

No. 18-6374

IN THE
Supreme Court of the United States

WILLIAM CARL WELSH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Cato Institute, a nonpartisan public-policy research foundation dedicated to the principles of individual liberty, free markets, and limited government, respectfully submits this brief as *amicus curiae*.¹

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

The Cato Institute is a nonpartisan public-policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability for law enforcement. Relevant here, the Cato Institute regularly files *amicus* briefs in this Court and courts throughout the country to ensure that individual liberty does not impermissibly give way to assertions of nonexistent federal powers.

This petition raises issues of serious and potentially far-reaching consequence for the proper operation of our constitutional order. The Federal Government cannot claim a civil-commitment authority under the Sex Offender Registration and Notification Act (SORNA) to detain indefinitely those persons whom it can neither lawfully charge with criminal activity nor convict. There is no generalized federal civil-commitment authority, detached from the commission of federal crimes. This Court should grant the petition and reestablish that bedrock limitation.

SUMMARY OF ARGUMENT

The Federal Government cannot exercise power it does not possess. Yet that is what the Government seeks to do here: Exercise a federal police power under the guise of SORNA, a law that already resides on the Constitution's outer edge. That troublesome statute has often required this Court's attention over its short life. It calls out again.

This case is the first time in the modern era that the Federal Government has successfully asserted a continuing power to civilly commit an individual who has been neither lawfully charged with nor convicted of a federal crime. Absent a lawful basis for federal custody, however, that power inheres in the several States. The Federal Government has no roving authority to initiate involuntary civil-detention proceedings. Supplanting the States' historic police powers in this manner offends their dignity as co-sovereigns, frustrates political accountability, and discourages state-level experimentation. Making matters worse, judicial review of the Federal Government's civil-commitment authority rests in the hands of a single federal appellate court, which has now written the Government a blank check to exercise the very type of "great substantive and independent power" that the Constitution denies it. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

Given that the Federal Government exceeded its powers in obtaining a civil-commitment order for Mr.

