

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**

---

**REPLY IN SUPPORT OF PETITION FOR A  
WRIT OF CERTIORARI**

---

JO-ANN TAMILA SAGAR  
*Counsel of Record*  
CATHERINE E. STETSON  
ERIC ROYTMAN-CASH  
DARRYL E. WILLIAMS, JR.  
HOGAN LOVELLS US LLP  
555 Thirteenth Street, NW  
Washington, DC 20004  
(202) 637-5600  
jo-ann.sagar@hoganlovells.com

*Counsel for Petitioner*

---

---

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT .....	3
I.    THIS CASE IS AN EXCELLENT VEHICLE.....	3
A. Berry Preserved His Constitutional Challenge To § 4246 .....	3
B. The Government’s Arguments To The Contrary Are Unpersuasive.....	4
C. The Court Cannot Avoid The Constitutional Question.....	6
II.   THE GOVERNMENT IS WRONG ON THE MERITS .....	7
A. The Government’s Position Is Impermissibly Expansive.....	7
B. The Government’s Position Conflicts With This Court’s Precedents .....	9
C. The Government’s Position Conflicts With Historical Practice.....	11
III.  ALTERNATIVELY, THIS COURT SHOULD SUMMARILY REVERSE.....	12
CONCLUSION .....	12

**TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b>CASES:</b>	
<i>Greenwood v. United States</i> , 350 U.S. 366 (1956).....	2, 4, 10
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	12
<i>In re Winship</i> , 397 U.S. 358 (1970).....	8
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977).....	8
<i>Johnson v. United States</i> , 576 U.S. 591 (2015).....	8
<i>Mont v. United States</i> , 587 U.S. 514 (2019).....	9
<i>National Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	7
<i>Nelson v. Adams USA, Inc.</i> , 529 U.S. 460 (2000).....	5
<i>Potter v. District of Columbia</i> , 126 F.4th 720 (D.C. Cir. 2025) .....	8
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020).....	8
<i>Shalala v. Illinois Council on Long Term Care</i> , 529 U.S. 1 (2000).....	11
<i>Thompson v. Thompson</i> , 484 U.S. 174 (1988).....	8
<i>United States v. Comstock</i> , 551 F.3d 274 (4th Cir. 2009).....	9

**TABLE OF AUTHORITIES—Continued**

	<u>Page(s)</u>
<i>United States v. Comstock</i> , 560 U.S. 126 (2010).....	2, 4, 6, 7, 9-11
<i>United States v. Tom</i> , 565 F.3d 497 (8th Cir. 2009).....	10
<i>Victor v. Nebraska</i> , 511 U.S. 1 (1994).....	8
<b>STATUTES:</b>	
18 U.S.C. § 4246(a).....	5
18 U.S.C. § 4248(a).....	6

## INTRODUCTION

The question presented is whether the federal government may indefinitely confine a man it will never prosecute. The government's answer is a resounding yes. So long as the government can convince a court that his release risks property damage, the government believes his indefinite confinement is constitutional. It thus candidly *agrees* (at 14, 17) that it can civilly commit someone with no "current connection to the federal criminal system," "even after any federal criminal authority to detain or imprison has lapsed."

The implications of that position are staggering. As the government sees things, Congress authorized the indefinite federal commitment of a criminal defendant whose period of supervised release has expired, or whose charges were dropped the day after they were filed, or who is acquitted by a jury. Anyone who finds themselves in federal criminal custody for any reason—however trivial, however fleeting—risks indefinite federal confinement. Indeed, if the government is free to do what it has done here, one wonders why it would bother with criminal prosecutions at all. It could simply arrest a person, certify him as dangerous under a civil evidentiary standard, and commit him indefinitely—without the inconvenience of gathering evidence for a trial, without the burden of proving guilt beyond a reasonable doubt to a jury of his peers, and without having to defer to a judicial determination of an appropriate sentence.

That is a federal police power and then some. This Court should say so.

