the Supreme Court 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 is reported at 88 F.4th 481 and is available at Pet. App. A1. The District Court's findings and order are available at Pet. App. A18 and A63. The Fourth Circuit's order denying the petition for rehearing and rehearing *en banc* is available at Pet. App. A65.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 8, 2023. Pet. App. A1. A timely petition for rehearing and rehearing *en banc* was denied on February 5, 2024. Pet. App. A65. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 4248:

(a) INSTITUTION OF PROCEEDINGS. — In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(d) DETERMINATION AND DISPOSITION. — If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment; whichever is earlier.

(e) DISCHARGE.—When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that—

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall—

(A) order that he be conditionally discharged under prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment. The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

18 USC § 4247:

(h) DISCHARGE.— Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

INTRODUCTION

In *Comstock*, the Supreme Court upheld Congress' authority to enact the civil commitment provision of the Adam Walsh Act under the Necessary and Proper Clause of the United States Constitution. The Court declined to decide any other issues related to the Act and explicitly left open "any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution." 560 U.S. at 149-150.

Since *Comstock*, the lower courts (almost exclusively the Eastern District of North Carolina and the Fourth Circuit for reasons explained below) have adopted a number of practices in regard to the Act that deviate from traditional judicial principles. The practice at issue here is the shifting of the burden at a discharge hearing instituted by the citizen-detainee from the Government to prove the reasons for commitment still exist, to the citizen-detainee to prove they no longer exist. This practice conflicts with (a) basic principles of statutory construction, and (b) the rationale underlying this Court's decisions in *Hendricks* and *Foucha*. In this unusual context, where the courts of a single circuit have sanctioned a rule that dramatically departs from the accepted and usual course of a judicial proceeding (citizens should not have the burden of proving their entitlement to freedom), it is necessary for the Court to exercise its supervisory authority over practice and procedure under the Act for the first time since *Comstock.*

Consequently, the Supreme Court should accept this case to address the due process issues anticipated by *Comstock* and reaffirm the rationale for its decisions in *Hendricks* and *Foucha*: that there must be substantial substantive and

procedural due process safeguards for persons who are detained under civil statutes such has having the burden of proof remain on the Government throughout a civil commitment procedure. The Supreme Court should use its supervisory powers to require the lower courts, when construing the Act, to follow basic rules of statutory construction and due process and hold that the burden of proof should be on the Government at all times when seeking to deprive a citizen of his liberty.

STATEMENT OF THE CASE

The Act authorizes the certification and civil commitment of people in the custody of the Bureau of Prisons who are determined to be sexually dangerous. 18 U.S.C. § 4248(a). For years, all persons being considered for certification have been sent to FCI Butner in North Carolina. As a result, all certifications and petitions for discharge are filed in the United States District Court for the Eastern District of North Carolina, and their appeals are heard by the United States Court of Appeals for the Fourth Circuit.

On August 11, 1999, Mr. Vandivere was convicted of sexual exploitation of children and transportation of a minor with intent to engage in criminal sexual activity. He was sentenced to 235 months. His projected release date from the Bureau of Prisons was July 12, 2015 and thus has served his full initial term.

Six months before his release date, the government certified Mr. Vandivere as a sexually dangerous person. Following a hearing in 2016, the district court for the Eastern District of North Carolina ordered Mr. Vandivere to be committed to confinement at FCI Butner. The Fourth Circuit Court of Appeals affirmed the

commitment order on July 5, 2018. *United States v. Vandivere*, 729 Fed. Appx. 265 (4th Cir. 2018).

On August 8, 2020, Mr. Vandivere filed a motion for a discharge hearing pursuant to Section 4247(h). The hearing was held on May 12, 2021. The district court denied Mr. Vandivere's petition for discharge on December 3, 2021. Pet. App. A63. Vandivere appealed.

