No. 25-833

In the Supreme Court of the United States

DUANE LETROY BERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CATO INSTITUTE AND THE DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The question presented is:

Whether 18 U.S.C. § 4246(a) exceeds the constitutional limits of Congress's powers insofar as it permits the federal government to civilly commit a person who has not been convicted of a federal offense and whose federal criminal charge has already been dismissed.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case aligns with Cato's objectives of preserving the doctrines of enumerated powers and federalism.

The Due Process Institute is a nonprofit, bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Due Process Institute is weighing in on this matter to ensure Americans enjoy protection from indefinite federal civil commitment when they have never been convicted of a crime and are no longer awaiting trial because their criminal charges were dismissed.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

The world has changed profoundly over the last decade, but for Duane Berry, time crawls by and freedom remains elusive. On December 17, 2019, after four years in custody and two rounds of competency hearings, a federal judge dismissed the sole criminal charge against Mr. Berry. Pet. App. 15a. Nonetheless, a decade after he was first taken into federal custody, he remains in detention—five years past the maximum time to which he could have been sentenced had he been convicted. *See* Pet. Br. 3; 18 U.S.C. § 1038(a)(1)(A). His continued detention is the result of the Fourth Circuit's unconstitutional expansion of the federal civil commitment power.

Congress's constitutionally granted powers are "defined, and limited." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Every federal law "must be based on one or more" of these. *United States v. Morrison*, 529 U.S. 598, 607 (2000). The Constitution deliberately withholds "from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995).

Indefinite post-dismissal civil commitment does not effectuate any enumerated power. The relevant statutes provide for the commitment and pre-trial restoration of mentally ill individuals, codified at 18 U.S.C. §§ 4246(a), 4241(d). They explicitly do not authorize the indefinite civil commitment of individuals who have never been convicted of a crime

and who no longer await trial. *Id.* The dismissal of the charges against Mr. Berry necessitated his immediate release, as any continued incarceration exceeded Congress's enumerated powers.

Rather than rectify the Government's overreach, the Fourth Circuit sidestepped the constitutional question, improperly holding that Mr. Berry remained in the custody of the Attorney General and so was committable pursuant to a pretrial restoration statute that no longer applied to him. Pet. App. 9a. (citing 18 U.S.C. § 4241(d)).

The Fourth Circuit's sweeping decision goes far beyond the cautious approach this Court has twice taken in addressing the constitutionality of federal civil commitment. *See United States v. Comstock*, 560 U.S. 126 (2010); *Greenwood v. United States*, 350 U.S. 366, 375 (1956). Allowing it to stand would authorize Congress to indefinitely civilly commit any mentally ill person charged with a federal crime, even after the charges are dismissed. This danger's scope is amplified by the proliferation of federal criminal law.

This Court should grant Mr. Berry's petition and reverse the judgment below.

ARGUMENT

I. MR. BERRY'S CONTINUED DETENTION IS UNCONSTITUTIONAL.

Congress lacks any power to further detain Mr. Berry. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the

States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Different default rules exist for Congress and the states: The powers delegated to the federal government are "few and defined," while those belonging to the states are "numerous and indefinite." THE FEDERALIST No. 45 (Madison).

This distinction reflects the Framers' deliberate choice. The proposed Virginia Plan would have relegated the states to the "subordinate roles that local government played in England." Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 472 (2003). Other proposals would have afforded Congress power over states' internal affairs or even eliminated the states altogether. *Id.* But that approach was defeated in favor of a federal government of limited, enumerated powers. *Id.* at 473. Proposed additions to these generally failed. *Id.* "When the convention adjourned, [the delegates] presented to Congress and to the states a scheme for a much weaker central government than had been envisioned in the Virginia Plan." *Id.*

Nonetheless, the Anti-Federalists still feared the possibility of a powerful central government. *Id.* Their trepidation inspired the Bill of Rights, with the Tenth Amendment safeguarding against federal overreach: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This division of power serves a

key purpose. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

"This [federal] government is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The Necessary and Proper Clause, which follows Article I's enumeration of Congress's powers, was never intended to supplement them. U.S. CONST. art. I, § 8. Congress may exercise incidental power only to "carr[y] into Execution the foregoing Powers." *Id.* James Wilson, who served on the Committee of Detail that drafted the clause, explained that it "gives no more, or other powers; nor does it in any degree go beyond the particular enumeration." Michael Boldin, *Understanding the Real Meaning of the Necessary and Proper Clause*, TENTH AMEND. CTR. (May 19, 2024)[2] (quoting THE FOUNDER'S CONSTITUTION (Phillip B. Kurland & Ralph Lerner eds., 1987)).[3] Fellow Committee member Oliver Ellsworth suggested that the Clause simply confirmed congressional enactments' legal supremacy. *Id.* Alexander Hamilton thought the Clause "may be chargeable with tautology or redundancy," but "is at least perfectly harmless." THE FEDERALIST No. 33 (Hamilton). The Constitution,

[2] Available at https://tinyurl.com/48dxzhr2.

