

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. XXX

UNITED STATES OF AMERICA

v.

JOHN DOE

MOTION TO DISMISS PETITION
FOR 18 U.S.C. 4248 HEARING AND
INCORPORATED MEMORANDUM OF
LAW

John Doe, the respondent in the above-captioned case, by and through undersigned counsel and pursuant to the United States Constitution, moves this Honorable Court for an order dismissing the government petition for a hearing pursuant to 18 U.S.C. § 4248. In support of this Motion, Mr. Doe shows unto the Court the following:

Argument

I. 18 U.S.C. § 4248 IS UNCONSTITUTIONAL BECAUSE CONGRESS EXCEEDED ITS POWER UNDER THE COMMERCE CLAUSE.

A. The Evolution of the Commerce Clause

Article I of the United States Constitution enumerates the entire universe of Congress's power. *United States v. Morrison*, 529 U.S. 598, 607 (2000). Within Article I § 8, Congress draws its law-making authority in large part from the Commerce Clause. The United States Supreme Court's interpretation of the Commerce Clause determines the outer bounds of Congress's law-making ability in this area. *Marbury v. Madison*, 1 Cranch 137 (1803).

The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8 cl. 3. Beginning

with *United States v. Lopez*, 514 U.S. 549 (1995), the Court has interpreted Congress’s power under the Commerce Clause to fall within well-defined limits. The *Lopez* Court established a three-prong test for Commerce Clause analysis which allows Congress to regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* In *Lopez*, the Court found a federal statutory provision¹, which prohibited the possession of a firearm within 1000 feet of a school, unconstitutional because it did not meet any of the requirements of the three-prong test. *Id.* at 558. Following *Lopez*, courts use this test to determine whether a challenged law falls within the bounds of Congress’s power under the Commerce Clause.

The *Lopez* Court found that Congress can regulate three types of activities under the Commerce Clause. *Id.* First, Congress can “regulate the use of the channels of interstate commerce.” *Id.* (citing, *e.g.*, *United States v. Darby*, 312 U.S.100, 114 (1941) (prohibiting the interstate shipment of goods made by employees who were paid less than minimum wage Constitutional)). Second, Congress may legislate to “regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* (citing, *e.g.*, *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce)). Third, Congress may regulate activities which substantially affect interstate commerce. *Id.* at 558-60 (citing, *e.g.*, *Wickard v. Filburn* 317 U.S. 111 (1942) (amount of wheat grown by a family farmer for home consumption may be regulated because of the total effect family farms have on the wheat markets in the United States)).

¹Gun-Free School Zones Act of 1990 (previously codified at 18 U.S.C. 922(q)).

In *Lopez*, the Court found the statute at issue was clearly not regulating a channel or instrumentality of interstate commerce; therefore, it did not fall into either of the first two areas Congress may regulate. *Id.* at 558. However, the question remained whether, as the government contended, the violence caused by guns in school zones substantially affected interstate commerce. *Id.* at 563-64. The Court found that it did not and held the Gun-Free School Zones Act:

is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 561. Further, the Court found the statute “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce,” nor did Congress make any findings discussing its impact on interstate commerce. *Id.* at 561-63. Finally, the Court rejected the government’s argument that there was a substantial affect on interstate commerce based on the cost of crime. The Court rejected the costs of crime and national productivity arguments because they would permit Congress to regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. *Id.* at 564 (internal quotations omitted). This grant of power would be limitless. *Id.* at 559-560. Based on this analysis, the Court concluded there were no grounds for upholding the Gun-Free School Zones Act.

In the decade since *Lopez*, the Supreme Court has regularly employed its three-prong test to interpret Congress’s power under the Commerce Clause. In *United States v. Morrison*, 529 U.S. 598 (2000), a woman who had allegedly been raped by a college football player civilly sued the player and the university under section 13981 of the Federal Violence Against Women Act, which

allowed a civil remedy for criminal conduct. The *Morrison* Court held that Congress was attempting to regulate non-economic activity. Citing precedent, the court held that regulation of intrastate acts, even ones which have a substantial impact on interstate commerce, may only be upheld under the Commerce Clause when the activity is economic in nature. *Id.* at 613. As in *Lopez*, the *Morrison* Court observed that criminal laws are inherently non-economic in nature. The provision allowing a civil remedy for criminal conduct is likewise inherently non-economic in nature. Thus the Court found Congress’s attempt to regulate criminal activity in this manner was too attenuated from any economic impact on interstate commerce that the government might proffer. *Id.* at 610, 615.²

B. Congress exceeded its power under the Commerce Clause because 18 U.S.C. § 4248 does not meet the three-prong test established in *Lopez*

The roadmap furnished by *Morrison* and *Lopez* demonstrates why the 18 U.S.C. § 4248 civil commitment statute falls outside Congress’s enumerated powers. In *Morrison*, the Court stated, “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 the vindication of its victims.” *Id.* at 613. Congress designed the 18 U.S.C. § 4248 civil commitment statute, like the civil damages statute in *Morrison* and the “Gun Free School Zones Act” of *Lopez*, to suppress and

