No. 08-1224

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2008

UNITED STATES OF AMERICA,
Petitioner,

v.

GRAYDON EARL COMSTOCK, JR., et al.,
Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

The Respondents, by and through their undersigned counsel, ask leave to file a Brief in Opposition to a Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006A and 18 U.S.C. § 4247(d).

This the 20th day of May 2009.

Respectfully submitted,

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GRAYDON EARL COMSTOCK, JR., et al.
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress lacks the constitutional authority to establish an indefinite civil commitment program for any individual in Bureau of Prisons custody, for any reason, if that person is deemed to be "sexually dangerous."

2. Whether the Due Process Clause mandates the reasonable doubt standard for the factual determination required by 18 U.S.C. § 4248.

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STATEMENT

In July 2006, President George W. Bush signed the Adam Walsh Child Protection and Safety Act into law. Pub. L. No. 109-248, 120 Stat. 587 (2006). A component of the Act, codified at 18 U.S.C. § 4248, authorizes the federal government to seek indefinite commitment for those in Bureau of Prisons ("BOP") custody who are deemed to be "sexually dangerous persons." In September 2007, the district court in the Eastern District of North Carolina held § 4248 unconstitutional on two distinct grounds: (1) the federal government does not have the power to enact the law, and (2) section 4248 violates the Due Process Clause by imposing an unconstitutional burden of proof on the factual determination required for commitment. Pet. App. 24a. In its analysis, the district court addressed the government's argument invoking the Necessary and Proper Clause in support of Congress's power and concluded that § 4248 was not a valid exercise of that power. Pet. App. 52a-76a.

On January 8, 2009, the Fourth Circuit Court of Appeals affirmed the district court's holding that § 4248 exceeds Congress's power. The Fourth Circuit also considered and dismissed the government's argument that the Necessary and Proper Clause authorizes § 4248. Pet. App. 18a-20a. The Fourth Circuit expressly declined to address whether due process mandates the reasonable doubt standard for the factual determination. The government petitioned for rehearing en banc, but no judge of the Fourth Circuit called for a poll, and the petition for rehearing was denied. Pet. App. 96a.

As of this filing, other circuits are addressing various aspects of § 4248. *See United States v. Shields* (1st Cir. Case No. 09-1330); *United States v. Hernandez-Arenado* (7th Cir. Case No. 08-2520); *United States v. Tom* (8th Cir. Case No. 08-2345). On May 13, 2009, an Eighth Circuit panel held § 4248 constitutional as a "responsible exercise of federal power over individuals subject to continuing federal jurisdiction through a period of supervised release following service of a federal

sentence." *United States v. Tom*, ____ F.3d ____, 2009 WL 1311612, at *11, 2009 U.S. App. LEXIS 10282 at *30 (8th Cir. 2009).

Section 4248 does not represent, as the government asserts, a mere amendment of and supplement to the general federal commitment scheme. Pet. Cert. 15. As a commitment scheme for sexually dangerous persons, § 4248 expands federal civil commitment into an area never before contemplated by the federal government, an area that has historically been the province of the states.

To date, 81 men have been certified as sexually dangerous persons under § 4248 in the Eastern District of North Carolina. Currently, 76 men remain incarcerated in the Eastern District of North Carolina under § 4248 certification; the vast majority are well past their BOP "release dates."

Respondents Comstock, Matherly, Revland and Vigil have been held in custody in a medium-security facility at FCI-Butner for over two years past their respective release dates. These four respondents have three-year terms of supervised release that remain to be served. As for Mr. Catron, after he was found not competent and not restorable, the government filed a "Certificate of Mental Disease or Defect and Dangerousness" under 18 U.S.C. § 4246. Two months later, the government withdrew the § 4246 certificate to certify him pursuant to § 4248. Throughout his § 4246 certification and during the initial period of his § 4248 certification, Mr. Catron was housed at the Federal Medical Center in Butner, North Carolina. Today, he remains incarcerated in the segregated housing unit of the FCI-Butner medium-security prison.

