No. _____

IN THE
Supreme Court of the United States

WILLIAM CARL WELSH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may deny relief from a civil-commitment judgment under 18 U.S.C. § 4248 and keep a person in federal prison indefinitely when his commitment was based on a conviction that has been vacated because he is actually innocent.

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Petitioner William Welsh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion, Pet. App. 1a-22a, is reported at 879 F.3d 530. The District Court's order is available at Pet. App. 23a-46a. The District of Oregon's stipulation and order vacating Mr. Welsh's judgment of conviction is available at Pet. App. 47a-48a. The Eastern District of North Carolina's order civilly committing Mr. Welsh is available at Pet. App. 55a-85a. The Fourth Circuit's opinion affirming that judgment is available at Pet. App. 49a-54a. The Fourth Circuit's order denying the petition for rehearing and rehearing en banc is available at Pet. App. 86a-88a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 2018. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on July 18, 2018. Pet. App. 86a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b):

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

18 U.S.C. § 4248(a):

> (a)INSTITUTION OF PROCEEDINGS.—
> In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

INTRODUCTION

This case presents a question of exceptional importance regarding the scope of the Government's authority to detain—indefinitely—a person who has been declared actually innocent of the offense that gave rise to his incarceration and subsequent civil commitment.

More than eight years ago, the Federal Government arrested, convicted and locked up William Welsh. More than two years ago, a federal court vacated his conviction, explaining that "the factual basis for the guilty plea * * * did not constitute a federal crime." Pet. App. 47a.

Yet Mr. Welsh remains indefinitely confined in a federal correctional facility under a civil-commitment order the lower courts refused to lift, despite the fact that he is legally and factually innocent of any crime and should not have been eligible for civil commitment under the statutory scheme Congress adopted. This continued deprivation of liberty is "offensive to the most basic tenets of justice." Pet. App. 21a (Thacker, J., dissenting).

The Adam Walsh Act provides for civil commitment of people who are in "the custody of the Bureau of Prisons" (or meet other criteria not at issue here) and are deemed to be "sexually dangerous." 18 U.S.C. § 4248(a). When Mr. Welsh's conviction—the prerequisite to his "custody" and commitment—was vacated because he had committed no crime, Mr. Welsh sought relief from civil commitment based on those changed circumstances, both because the commitment order was "based on an earlier judgment that has been reversed or vacated" and because

applying it prospectively would no longer be equitable, Fed. R. Civ. P. 60(b)(5), and because it was "void" for lack of jurisdiction, Fed. R. Civ. P. 60(b)(4).

Despite having shown that the statutory precondition for his indefinite confinement no longer existed, the courts below denied Mr. Welsh relief based on the subjective policy determination that there was a "substantial countervailing interest in Welsh's continued commitment," Pet. App. 12a, and a conclusion that the Act's custody requirement is not jurisdictional, Pet. App. 7a. Each of these conclusions is wrong and contravenes this Court's precedents.

This Court has recognized that a district court's discretion to deny relief under Rule 60(b)(5) is not unlimited: "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.' " *Horne* v. *Flores*, 557 U.S. 433, 447 (2009) (citations omitted). And the Court has expressly rejected lower courts' attempts to require satisfaction of the original judgment. *Id.* at 454. After all, there is a distinct basis for relief under Rule 60(b)(5) if the judgment has been "satisfied, released or discharged."

What is more, a district court has *no* discretion to deny relief under 60(b)(4) if the judgment is void—that is, the court lacked jurisdiction to enter it. Jurisdiction is the power to adjudicate. And in *United States* v. *Comstock*, this Court expressly tied Congress's civil-commitment power to its power to define and punish crimes and noted the Government's acknowledgment it "would not have * * * the power to

commit a person" who was not in prison or on federal supervised release. 560 U.S. 126, 148 (2010) (quoting Tr. Of Oral Arg. 7, 9).