The Fourth Circuit affirmed the district court's decision denying Mr. Vandivere's release. Pet. App. A1. The court concluded, in the face of statutory silence on the issue, that the standard of proof in a Section 4247(h) discharge hearing is the same preponderance of the evidence standard as in director-initiated hearings under Section 4248(e), rather than the clear and convincing evidence standard that is constitutionally and statutorily required at the initial commitment hearing under Section 4248(a). Pet. App. A12.

The court further held that the citizen-detainee bears the burden of proof at a 4247(h) discharge hearing to prove that he is no longer sexually dangerous by a preponderance of the evidence. The court reasoned "it would not make sense to place on the government the burden of proving precisely what it disagrees with: that the committed person is no longer sexually dangerous." Pet. App. A13. The court further reasoned that shifting the burden to the citizen-detainee "makes sense," because it is the citizen-detainee seeking his freedom who seeks to alter "the status quo" at a discharge hearing. Pet. App. A13.

Mr. Vandivere petitioned for rehearing *en banc*, which the Court of Appeals denied on February 5, 2024. Pet. App. A65.

This petition followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for the following reasons.

Since all Adam Walsh Act cases are now brought in the Fourth Circuit, Mr. Vandivere acknowledges there is no conflict between decisions of the federal appellate courts here. The concentration of these cases in the Fourth Circuit has resulted in the Fourth Circuit, and the district courts below it, determining the law of the land in commitment cases under the Act.

Here, the Fourth Circuit announced a rule that is not stated in the Act itself and that dramatically affects the substantive due process rights of citizen-detainees under the Act. It does so by shifting the burden to the citizen-detainee to prove his entitlement to freedom. This is a drastic departure from the accepted and usual judicial practice of requiring the government to prove the basis for depriving a person of his liberty.

The Fourth Circuit's rule also violates the basic due process foundations of this Court's decisions in *Hendricks* and *Foucha,* which addressed state commitment statutes. In both cases, the Court's decision as to whether the statute was constitutional rested at least in part on whether the statute improperly shifted the burden to the citizen-detainee to prove his right to release rather than keeping it on the Government.

Finally, this is a civil case. In all civil cases, the plaintiff – here the Government – must have Article III standing at all times during the proceedings. As explained below, shifting the burden of proof to the defendant (here, the citizen-detainee) would create a unique exception to the foundational rules of Article III standing. It would relieve the Government of the basic requirement that all plaintiffs in civil cases make an appropriate showing of injury (here, a future injury) in order to proceed with its case. Requiring the Government to prove "future injury" standing at all times in an Adam Walsh Act proceeding aligns with the statutory construction analysis above, and the holdings in *Foucha* and *Hendricks* – all of which require the burden of proof to be on the Government at all phases of an Act proceeding unless explicitly stated otherwise.

I. The Court Should Exercise Its Supervisory Authority to Prohibit Burden Shifting in Adam Walsh Act Cases Despite the Lack of a Circuit Split as Almost All Act Cases are Heard in the Fourth Circuit.

There is a good reason why there is no split among the Federal Circuit Courts of Appeal regarding who bears the burden of proof in discharge hearings under the Adam Walsh Act: all persons committed under the Act are sent to FCI Butner in North Carolina. All discharge petitions are therefore filed in the Eastern District of North Carolina, and all appeals are taken to the Court of Appeals for the Fourth Circuit. The lack of a circuit split should not deter this Court from granting certiorari where only one Court of Appeals hears almost all Adam Walsh Act cases.

Instead, this Court should continue to supervise the Act's exercise of the federal government's authority to civilly detain citizens who have served their full

criminal sentences. The Court should grant review to ensure that remarkable power is exercised in a constitutional manner – constitutional issues the Court specifically foresaw in its conclusion to the *Comstock* decision.

II. There Is No Statutory Basis for the Extraordinary Departure from the Accepted and Usual Rule that the Government Bears the Burden of Proof to Deprive a Citizen of His Liberty.