ARGUMENT

I. CERTIORARI REVIEW IS PREMATURE BECAUSE OTHER CIRCUITS ARE CURRENTLY ADJUDICATING ASPECTS OF § 4248 THAT ADDRESS THE EXTENT OF CONGRESS'S POWER TO ENACT THE STATUTE.

Contrary to the Government's view, this case is not the best vehicle for this Court to address the constitutionality of 18 U.S.C. § 4248. Although the Fourth Circuit declared § 4248 unconstitutional, its ruling covered a relatively narrow category of cases. The respondents in this case were either incarcerated for federal sex offenses, or in the case of Mr. Catron, charged with a federal sex offense but found incompetent. The Government seeks certiorari, however, to establish § 4248 jurisdiction over a far larger group of individuals. Section 4248 applies to individuals "in the custody of the Bureau of Prisons," and the government interprets this language broadly. In other circuits, it is seeking to apply § 4248 not just to individuals incarcerated for federal crimes, but also to individuals who are in Bureau of Prisons ("BOP") custody for reasons completely unrelated to the federal criminal justice system, and even to individuals who are not lawfully in BOP custody at all. For example, in *United States v. Hernandez-Arenado* (7th Cir. Case No. 08-2520), the Seventh Circuit is considering whether § 4248 commitment is proper for an immigration detainee who was lawfully in BOP custody for reasons unrelated to a federal criminal prosecution.[1] In *United States v. Shields* (1st Cir. Case No. 09-1330), the First Circuit is addressing, among other issues, whether an individual who is unlawfully in BOP custody is in "custody" for purposes of § 4248.[2]

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[1] In *United States v. Hernandez-Arenado*, the Seventh Circuit panel comprised of Circuit Judges Ripple, Rovner, and Evans heard oral argument on September 12, 2008. The Seventh Circuit has yet to issue an opinion.

[2] In *United States v. Shields*, the First Circuit docketed the appellant's notice of appeal on March 19, 2009. The First Circuit has not yet issued a briefing order.

As the Fourth Circuit recognized, these other litigations—by exploring the extent of § 4248's reach—do not simply raise collateral issues; they directly implicate the constitutionality of the statute in a way the present case does not:

> We further note that the expansive view of "custody" that the Government itself has urged in other § 4248 cases belies its contention that § 4248 constitutes a limited, necessary extension of the federal penal system. For example, in *United States v. Shields*, the Government maintained that § 4248 requires only that a person is "in custody" of the Bureau of Prisons, not that this custody is lawful. *See* Government's Mem. in Opp'n to Mot. to Dismiss at 1-3, *United States v. Shields*, 522 F. Supp. 2d 317 (D. Mass. 2007). Similarly, in a case currently on appeal before the Seventh Circuit, the Government argues that § 4248 validly applies to persons whom the federal government has never convicted of a crime–a rationale that would extend § 4248's reach to material witnesses, civil contempt detainees, and individuals in immigration detention. See *United States v. Hernandez-Arenado*, No. 08-278, 2008 U.S. Dist. LEXIS 44988, 2008 WL 2373747, at *3-5 (S.D. Ill. June 9, 2008). These arguments starkly conflict with the Government's attempt here to justify § 4248 as a narrow exercise of federal penal power.

Pet. App. 14a at n.7 (emphasis in original).

These pending cases address the heart of the question presented by this case: how far does § 4248 reach, and does that reach exceed the constitutional limits on Congress's power? By allowing these appeals to be litigated, this Court can ensure it avoids addressing the scope and constitutionality of § 4248 in a piecemeal fashion. The nuances and complexities of this statutory scheme—and how the government intends to operate it in practice—will be simplified through the crucible of circuit court adjudication. Waiting for these issues to run their course will conserve judicial resources.