At the time of his certification, Mr. Welsh should not have been in the custody of the Bureau of Prisons; he had committed no crime. The District Court's commitment order was based on a vacated judgment and its continued application is inequitable. It is also void; the Government is without power to commit those who are not in the legal custody of the Bureau of Prisons.

Rule 60(b) is not a mechanism for the District Court to bless continued confinement based on an abstract policy determination that a person should remain confined. It is a limited exception to finality designed to redress injustice.

For Mr. Welsh, injustice persists. The petition should be granted.

STATEMENT

1. The Adam Walsh Act, codified in relevant part at 18 U.S.C. §§ 4247-4248, provides for certification and civil commitment of people in carefully circumscribed situations. To be eligible for certification, a person must be: (1) in the custody of the Bureau of Prisons; (2) "committed to the custody of the Attorney General pursuant to section 4241(d)" because he is incompetent to stand trial; or (3) a person whose criminal charges have been dismissed "solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a). With respect to the first category, the Fourth and Seventh Circuits have explained that a person must not simply be in the physical custody of the Bureau of Prisons; he must be in its *legal* custody. That is, the Bureau of Prisons must have "legal control" over the person. *United States*

v. *Joshua*, 607 F.3d 379, 387-388 (4th Cir. 2010); *United States* v. *Hernandez-Arenado*, 571 F.3d 662, 667 (7th Cir. 2009).

If a person is properly certified, a District Court must hold a hearing at which the Government bears the burden to prove, by clear and convincing evidence, that the person has "engaged or attempted to engage in sexually violent conduct or child molestation," and presently "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. §§ 4247(a)(5), (a)(6).

All persons being considered for certification are sent to FCI Butner. As a result, all certifications are filed in the United States District Court of the Eastern District of North Carolina, and their appeals are heard by the United States Court of Appeals for the Fourth Circuit.

2. In January 2011, Mr. Welsh was convicted for failure to register under the Sex Offender Registration and Notification Act, 120 Stat. 590, 42 U.S.C. § 16901 *et seq.* The indictment to which Mr. Welsh pleaded guilty alleged that he failed to update his registration in Oregon when he traveled to Belize. He was sentenced to a term of six hundred seventy-three days of imprisonment. Ten days before his projected release date, the Government filed a certification pursuant to 18 U.S.C. § 4248, alleging that Mr. Welsh was a "sexually dangerous person" for purposes of the Adam Walsh Act. To satisfy the prerequisite for certification, the Government cited Mr. Welsh's custody status as a result of his Oregon conviction; it never

argued that Mr. Welsh had been found incompetent to stand trial or that his charge had been dismissed for reasons related solely to his mental condition because neither of those conditions was met.

The District Court for the Eastern District of North Carolina held a hearing and concluded that Mr. Welsh met the criteria for civil commitment. Pet. App. 55a-85a. It committed him to the custody of the Attorney General. The Fourth Circuit affirmed in an unpublished per curiam opinion. Pet. App. 49a-54a.

3. Two years later, this Court decided *Nichols* v. *United States*, 136 S. Ct. 1113 (2016). In *Nichols*, the Court unanimously held that a person who was required to register under the SORNA was not required to update his registration in the jurisdiction he is leaving. 136 S. Ct. at 1118.

On the basis of the *Nichols* decision, Mr. Welsh filed a motion to vacate the criminal judgment and dismiss the indictment because he was actually innocent. The Government consented to that motion. The District Court for the District of Oregon vacated Mr. Welsh's judgment and commitment order and dismissed the underlying indictment with prejudice. It did so because *Nichols* explained that "the factual basis for the guilty plea in this case did not constitute a federal crime."

4. Once Mr. Welsh's conviction was vacated, he filed a motion in the District Court for the Eastern District of North Carolina for relief from that court's judgment civilly committing him. Mr. Welsh sought relief under Federal Rule of Civil Procedure 60(b)(4), (b)(5), and (b)(6). Federal Rule of Civil Procedure 60(b) provides relief from judgment in certain circumstances to avoid unjust results.