²The Supreme Court has found some challenged exercises of Congress’s power to be within the Constitutional moorings. In *Gonzalez v. Raich*, 545 U.S. 1 (2005), the court found that a federal law which prohibited the cultivation and possession of small amounts of marijuana for medicinal purposes was constitutional. The Court cited *Wickard* and stated that cultivation of even small amounts of marijuana has a substantial impact on interstate commerce. The Court did not change its holding in *Lopez* nor did it revisit *Morrison*. Instead *Raich* stands for the proposition that intrastate production of a commodity sold in interstate commerce is an economic activity and thus the substantial affect on interstate commerce can be based on cumulative impact. As detailed later, one can easily distinguish *Raich* from the case at bar, unlike *Morrison* and *Lopez*.

reduce violent crime. The goal of 18 U.S.C. § 4248 is to keep those individuals who the government perceives to be sexually dangerous off the streets—regardless of where, when or how their crimes were committed.

The *Morrison* court stated that “*Lopez* emphasized . . . even under our modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.” *Id.* at 608 (internal quotations omitted). “The scope of the interstate commerce power must be considered in the 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.* (internal citations omitted).

The *Morrison* Court held that the connection between the civil statute regulating certain criminal conduct and the impact of that conduct on interstate commerce was too attenuated. One reason being that the criminal conduct at issue—violence against women—does not substantially affect interstate commerce. The connection between § 4248, a civil statute regulating certain criminal conduct, and the impact of that conduct on interstate commerce is likewise too attenuated for the same reason: sexually violent conduct does not substantially affect interstate commerce.

Intrastate activities held by the Supreme Court and the Fourth Circuit Court of Appeals to have a substantial impact on interstate commerce are those which are in some way related to the buying, selling, production or use of a commodity—contraband or not. *See e.g., Wickard v. Filburn* 317 U.S. 111 (1942) (holding Congress may regulate the amount of wheat grown by a family farmer for home consumption because of the total effect of family farms on the wheat markets in the United States); *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding Congress has the power to

regulate the intrastate cultivation and possession of marijuana because of the impact on the national market); *United States v. Williams*, 342 F.3d 350, 355 (4th Cir. 2003) (interpreting *Lopez* and *Morrison*, holding that “drug dealing . . . is an inherently economic enterprise that affects interstate commerce. For this reason, the robbery of a drug dealer has been found to be the kind of act which satisfies the ‘affecting commerce’ element of the Hobbs Act, inasmuch as such a robbery depletes the business assets of the drug dealer”). In each of the cases cited, the courts confronted activities that have a clear national economic impact, even if the activity was conducted wholly intrastate. Such is not the case with the civil commitment of sexually dangerous persons.³

Morrison defines the outer limits imposed by the Constitution on Congress’s power to regulate criminal conduct. It recognized that the police power is primarily reposed in the states. With § 4248 Congress attempts to regulate criminal conduct through a civil remedy by imposing indefinite civil commitment based on criminal actions—sexual violence. This is not permissible under *Morrison* because the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” *Morrison*, 529 U.S. at 617. Therefore, Congress has exceeded its power in enacting § 4248.

C. Congress exceeded its power under the Commerce Clause because it did not make findings of economic impact or draft jurisdictional requirements for 18 U.S.C. § 4248.

Seeking to establish the Constitutional basis of a statute regulating a non-economic activity, Congress may clarify the nexus that it perceives between the activity and interstate commerce.

³As noted above, the Constitution does not restrict Congress to enacting only laws which have an economic impact. Though not relevant to the present case, Congress may regulate activities which affect the instrumentalities of interstate commerce or persons or things in interstate commerce, or the channels of interstate commerce. *Lopez* at 558.

First, it may make findings of the impact of the activity on interstate commerce. Second, it may impose jurisdictional requirements that tie the activity, controlled by the statute, to interstate commerce. Though neither of these factors are determinative, they do provide insight and guidance to the courts. When both are absent from a bill, it calls into question whether the legislature had the authority to enact the statute.

In the case at bar, Congress did not make any findings of impact on interstate commerce directly related to the section of the Adam Walsh Act (“Act”) which created 18 U.S.C. § 4248. While “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, the existence of such findings may enable [the Court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.” *Lopez* at 563. When finding the law unconstitutional in *Lopez*, the Supreme Court noted that neither § 922(q) “nor its legislative history contain[s] express Congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” 515 U.S. at 562.

Further, Congress did not include any requirement in the Adam Walsh Act that the actions have any nexus to interstate activity. This jurisdictional element, though not required, has been the saving grace for many laws which push the bounds of Congress’s Commerce Clause power, yet it is noticeably absent in this case. *See e.g., Morrison*, 529 U.S. at 611-612 (noting that the absence of a jurisdictional element was an important consideration in *Lopez*); *Lopez*, at 561 (holding that “[Section] 922(q) contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession statute in question affects interstate commerce.”). The Fourth Circuit Court of Appeals has also emphasized the presence of this element when analyzing the constitutionality of a statute. *See e.g., Williams*, 342 F.3d at 354 (noting that “unlike the statute

involved in *Lopez*, the Hobbs Act contains a jurisdictional requirement that the [particular offense] be connected to interstate commerce;”); *United States v. Bostic*, 168 F.3d 718, 723 (1999) (internal quotations omitted) (internal citations omitted) (holding that “Unlike the statute at issue in *Lopez*, Section 922(g) expressly requires the government to prove [the jurisdictional element,] that the firearm was ship[ped] or transport[ed] in interstate or foreign commerce; was possess[ed] in or affect[ed] commerce; or is received after having been shipped or transported in interstate or foreign commerce).