Recently, in *United States v. Tom*, a panel of the Eighth Circuit held § 4248 constitutional as a "responsible exercise of federal power over individuals subject to continuing federal jurisdiction

through a period of supervised release following service of a federal sentence." ___ Fed. 3d at ___, 2009 WL 1311612, at *11, 2009 U.S. App. LEXIS 10282 at *30.[3] This holding presents a question involving the interplay between a term of supervised release and § 4248 commitment. The Eighth Circuit panel decision relies, in part, on the existence of an unexpired term of supervised release to find federal power. The decision does not, however, indicate how § 4248 commitment affects the term of supervision, nor does it clarify whether the existence of supervised release at the time of certification can justify indefinite civil commitment.

The Eight Circuit panel opinion in *Tom* leaves unresolved Mr. Tom's other constitutional challenges to § 4248. Mr. Tom argued in the district court that "(1) neither the Constitution's Commerce Clause nor Necessary and Proper Clause authorized Congress to enact the statute, (2) the statute violates due process and equal protection, and (3) the statute is a criminal sanction requiring the Government to establish sexual dangerousness beyond a reasonable doubt." *United States v. Tom*, 558 F. Supp. 2d 931, 934 (D. Minn. 2008). Because the district court and the Eighth Circuit panel only addressed Mr. Tom's first argument, these additional constitutional challenges will need to be reviewed. In short, the *Tom* litigation at this stage raises as many questions as it answers and is far from complete. By denying certiorari review, this Court can wait for the lower courts to fully adjudicate the other constitutional issues in *Tom*.

II. THE CORRECT QUESTION IS WHETHER 18 U.S.C. § 4248 LIES WITHIN CONGRESS'S POWER.

The proper question for this Court is whether the Fourth Circuit correctly held that Congress lacks the constitutional authority to establish an indefinite civil commitment program for any

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[3]Like the respondent in *Tom*, four of the five respondents in this case have terms of supervised release that remain to be served.

individual in BOP custody deemed to be sexually dangerous. This is the question asked and answered by the district court and the Fourth Circuit. Both lower courts found this commitment program to be outside the scope of Congress's constitutional authority. Pet. App. 3a, 52a.

The government bifurcates the question presented by separating those persons in federal custody coming to the end of a federal criminal sentence from those found mentally incompetent to stand trial. Pet. Cert. (I). In the first category, the government narrows the plain language of the statute because § 4248 does not distinguish between those in BOP custody nearing the end of a federal criminal sentence and those in BOP custody for any other reason. Unlike 18 U.S.C. § 4246, which limits certification to hospitalized inmates nearing the end of their sentence, those found not competent, and those against whom all charges have been dismissed for mental health reasons, §4248 casts a wide net to find anyone in BOP custody for any reason eligible for § 4248 certification and commitment. *See Hernandez-Arenado*, (7th Cir. Case No. 08-2520); *see also* Pet. App. 66a-67a, 100a.

In the second category, and for the first time, the government's petition suggests separate relief for respondent Catron, who was found not competent and not restorable. Although the government asserts that the Fourth Circuit failed to bifurcate Catron's case in its analysis, the government overlooks its own failure to make that argument below. Pet. Cert. 29; Pet. App. 18a-19a at n.10. In its briefing to the Fourth Circuit, the government neglected to seek separate relief for respondent Catron; it simply referenced his status in the discussion of *Greenwood v. United States*, 350 U.S. 366 (1956), and it recognized that his case parallels that of the defendant in *Greenwood.* Pet. Cert. 30. The government should not have the opportunity to present to this Court the argument

that Mr. Catron deserves separate constitutional treatment after it declined to seek such relief in the Fourth Circuit.

III. THE GOVERNMENT FAILS TO SHOW THE FOURTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The government relies on Rule 10(c) of the Supreme Court Rules in seeking certiorari review. While the government argues this case presents an "important question," Rule 10(c) also requires that the question "has not been . . . settled by this Court, or [that the lower courts' decision] conflicts with relevant decisions of this court." Far from conflicting with these decisions, the Fourth Circuit decision embraces them. *See Greenwood v. United States,* 350 U.S. 366 (1956); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Pet. App 9a-12a, 18a-20a.