Relevant to this case, Rule 60(b)(4) provides for relief from judgment where the judgment is void. Rule 60(b)(5) provides for relief from judgment where "the judgment has been satisfied, released, or discharged; [ ] is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." And Rule 60(b)(6) provides for relief from judgment for "any other reason that justifies relief."

Mr. Welsh argued that he was never in the legal custody of the Bureau of Prisons, as required by 18 U.S.C. § 4248(a), and the civil-commitment judgment thus was void for lack of jurisdiction, *see* Rule 60(b)(4), and, in any event, the judgment was based on an earlier judgment that was vacated and applying it prospectively was no longer equitable, *see* Rule 60(b)(5). He also argued for relief under Rule 60(b)(6) for "any other reason" because "extraordinary circumstances" justify relief: He had been subjected to "indefinite civil commitment in a federal prison, predicated on an unlawful term of imprisonment for conduct the Supreme Court of the United States has deemed not to be criminal."

5. The District Court denied relief. It concluded, as a threshold matter, that Mr. Welsh's motion was timely and that the Government would not suffer unfair prejudice if the judgment were set aside.

Under Rule 60(b)(4), the court noted that a judgment is void where it is "premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." Pet. App. 28a. The court held that Section 4248(a)'s custody requirement is not jurisdictional

and is instead a mere "element of the government's claim for relief under the Adam Walsh Act." Pet. App. 31a. Even if the custody requirement were jurisdictional, the court reasoned, Mr. Welsh was nonetheless "in the custody of the Bureau of Prisons" when he was certified because, in the court's view, the District of Oregon's judgment committing him to the custody of the Bureau of Prisons was controlling, even though "the facts stated in [Mr. Welsh's 2010] indictment do not constitute a crime." Pet. App. 30a.

Under Rule 60(b)(5), the court began with the clause providing for relief from a judgment where applying it prospectively is no longer equitable. Although the court acknowledged that a significant change in Mr. Welsh's circumstances occurred when this Court decided *Nichols* and the District of Oregon vacated his conviction, it nonetheless denied relief on the basis of its own perception of the public's "great countervailing interest in Welsh's continued commitment." Pet. App. 34a.

Turning to the clause providing for relief from a judgment where it is "based on an earlier judgment that has been reversed or vacated," the court acknowledged it had "necessarily considered" the Oregon conviction in rendering its civil-commitment judgment and if it had not existed, "the BOP would not have had legal custody over Welsh" on the date of his certification. It nonetheless denied relief, asserting that, in its view, the vacated conviction played only a "minimal" role in Mr. Welsh's civil-commitment hearing. Pet. App. 38a.

Finally, the District Court denied relief under Rule 60(b)(6) for "any other reason." It explained that, in its view, the necessary "exceptional circumstances"

were lacking because Mr. Welsh's "substantial personal interest in release from civil commitment" could not outweigh what it viewed as the public interest in his continued commitment. Pet. App. 42a.

6. Mr. Welsh appealed, and the Court of Appeals affirmed in a divided decision, with Judge Thacker dissenting. The panel majority held that Mr. Welsh's civil-commitment judgment is not void under Rule 60(b)(4) and the District Court had discretion to deny relief under Rules 60(b)(5) and 60(b)(6).

Under Rule 60(b)(4), the court agreed with the District Court that Section 4248(a)'s custody requirement is not jurisdictional, but only an element of a civil-commitment claim. And, in any event, it found that Mr. Welsh was in the "legal custody" of the Bureau of Prisons at the time of his certification for two reasons: (1) Mr. Welsh was placed there "by statutory authority" and (2) the Bureau of Prisons was "solely responsible" for his "custody, care subsistence, education, treatment and training." Pet. App. 9a. The court held that "the constitutional justification for federal civil commitment is rooted in the federal government's role as custodian, not in an underlying criminal conviction." *Id.* The court stated its view that the "government's interest in ensuring it doesn't release dangerous individuals into society exists whenever it asserts legal custody over a person, even if the underlying conviction is ultimately vacated." Pet. App. 10a.