Rather than disclaim that power, the government leads its brief in opposition with the assertion that

Berry failed to preserve his constitutional challenge. That argument is meritless—Berry argued on the first page of his opening brief in the court below that the federal government “exceeds the bounds of its authority when it seeks to civilly commit individuals who are presumed innocent, are no longer in lawful competency and restoration proceedings with an eye toward trial, and against whom all federal charges have been dismissed.” Berry CA4 Br. 1.

The government’s fallback is to insist that this Court’s precedents already decided the constitutional question in its favor. They do not. Neither *United States v. Comstock*, 560 U.S. 126 (2010), nor *Greenwood v. United States*, 350 U.S. 366 (1956), holds that the federal government may civilly commit a person with no current connection to the federal criminal system. To the contrary—both decisions went out of their way to disclaim that power.

The government’s merits position is also notable for what it asks this Court to forget. At oral argument in *Comstock*, multiple Justices pressed then-Solicitor General Kagan for a limiting principle—where does the federal civil commitment power end? Her answer was unequivocal: the federal government lacks authority “to commit a person who has been released from prison and whose period of supervised release is also completed,” because that is when the “Federal power” ends. *United States v. Comstock*, No. 08-1224, Tr. 8-9 (U.S. Jan. 12, 2010). This Court quoted that concession verbatim and relied on it to hold that *Comstock* did not “confer[] on Congress a general police power.” 560 U.S. at 148 (quotations omitted). The government now disavows that concession entirely,

insisting (at 17) that no “current connection to the federal criminal system” is required.

The question presented lies at the heart of our constitutional order. A government of enumerated powers cannot detain a man indefinitely simply because it worries his release might result in property damage. Duane Berry was never convicted. He was never tried. Nor will he ever be tried. Yet the federal government has detained Berry for eleven years after arresting him on a dropped charge that carried a five-year maximum sentence. If that is consistent with a government of enumerated powers, those words have lost their meaning.

## **ARGUMENT**

### **I. THIS CASE IS AN EXCELLENT VEHICLE.**

#### **A. Berry Preserved His Constitutional Challenge To § 4246.**

At every stage of this litigation, Berry challenged his confinement on the basis that the government lacked authority to civilly commit him after his criminal charges had been dismissed.

In the district court, immediately after the government filed a certification that he met the criteria for civil commitment, Berry filed a motion to dismiss. JA18-32;<sup>1</sup> *see also* Pet. 13. On the first page of his motion, he argued that “he was not certifiable \* \* \* because his charges were dismissed five months before.” He renewed that assertion in a later filing, arguing that 18 U.S.C. § 4246’s allowance for the civil commitment of a person whose charges had already been

---

<sup>1</sup> “JA” refers to the joint appendix filed in the Fourth Circuit. *See* Dkt. Nos. 25-26 (Sep. 16, 2024).

dismissed was “unconstitutional[.]” JA104-106 (emphasis omitted).

On appeal, the constitutional argument was raised in the first paragraph of Berry’s brief: “After \* \* \* the sole charge against Mr. Berry was dismissed,” “the Government relinquished any claim to continue detaining him in federal custody.” Berry CA4 Br. 1. Berry explained that it was “beyond the power of Congress” to permit “post-dismissal certification.” *Id.* at 14-15 (citation omitted); *see also, e.g., id.* at 18 (similar) (quoting *Greenwood*, 350 U.S. at 375); *see also id.* at 19 (similar) (citing *Comstock*, 560 U.S. at 148). On reply, Berry again led with the contention that “federal civil commitment is only constitutional when it is pursued against a person in active, legal federal custody.” Berry CA4 Reply Br. 1. And minutes into the Fourth Circuit oral argument, counsel explained that there was a “clear deadline” to civilly commit Berry: “December 17, 2019—when the indictment was dismissed.” CA4 Oral Arg. 2:35-2:45.