[3] Available at https://tinyurl.com/mwd2rz5s.

then, requires that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Morrison*, 529 U.S. at 607.

No enumerated power authorizes post-dismissal civil commitment. "[T]he Constitution does not vest in Congress the authority to protect society from every bad act that might befall it." *Comstock*, 560 U.S. at 165 (Thomas, J., dissenting) (citing *New York v. United States*, 505 U.S. 144, 157 (1992)). Congress can legislate to proscribe federal crimes and punish violators, but that power "does not provide the Government with the additional power to exercise indefinite civil control over that person." *Id.* at 174. Once Mr. Berry no longer faced a pending criminal charge, the federal government lost its constitutional authority to continue holding him. When federal charges are dismissed, the federal government's legitimate interest in having a defendant made competent to stand trial is extinguished. All that remains is concern for community safety, but the power "to protect the community from the dangerous tendencies of some who are mentally ill" is among those reserved to the states. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

This Court has repeatedly affirmed states' primary responsibility for civil commitment. *Id.*; *Kansas v. Hendricks*, 521 U.S. 356, 363 (1997) ("The State may take measures to restrict the freedom of the dangerously mentally ill."). Civil commitment has long

been understood to be a police power, the likes of which traditionally belong to the states. *Addington*, 441 U.S. at 426 (noting that "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves."). The federal usurpation of a quintessential state police power upsets the "'constitutionally mandated balance of power' between the States and the Federal Government" that was "adopted by the Framers to ensure the protection of our fundamental liberties." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985)).

Indefinite post-dismissal federal civil commitment unconstitutionally arrogates traditional state functions to the federal government, in violation of federalism and in excess of Congress's enumerated powers.

II. THE DECISION BELOW OVERSTEPS THIS COURT'S CAREFULLY PRESCRIBED LIMITS ON FEDERAL CIVIL COMMITMENT POWERS.

This Court's precedent has authorized federal civil commitment only in extremely narrow circumstances. *See Comstock*, 560 U.S. at 126. The Fourth Circuit's decision eviscerates the guardrails and expands federal power in a way that would have been unrecognizable to the Framers.

In *Comstock*, this Court asked whether "the Government has the authority under Article I of the Constitution to enact [a] federal civil-commitment program" in assessing the constitutionality of 18 U.S.C. § 4248. *Id.* at 129–30. The Court held that the federal government may civilly commit a mentally ill, sexually dangerous individual beyond the conclusion of his sentence. *Id.* But the Court's narrow holding relied on then-Solicitor General Kagan's argument that § 4248 was necessary and proper to administer a "responsible" prison system. *Id.* at 148; *see* Tr. of Oral Arg. at 14, United States v. Comstock, 560 U.S. 126 (2010) (No. 08-1224). She stressed that the applicable statute is "narrow in scope," limited to individuals already in federal custody pursuant to other authority. *Comstock*, 560 U.S. at 148 (quoting 18 U.S.C. § 4248(a)).[4] Further, she conceded that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." *Id.* (ellipses in original) (citation omitted). *Comstock* allows federal civil commitment only where the person has been convicted of a federal crime and is lawfully serving a sentence at the time civil commitment proceedings are initiated—unlike Mr. Berry, whose charge had been dismissed. *Id.* "Section 4248 has been

[4] Underscoring the necessity of a legal basis for detention, the statute actually reads "committed to the custody of" rather than "in the custody of." 18 U.S.C. § 4248(a).

applied to only a small fraction of federal prisoners" and is far from a police power. *Id.*

This Court's other holding addressing federal civil commitment is likewise limited. *See Greenwood*, 350 U.S. at 375. In *Greenwood*, the Court examined the constitutionality of § 4248's predecessor statute. *Id.* at 367; *see* 18 U.S.C. § 4248. The Court held that the power to civilly commit an individual with pending charges was linked to the federal government's prosecutorial power and the existence of a pending indictment. *Id*. at 375. Where the mental acuity of the accused remains in dispute, "[w]e cannot say that federal authority to prosecute has now been irretrievably frustrated." *Id.* But the *Greenwood* decision is fundamentally different than Mr. Berry's plight. Mr. Berry was not otherwise lawfully in federal custody, and no charges were pending when the Government sought to commit Mr. Berry. And unlike in that case, Mr. Berry's lack of competency had been established—the prosecution requested, and a judge granted, dismissal based on it.