The panel majority turned next to Rule 60(b)(5), concluding that the District Court did not abuse its discretion in denying relief under either the "reversed or vacated" clause or the "no longer equitable" clause. With respect to the "reversed or

vacated" clause, the panel majority affirmed the District Court's decision to deny relief as "reasonable." Pet. App. 12a. Although the District Court "necessarily considered" Mr. Welsh's now-vacated conviction, the panel majority did not take issue with the District Court's conclusion that it "played a very minor role in the substantive decision to commit Welsh." *Id.* The panel majority noted that "the Adam Walsh Act expressly authorizes the civil commitment of individuals who were never convicted of a crime," in circumstances that do not apply to Mr. Welsh. Pet. App. 13a.

Under the "no longer equitable" clause, the panel majority agreed with the District Court that there was certainly a "change in circumstances" in Mr. Welsh's case when *Nichols* was decided and the Oregon conviction was vacated. The court summarily accepted the District Court's invocation of the public's alleged "substantial countervailing interest in Welsh's continued commitment." Pet. App. 12a.

And it affirmed denial of relief under Rule 60(b)(6), concluding that it "does not apply because Welsh's claim falls under the more specific Rule 60(b)(5)." Pet. App. 11a n.2.

Despite its recognition that Mr. Welsh had not had any infractions over the year preceding the hearing and would be subject to SORNA's significant reporting requirements if released, the panel majority deferred to the District Court on the basis of a Bureau of Prisons' report opining that he would "have serious difficulty

refraining from acts of sexual violence or child molestation if released." Pet. App. 13a.

The panel concluded "in sum" that although the only legal basis for Mr. Welsh's commitment had been vacated and Mr. Welsh was actually innocent of any crime, it was reasonable for a federal court to conclude that he "should remain civilly committed." Pet. App. 14a.

7. Judge Thacker dissented. Noting that the majority "affirms a district court order denying relief to a person who has spent the last seven years in federal custody without a valid conviction," she explained that, although she agreed with the panel majority's analysis on Rules 60(b)(4) and 60(b)(6), she would reverse under Rule 60(b)(5)'s "reversed or vacated" and "no longer equitable clauses." Pet. App. 16a.

Judge Thacker began by explaining that the Adam Walsh Act is "intrinsically tied to Congress's authority to criminalize conduct" and that the majority "disregards that constitutional nexus." Pet. App. 15a.

With respect to the "reversed or vacated" clause, Judge Thacker explained that this case "fits so squarely" within the Rule it was "plainly an abuse of discretion" for the District Court to deny Mr. Welsh's motion. Pet. App. 16a. In her view, the District Court further abused its discretion by improperly weighing the "sanctity of final judgments" against "the incessant command of the court's conscience that justice be done in light of [a]ll the facts." Pet. App. 17a.

Judge Thacker would have held that the District Court gave undue weight to finality in three respects. Pet. App. 17a. *First*, civil commitment is indefinite by nature, and the director of the facility in which a person is committed must submit annual reports addressing whether continued commitment is necessary. *Id.* *Second*, vacatur in this case would not threaten a large number of final judgments because "civil commitment 'has been applied to only a small fraction of federal prisoners.' " (quoting *Comstock*, 560 U.S. at 148). *Id.* *Third*, because Mr. Welsh's final judgment is predicated on a vacated conviction, Judge Thacker explained: "My conscience dictates that such a judgment cannot be treated as sacrosanct." *Id.* And she noted that Mr. Welsh will be subject to SORNA's registration requirements for the rest of his life. Pet. App. 18a.

Judge Thacker also would have reversed on the "reversed or vacated" clause, calling the District Court's analysis, relying entirely on the public's interest in Mr. Welsh's continued commitment, "inappropriate and illogical." Pet. App. 19a. She explained that "surely" the Government's use of "this erroneous conviction to justify his now seven year (and counting) span of detention in a federal correctional facility" is "more than sufficient to satisfy Welsh's burden of establishing that changed circumstances warrant relief." Pet. App. 21a.