Under the Act, the Government bears the burden in the initial commitment hearing to prove by clear and convincing evidence that the person it seeks to detain is a sexually dangerous person. 18 USC § 4248(d). Section 4247(h), which allows detainees to move for a discharge hearing after 180 days, is silent as to who carries the burden of proof at those hearings and what the burden is. The statute contains not a single word evidencing an intent by Congress to either shift the burden to the citizen-detainee or to lower the burden imposed on the Government to keep the citizen-detainee in confinement.

The Fourth Circuit's remarkable decision to shift the burden to the citizen-detainee to prove his right to freedom is contrary to 4247(h)'s text and the surrounding statutory context. Since Congress gave no indication of an intention to shift the burden, the only correct statutory interpretation must be that Congress intended the government to have the burden of proving at a discharge hearing that a citizen-detainee should remain confined. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). The Act expressly places

the burden on the Government to prove each of the statute's elements for a "sexually dangerous person" to secure the civil-commitment judgment. 18 USC 4248(d); *Comstock*, 560 U.S. at 128. Since there is no express statutory indication of an intent to shift the burden to the detainee, the burden must remain in the same place throughout the entire statutory process -- including 4247(h) discharge proceedings.

When Congress intends to alter the applicable burden – either what the burden is or who bears it – it has in related statutory provisions said so explicitly. For example, in 4248(e), when the director of the facility initiates a discharge proceeding and the court elects to hold a hearing, Congress changed the burden from a finding by clear and convincing evidence that the petitioner is sexually dangerous to a finding by a preponderance of the evidence that the detainee is no longer sexually dangerous. The change in the standard of proof in this context makes sense. The initial hearing involves the contested issue of whether the Government can deprive the person of his liberty while the director-initiated hearing is an uncontested proceeding to restore liberty; therefore, the burden of proof should be lower.

Congress made no such change of the burden of proof for a 4247(h) hearing where the petitioner contests his continued confinement, nor did it shift the burden to the citizen-detainee. *See e.g. Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary

legislative intent."). This fundamental rule that statutes must be read to give meaning to what they say, not what they do not say, prevents the burden from shifting to the citizen-detainee.

This interpretation of 4247(h) also avoids the due process concerns over burden shifting that are part of the foundation of the holdings in *Foucha* and *Hendricks*. An interpretation of 4247(h) concluding the burden does not shift complies with the fundamental rule of statutory construction that courts should avoid even potential constitutional problems when construing a statute.

In its opinion, the Fourth Circuit attempted to justify its departure from the usual and accepted practice of requiring the government to carry the burden when seeking to deprive a citizen of liberty by adopting the flawed reasoning in *United States v. Wetmore*, 812 F.3rd 245 (1st Cir. 2016). In *Wetmore*, one of the very few Act cases from outside the Fourth Circuit, the First Circuit employed a cursory analysis to place the burden of proof on the citizen-detainee when moving for discharge under Section 4247(h).

The First Circuit claimed this was because the Government should not be forced to prove what it disagrees with: "that the committed person is no longer sexually dangerous." Pet. App. A13. Citing to, of all things, an evidence treatise to support its reading of *Wetmore*, the Fourth Circuit adopted this reasoning and then took this error even further, contending that placing the burden on the citizen-detainee was appropriate due to the "general rule" that a "the person who seeks court action should justify the request." Pet. App. A13. This of course is not the

general rule, nor should it be, when determining who bears the burden of proving whether a citizen-detainee should be deprived of his liberty – *Foucha* and *Hendricks* make clear the burden should be on the Government.

The Fourth Circuit's reasoning is remarkably flawed. No one is arguing the Government should be required to prove something it does not advocate – here, that Mr. Vandivere is no longer sexually dangerous. Rather, Mr. Vandivere is simply saying that in the absence of a clear statement by Congress in the statute or the legislative history showing an intent to shift the burden, the Government should be required to prove, in a contested proceeding, that the citizen-detainee remains sexually dangerous so as to justify continued confinement.