The Fourth Circuit authorized Mr. Berry's continued detention only by disregarding the caution that marks *Comstock* and *Greenwood*. If *Comstock* came "perilously close" to giving the federal government a police power that this Court has always rejected, *Comstock*, 560 U.S. at 180 (Thomas, J., dissenting), then the Fourth Circuit leaped straight over the constitutional line.

III. THE DECISION BELOW INVITES THE DRAMATIC OVEREXPANSION OF FEDERAL CIVIL COMMITMENT AUTHORITY.

By conflating physical custody with legal custody, the decision below unconstitutionally expanded congressional authority at the expense of personal liberty and federalism. The scope of that error could rapidly inflate due to the hyper-proliferation of federal criminal law.

A. Mr. Berry was not lawfully in federal custody when the federal government sought to civilly commit him.

While the word custody "is a chameleon" whose meaning depends on context, *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989), *see also Rumsfeld v. Padilla*, 542 U.S. 426, 438–39 (2004), a person cannot be federally civilly committed without a federal conviction or pending federal charges. *See Comstock*, 560 U.S. at 148, *Greenwood*, 350 U.S. at 375. Once Mr. Berry's charges were dismissed, the Government lost its authority to hold him. The Fourth Circuit's decision thus allows for his commitment based solely on physical—albeit illegal—detention. *But see United States v. Joshua*, 607 F.3d 379, 388 (4th Cir. 2010) (explaining that "custody" for purposes of civil commitment "refers not to physical custody . . . but rather to legal custody"); *see also United States v. Wayda*, 966 F.3d 294, 304 (4th Cir. 2020) (holding that custody must "be active and legitimate" before the civil commitment statute can apply).

In past cases, the government tried—and failed—to convince courts that "custody" means physical custody. *Joshua*, 607 F.3d at 388; *United States v. Wetmore*, 700 F.3d 570, 573 (1st Cir. 2012) ("[M]ere physical control could hardly suffice . . . at the very least, some colorable legal authority must exist for the detention."); *United States v. Hernandez-Arenado*, 571 F.3d 662, 667 (7th Cir. 2009) ("We reject an interpretation that would allow physical custody alone to suffice"). But as the Fourth Circuit previously emphasized, "[w]here the challenged action involves a confinement that would be imposed in the future, rather than a present incarceration, custody may be defined not in terms of physical control, but rather in terms of the *legal* control over the person." *Joshua*, 607 F.3d at 387 (emphasis added) (quoting *Hernandez-Arenado*, 571 F.3d at 666).

The need for legal authority, not just physical custody, is also present in this Court's federal civil commitment precedent. In *Greenwood* the legal authority to commit was derived from active prosecutorial power. *Greenwood*, 350 U.S. at 375. In *Comstock,* the government sought to further commit individuals who were already committed to its custody as a result of criminal convictions. *Comstock*, 560 U.S. at 148. "[R]eading the word 'custody' to mean physical custody produces absurd results that Congress could not reasonably have intended." *Joshua*, 607 F.3d at 387.

The federal government had no legal custody over Mr. Berry when it initiated commitment proceedings under § 4246. For a time, Mr. Berry was in "the custody of the Attorney General . . . for treatment in a suitable facility." 18 U.S.C. § 4241(d); *see also* Pet. App. 9a. But that provision justified his commitment to the Attorney General for just four months. 18 U.S.C. § 4241(d)(1). Additional reasonable time would have been allowed had the court determined that Mr. Berry would regain competency prior to granting the dismissal. *Id.* § 4241(d)(2). Once his charges were dismissed, the legal authority for maintaining federal custody over him ran out.

Prior to this case, the Fourth Circuit held that "the government lacks authority to confine a defendant beyond the specific period provided by the statute." *Wayda*, 966 F.3d at 305. This is consistent with other circuits. *See, e.g.*, *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990) (stating that the government cannot "prolong confinement beyond the statutory mandate"); *United States v. Baker*, 807 F.2d 1315, 1320 (6th Cir. 1986) (stating that there is "no authority to confine" beyond the strict statutory limits). A § 4246 certificate must be filed when a "person is *presently* committed to the Attorney General's custody." *United States v. Carrington*, 91 F.4th 252, 258 (4th Cir. 2024). The legitimacy of that custody turns on "whether the time limits in § 4241(d) have expired." *Id.* If the government wants to confine a defendant beyond the four-month period, it must find

"an additional justification in" § 4241. *Wayda*, 966 F.3d at 305.