### **B. The Government’s Arguments To The Contrary Are Unpersuasive.**

The government nevertheless makes the astonishing argument (at 12) that Berry’s constitutional challenge is “unpreserved.” That argument is grounded in an attempt to divide § 4246(a) and defend the constitutionality of certain parts of that provision while ignoring the *unconstitutionality* of others. The government’s divide-and-conquer approach does not work for three reasons.

*First*, 18 U.S.C. § 4246(a) has no subsections. The government therefore necessarily concedes that Berry has consistently challenged the correct statutory provision, and even the correct sentence within that

provision. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (claims are preserved when the court is “fairly put on notice” as to the claim being raised).

The government, however, argues (at 10) that Berry failed to preserve his constitutional challenge to § 4246(a) by failing (on the government’s telling) to notify the court of appeals that Berry’s constitutional challenge applied to *both* the second and the third clause in the first sentence of that provision, instead of the third clause *alone*. That is not credible. The second clause covers defendants in pretrial competency proceedings; the third covers defendants whose charges have been dismissed. 18 U.S.C. § 4246(a). The government reads the second clause to overlap with the third, such that it covers people who were in pretrial competency proceedings *and then* had their charges dismissed. On that reading, both clauses are inherently implicated by any challenge to post-dismissal commitment.

*Second*, the government is wrong about the scope of Berry’s challenge. Berry has maintained throughout this litigation that his confinement is unconstitutional, *no matter which clause* of the first sentence of § 4246(a) the government relies upon. Berry CA4 Br. 12 (“Section 4246(a)’s post-dismissal certification, which extends eligibility for civil-commitment proceedings to individuals who are not in federal custody, is unconstitutional.”). Indeed, it was *the government* that elected to splice that first sentence into categories and invoke the third clause as the basis for Berry’s commitment. *See* Government’s Motion To Refer Defendant For A Civil Commitment Determination, ECF No. 143, *United States v. Berry*, 2:15-cv-20743 (E.D. Mich. Feb. 15, 2019) (“Section 4246 identifies three

types of defendants \* \* \* Berry falls into this last category,” “defendants against whom all criminal charges have been dismissed.”).

*Third*, the government’s approach is inconsistent with *Comstock*. The first sentence of 18 U.S.C. § 4248(a) (which this Court examined in *Comstock*) is functionally identical to the first sentence of § 4246(a). And the Court in *Comstock* examined “whether the Necessary and Proper Clause \* \* \* grants Congress authority sufficient to enact the statute.” 560 U.S. at 133. It did not parse the first sentence clause by clause, asking whether each part of the sentence was constitutional—much less require the defendants to challenge each clause separately.

### **C. The Court Cannot Avoid The Constitutional Question.**

The government is wrong (at 11) that the court of appeals’ statutory holding rendered the constitutional question “no longer relevant.” The panel’s conclusion that the statute permits post-dismissal commitment for a “reasonable period,” Pet. 29, quite pointedly did not respond to the constitutional argument Berry pressed—that Congress lacks the power to authorize post-dismissal commitment in the first place.

Indeed, if the decision below is permitted to stand, no Fourth Circuit panel would *ever* have reason to reach the constitutional question at the heart of Berry’s petition—even where, as here, the court would be doing so in the face of arguments challenging the federal power to civilly commit a person after their charges have been dismissed, *see supra* 3-4. This Court should grant review to correct that grave misapprehension of federal power.

## II. THE GOVERNMENT IS WRONG ON THE MERITS.

Under *Comstock*, Berry's continued commitment is flagrantly unconstitutional. *See* Pet. 15-24. The government's rule amounts to a federal police power, this Court's precedents repudiate it, and history confirms what those precedents teach.

### A. The Government's Position Is Impermissibly Expansive.

1. In the government's view, the Necessary and Proper Clause authorizes Congress to provide for the civil commitment of anyone "currently" held in a federal facility—"even after any federal criminal authority to detain or imprison has lapsed"—so long as his release might "threaten others" (or, in this case, property). BIO at 14-17 (emphasis added). That is the very police power the Founders "denied the National Government and reposed in the States." *Comstock*, 560 U.S. at 148.