While jurisdictional elements and findings are not prerequisites for a statute to be a constitutional exercise of Congress’s power, they are clearly an indicator. Congress did not take either of these steps when enacting this civil commitment statute. The broad nature of this statute and the absence of an interstate nexus requirement make it likely, if not inevitable, that it will encompass individuals whose actions, though criminal, had no meaningful impact on interstate commerce. The statute contains no limiting provision, and therefore Congress’s action in bestowing this police power upon the Federal Government goes far beyond what it is empowered to do under the Constitution. Police power of this nature is exactly what our federal system reserves for the states.

Moreover, even if Congress produced findings that sexual violence—even wholly intrastate—has an impact on interstate commerce, that alone would not be sufficient to salvage the constitutionality of this statute post-*Morrison*. The statute in *Morrison* contained extensive findings regarding the national impact of violence against women, yet the Court struck down the statute. The Court found that the findings relied upon “a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce.” *Morrison* at 599. While

Congress may be able to enumerate *some* violent criminal conduct with a direct impact on interstate commerce, § 4248 captures such a broad spectrum of conduct that it cannot survive *Lopez*.

D. Congress exceeded its power under the Commerce Clause because civil commitment is traditionally the domain of the states' *parens patriae* power.

Federal case law recognizes that care and treatment of the mentally ill has historically been the province of the states. In *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984), then Circuit Judge Scalia noted that Congress's own assessment is that the federal government is not the proper custodian of federal defendants who were acquitted on the grounds of insanity:

the Federal government is one of specifically enumerated powers. State governments, on the other hand, may act in any given area unless specifically prohibited by the Constitution. Commitment and treatment of the mentally ill has traditionally been left to the states pursuant to their *parens patriae* or general police power. The Federal government has no such authority.

In view of these considerations, the Committee believes that a Federal procedure for the commitment of the dangerously mental [*sic*] disturbed would constitute an inappropriate interference with the balance of Federal and State powers. Moreover, such a procedure could constitute a precedent for further Federal involvement in the care of the mentally ill. Once the Federal Government takes on the task of caring for the dangerously mental [*sic*] ill that become involved in the Federal criminal system, Congress would most likely be asked to expand the Federal role even further. For example, legislation might be proposed allowing the Federal Government to take over State mental health institutions, or to accept the transfer of those incarcerated there, when the State is allegedly not doing a satisfactory job. The Committee thus believes that the care of the mentally ill is a task that uniquely belongs within the *parens patriae* powers of the States.

Id. at 137-138 (quoting findings of House Judiciary Committee).

Not only have the House Judiciary Committee and the D.C. Circuit Court of Appeals recognized the importance of reserving this function for the states, but even more recently, a United States District Court reached the same conclusion. The court found that “care for the mentally incompetent, where necessary, has historically been left to the states.” *United States v. Duhon*, 104 F. Supp. 2d 663, 681 (W.D. La. 2000). Though the cases cited in *Duhon* deal

specifically with those who have been acquitted, the over-inclusive text of 18 U.S.C. § 4248 provides an analogous situation. In fact, 18 U.S.C. § 4248(a) specifically includes those “against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person.”

Previous statutes allowing the federal government to treat the mentally ill were careful to not usurp the states’ power. For example, under 18 U.S.C. § 4246(d), the Attorney General remains under an ongoing obligation to seek state placement of individuals. The statute at issue here merely requires an initial effort for state placement—effectively eliminating the states’ role once an individual has been committed. Like the police power at issue in *Morrison* and *Lopez*, the care and treatment of the mentally ill under our federalist system is primarily an obligation of the states. The Act, in fact, recognizes this and contains a provision allowing and encouraging the states to develop systems to civilly commit sexually dangerous persons. Section 301, the “Jimmy Ryce state civil commitment programs for sexually dangerous persons,” provides states with incentives to start their own programs. This section of the Act leaves the power where it should remain—in the hands of the states.

18 U.S.C. § 4248 unconstitutionally deprives the states of their *parens patriae* and police power. This federal civil commitment statute enacted under Section 302 of the Act over-steps Congress’s bounds and intrudes upon an area relegated to the states. Congress’s power is enumerated in the Constitution and has been carefully defined by the United States Supreme Court in *Morrison* and *Lopez*. These cases demonstrate that a statute such as the civil commitment of sexually dangerous persons is beyond Congress’s enumerated powers, and thus § 4248 is facially invalid as an unconstitutional exercise of Congress’s power.

