No. 08-1224

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The United States Court of Appeals for the Fourth Circuit held that 18 U.S.C. 4248 is unconstitutional because it exceeds Congress's powers under Article I of the Constitution. Pet. App. 3a. That invalidation of an Act of Congress is itself a compelling reason for granting review. See Pet. 14-15. That is especially so because the vast majority of all of the Section 4248 proceedings in the Nation are pending in the Fourth Circuit (Pet. 16 & n.10), and in the absence of review by this Court, those proceedings would have to be dismissed. Moreover, as discussed below, since the petition for a writ of certiorari was filed, a circuit split has developed. Respondents present no good reason why this case is not the best vehicle for considering whether Congress has the power to protect the public against the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to

others. The petition for a writ of certiorari should be granted.

A. There Is Now A Circuit Split On The Constitutionality Of An Important Federal Statute

1. As explained in the petition (Pet. 14-15), this Court often grants certiorari, even in the absence of a circuit conflict, when a court of appeals has held an Act of Congress unconstitutional. The petition also explained (Pet. 16) that, because the principal Bureau of Prisons (BOP) facility for treating sex offenders is located in North Carolina, the invalidation of Section 4248 by the Fourth Circuit is uniquely harmful to the statute's implementation. As a result, this case was already a prime candidate for certiorari when the petition was filed.

Since that time, however, the need for this Court's review has become even more compelling: there is now a conflict between the only two appellate decisions that have addressed whether Congress had the authority under Article I of the Constitution to enact Section 4248. In this case, the Fourth Circuit held that Section 4248 "lie[s] beyond the scope of Congress's authority." Pet. App. 3a. On May 13, 2009, however, the Eighth Circuit held that Section 4248 "is a rational and appropriate means to effectuate legislation authorized by the Constitution," that civil commitment of a federal inmate who has been convicted of sex offenses lies within Congress's "ancillary authority under the Necessary and Proper Clause," and that Section 4248 "does not upset the delicate federal[-]state balance mandated by the Constitution." *United States* v. *Tom*, No. 08-2345, 2009 WL 1311612, at *7, *8, *10.

Respondents imply that the Eighth Circuit's holding in *Tom* might be limited to civil-commitment authority "over individuals subject to continuing federal jurisdiction through a period of supervised release following service of a federal sentence," Br. in Opp. 1-2 (quoting *Tom*, 2009 WL 1311612, at *11), but they do not claim that *Tom* can be distinguished from this case on that ground or that it minimizes the circuit split. To the contrary, they admit that, "[l]ike the respondent in *Tom*, four of the five respondents in this case have terms of supervised release that remain to be served." *Id.* at 5 n.3.

2. Rather than deny the existence of the circuit split, respondents suggest that this Court should wait for a case that might better "explor[e] the extent of [Section] 4248's reach" by addressing factual scenarios that respondents believe lie further beyond Congress's legitimate reach than their own cases. Br. in Opp. 4. That argument for denying certiorari might make sense if the Fourth Circuit had *sustained* Section 4248's application to respondents, because the Court might then await another case to consider whether the statute nonetheless is unconstitutional in other applications. The Fourth Circuit, however, affirmed a district court decision (Pet. App. 28a-29a) that *invalidated* Section 4248 in all of its applications, concluding broadly that the establishment of a civil-commitment regime for sexually dangerous persons in federal custody is beyond Congress's authority. That categorical ruling warrants this Court's review now.

Even assuming that other cases might present questions about the furthest reach of Congress's authority —an assumption not borne out by the cases respondents

cite[1]—postponing review for one of those cases would not necessarily "conserve judicial resources." Br. in Opp. 4. A decision by this Court, for example, that Section 4248 cannot be applied to persons whose BOP custody was unlawful still would not answer the question that is squarely presented in this case: whether Section 4248 can be applied to persons, like respondents, who were indisputably in lawful BOP custody when they

[1] Neither of the two cases respondents discuss (Br. in Opp. 3-4) would be a better vehicle for considering Section 4248's constitutionality. In *United States* v. *Hernandez-Arenado*, No. 08-2520 (7th Cir. argued Sept. 12, 2008), the respondent is a Mariel Cuban, an alien whose immigration parole was revoked, who was detained by the Immigration and Naturalization Service in 1987, and who has since then been held in BOP facilities. See *United States* v. *Hernandez-Arenado*, No. 08-278, 2008 WL 2373747, at *1 (S.D. Ill. June 9, 2008). He has not presented a constitutional challenge to Section 4248, but instead has argued that he was not "in the custody of the Bureau of Prisons" within the meaning of Section 4248(a) when the government certified him as sexually dangerous. Moreover, *Hernandez-Arenado* would present different constitutional considerations, because an inadmissible alien is not a citizen of any State and is subject to Congress's "plenary" authority. *Kleindienst* v. *Mandel*, 408 U.S. 753, 769 (1972).