III. The Panel's Decision to Shift the Burden to the Petitioner in a Discharge Hearing Conflicts with the Foundational Basis for this Court's opinions in *Foucha v. Louisiana* and *Kansas v. Hendricks*.

The Fourth Circuit dismissed the argument that *Foucha* and *Hendricks* are based on the notion that civil commitment statutes may violate substantive due process concerns if they shift the burden of proof to the citizen- detainee to gain his release. Pet. App. A15. However, those opinions make it clear that the Fourth Circuit's shifting of the burden to the citizen-detainee in a civil commitment case, with its inaccurate presumption that confinement constitutes the "status quo," is not constitutional.

In *Foucha,* this Court emphasized that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." 504 U.S. at 80 (citation omitted). The Court further

acknowledged that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.*

While *Foucha* involved a state civil commitment proceeding for an individual who had been acquitted of a crime due to mental illness rather than a discharge hearing under the Adam Walsh Act, the Supreme Court made it clear that distinction did not matter for due process purposes. The Court wrote that, for all intents and purposes, there is no difference for purposes of the burden shifting analysis between the petitioner in *Foucha* and Mr. Vandivere: "[t]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term [such as Vandivere] from all other civil commitments. 504 U.S. at 79 (cleaned up).

The Court then explicitly held that the Louisiana statute shifting the burden to the petitioner during a discharge hearing after initial commitment due to mental illness was unconstitutional, in part because "the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous." *Id.* at 81-82 (emphasis added). There can be only one reading of these passages in *Foucha*, which the Fourth Circuit ignored: to justify continued detention after an initial commitment the Government must retain the burden of proof at all times.

The Kansas statute at issue in *Hendricks,* a direct predecessor of and model for the Adam Walsh Act, expressly placed the burden on the Government during

discharge hearings.[1] Kansas St. 59-29a08(g) ("The burden of proof at the hearing for transitional release shall be upon the state to prove beyond a reasonable doubt that the person's mental abnormality or personality disorder remains such that the person is not safe to be placed in transitional release and if transitionally released is likely to engage in repeat acts of sexual violence.")

The placement of the burden on the Government was a key part of the Court's holding that the statute was constitutional. Specifically, the Court wrote that "[i]n addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards." 521 U.S. at 353. These safeguards included "three different avenues of review" in which the burden of proving that detention was necessary never shifted from the state to the detainee:

> First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate and could then authorize the person to petition for release. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

Id. (emphasis added) (internal citations omitted).

The Fourth Circuit attempted to distinguish *Hendricks* by stating "[t]he statute's lack of burden shifting simply did not play into the Court's analysis." Pet. App. A15. This is simply not true. The fact the burden remained on the Government

[1] House of Representatives Report of the Committee on the Judiciary, 109 H. Rpt. 218 at 29, 55 (Sept. 9, 2005) (explaining that the Adam Walsh Act "combines commitment standards substantively similar to those approved by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Kansas v. Crane*, 534 U.S. 407 (2002)").

was a key element of the *Hendricks* Court's decision to uphold the state statute as constitutional. The Court determined that the Kansas statute did not violate double jeopardy because the burden of proof justifying continued confinement remained on the state after the initial detention hearing thus making the continued confinement civil, not criminal, in nature. *Hendricks* at 364-65 ("If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement."). This reference to a reasonable doubt standard – the same as that used during the initial hearing – can only mean that the burden of proving this standard remained with the state.

The *Hendricks* Court also provided the justification for why the burden had to remain with the state and had to remain at the same level as at the initial commitment hearing. Doing so protected the detainee from indefinite commitment and again ensured that the civil commitment was not criminal in nature such that it violated the Double Jeopardy Clause of the Constitution. *Id.*

Under *Foucha* and *Hendricks,* to be constitutional, civil commitment statutes must include due process safeguards that are both substantive and procedural. This is to ensure the commitment is not indefinite and to protect the citizen detainee's liberty interests. The Fourth Circuit's basic presumption that, following the initial confinement hearing, confinement constitutes the "status quo" and the burden therefore shifts to the citizen-detainee stands in direct conflict with *Foucha*

and *Hendricks*. Both cases make it clear that the burden must remain with the Government.