A. The government's reliance on the Necessary and Proper Clause fails to recognize that § 4248 operates as an independent assertion of federal power.

The government asserts that "Congress's judgment that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore [a] necessary and proper—component of Congress's unquestioned power to enact criminal laws . . . " Pet. Cert. 14. Under the system of checks and balances established by the Constitution, however, it is not Congress that determines when its actions are appropriate, but the Judiciary that is tasked with that weighty duty. *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

As held by this Court and recognized by the Fourth Circuit, "[the] Necessary and Proper Clause simply does not—in and of itself—create any Congressional power" Pet. App. 12a-13a. (citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960)). As a result, the

government must tether its Necessary and Proper Clause argument for the constitutionality of § 4248 to an enumerated power.[4] Although § 4248 applies to **all** individuals "in the custody of the Bureau of Prisons," the government argues in this petition that § 4248 necessarily and properly derives from the power that placed the individual in BOP custody in the first place—the power to criminalize certain behaviors.

Specifically, the government argues that § 4248 "is a rational incident to the government's undisputed authority under Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners." Pet. Cert. 18. The argument that § 4248 commitment is a necessary and proper "component" of the power to enact criminal laws falls for two reasons.[5] First, it does not accord either with the text of § 4248 or with how the government intends to enforce § 4248 in practice. Second, whatever custodial authority Congress has over an individual based on his presence in BOP custody necessarily ends when that individual's lawful presence in BOP custody ends—such as at the expiration of his term of imprisonment.

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[4]In the district court and in the Fourth Circuit, the government "barely mentione[d]" the Commerce Clause (or any other enumerated power), contending that "the Necessary and Proper Clause, standing alone" provided the constitutional authority to enact § 4248. Pet. App. 9a n.5, 12a, 32a-33a. When pressed by those courts, however, the government acknowledged that § 4248 must flow from an enumerated power. Pet. App. 9a n.5, 32a at n.5.

[5]In the district court and the Fourth Circuit, respondents argued that § 4248 operates as a criminal punishment that violates the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition against cruel and unusual punishment and the Sixth Amendment right to a jury trial. The government's argument that § 4248 lies within Congress's power because it is a component of federal criminal law suggests that § 4248 actually operates as a criminal punishment dressed in "civil" clothing. As such, the government's argument in support of certiorari raises a host of complicated constitutional issues better adjudicated initially by the lower courts.

As an initial matter, the plain language of § 4248 undercuts the government's argument that commitment is a "component" of Congress's power to enact criminal laws pursuant to its enumerated powers. The statute does not require any connection to criminal prosecution. As the government has argued, certification and commitment under § 4248 extends broadly to reach any individual in BOP custody for **any** reason. Pet. App. 14a n.7. And, as the Fourth Circuit observed, the government's arguments in other § 4248 litigation implies that § 4248 could reach an array of individuals who have no connection to the criminal justice system, including material witnesses, civil contempt detainees, and immigration detainees. *Id*. In short, the plain language of § 4248 itself, the Fourth Circuit's decision, and the government's own arguments in other cases, all recognize that § 4248 expands federal power outside of the criminal context.[6]

Second, § 4248 authorizes the indefinite commitment of an individual as long as that person is in BOP custody at the time of certification. Physical presence in the BOP, in other words, authorizes the government to institute new proceedings that extend federal power over an individual beyond that authorized by whatever proceedings resulted in the original custody. As the district court observed,

> preventing a prisoner from engaging in certain conduct while he is in federal custody serving a federal sentence or on federal supervised release is a different thing all together from preventing a person who is a federal prisoner from possibly engaging in certain conduct in the future after the expiration of his sentence that Congress does not have the authority to regulate. The fact of legitimate custody might be a sufficient basis for the exercise of control over an individual's conduct during the period of custody (including a period of supervised release)–but it does not establish Congressional authority

[6]As discussed in Section I of this Brief in Opposition, these other cases are currently being adjudicated by other circuits. The opinions of these other circuits will provide this Court with a better vehicle to address the comprehensive scope of § 4248.