In *United States* v. *Shields*, No. 09-1330 (1st Cir. notice of appeal docketed Mar. 19, 2009), no briefs have been filed on appeal. Respondents assert (Br. in Opp. 3) that *Shields* presents a question about whether Section 4248 applies to a person who is "unlawfully" in BOP custody. That characterization stems from Shields's claim that his release date should have been two days earlier to correct an administrative error that denied him credit for previous time served—which would mean that he was certified the day after, rather than the day before, his sentence expired. The district court, however, treated Shields as in lawful BOP custody and described him as serving a 57-month prison term for a child-pornography offense at the time of his certification. *United States* v. *Shields*, 522 F. Supp. 2d 317, 322-323 (D. Mass. 2007). That ruling substantially limits the likelihood that any constitutional analysis on appeal in *Shields* will explore the broader questions respondents raise about "the extent of § 4248's reach" (Br. in Opp. 4).

were certified as "sexually dangerous" and who indisputably fall within the scope of the statute. The Fourth Circuit held that Section 4248 is unconstitutional even in those circumstances, and that holding warrants this Court's review.

B. The Petition Properly Addresses The Constitutionality Of Section 4248 As Applied To Persons In Respondents' Circumstances

Respondents suggest that the government has inappropriately sought to "narrow[] the plain language of the statute" (Br. in Opp. 6) by focusing in its question presented (Pet. i) on (1) "persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences," and (2) "persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial." Those two categories of persons, however, are the categories within the scope of the statutory text that are represented by respondents in this case. The government consistently has argued that the statute is constitutional as applied to persons in those categories, and the court of appeals held otherwise. It thus makes sense for this Court to analyze whether the statute can be constitutionally applied to those two categories of individuals.[2]

With regard to the first category—those in BOP custody—the statutory text does not limit itself to persons who are nearing the end of a federal criminal sentence.

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[2] That is not to say, of course, that the statute cannot also be constitutionally applied to other persons, such as those "against whom all criminal charges have been dismissed solely for reasons relating to [their] mental condition." 18 U.S.C. 4248(a). The proceedings against respondents, however, do not present such a question.

But the government's framing of the question presented does not provide respondents with any cause for complaint. That framing was designed to describe the precise position of four of the respondents, as well as to pose the constitutional question at issue in what respondents would agree is its starkest form. Respondents defend the court of appeals' distinction between the federal government's "broad powers over persons *during* their prison sentences" and its supposed inability to provide for commitment "*after* the expiration of their prison terms." Pet. App. 14a; see Br. in Opp. 8. The government's reference to persons "coming to the end" of their prison sentences (as opposed, for example, to persons just beginning to serve their sentences) was similarly meant to identify the most difficult cases, in which a certification will result in commitment after a person's term of imprisonment ends.

With regard to the second category of persons mentioned in the question presented—those who have been charged with federal offenses, but who have been found incompetent to stand trial and committed to the Attorney General's custody—respondents repeat the court of appeals' inexplicable conclusion that the government somehow forfeited any argument that the statute could be constitutionally applied to respondent Catron. See Br. in Opp. 6-7; Pet. App. 19a n.10. But the government had neither reason nor need, in respondents' words, to "seek separate relief" (Br. in Opp. 6) for Catron in the Fourth Circuit. The government asked for exactly the relief that was appropriate in the circumstances, which was for the district court's invalidation of the statute to be reversed. Perhaps more important, in its briefing to the court of appeals, the government in fact dealt specifically with Catron's case. As explained in the petition

(Pet. 30), the government argued in a four-page section of its principal brief and again in its reply that Catron's certification was based on grounds distinct from those of the other four respondents, and that *Greenwood* v. *United States*, 350 U.S. 366 (1956), therefore applies differently to his case (as respondents agree) than to those of the other respondents.

C. The Court Of Appeals' Analysis Remains Difficult To Square With This Court's Decision In *Greenwood*

Respondents address the merits of the Fourth Circuit's constitutional analysis by asserting that, however "important" the question presented, it does not "conflict[]" with this Court's decisions but instead "embraces them." Br. in Opp. 7 (citing *Greenwood*, *supra*, and *United States* v. *Morrison*, 529 U.S. 598 (2000)). Their discussion of *Greenwood*, however, continues to be based on a distinction between those who have not yet been prosecuted and those who already have been convicted. *Id*. at 13-15. They thus conspicuously fail to explain why the proceedings against respondent Catron, who was not prosecuted, exceed Congress's authority. See Pet. 29-30. And even as to the other four respondents, their attempt to limit *Greenwood* to cases involving persons declared incompetent to stand trial (Br. in Opp. 15) implicitly concedes the government's argument (Pet. 24) that *Greenwood* did not purport to "place beyond Congress's power any ability to address * * * threats posed by other persons (like most of respondents here) who have not only been indicted but also convicted of federal crimes and imprisoned by the federal government."