II. 18 U.S.C. § 4248 VIOLATES BOTH DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.

The indefinite civil commitment provisions of the Act apply broadly to all “person[s] who [are] in the custody of the Bureau of Prisons,” not simply those convicted of a sexually violent offense. 18 U.S.C. § 4248(a).⁴ This panoptic classification violates both substantive due process and equal protection under the Fifth Amendment. As discussed below, the Supreme Court has held that substantive due process requires, at a minimum, that the state prove that an individual is sexually dangerous before subjecting that individual to indefinite civil commitment on grounds of sexual deviance. The procedures that the Act utilizes to prove sexual dangerousness lack the basic constitutional protections approved by the Supreme Court and employed by almost every other jurisdiction to civilly commit sexually dangerous individuals. The Act, accordingly, commits individuals to indefinite confinement in violation of substantive due process. In addition, the classification of “person[s] who [are] in the custody of the Bureau of Prisons” bears no relation whatsoever to the violent sex offenses that Congress intended the Act to prevent and, accordingly, violates equal protection.

A. Section 4248 Violates Substantive Due Process

The Fifth Amendment forbids the government from depriving any person of liberty without due process of law. U.S. Const. Amend. V. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. INS*, 533 U.S. 678, 690 (2001). “In our society, liberty is the norm, and detention . . . without trial is the carefully limited exception.” *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (internal quotation omitted). Accordingly, the

⁴Though not relevant to the present case, § 4248 also applies to all individuals found incompetent to stand trial or for whom charges were dismissed for reason of mental defect. 18 U.S.C. § 4248(a).

government cannot detain an individual outside of the criminal context except in very narrow circumstances. *Id.*

In *Kansas v. Hendricks*, the Supreme Court examined one of those narrow circumstances and discussed the framework through which to examine the substantive due process concerns surrounding the civil commitment of sexually dangerous individuals. 521 U.S. 346 (1997). Specifically, the Court held that any civil commitment of an allegedly “sexually dangerous individual” must (1) take place pursuant to proper procedures and evidentiary standards; (2) involve a finding of dangerousness to one’s self or others; and (3) couple that proof of dangerousness with proof of some additional factor such as mental illness or mental abnormality. *Kansas v. Crane*, 534 U.S. 407, 409 (2002) (discussing *Hendricks*).

In examining the dangerousness requirement, the Court placed great weight on the statute’s internal procedural safeguards. Specifically, the Court emphasized that the statute at issue in *Hendricks* “unambiguously require[d] a finding of dangerousness” because “[c]ommitment proceedings can be initiated *only* when a person has been convicted of or charged with a sexually violent offense.” *Hendricks*, 521 U.S. at 357 (emphasis added). The Court noted that “[t]he statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior As we have recognized, previous instances of violent behavior are an important indicator of future violent tendencies.” *Id.* at 357-58 (internal quotation omitted).

The *Hendricks* statute, in other words, required proof of a previous criminal charge or conviction involving sexually violent behavior as a gatekeeping mechanism to ensure that the individuals subjected to the commitment were in fact dangerous to themselves or others. The Court has noted that these “strong procedural safeguards” played a large role in its holding that

the statute at issue satisfied substantive due process concerns. *Zadvydas*, 533 U.S. at 691 (quoting *Hendricks*, 521 U.S. at 368).

Following this understanding of Due Process Clause requirements, the vast majority of states to implement civil commitment proceedings for sexually violent predators require that the individual subjected to detention have been convicted of a sexually violent offense.⁵ “The fact that a practice is followed by a large number of states is . . . plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Schall v. Martin*, 467 U.S. 253, 268 (1984)(internal quotation omitted). These states recognize that a previous conviction for

⁵*See* Ariz. Rev. Stat § 36-3701(7)(a) (requiring that a “sexually violent person” have been, inter alia, “convicted of . . . a sexually violent offense”); Cal. Welf. & Inst. Code § 6600(a)(1) (requiring that a “sexually violent predator” have, inter alia, “been convicted of a sexually violent offense against one or more victims”); Fla. Stat. Ann. § 394.910(10)(a)(requiring that a “sexually violent predator” have, inter alia, “been convicted of a sexually violent offense”); 725 Ill. Comp. Stat. 207/5(f) (requiring that a “sexually violent person” have, inter alia, “been convicted of a sexually violent offense”); Iowa Code § 229.A2(11) (requiring that a “sexually violent predator” have been, inter alia, “convicted of or charged with a sexually violent offense”); Kan. Stat. Ann. § 59-29a02(a) (requiring that a “sexually violent predator” have been, inter alia, “convicted of or charged with a sexually violent offense”); Mass. Gen. Laws. Ch.123A, §1 (requiring that a “sexually dangerous person” have been, inter alia, “convicted of . . . a sexual offense”); Mo. Rev. Stat. § 632.480(5)(a) (requiring that a “sexually violent predator” have, inter alia, “pled guilty or been found guilty . . . of a sexually violent offense”); N.J. Stat. Ann. § 30:4-27.26 (requiring that a “sexually violent predator” have been, inter alia, “convicted . . . of a sexually violent offense”); S.C. Code Ann. § 44-48-10(1) (requiring that a “sexually violent predator” have been, inter alia, “convicted of a sexually violent offense”); Tex. Health & Safety Code Ann. § 841.003 (requiring that a “repeat sexually violent offender” have been, inter alia, “convicted of more than one sexually violent offense”); Va. Code Ann. § 37.2-900 (requiring that a “sexually violent predator” have been, inter alia, “convicted of a sexually violent offense”); Wash. Rev. Code § 71.09.20(16) (requiring that a “sexually violent predator” have been, inter alia, “convicted of or charged with a crime of sexual violence”); Wis. Stat § 980.01(7) (requiring that a “sexually violent person” have been, inter alia, “convicted of a sexually violent offense”). Though not relevant to the present case, some states will consider an individual “convicted” of a sexually violent offense for purposes of civil commitment if that individual has been charged with a sexually violent offense but found not guilty by reason of insanity or not competent to stand trial.