The government's argument also is hopelessly circular. The Necessary and Proper Clause does not grant "independent powers beyond those specifically enumerated." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012) (citation modified). Once the federal power to punish violations of federal law "has lapsed," BIO at 14, there remains no "granted power" from which civil commitment authority can be "derived," *Comstock*, 560 U.S. at 147.

If the government were correct in its contention (at 15) that "current[]" detention in a federal facility—standing alone, and however unlawful—serves as a sufficient constitutional justification for "continued commitment," then the federal government need not

offer any legal justification for commitment at all. All the government has to do is refuse to let someone free after their lawful confinement ends. The government's position (at 18) is thus anything but "narrow."

2. The government waves away these concerns, gesturing (at 19) to what it calls "extensive procedural safeguards." But those safeguards are not the ones that we ordinarily rely upon when the federal government confines a person for a decade in the absence of any existing federal charge. There is no innocent until proven guilty. *Victor v. Nebraska*, 511 U.S. 1, 29 (1994) (Blackmun., J., concurring in part). There is no jury of your peers. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). There is no proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). There is no fair notice of a statutory maximum sentence. *Johnson v. United States*, 576 U.S. 591, 595-596 (2015). There is no prohibition of cruel and unusual punishment. *Ingraham v. Wright*, 430 U.S. 651, 666-668 (1977).

What procedural safeguards, then, does the government reference? "[A] federal district court f[inding] by clear and convincing evidence that petitioner's release from federal custody would create a substantial risk of serious property damage due to his untreated mental illness," and a "periodic[] reassess[ment of] the need for continued custody." BIO at 19. In other words, the government would have civil commitment governed by the same evidentiary standard that applies to civil-contempt claims. *See, e.g., Potter v. District of Columbia*, 126 F.4th 720, 723 (D.C. Cir. 2025). And the same type of court assessment that applies to child-custody disputes. *See, e.g., Thompson v.*

*Thompson*, 484 U.S. 174, 180 (1988). The government’s reassurances are cold comfort.

**B. The Government’s Position Conflicts With This Court’s Precedents.**

Noting that the respondents in *Comstock* had completed their prison sentences, the government argues (at 14) that it is free to civilly commit a person even “after the end of any federal criminal proceeding” to which he is subject. That gets it all wrong.

1. The government ignores that the *Comstock* respondents were, at the time of their commitment, still lawfully confined and about to begin terms of supervised release. 560 U.S. at 148; *United States v. Comstock*, 551 F.3d 274, 284 n.11 (4th Cir. 2009). That fact was no throwaway. At oral argument, then-Solicitor General Kagan was pressed for a limiting principle. See, e.g., *United States v. Comstock*, No. 08-1224, Tr. 8-9 (U.S. Jan. 12, 2010). General Kagan responded that the federal government lacks the authority “to commit a person who \* \* \* has been released from prison *and whose period of supervised release is also completed.*” *Id.* at 9 (emphasis added). That concession—quoted verbatim in the opinion—assuaged this Court’s “fear” that its “holding \* \* \* confers on Congress a general police power.” 560 U.S. at 148 (quotations omitted). Supervised release is, after all, “part of” the federal criminal sentence, see *Mont v. United States*, 587 U.S. 514, 523 (2019), so the civil commitment of a person on supervised release “ultimately derive[s] from an enumerated power,” *Comstock*, 560 U.S. at 147 (quotations omitted).

Indeed, *Comstock* resolved a “split of authority,” *id.* at 133, between the Fourth and Eighth Circuits, which were divided on whether ongoing supervised

release meant that the federal power over a criminal defendant had not yet been exhausted. *See id.*; compare 551 F.3d at 284 n.11 with *United States v. Tom*, 565 F.3d 497, 505 (8th Cir. 2009). In siding with the Eighth Circuit, this Court confirmed that federal civil commitment “must itself be legitimately predicated on an enumerated power”—it did *not* greenlight the commitment of people without a current connection to the federal criminal system. *Comstock*, 560 U.S. at 148.