Respondents otherwise address the constitutional issue by refuting arguments the government has not

made. The government does not assert a general federal police power (Br. in Opp. 10-12), and does not claim that the Necessary and Proper Clause gives Congress powers that are not "tether[ed]" (*id.* at 8) to other powers vested in the federal government. But for matters that fall within Congress's enumerated powers, respondents do not deny that Congress has the authority under the Necessary and Proper Clause "to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners." Pet. 18. And respondents fail to demonstrate why Congress cannot reasonably determine that in the case of a person who has become mentally ill and a danger to society, those custodial responsibilities include "provid[ing] for his supervision, treatment, and care—where the most relevant States decline to do so—rather than simply [releasing him] into society at large." Pet. 2-5, 20-22.

D. The Court Should Not Add A Due Process Question That Has Not Been Addressed By Any Court Of Appeals

1. Respondents "request" (Br. in Opp. 17) that, if the Court grants certiorari in this case, it also "order the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by [Section] 4248" concerning an individual's previous "sexually violent conduct or child molestation." The court of appeals did not reach that question. See Pet. App. 4a n.1. And respondents do not claim that their due process argument independently warrants certiorari at this time. They suggest only (Br. in Opp. 17) that this Court would foster "judicial economy" by deciding their due process challenge now. The due process issue, however, is en-

tirely separate from the question presented in the petition, and it has not yet been decided by *any* court of appeals. That alone should suffice to reject respondents' request.

As this Court recently explained, under its "usual procedures," it does not decide questions that have not already been answered by a court of appeals, because "[t]his Court * * * is one of final review, 'not of first view.'" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). That is especially true with regard to constitutional questions. Thus, in *Fox Television*, the Court upheld certain FCC orders against a challenge under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, but, because the court of appeals had "not definitively rule[d] on the constitutionality of the Commission's orders," this Court refused the respondents' request that it "decide their validity under the First Amendment." 129 S. Ct. at 1819.[3] Although respondents mention that their due process challenge was "fully litigated in the district court" (Br. in Opp. 17), that consideration is insufficient to warrant exceptional

[3] The posture of *Cutter* was even more analogous to this case. The court of appeals held that a federal statute violated the Establishment Clause. *Cutter*, 544 U.S. at 718 n.7. At the certiorari stage, the petitioners presented only an Establishment Clause question, Pet. at i, *Cutter*, *supra* (No. 03-9877), but the respondents argued that "the Court should review the other constitutional issues regarding [the statute's] validity, such as challenges under the Spending and Commerce Clauses and the Tenth and Eleventh Amendments," Br. in Opp. at 14. Although the parties briefed the additional constitutional questions at the merits stage in *Cutter*, see, *e.g.*, Pet. Br. at 36-49; U.S. Br. at 37-49; Resp. Br. at 25-33; U.S. Reply Br. at 14-20, this Court refused to consider those "defensive pleas" because they "were not addressed by the Court of Appeals." 544 U.S. at 718 n.7.

treatment. See, *e.g.*, *Aschroft* v. *ACLU*, 535 U.S. 564, 585-586 (2002).

2. In any event, respondents' due process argument lacks merit. This Court previously has held that a civil-commitment framework predicated on clear and convincing evidence of mental illness and future dangerousness does not violate due process. See *Addington* v. *Texas*, 441 U.S. 418, 431-433 (1979). Section 4248 satisfies that standard by requiring the government to prove by clear and convincing evidence 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." 18 U.S.C. 4247(a)(6). Respondents contend that Section 4248 violates due process because the *additional* showing it requires—that the individual "engaged or attempted to engage in sexually violent conduct or child molestation," 18 U.S.C. 4247(a)(5)—need not be proved beyond a reasonable doubt. But Congress's requirement in Section 4248 of a further showing, beyond what due process requires, to justify civil commitment, provides no reasonable basis for finding the provision unconstitutional. Here, Congress has increased the evidentiary burden on the government above the constitutionally mandated floor. In doing so, Congress need not demand that the government make its additional showing by the highest possible burden of proof.[4]

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[4] Even if respondents were correct on the merits of their due process argument, it would not provide an alternative ground for affirming the judgment of the court of appeals, because the proper remedy would not be invalidation of Section 4248 as a whole. If due process requires a higher burden of proof for certain facts than the "clear and convincing evidence" standard in Section 4248(d), the Court would need to deter-

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

JUNE 2009

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mine whether that standard is severable from the rest of the statute. See, *e.g.*, *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-330 (2006). Assuming it is, the court of appeals' judgment—which affirmed the district court's grant of respondents' motions to dismiss, Pet. App. 21a, 94a—would need to be vacated so that the cases against respondents could proceed under a higher burden of proof.