sexually violent behavior provides “an important indicator” of future dangerousness and, accordingly, strike the delicate balance between restricting “the heart of the liberty that [the Due Process] Clause protects” and satisfying a government’s interest in involuntary commitment of its dangerous citizens. *Hendricks*, 521 U.S. at 358; *Zadvydas*, 533 U.S. at 690.

The Act, in contrast, provides no such internal procedural protections in order to determine whether an individual actually presents a danger of sexual violence to others. The Act mandates no requirement that the individual subjected to indefinite civil commitment have been convicted of or even charged with a sexually violent offense.

In fact, the Act requires only that the government prove by clear and convincing evidence that an individual have “engaged or attempted to engage in sexually violent conduct or child molestation” in order to meet the “dangerousness” requirement imposed by substantive due process. 18 U.S.C. §§ 4247(a)(5); 4248(d). The application of the “clear and convincing” burden of proof (as opposed to the reasonable doubt standard) in conjunction with the lack of a requirement that an individual ever have been charged with a sexually violent offense compounds the due process problems inherent in the government’s commitment scheme. *See Varner v. Monohan*, 460 F.3d 861, 865-66 (7th Cir. 2006) (noting that “it is sensible (if it is not compulsory) to give . . . additional protection in the form of a higher burden that the state must surmount” to “persons who have not been found guilty of a crime of sexual violence”).

The Act does not require, in other words, that the evidence of “sexually violent conduct or child molestation” have undergone the basic gatekeeping processes present in *Hendricks* and utilized by the various states with civil commitment programs. In fact, the Act does not even *define* “sexually violent conduct” or “child molestation.”

Unlike the “unambiguous” finding of dangerousness present in *Hendricks* where the procedural protections inherent in previous criminal proceedings provide the courts and the litigants with confidence in the reliability and certainty of evidence relating to past and future dangerousness, commitment under the Act centers on a single finding that an individual violated a term that is not even defined in the statute. This stark lack of procedural certainty and reliability—unprecedented in American civil commitment proceedings—violates substantive due process.

“Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). “In cases in which preventative detention is of potentially *infinite* duration, [the Supreme Court has] demanded that the dangerousness rationale be accompanied by some other special circumstance.” *Zadvydas* 533 U.S. at 691(emphasis in original). It has favorably noted as part of the due process analysis when the government strictly limits civil commitment proceedings to “a small segment of particularly dangerous individuals.” *Id.* (discussing *Hendricks*).

The Court has never come close to allowing what the Act mandates: a system that exposes *every single person* incarcerated in federal prison to a procedure through which “the Attorney General . . . or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person” and subject them to lifelong confinement. 18 U.S.C. § 4248(a).⁶ The adjudication of this classification does not then require “unambiguous” proof of dangerousness, but rather simple reliance on an undefined term in a statute that “encourage[s]

⁶Nothing in the Act provides any standards to determine who can be certified as a sexually dangerous person and subjected to a hearing—presumably leaving such decision completely within the discretion of the Director of the Bureau of Prisons or the Attorney General.

arbitrary and discriminatory enforcement.” *Kolender* , 461 U.S. at 357 (discussing the void for vagueness doctrine).

The unprecedented expansive reach and undefined scope of the Act proves especially troubling to substantive due process because, after a single finding that an individual is a “sexually dangerous person,” the Act subjects that individual to lifelong commitment until he can prove that he is *not* sexually dangerous. 18 U.S.C. § 4248(e). The Supreme Court has expressly noted the Constitutional significance of this burden shifting. *Zadvydas*, 533 U.S. at 691 (comparing *Hendricks*, which “uph[eld a] scheme that impose[d] detention upon a small segment of particularly dangerous individuals and provide[d] strict procedural safeguards” to *Foucha*, which “str[uck] down insanity-related detention system that placed burden on detainee to prove nondangerousness”) (internal quotations omitted). The Court has, accordingly, struck down statutes in which “the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous.” *Foucha*, 504 U.S. at 81-82. Specifically, the Court noted that such a “scheme of confinement is not carefully limited” as the Due Process Clause requires. *Id.* at 81. Coupling this burden shifting in the Act with the extremely low bar required for an initial commitment violates due process.

In short, the carefully drawn statutory scheme discussed at length in *Hendricks* and followed by the numerous states that have enacted civil commitment proceedings for sexually violent individuals falls into a narrow exception to the general prohibition against physical restraint imposed by the Due Process Clause. The Supreme Court has held that these laws strike a Constitutionally permissible balance between individual freedom and ordered liberty. The Act, in contrast, applies broadly, utilizes a lesser burden of proof, neglects evidentiary safeguards, and engages in impermissible burden shifting. Even assuming *arguendo* that each of these

individual aspects of the statute would, if examined in isolation, satisfy due process, they still create in the aggregate a unprecedented civil commitment scheme with a broader reach and less procedural safeguards than any yet seen in American jurisprudence.

