NO. 12-418

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

ANTHONY JAMES KEBODEAUX,
Respondent.

On Writ of Certiorari
to the U.S. Court Of Appeals
for the Fifth Circuit

Brief of the Cato Institute as *Amicus Curiae* in Support of Respondent

ILYA SOMIN
Counsel of Record
GEORGE MASON UNIVERSITY SCHOOL OF LAW
3301 Fairfax Drive,
Arlington, VA 22201
(703) 993-8069
isomin@gmu.edu

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

QUESTION PRESENTED

Can the United States use the Necessary and Proper Clause to assert perpetual jurisdiction over someone merely because he once was within federal jurisdiction?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a potentially far-reaching and dangerous assertion of federal power.

SUMMARY OF ARGUMENT

Amicus submits this brief to highlight the impropriety of the federal government's claiming jurisdiction over Anthony Kebodeaux for failing to update his change of address pursuant to the Sex Offender Registration and Notification Act (SORNA) when he moved intrastate. Mr. Kebodeaux had completed his sentence, was no longer in federal custody or the military, and was not under any supervised release or parole. In short, he had no special relationship with the federal government that

---

[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

would justify his continued and indefinite supervision.[2]

The continued monitoring of Mr. Kebodeaux is improper under this Court's recent clarification of the term in both *United States v. Comstock*, 130 S. Ct. 1949 (2010), and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Although cases analyzing the "proper" component of the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, are historically rare in this Court's jurisprudence, those recent cases affirm the "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). The Court has made clear that a law may be unconstitutionally improper even if it is "necessary."

The Supreme Court "ha[s] been very deferential to Congress's determination that a regulation is 'necessary.'" *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). The major cases interpreting the meaning of "necessary" focus on the nature of the object being regulated and its relationship to a power of Congress. *See, e.g. United States v. Lopez*, 514 U.S. 549, 567 (1994) (holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate

---

[2] This brief assumes the validity the above assessment, which accords with the en banc decision below that Kebodeaux's release was "unconditional" and thus not subject to registration requirements under the Watterling Act because "only sex-offenders residing in non-compliant states were subject to federal registration for intrastate changes of residence." *United States v. Kebodeaux*, 687 F.3d 232, 235 n.4 (5th Cir. 2012) (en banc). However, as briefly discussed below, Petitioner's position is problematic even if this statutory analysis is incorrect.

commerce."); *United States v. Morrison*, 529 U.S. 598, 613) (2000) (overturning the Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Gonzales v. Raich*, 545 U.S 1, 25 (2005) (defining "quintessentially economic" activities as pertaining to the "the production, distribution, and consumption of commodities."). The connection between the regulated object and interstate commerce can be quite attenuated, yet Congress will receive deference if that connection does not violate the rule that the object must in some sense be "economic." *Id.*

Without the propriety requirement, a test based on mere usefulness and convenience would soon become a backdoor to an unbounded field of federal power. Much like the proximate cause test for causation in torts, the propriety test limits congressional power to something more than mere examination of links in a causal chain that are "useful" or "convenient." In *NFIB*, this Court made clear that mere convenience and usefulness were not sufficient to sustain a statute under the Commerce and Necessary and Proper Clauses, *NFIB*, 132 S. Ct. at 2590-92, and that the Constitution does not give the federal government an "indefinite supremacy over all persons and things." *The Federalist* No. 39 (James Madison) (Clinton Rossiter ed., 1961).

Mr. Kebodeaux's detention is improper for two distinct reasons. First, it amounts to the exercise of a "'great substantive and independent power' beyond those specifically enumerated" in the Constitution. *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 411 (1819)); second, the logic of the government's position would

give it virtually unlimited power to regulate nearly all Americans. This undermines the Constitution's "careful enumeration of federal powers." *Morrison,* 529 U.S. at 618 n.8.; Cf. Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper," in The Health Care Case: The Supreme Court's Decision and Implications* (Gillian Metzger, Trevor Morrison, & Nathaniel Persily, eds., Oxford University Press) (forthcoming) available at http://ssrn.com/abstract=2167381 (explaining how these two standards are separate, though overlapping, tests of propriety). The government's position in this case also runs afoul of four of the five factors applied by this Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). Those factors are best understood as standards of propriety.

Unlike in the adjudication of issues related to necessity, Congress does not receive deference under the test for propriety. *See, e.g., NFIB*, 132 S. Ct. at 2591-92 (applying propriety constraints without deferring to the federal government's assertions of power). Even if asserting jurisdiction over Mr. Kebodeaux could be tied to an enumerated power of Congress through a chain of "necessary" connections, it would not be proper to do so. Mr. Kebodeaux sits outside of Congress's jurisdiction, and the solicitor general's arguments that he is within congressional jurisdiction amount to an improper grant of a great, independent, an unbounded power that tramples on the traditional police powers of the several states.