Judge Thacker then turned to the District Court's improper discounting of Mr. Welsh's interest in release, explaining that the prohibition against detention for nothing more than a perceived propensity to commit an act is "so deeply embedded in our understanding of due process that it is indispensable in a free society." *Id.*

Judge Thacker described how the Adam Walsh Act "walks a tightrope" in allowing civil commitment in certain circumstances, but that a civil commitment under the Act in the absence of a valid conviction likely would not survive a constitutional challenge. *Id.* And even if it would, "extending *Comstock* to permit the commitment of the factually and legally innocent is a bridge too far." Pet. App. 22a n.3.

Judge Thacker expressed her outrage that in Mr. Welsh's case, the Government is "detaining for propensity a citizen who never should have been in federal custody in the first place," which is "not only inequitable, it is offensive to the most basic tenets of justice." Pet. App. 21a. She cautioned against ignoring the public's interest in "checking the government's power to detain" in this fashion, warning that it is "to ignore a vital cornerstone of a free society, in favor of emphasizing a general public risk." Pet. App. 22a.

Mr. Welsh petitioned for rehearing and rehearing en banc, which the Court of Appeals denied. Pet. App. 86a. Judge Thacker wrote a statement respecting the petition, explaining her unwillingness "to sacrifice individual liberty absent a valid conviction." Pet. App. 88a. She noted Congress's lack of a general police power "to freely detain citizens on the basis of their proclivities" and expressed that civil commitment in this case, in the absence of a valid conviction, is "divorce[d] * * * from the constitutional principles upon which it is justified." *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons. *First*, the Fourth Circuit's decision conflicts with this Court's precedents establishing when denial of relief under Rule 60(b)(5) is an abuse of discretion. *Second*, the decision conflicts with this Court's precedents about how to determine whether a statutory requirement is jurisdictional. *Third and finally*, this case presents a clean vehicle to decide the question presented. The Court should grant plenary review or, in the alternative, summarily reverse, to stem the lower courts' erosion of liberty in the name of finality.

I. The Fourth Circuit's Decision Conflicts With This Court's Precedents Establishing When It Is An Abuse Of Discretion To Deny Relief Under Rule 60(b)(5)

When Mr. Welsh's Oregon conviction was vacated, the court made plain that he was actually innocent and imprisoned for conduct that was not a crime. That vacatur required relief from his civil commitment judgment under Federal Rule of Civil Procedure 60(b)(5) and this Court's cases interpreting the Rule.

A Rule 60(b)(5) motion should be granted when a party can show "a significant change either in factual conditions or in law." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). Failure to do so is reversible error. *Railway Employees* v. *Wright*, 364 U.S. 642, 647 (1961) ("[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.") (internal quotation marks and citation omitted).

As Judge Thacker rightly recognized, Mr. Welsh's civil-commitment judgment "fits so squarely" within Rule 60(b)(5)'s provision for relief from judgments based on vacated judgments that it was "plainly an abuse of discretion" to deny his motion. Pet. App. 16a. And she is correct, in this unique set of circumstances, to conclude that finality must give way to "the incessant command of the court's conscience that justice be done in light of [a]ll the facts." Pet. App. 17a (internal quotation marks and citation omitted).

This Court last had occasion to consider the "no longer equitable clause" of Rule 60(b)(5) nine years ago, in *Horne v. Flores*. 557 U.S. 433 (2009). In that case, English Language Learner students filed a class action suit alleging that the State of Arizona was violating a federal statute that required it to provide adequate assistance to students experiencing language barriers at school. *Horne*, 557 U.S. at 438. In 2000, the district court entered a declaratory judgment applicable to the school district, which it extended to apply to the whole state the next year. Six years later, the state legislature passed a law designed to implement a permanent funding solution to the problems identified by the district court. Legislators and the superintendent moved to intervene and, once that motion was granted, to purge the District Court's contempt order in light of the new law. They also moved for relief from the judgment under Rule 60(b)(5). *Id.* at 443.