By neglecting these basic procedural and substantive safeguards, the Act is “only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law.” *Foucha*, 504 U.S. at 83.

B. Section 4248 Violates Equal Protection⁷

If a classification is so overinclusive or underinclusive that it no longer bears a rational relationship to the government purpose allegedly addressed by the classification, then the classification violates the Constitutional guarantee of equal protection of the law. *Burlington N. R.R. v. Ford*, 504 U.S. 648, 653 (1992).⁸ In the present case, all “person[s] who [are] in the custody of the Bureau of Prisons” may be certified as a sexually dangerous person by the Attorney General or the Director of the Bureau of Prisons and subjected to a civil commitment

⁷If a classification would violate the Equal Protection Clause of the Fourteenth Amendment, then it violates the Fifth Amendment’s Due Process Clause as a matter of law. *See Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). Mr. Doe’s argument, therefore, derives from the Due Process Clause of the Fifth Amendment, though he discusses it in terms of the Equal Protection Clause.

⁸“[T]he Supreme Court has not squarely addressed the appropriate level of scrutiny to apply to civil commitment statutes.” *Hubbart v. Knapp*, 379 F.3d 773, 781 (9th Cir. 2004). Because the liberty interest implicated by indefinite commitment strikes at the “heart” of the Due Process Clause, *Zadvydas* 533 U.S. at 690, it implicates a fundamental right and heightened scrutiny should apply. Defendant, therefore, asserts that this court should apply heightened scrutiny to his Equal Protection claim. Defendant will, however, argue as though rational basis scrutiny applies in order to demonstrate that the government’s arbitrary classification system violates any level of scrutiny.

hearing, regardless of whether that person has any history of sexually violent conduct. 18 U.S.C. § 4248(a).

The Act potentially subjects every federal prisoner, simply by virtue of being a federal prisoner, to a hearing at which the prisoner could indefinitely lose his fundamental right to liberty. The class of “all federal prisoners,” bears absolutely *no relation*, let alone a rational relation, to the governmental purpose of committing sexually dangerous individuals. “Based upon the most recent data. . .it is estimated that rape and sexual assault offenders account for . . . about 1% of those serving time in Federal prisons.” Sex Offenders and Offenses, Bureau of Justice Statistics (revised 2/6/1997) at 16-17 (emphasis added).⁹ In addition, most individuals who would qualify as sexually dangerous are not in the federal prison system. Unlike the vast majority of states,¹⁰ which rationally limit their classifications to individuals who have committed or been formally charged with a sexually violent offense, the Act transforms mere status as a federal prisoner into eligibility for lifelong civil commitment. This arbitrary classification bears no relation to the purpose motivating the statute; the fact that an individual may have robbed a bank or possessed narcotics does not relate in any way to the question of whether they should be forced into a sexual predator civil commitment hearing at the pleasure of the director of the Bureau of Prisons.

⁹The fact that the federal government lacks a general police power to prosecute violent crimes explains the extreme disconnect between the federal prison population and the class of sexually violent offenders and child molesters. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) (“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.”).

¹⁰*See, supra*, n.6.

Considering the facial arbitrariness and risk for prejudice inherent in using one's status as a prisoner as a surrogate for a rational classification system, the Supreme Court has expressly rejected just such an approach. In *Baxtrom v. Herold*, the Court examined a New York system under which the state subjected prisoners suspected of mental illness to a different civil commitment proceeding than it subjected non-prisoners suspected of mental illness. 383 U.S. 107, 111 (1966). The Court noted that a state may, consistent with equal protection, use one's status as a prisoner "for purposes of determining the type of custodial or medical care to be given." *Id.* The Court continued, however, that such status:

has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all. For purposes of granting judicial review . . . of the question whether a person is mentally ill and in need of institutionalization, *there is no conceivable basis* for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

Id. at 111-12. (emphasis added). Put simply, a state violates equal protection through using one's status as a prisoner to control the nature of the proceedings used to determine whether to subject someone to civil commitment.

In *Jackson v. Indiana*, the Supreme Court expanded and emphasized this understanding of the Equal Protection Clause, noting that

The harm to the individual [charged with a crime] is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to [those not charged with a crime] afford [those others] a substantial opportunity for early release. . . . [W]e hold that by subjecting [petitioner] to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded [to those not charged with offenses], Indiana

deprived petitioner of equal protection of the laws under the Fourteenth Amendment.