2. The government’s position is also inconsistent with *Greenwood*. There, this Court held that a defendant’s commitment was constitutional because “[t]he power that put him into [federal] custody—the power to prosecute for federal offenses—[was] not exhausted” and “persist[ed]” “in the form of the pending indictment.” 350 U.S. at 375. So when civil commitment is initiated, the power that brought a person into federal custody must “persist[.]” *Id.* (emphasis added). That is incompatible with the government’s claim (at 14) that it may civilly commit those currently in its custody “even after any federal criminal authority to detain or imprison has lapsed.”

The government responds (at 18) that *Greenwood* “did not suggest that Congress would have lacked the power to commit someone whose charges had been dismissed.” But were that so, the Court would not have emphasized that the power to prosecute was “not exhausted” or highlighted the “pending indictment.” 350 U.S. at 375. That language was germane to the Court’s explanation of why the commitment there was constitutional. And contemporaneous commentators understood it exactly that way, uniformly warning that Congress lacked the power to “civilly commit someone whose charges had been dismissed.” Pet. 21

(collecting sources). The government offers no contrary authority.

Retreating further, the government argues (at 18) that if *Greenwood* meant what it said, *Comstock* effectively abrogated it. But *Comstock* did not say it was abrogating *Greenwood*—rather, it invoked *Greenwood* repeatedly and approvingly. 560 U.S. at 145, 146. Nor does this Court normally abrogate its holdings “*sub silentio*.” *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000).

And it makes little sense to assume the Court did so here, where stripping away *Greenwood*'s limiting principle would produce the federal police power *Comstock* disclaimed. If civilly committing convicted offenders approaching supervised release teeters “perilously close” to the proper limits of government power, *see* 560 U.S. at 180 (Thomas, J., dissenting), then committing a person who is presumed innocent and against whom all charges have been dropped is firmly planted on the wrong side of that line.

### **C. The Government's Position Conflicts With Historical Practice.**

The government maintains (at 15-16) that its position finds support in a “long history of civil commitment of federal detainees.” But it does not dispute that for nearly all of American history, federal civil commitment “was limited to \* \* \* persons *accused* or *convicted* of committing federal offenses.” Pet. 20 (quotations omitted). The government's “long history,” then, cuts squarely against the power it now claims.

Relatedly, the government (at 20) urges this Court to deny Berry's petition because the government does not often exercise the awesome power it now claims it has. But even a single unlawful confinement is one too

many. And this Court should remain wary of trusting the fox to guard the hen house. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 527-532 (2004) (O'Connor, J., plurality op.).

### **III. ALTERNATIVELY, THIS COURT SHOULD SUMMARILY REVERSE.**

The Fourth Circuit sanctioned the indefinite civil commitment of a man who is neither charged with nor convicted of a federal offense without engaging with *Greenwood* or *Comstock*—the precedents that directly govern the question. That in itself warrants reversal. *See* Pet. 29-30. But the case for summary reversal is stronger still. The government prevailed in *Comstock* by conceding that the power it claimed had meaningful limits. This Court should hold the government to its word and reverse.

### **CONCLUSION**

For the foregoing reasons, and those in the petition, certiorari should be granted and the decision below reversed.

Respectfully submitted,

JO-ANN TAMILA SAGAR

*Counsel of Record*

CATHERINE E. STETSON

ERIC ROYTMAN-CASH

DARRYL E. WILLIAMS, JR.

HOGAN LOVELLS US LLP

555 Thirteenth Street, NW

Washington, DC 20004

(202) 637-5600

jo-ann.sagar@hoganlovells.com

*Counsel for Petitioner*

APRIL 2026