> to provide for the commitment of a person *after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted, when that person has not committed any misconduct while in custody, and where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize. The fact of federal custody, standing alone, shorn of the power to prosecute that was the linchpin of the *Greenwood* decision, does not render the § 4248 commitment scheme a "proper" exercise of Congressional power.

Pet. App. 75a-76a (emphasis in original). Section 4248 does not represent a mere exercise of valid federal authority; rather, it operates as an independent assertion of additional federal power, initiated by its own certification and commitment scheme, and temporally and causally distinct from the enumerated federal power that placed an individual in BOP custody.

B. The Fourth Circuit properly applied this Court's decisions in *United States v. Lopez* and *United States v. Morrison* to find 18 U.S.C. § 4248 exceeds the bounds of Congress's authority.

The government argues that § 4248 necessarily and properly derives from the government's criminal powers, and acknowledges the Commerce Clause represents the enumerated power from which the majority of federal criminal statutes derive. Pet. App. 9a n.5. The government's argument overlooks, however, that the federal government "enact[s] criminal laws," not as a matter of general right, but in a manner constitutionally limited by the derivative nature of the federal criminal statutes themselves. One must view the power that the government claims—the power to run a penal system—not as a general police power with a panoply of incident powers such as those exercised by the states, but through the filter of the enumerated powers upon which the criminal statutes themselves are based, i.e., the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. Art. I § 8.

Through this filter, the tenuous nature of the government's petition becomes apparent. The government's petition requires this Court to hold that regulating commerce between the several states necessarily and properly allows the BOP to indefinitely detain anyone it deems to be sexually dangerous. This contention cannot stand because it requires the government to pile inference upon inference and leads to a "general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567-68.

The Fourth Circuit properly engaged this Court's Commerce Clause analysis, determining that § 4248, "like the statutes at issue in *Lopez* and *Morrison*, . . . contains no jurisdictional requirement limiting it to commercial or interstate activities. Nor does . . . [it] target the channels of interstate commerce or persons and things in interstate commerce. Therefore [it can only be upheld] if it regulates activities which 'substantially affect' interstate commerce." Pet. App. 10a. Upon making this determination, the Fourth Circuit looked to this Court's analysis of the Violence Against Women Act, which was the subject of *Morrison*, and determined that it "foreclosed any . . . argument" that § 4248 regulated an activity that substantially affects interstate commerce. Pet. App. 10a. In reaching its conclusion, the Fourth Circuit cited *Morrison*'s finding that, "the regulation and punishment of intrastate violence . . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618-19.

The federal government is one of prescribed, limited, enumerated powers. As stated by this Court in *N.L.R.B v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and emphasized by the district court and court of appeals below, the power of the federal government "must be considered in light

of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 37. Concern about the extension and attenuation of federal power arises not only when Congress exercises an enumerated power, such as the Commerce Clause, but also when the Necessary and Proper Clause purportedly provides authority for a particular law. Absent this interpretation, any attempt to cabin Congress to its constitutional role would be futile as Congress could simply raise the Necessary and Proper Clause as a cure.

The connection between the enumerated powers that allow Congress to enact criminal laws and the institution of an independent civil commitment scheme for any person in BOP custody presents the weakest link in the inferential chain between the Constitution and civil commitment under § 4248. This Court's precedents do not allow the government to merely acknowledge a connection between enumerated powers and the federal criminal justice system and then move on. Pet. Cert. 17. The government cannot glide over this essential step in the analysis; it must fully engage the question asked and answered by the district court and the Fourth Circuit: does § 4248 commitment require this Court to pile inference upon inference in such a way that it leads to a general federal police power? *Lopez*, 514 U.S. at 567-68.[7]

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[7]*Lopez*, in addition to providing the necessary understanding of the limits of Congress's Commerce Clause authority, also addresses the application of the Necessary and Proper Clause. Specifically, the government in *Lopez* presented, and this Court considered and rejected, the assertion that "evidence adduced and findings made in the course of . . . prior legislative proceedings make clear that the Gun-Free School Zones Act is a permissible exercise of Congress's power under the Commerce Clause, as well as a law '*necessary and proper for carrying into Execution*' that power." Brief for Government at 44, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), *available at* 1994 WL 242541, LEXIS 1993 U.S. Briefs 1260 (emphasis added).