406 U.S. 715, 729-30 (1972) (discussing *Baxtrom*).

In fact, in *Humphrey v. Cady*, the Supreme Court expressly extended the *Baxtrom* holding to civil commitments of sexual offenders. *Humphrey v. Cady*, 405 U.S. 504 (1972). The Court noted that Wisconsin held persons convicted of a sexually motivated crime to a different civil commitment standard than it held those not convicted of a crime. *Id.* at 508 (comparing the Wisconsin Sex Crimes Act to the Wisconsin Mental Health Act). The Court then stated that perhaps Wisconsin could draw such a distinction consistent with equal protection “with respect to an initial commitment . . . which is imposed in lieu of a sentence, and is limited in duration to the maximum permissible sentence.” *Id.* at 510-11. The Court, however, continued that the distinction “can carry little weight . . . with respect to the subsequent renewal proceedings [authorized by Wisconsin law], which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant’s crime or the maximum sentence authorized for that crime.” *Id.* at 511. In other words, an individual’s presence in the criminal justice system does not provide a reasonable basis on which to distinguish that person’s civil commitment proceeding for sexual dangerousness from any other civil commitment proceeding.

The irrational disconnect created by the Act’s classification actually exceeds that imposed by the states and found wanting in *Baxtrom*, *Jackson*, and *Humphrey*. In those cases, the states used one’s status as a prisoner simply to determine which of two sets of procedures to apply at a civil commitment hearing. The Act, by contrast, uses one’s status as a prisoner to determine *whether to subject one to a civil commitment hearing at all*. Persons in federal prison are subjected to a 18 U.S.C. § 4248 hearing at the pleasure of the Director of the Bureau of

Prisons; persons outside of federal prison can never be subjected to a § 4248 hearing. As the Supreme Court has held, this arbitrary distinction lacks a “conceivable basis” and “has no relevance whatsoever” to the purposes behind civil commitment. As the Court has noted, the government “discriminates against [someone] in violation of the Equal Protection Clause of the Fourteenth Amendment” when it subjects him to specific civil commitment proceedings simply “because he at one time committed a criminal act.” *Foucha*, 504 U.S. at 84-85 (plurality opinion of White, J.).¹¹

The Seventh Circuit recently confronted a similar issue and reached a similar conclusion. In *Varner v. Monohan*, 460 F.3d 861 (7th Cir. 2006), the court examined two Illinois civil commitment laws for sexual offenders, one of which required a conviction for a sex offense as a precondition for a commitment hearing, and one of which did not. The Court noted that “[t]he difference between those with a criminal record of sexual offenses and those without is vital. . . . [I]t is sensible (if it is not compulsory) to give [those without a record of criminal conviction] additional protection in the form of a higher burden that the state must surmount.” *Id.* at 865-66.

In contrast to this analysis, the Act creates *no* distinction between those with a record of sexually violent conduct and those without. All prisoners, no matter their history (or lack of history) of sexually violent conduct are subjected to the same clear and convincing standard of proof before indefinite civil commitment. Equal protection simply forbids the government from relying on such an overinclusive and irrational classification.

III. SECTION 4248 VIOLATES THE DOUBLE JEOPARDY CLAUSE, THE EX POST FACTO CLAUSE, THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE JURY TRIAL RIGHT CONTAINED IN THE SIXTH AMENDMENT.

¹¹For this reason, § 4248 actually violates both underinclusion and overinclusion under the Equal Protection Clause.

A § 4248 commitment operates as a form of preventative detention and, therefore, constitutes criminal as opposed to civil proceedings. As such, the potentially indefinite commitment imposed by § 4248 violates the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition against cruel and unusual punishment, and the jury trial right contained in the Sixth Amendment.

Allen v. Illinois, 478 U.S. 364 (1986), provides the proper framework through which to determine the criminal or civil nature of a detention scheme. “The question whether a particular proceeding is criminal . . . is first of all a question of statutory construction.” *Id.* at 368. In the present case, even though § 4248 is entitled “Civil Commitment of a Sexually Dangerous Person,” its inclusion in Title 18 of the United States Code demonstrates that it actually operates as a criminal detention scheme.

In addition, even assuming *arguendo* that, despite § 4248's placement in Title 18, this Court believes that it is facially a civil statute, this Court should still treat it as a criminal statute because Mr. Doe can demonstrate with “the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the [government’s] intention that the proceeding be civil.” *Id.* at 369 (internal quotations and alterations omitted).

Commitment under § 4248 requires this Court to determine, *inter alia*, whether Mr. Doe has ever “engaged or attempted to engage in sexually violent conduct or child molestation.” 18 U.S.C. §4247(a)(5). This action—determining whether an individual has committed a wrongful act in the past—constitutes the heart of any criminal proceeding. *See Allen*, 478 U.S. at 371 (noting that a “civil commitment proceeding is very different from the central issue in . . . a criminal prosecution. In the latter case[] the basic issue is a straightforward factual question -- did the accused commit the act alleged?”(internal quotation omitted)).

In addition, once an individual is committed under § 4248, the government no longer has the burden to prove that the statute mandates commitment. Instead, the individual has to prove that he is “no longer sexually dangerous to others.” 18 U.S.C. § 4248(e). In other words, a § 4248 commitment does not provide the government with an ongoing obligation to demonstrate that it is treating an individual or otherwise justifying a commitment on public health or safety grounds. Section 4248 instead involves a single factual finding, the result of which keeps an individual committed, potentially indefinitely. It is, in other words, designed to punish and deter criminal conduct and, accordingly, is a criminal statute. As a criminal statute, § 4248 violates a host of constitutional provisions, including the Double Jeopardy Clause, the Ex Post Facto Clause, the Eighth Amendment prohibition against cruel and unusual punishment, and the jury trial right contained in the Sixth Amendment. This court should, therefore, dismiss the current proceeding as unconstitutional.