The district court denied the 60(b)(5) motion, and the court of appeals affirmed, holding that the school district's "significant strides" since 2000 were insufficient and that relief would be warranted only if petitioners could show that there are no

longer incremental costs associated with ELL programs in Arizona or that Arizona had altered its funding model.

This Court reversed. It explained that Rule 60(b)(5) provides relief if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Id.* at 447 (quoting *Rufo*, 502 U.S. at 384). It explained that once a party demonstrates that changed circumstances warrant relief, a court "abuses its discretion 'when it refuses to modify an injunction or consent decree in light of such changes.' " *Id.*

The Court explained the significance of the Rule in the context of institutional reform litigation because, among other things, injunctions in those cases "remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id.* at 448. And they are important also because these cases "often raise sensitive federalism concerns" because they deal with areas of core state responsibility. *Id.*

The Court rejected the court of appeals' application of Rule 60(b)(5) calling it, at once, "too strict" because it found that circumstances were not "so *radically* changed" to require relief, and "too narrow," because it asked only whether the original order had been satisfied, not whether, more broadly, relief is warranted even if it has not. *Id.* at 454. This Court held that it was an abuse of discretion for

the lower court to fail to engage in a "broad and flexible Rule 60(b)(5) analysis." *Id.* at 456.

Although the factual circumstances in *Horne* are distinct, the analytical error below is the same. As in institutional reform cases, a civil-commitment judgment "remains in force for many years" with even more egregious consequences: Mr. Welsh remains indefinitely confined in a federal prison. And it raises sensitive federalism concerns because "[t]he States have traditionally exercised broad power to commit persons found to be mentally ill." *Jackson* v. *Indiana*, 406 U.S. 715, 736 (1972). Where, as here, the Federal Government reaches into an area of traditional state concern to hold a person in indefinite civil commitment absent a valid federal conviction, federalism is most certainly implicated. After all, "federalism protects the liberty of the individual from arbitrary power," *Bond* v. *United States*, 564 U.S. 211, 222 (2011).

As in *Horne*, the panel majority's construction of the Rule is, at once, too strict and too narrow. The panel majority affirmed the District Court's determination that, despite the cataclysmic change in Mr. Welsh's circumstances—he had not, in fact, committed a crime—he should nonetheless remain civilly committed for two reasons. First, it viewed the mandatory precondition of legal custody as playing a "minor role" in the decision to commit Mr. Welsh, despite the Government's concession in *Comstock* that it would not have the authority to civilly commit someone who was not in custody. *See* 560 U.S. at 148. It cited the fact that "the Adam Walsh Act expressly authorizes the civil commitment of individuals who were

never convicted of a crime," Pet. App. 13a, but failed to note that that is so in only two narrow circumstances, neither of which apply to Mr. Welsh—when a person has been committed to the custody of the Attorney General because he is incompetent to stand trial and when a person's criminal charges have all been dismissed "solely for reasons related to the mental condition of the person." 18 U.S.C. § 4248(a).

Second, it relied on a Bureau of Prisons' report opining that Mr. Welsh remained "sexually dangerous." In other words, the Fourth Circuit adopted exactly the reasoning this Court foreclosed in *Horne*, denying relief because it viewed Mr. Welsh's circumstances as not "so radically changed" as to require relief and because it viewed the District Court's civil-commitment judgment as not yet satisfied. As was true in *Horne*, the lower courts failed to engage in a "broad and flexible Rule 60(b)(5) analysis." As was true in *Horne*, this Court's intervention is required.