C. The Fourth Circuit correctly applied *Greenwood v. United States*.

The Fourth Circuit found the government's attempt to stretch the holding in *Greenwood* off the mark. Pet. App. 18a. When the *Greenwood* Court addressed the constitutionality of federal civil commitment, it relied on specific factors to find the civil commitment scheme in place at that time constitutional: (1) the defendant was mentally incompetent; (2) his release would endanger the interests of the United States;[8] and (3) the federal power to prosecute was not exhausted. *Greenwood,* 350 U.S at 375. In its discussion, the *Greenwood* Court also recognized the general preference for state custody for those who are mentally disabled. *Id.* at 374. Pertinent to the instant case, the *Greenwood* Court was careful to recognize the limits of its holding: "We reach the narrow constitutional issue raised by commitment in the circumstances of this case. The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted." *Id.* at 375. Even though there was little likelihood Mr. Greenwood would recover, the Court stated: "We cannot say that federal authority to prosecute has now been irretrievably frustrated." *Id.*

In its petition, the government ignores *Greenwood*'s narrow reasoning, anchored by the unexhausted "power to prosecute," to assert that governmental authority over Mr. Greenwood stems not from the power to prosecute but from the lawfulness of his custody. Overlooking how Mr. Greenwood came into federal custody in the first place, the government insists the federal authority of his commitment did not depend on the government's ability to prosecute him but rather relied on

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[8]*Greenwood* contains an essential distinction from § 4248—a specific reference to federal interests. *See Greenwood*, 350 U.S. at 375. Section 4248 contains no such specific connection to a federal interest. This language is not mere surplusage, but provides an essential jurisdictional nexus present in *Greenwood* and lacking from § 4248. *See Lopez*, 514 U.S. at 562 (noting the importance of an "express jurisdictional element" in a statute when conducting federalism analysis).

the primary purpose of commitment statutes. Pet. Cert. 23. This reasoning ignores what occurred in *Greenwood*—without the pending indictment, the federal government was simply without authority to re-arrest Mr. Greenwood. *Greenwood*, 350 U.S. at 372, 375. As the Fourth Circuit stated, "*Greenwood* simply upholds a statute that permits the federal civil commitment of a person charged with federal crimes *but found incompetent to stand trial.*"[9] Pet. App. 18a (emphasis in original) (citing *Greenwood*).

Seeking to bolster its custodial argument, and relying on dicta from the circuit court opinion in *Greenwood*, the government next argues that civil commitment justifies doing whatever is necessary to protect the public. Because the "primary purpose of the commitment statutes is not to facilitate prosecution but to protect the public and provide care to the person over whom the federal government already has lawfully exercised control . . . ," the government has the "undoubted right" to do whatever can be done to protect society. Pet. Cert. 23-24 (citing *Greenwood v. United States*, 219 F.2d 376, 387 (8th Cir. 1955)). Again, the government misses the point. Choosing to ignore that Mr. Greenwood was never prosecuted nor convicted, the government expands the lower court decision to glean a generalized right to protect society. From this generalized right, the government argues for the validity of post-conviction commitment by finding that *Greenwood* superimposes a Congressional power over those "who have not only been indicted but also convicted of federal crimes." Pet. Cert. 24. The government goes too far; this extrapolation of *Greenwood* is simply not available because the *Greenwood* Court never considered the constitutional validity of post-

[9]In addition to the Fourth Circuit, the Court of Appeals for the District of Columbia Circuit has recognized the limits of *Greenwood*, noting that the question of "whether Congress has the constitutional authority to provide for a nationwide federal commitment procedure" was "raised but not resolved" by *Greenwood*. *United States v. Cohen*, 733 F.2d 128, 137 & n.15 (D.C. Cir. 1984).

conviction commitment and explicitly limited its holding. The government fails to heed the conclusion in *Greenwood*: "We decide no more than the situation before us presents and equally do not imply an opinion on situations not now before us." *Greenwood*, 350 U.S. at 376. Because the Fourth Circuit properly applied this Court's ruling in *Greenwood*, further review by this Court is unnecessary.