Moreover, the Fourth Circuit deviated from accepted judicial norms in treating the burden of proof issue as purely procedural and not one of substantive due process. The Fourth Circuit did so by incorrectly applying the factors set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), which courts use to determine what procedural (not substantive) due process is required when a liberty or property interest is affected when, as here, the statute in question is silent.

The use of the *Eldridge* factors here was a stark deviation from accepted judicial practice. The Supreme Court has repeatedly held that the question of who bears the burden of proof is a substantive issue of law. *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) ("the burden of proof is a substantive aspect of a claim."); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 271 (1994) ("The assignment of the burden of proof is a rule of substantive law."); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) ("The burden of proof is part of the very substance of [the plaintiff's] claim and cannot be considered a mere incident of a form of procedure.").

Because the question of burden of proof is an issue of substantive due process, the Fourth Circuit's application of the *Eldridge* factors in the unusual and developing milieu of civil commitment cases was a significant deviation from normal judicial practice. The Supreme Court should exercise its supervisory power to correct it. Improper use of *Eldridge* going forward could result in significant

deprivations of substantive due process rights using an incorrect, lower standard for determining what process is due.

This Court appears to agree. The Supreme Court made no mention of the *Eldridge* balancing factors in *Foucha, Hendricks,* or *Addington v. Texas,* 441 U.S. 418, 433 (1979) (holding that the burden of proof in civil confinements must be at least "clear and convincing").[2]

Finally, basic rules of Article III standing confirm that the burden to show the reasons for confinement exist must remain on the government throughout an Adam Walsh Act proceeding. It is axiomatic that in every civil action, the party invoking federal jurisdiction has the burden of establishing standing by showing an injury in fact. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-158 (2014). To satisfy Article III, the injury must be "concrete and particularized" and "actual or imminent." *Id.* In cases such as this one involving an allegation of future injury (that the citizen-detainee may harm someone in the future if released), the threatened injury must be "certainly impending" or there must be a "substantial risk" the harm will occur. *Id.* (citations omitted). The plaintiff must also bear the burden of establishing these requirements for standing at all times in the course of a civil proceeding like the Adam Walsh Act. *Lujan v. Defenders of Wildlife* 504 U.S.

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[2] *Addington* cited *Eldridge* solely for the proposition that: "In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions."
Addington, 441 U.S. at 425 (citing *Eldridge*, 424 U.S. at 335).

555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing [the elements of standing]…each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation.") (cleaned up).

Lujan makes it clear that shifting the burden back to the citizen-detainee – the defendant in a civil commitment proceeding – violates these basic rules of standing. The burden of proving each element of the plaintiff's (here, the Government) claim must remain with the plaintiff at all times throughout an Adam Walsh Act proceeding, from the initial hearing through a contested discharge petition. Shifting the burden back to the citizen-detainee in this, a civil case, would violate bedrock rules of Article III standing.

In *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), the Supreme Court confirmed that injury in fact is a constitutional requirement that cannot be conferred by statute. ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") Thus, the mere fact the Act exists only gets the Government in the door – it can bring the initial commitment proceeding but at all times throughout the course of a civil Adam Walsh Act case the burden to show standing must remain on the Government.

Of course, Article III standing requirements would not apply if the Act was criminal in nature, something the Government has argued vociferously against in

other cases. The reason? Because if the Act were criminal in nature, Mr. Vandivere and nearly all other detainees would be free on Double Jeopardy grounds.

CONCLUSION

The petition for a writ of certiorari should be granted to (a) address the important federal question raised by the Fourth Circuit's decision to endorse a practice far outside of judicial norms that typically place the burden on the government when seeking to deprive a citizen of their liberty interest; and (b) ensure compliance with both the property statutory construction of the Adam Walsh Act, and this Court's holdings in *Foucha* and *Hendricks*.

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