Similarly, in *Agostini* v. *Felton*, 521 U.S. 203 (1997), the Court reversed denial of a Rule 60(b)(5) motion filed by the City of New York, seeking relief from an injunction barring it from sending public school teachers to parochial schools to provide remedial education to disadvantaged children. 521 U.S. at 208-209. It did so because subsequent Supreme Court cases made "legal what the [injunction] was designed to prevent." *Id.* at 214. The Court explained that relief was warranted to "vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law." *Id.* at 238-239. As in *Agostini*, this Court's unanimous decision in *Nichols* v. *United States*, which made plain that Mr. Welsh

had committed no crime, warrants relief under Rule 60(b)(5) from the judgment civilly committing him on the basis of a now-vacated conviction.

II. The Fourth Circuit's Decision Conflicts With This Court's Precedents Explaining When A Statutory Requirement Is Jurisdictional

This Court has addressed Federal Rule of Civil Procedure 60(b)(4) only twice, most recently in *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260 (2010). There, the Court explained that the Rule applies "where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271.

The panel majority here concluded that the legal custody requirement of Section 4248(a) is not jurisdictional. In doing so, it paid little heed to the statutory text and failed to follow this Court's guidance on how to determine whether a statutory requirement is jurisdictional.

The panel majority concluded that the legal custody provision is not jurisdictional because "nothing in the text of § 4248(a)'s custody requirement suggests that it's a limit on the court's jurisdiction." *Id.* at 534. That is not correct. Although § 4248 does not use the word "jurisdiction," the structure of the statute strongly suggests that Congress was thinking in those terms. It explains that the statutory provisions apply only "[i]n relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a). That precondition, which establishes those over whom the

Federal Government may constitutionally exercise its civil-commitment power, is set apart from the elements of a claim under the statute, which establish how the Government must prove that a person is "sexually dangerous" and are set forth in 18 U.S.C. §§ 4247(a)(5) and (a)(6).

In *Arbaugh* v. *Y&H Corp.*, this Court explained that Congress has conferred subject-matter jurisdiction over actions brought by specific plaintiffs (citing 28 U.S.C. § 1345, 49 U.S.C. § 24301(l)(2)) or against particular defendants (citing 7 U.S.C. § 2707(e)(3) and 28 U.S.C. § 1348). 546 U.S. 500, 515 n.11 (2006). These statutes confirm that identifying a particular defendant is the kind of thing Congress places within the ambit of subject-matter jurisdiction. *See Reid Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010) ("the relevant question here is * * * whether the type of limitation that [the statute] imposes is one that is properly ranked as jurisdictional absent an express designation").

Although these statutes expressly use the term "jurisdiction," this Court has made clear that Congress need not "incant magic words in order to speak clearly." *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013). Instead, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress's intent]." *Id.* at 153-154 (quoting *Reid Elsevier*, 559 U.S. at 168).

Proper consideration of this context and case law make clear what the text already suggests: The legal custody requirement is jurisdictional. In *United States* v. *Comstock*, this Court held that the constitutionality of the Adam Walsh Act's

civil-commitment scheme hinges on the Constitution's grant of authority to Congress to create federal crimes under the Necessary and Proper Clause, Art. I, § 8, cl. 18. 560 U.S. at 135-136. To ensure enforcement of those crimes, it held, Congress may also erect prisons to house federal prisoners, may provide mental health treatment to them, and may civilly commit federal prisoners beyond the expiration of their criminal sentences to protect nearby communities. *Id.* at 136-137. But the Federal Government does not have a general police power: "[Federal authority for § 4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system * * * ." *Id.* at 148. The Government even acknowledged at oral argument in *Comstock* that it "would not have * * * the power to commit a person" who was not in prison or on federal supervised release. 560 U.S. at 148 (quoting Tr. Of Oral Arg. 7, 9).

Legal custody is the source of the Federal Government's "power to commit a person." And it is at the heart of "Federal authority." *Id.* Legal custody thus is jurisdictional: " '[J]urisdiction' properly refers to a court's power to hear a case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002); *see also Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (" 'Jurisdiction' refers to 'a court's adjudicatory authority.' "). The Fourth Circuit has previously confirmed this reading, explaining that the requirement that a person be in the legal custody of the Bureau of Prisons is the source of "jurisdictional authority for civil commitment under § 4248." *United States* v. *Savage*, 737 F.3d 304, 307 (4th Cir. 2013).