The civil commitment framework thus provides "a clear start and end point during which the government must initiate commitment proceedings." *United States v. Searcy*, 880 F.3d 116, 122 (4th Cir. 2018). The Fourth Circuit unlawfully sanctioned the initiation of proceedings after that expiration date, and now, Mr. Berry has remained in federal custody for ten years despite no longer facing a charge. Worse—if federal civil commitment proceedings can be initiated even after the government loses legal custody, prosecutors can unlawfully incarcerate defendants in perpetuity to initiate civil commitment proceedings. "[C]ivil commitment is not some indefinite threat unmoored in time." *Id.* At least, it isn't so long as mere physical detention does not authorize civil commitment proceedings.

Federal civil commitment must be kept closely cabined. *See Jackson v. Indiana*, 406 U.S. 715, 732–33 (1972) (expressing doubt that "§§ 4244 and 4246 could survive constitutional scrutiny if interpreted to authorize indefinite commitment"). Limits need to contain not just the length of commitment, but also when proceedings may be initiated. *See Wayda*, 966 F.3d at 306 (stating that if a person "can be made subject to § 4248 proceedings at any time . . . we would effectively authorize indefinite commitment"). The decision below effectively authorizes the Federal

Government to unlawfully detain individuals whose release was compelled under law.

B. The unmitigated growth of federal criminal law renders the decision below especially dangerous.

The Framers envisioned a government of enumerated powers, a limited set of federal crimes effectuating them, and a correspondingly sparse federal prison population. It is "historical fact that federal jurisdiction was extremely limited for most of the nation's history." Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 754 (2005) ("[T]he general rule" was that "garden variety crime was the province of the states, not the federal government"). America has not kept faith with that original vision. Today, the federal criminal code spells out nearly 5,200 statutory crimes, and these are joined by approximately another 300,000 regulatory ones—promulgated not by the people's elected representatives, but by unelected and often unaccountable bureaucrats. *See* Patrick McLaughlin & Liya Palagasvhili, *Counting the Code: How Many Criminal Laws Has Congress Created?*, MERCATUS CTR. (Jan. 17, 2023);[5] GianCarlo Canaparo, *Quantifying and Remedying Overcriminalization in Federal Law*, HERITAGE FOUND. (May 14, 2025).[6]

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[5] Available at https://tinyurl.com/3ddt7z6p.

[6] Available at https://tinyurl.com/4dv3b4tr.

This Court's 2010 *Comstock* decision applied to a just 105 out of 188,000 federal inmates. *Comstock*, 560 U.S. at 148. But the Fourth Circuit's decision in this case knows no such bounds. It places anyone charged with a federal crime who suffers from mental illness—no matter how trivial the alleged offense—at risk of indefinite detention. And over a third of federal prisoners have a history of mental illness. U.S. DEP'T OF JUSTICE, OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011–12* (2017).[7]

For decades, lawmakers "have expressed concerns about a growing federalization of local offenses." Liz Komar, *Over-Federalization: Federal Intrusion Into State Criminal Law*, THE SENT'G PROJECT (Oct. 1, 2025);[8] Edwin Meese III, *The Dangerous Federalization of Crime*, HOOVER INST. (July 30, 1999) ("[W]e federalize everything that walks, talks, and moves." (quoting Senator Joseph Biden)).[9] From walking a dog on Supreme Court grounds with a standard-length leash to taking a stroller into the restroom at the National Zoo, federal crimes are ubiquitous and often invisible. Mike Fox, *From Dog Leashes to Potty Breaks: Are We All Unwitting Criminals?*, CATO INST. (May 14, 2025).[10]

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[7] Available at https://tinyurl.com/362zztht.

[8] Available at https://tinyurl.com/erkw8rv8.

[9] Available at https://tinyurl.com/2kjjhb9j.

[10] Available at https://tinyurl.com/53je88ah.

Consider the implications of this reality: A mentally ill homeless man walking his dog on this Court's grounds using a standard-length leash thereby commits a federal regulatory infraction. *See* 40 U.S.C. § 6137; *Regulation Four, Building Regulations*, SUPREME COURT OF THE UNITED STATES (Nov. 12, 1999).[11] Under the Fourth Circuit's logic, he can now be federally detained *in perpetuity*, even if a prosecutor wisely dismissed any criminal charge. So much for liberty and constitutionally limited government.

CONCLUSION

A decade after Duane Berry first faced a five-year maximum sentence, and long after that charge was dismissed, he still languishes in solitary confinement. The Fourth Circuit's decision authorizing this invites a dramatic and unconstitutional expansion of federal power that Congress did not intend. This Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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[11] Available at https://tinyurl.com/4pcr2fax.