IV. CERTIORARI REVIEW IS UNNECESSARY BECAUSE THE DISTRICT COURT CORRECTLY HELD § 4248 VIOLATES THE DUE PROCESS CLAUSE.

The district court struck down § 4248 on two distinct grounds. First, it held that Congress lacked the authority to enact § 4248; the Fourth Circuit affirmed this holding. The district court also struck down § 4248 because it imposes the clear and convincing burden of proof on a factual determination that requires the reasonable doubt standard. The Fourth Circuit expressly declined to reach this additional holding by the district court. Certiorari is unnecessary because the district court correctly held § 4248 violates the Due Process Clause as explained by its analysis of *In re Winship*, 397 U.S. 358 (1970), and *Addington v. Texas*, 441 U.S. 418 (1979).

Respondents, relying on *Winship* and *Addington*, argued in the district court that § 4248 improperly employs the clear and convincing burden of proof to determine whether a respondent "has engaged or attempted to engage in sexually violent conduct or child molestation." Pet. App. 76a-77a. The district court agreed, holding that due process mandates the application of the reasonable doubt standard. Pet. App. 93a.[10]

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[10]Respondents argued below that the reasonable doubt standard should apply to *all* factual determinations required for § 4248 commitment, including the determination that an individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." The district court rejected this argument, but it provides an additional basis for upholding the Fourth Circuit's judgment in this case. Pet. App. 84a.

In *Winship*, this Court held that adjudicating a juvenile delinquent requires proof of facts beyond a reasonable doubt. 397 U.S. at 368. The opinion noted that, although juvenile proceedings are civil proceedings designed to help children, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards" where the loss of liberty is "comparable in seriousness to a felony prosecution." *Id.* at 365-66 (internal quotation omitted). Application of *Winship* to the present case demonstrates that the clear and convincing standard set forth in § 4248(d) does not satisfy due process. First, as in *Winship*, § 4248 implicates the exact concerns that mandate the use of the reasonable doubt standard in criminal cases—a loss of liberty upon an adjudication that the individual is sexually dangerous. *Id.* at 363. Second, the "civil" label applied to the hearing under § 4248 does not reduce the need for the safeguard of the reasonable doubt standard.

Addington v. Texas bolsters this conclusion. *Addington* re-affirmed *Winship*, expressly distinguished it, and further clarified the application of due process to factual findings in civil commitment proceedings. In *Addington*, this Court held that due process permits a clear and convincing standard of proof in making mental health determinations about an individual, recognizing that such determinations necessarily involve such a lack of certainty that application of the reasonable doubt standard places too high a burden on the government. 441 U.S. at 419-20, 29.

In so ruling, this Court re-affirmed and distinguished *Winship*, stating that a mental health commitment, "[u]nlike the delinquency proceeding in *Winship*, . . . can in no sense be equated to a criminal prosecution." *Id.* at 428. *Winship* and *Addington*, read together, hold that the government may impose the clear and convincing standard of proof to mental health determinations in a civil commitment proceeding, but that it must apply the reasonable doubt standard to findings of criminal-type behavior that form the factual basis for civil or criminal commitment. Because the plain

language of the statute mandates the application of the clear and convincing burden of proof to determine whether an individual "has engaged or attempted to engage in sexually violent conduct or child molestation," the district court correctly held the statute unconstitutional.

In the event this Court grants certiorari, respondents request that this Court order the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by § 4248. This issue presents a question of pure law that the parties fully litigated in the district court and briefed to the Fourth Circuit. By addressing this question as part of certiorari review, this Court will exercise judicial economy by preventing piecemeal litigation in the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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This the 20th day of May 2009.