IV. SECTION 4248 VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT MANDATES THE USE OF THE CLEAR AND CONVINCING, AS OPPOSED TO THE REASONABLE DOUBT, BURDEN OF PROOF

The application of the clear and convincing standard of proof in this case violates the Due Process Clause. Specifically, § 4248 unconstitutionally allows this Court to find that the respondent is a sexually dangerous person based on clear and convincing evidence. 18 U.S.C. § 4248(d). Supreme Court precedent indicates that the Act must instead require proof beyond a reasonable doubt. Accordingly, this Court must strike down this statute as facially unconstitutional.

The Supreme Court has never addressed directly what standard of proof due process demands in a proceeding to determine whether to commit involuntarily an individual as a

sexually violent predator. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 353 (1997)(noting that the civil commitment procedures used in that case utilized a reasonable doubt standard as a matter of state law). The Court has, however, addressed what standard of proof satisfies due process in various other types of civil commitment proceedings. In *In re Winship*, 397 U.S. 358 (1970), the Court held that adjudicating a juvenile delinquent requires proving facts beyond a reasonable doubt. In contrast, the Court held in *Addington v. Texas*, 441 U.S. 418 (1979), that adjudicating a respondent mentally ill required proving facts by only clear and convincing evidence. As will be explained below, closer examination of these precedents demonstrates that the clear and convincing standard used in § 4248 violates due process of law.

In *Winship*, the Court first noted that courts apply the reasonable doubt standard in criminal cases “both because of the possibility that [the accused] may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.” *Winship*, 397 U.S. at 363. The government in *Winship* argued that, notwithstanding this import of the reasonable doubt standard, due process does not mandate its application to juvenile delinquency proceedings because such proceedings (1) are civil and (2) “are designed not to punish but to save the child.” *Id.* at 365 (internal quotation omitted). Significantly, the Court rejected this argument, holding that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for a proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.” *Id.* at 365-66 (internal quotation omitted).

Applying *Winship* to the present case demonstrates that the clear and convincing standard mandated by § 4248(d) does not satisfy due process. First, § 4248 implicates the exact concerns

that mandate the use of the reasonable doubt standard in criminal cases. Specifically, Mr. Doe will lose his liberty upon an adjudication that he is a sexually dangerous individual. *Id.* at 363. In addition, he will suffer a stigma from such an adjudication, arguable greater than the stigma which attaches to convicted criminals in our society. *Id.*

Further, the “civil” label applied to the hearing under § 4248 and the government’s goal of “treating” Mr. Doe do not reduce the need for the safeguard of the reasonable doubt standard. As the Supreme Court noted, when the government subjects an individual to years of stigmatizing involuntary confinement, no matter the label used or the intentions expressed, such actions compare in seriousness to felony prosecutions, and due process mandates the application of our most rigorous procedural safeguards. *Id.* at 366.

Addington v. Texas does not change this analysis. *Addington* did not overrule *Winship*, but simply examined a different type of civil commitment proceeding. Specifically, *Addington* held that due process demands only a clear and convincing standard of proof “in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital.” *Addington*, 441 U.S. at 419-420.

The *Addington* Court expressly noted the distinction between the proceedings at issue in *Winship* and the proceedings at issue in *Addington*. Specifically, the Court held that juvenile commitment proceedings, unlike mental health proceedings, ask the courts to determine whether an individual committed a criminal-type act. *Id.* at 427-28. Put more precisely, the *Addington* Court held 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.

The question for this Court is whether the present § 4248 proceeding resembles a stigmatizing criminal-type prosecution, or whether it resembles a standard mental health civil

commitment. Examination of the relevant statutes reveals that the present § 4248 proceeding very closely resembles the proceeding at issue in *Winship* and, accordingly, this Court should dismiss the government’s petition because the proceedings do not apply the reasonable doubt standard.

The core of a § 4248 proceeding involves finding whether a respondent has “engaged or attempted to engage in sexually violent conduct or child molestation.” 18 U.S.C. § 4247(a)(5). In other words, § 4248 hearings must find whether a respondent engaged in a criminal sexual act. More importantly, § 4248 hearings must find whether a respondent engaged in precisely the kind of highly stigmatizing criminal act that the Supreme Court has said compels the application of the reasonable doubt standard.

These stigmatizing factual findings about criminal behavior differ from the findings at issue in § 4245 hearings, or § 4246 hearings, or the hearings at issue in *Addington*, in which a court must determine that a respondent suffers from a mental illness and that, as a result, the release of the respondent presents a danger to society. This critical distinction indicates that, pursuant to the Supreme Court’s direction in *Winship*, courts must apply the reasonable doubt standard when finding facts in § 4248 proceedings.

Conclusion

For all of the foregoing reasons, Mr. Doe moves this Court to dismiss the 18 U.S.C. § 4248 proceedings. Mr. Doe respectfully requests a hearing on this matter.

Respectfully requested.

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