Because the District Court lacked jurisdiction to enter its civil-commitment judgment, that judgment was always void and relief was warranted under Rule 60(b)(4). The Court should grant certiorari to confirm that the legal custody requirement of Section 4248(a) is jurisdictional and to bring the Fourth Circuit—the Circuit that now entertains all appeals of civil-commitment judgments—into conformity with this Court's precedents.

III. This Case Presents A Clean Vehicle To Decide The Question Presented

All of Mr. Welsh's claims for relief have been submitted to, and considered by, the District Court and the Court of Appeals. A favorable decision under either Rule 60(b)(4) or 60(b)(5) would be outcome-determinative: It is only the lower courts' decisions denying Rule 60(b) relief that keep Mr. Welsh in prison today.

Although there is not a split among the courts of appeals regarding Rule 60(b)'s application in the civil-commitment context, that is only because all who are being considered for certification and commitment are sent to FCI Butner: All certificates thus are filed in the Eastern District of North Carolina, and all appeals are taken to the Court of Appeals for the Fourth Circuit.

The lack of a circuit split should not deter this Court from granting certiorari where the only court of appeals to hear these cases issued a divided decision. Only one of the regional circuits retains review over indefinite civil commitments under the Adam Walsh Act. This Court should not abdicate supervision of this rare exercise of the Federal Government's authority to preemptively detain; it should

grant review to ensure that remarkable power remains within its constitutional bounds.

IV. Even If The Court Believes Plenary Review Is Not Warranted, It Should Summarily Reverse

The Fourth Circuit's decision so plainly conflicts with this Court's precedents and the text of Rule 60(b) that the Court should, in the alternative, summarily reverse. *See Maryland* v. *Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing a judgment inconsistent with the Court's Fourth Amendment precedents); *Martinez* v. *Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

This Court's cases already adequately explain why Rule 60(b) should have given Mr. Welsh relief from an otherwise final judgment. As this Court explained in *Gonzalez* v. *Crosby*, the "policy consideration [of finality], standing alone, is unpersuasive in the interpretation of a provision whose purpose is to make an exception to finality." 545 U.S. 524, 529 (2005). What is more, civil-commitment judgments are unique among civil judgments to which the Rule applies. First, and most importantly, they affect a person's liberty status and do not just establish a money judgment or even an institutional reform decree. And second, they are, by their nature, less "final" than other civil judgments—they are regularly up for review in annual reports filed by the facility director, 18 U.S.C. § 4247(e)(1)(B), and in discharge hearings initiated by the respondent, *id.* § 4247(h). *Id.*

Judge Thacker rightly explained that this case "fits so squarely" within the Rule it was "plainly an abuse of discretion" for the District Court to deny Mr. Welsh's motion. Pet. App. 16a. As she explained, the District Court abused its discretion by allowing the "sanctity of final judgments" to prevail over "the incessant command of the court's conscience that justice be done in light of [a]ll the facts." Pet. App. 17a (internal quotation marks and citation omitted). The panel majority likewise remained deaf to that incessant command.

* * *

This case sets a disturbing precedent that cries out for this Court's review. Mr. Welsh remains in a federal prison, indefinitely civilly committed, despite having committed no crime and not qualifying for civil commitment under the scheme Congress adopted. In *Comstock*, this Court made clear that the authority to civilly commit is intrinsically, and inextricably, tied to Congress's authority to criminalize conduct. Pet. App. 15a. And it confirmed that "Congress does not have a 'general "police power" ' to freely detain citizens on the basis of their proclivities." Pet. App. 88a (quoting *Comstock*, 560 U.S. at 148). But the courts below delinked the civil-commitment power from the authority to criminalize conduct, upholding civil commitment in the absence of a valid conviction. That is a dangerous step. And, as Judge Thacker noted, it erodes "a vital cornerstone of a free society." Pet. App. 22a. The Court should stop this erosion in its tracks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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