In this case, as in others, the Necessary and Proper Clause has become "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States,* 521 U.S. 898, 923 (1997). To prevent the Clause from becoming a back door to

unconstrained federal power, and it is essential for this Court to enforce the requirement of propriety.

ARGUMENT

I. MR. KEBODEAUX'S DETENTION IS IMPROPER BECAUSE IT REQUIRES THE ASSUMPTION OF A GREAT, SUBSTANTIVE, AND INDEPENDENT POWER BEYOND THOSE ENUMERATED IN THE CONSTITUTION

Imprisoning past sex offenders for failing to register under a law passed after their unconditional release from federal custody may be "necessary" to forwarding Congress's goal of monitoring sexually dangerous individuals in order to minimize the risk they pose to society. It is improper, however, to allow Congress to expand its power in such a novel and limitless way. The government claims that its assertion of federal power is modest because it is limited to persons who have "greater ties" to federal jurisdiction. The problem with this theory is that huge numbers of people have ties to federal jurisdiction just as "great" as Mr. Kebodeaux's. Unconstrained federal authority to register, regulate, and detain all of these persons clearly constitutes a new great and independent realm of federal power.

The Necessary and Proper Clause only grants Congress powers that are "incidental to the [enumerated] power, and conducive to its beneficial exercise." *McCulloch*, 17 U.S. (4 Wheat.) at 418. While the "necessary" prong of the clause allows Congress any means that are "useful" or "convenient"

to executing the enumerated powers, *id.* at 413-15, the "proper" element prevents Congress from creating a "'great substantive and independent power' beyond those specifically enumerated." *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch*, 17 U.S. at 411); Cf. Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267 (1993) (explaining the original meaning of "proper" as a constraint on federal intrusion into the domain of the states).

Were the Necessary and Proper Clause just a "Necessary Clause," this Court's inquiry could be confined to a means/end analysis of whether a given law or assertion of jurisdiction is convenient, useful, or conducive to Congress's execution of an enumerated power. Yet this Court is also bound to strike down laws that "undermine the structure of government established by the Constitution," *NFIB*, 132 S. Ct. at 2592, because they are improper, even if necessary.

Mr. Kebodeaux's detention is not incidental to an enumerated power. Rather it is a new substantive power that is in fact greater than the powers which the government claims to be executing. An incidental power can be described as a power that is "less worthy" than the enumerated power that it is joined to. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011). Any other interpretation would have the Necessary and Proper Clause to granting powers that are in fact greater than those enumerated.

The government claims that maintaining jurisdiction over Mr. Kebodeaux helps monitor a "'legitimate' collateral consequence of conviction that is intended to protect the community." Pet. Br. at 15. Yet any risk posed by a former offender many years after his "unconditional" release is hardly a genuine "collateral consequence" of his original conviction. Presumably, he would pose as much or more risk to the community had he never been convicted for his previous crimes in the first place. The government's position implies that there is a federal interest in the possible future crimes of anyone who has ever been convicted of a federal offense in the past. With only narrow exceptions—punishing counterfeiting, U.S. Const. art. I, §8, cl. 6, and punishing piracy, felonies committed at sea, and "Offenses against the law of nations," U.S. Const. art. I, §8, cl. 8—Congress lacks an enumerated power to punish criminals, much less monitor previously released criminals in perpetuity. Providing general criminal enforcement within its jurisdiction, such as within federal enclaves, is itself a power incidental to the greater power to set up such jurisdictions in the first place.

Here, the government's argument ultimately creates a power that is several steps beyond incidental and instead becomes a "great substantive and independent power." The power to monitor in perpetuity those who were once in federal jurisdiction and to impose new and onerous restrictions on them at Congress's will is unquestionably great and could fundamentally change the relationship between U.S. citizens and the federal government. As a practical matter, it would give Congress unlimited life-long authority to impose regulations on any of the hundreds of

thousands of people who have been in federal custody at some point in their lives. Had the Framers intended this power to reside in Congress they would have listed it among those powers enumerated in Article I, Section Eight.

Not being a government, like the states, empowered to legislate "numerous and indefinite" issues, the federal government must restrict itself to powers that are "few and defined" and those powers which are incidental to enumerated powers. *The Federalist* No. 45 (James Madison) (Clinton Rossiter ed., 1961). At the very least, this must mean that it is possible for someone to exit federal subject-matter jurisdiction by ceasing to do whatever action implicated federal jurisdiction in the first place, *e.g.* ceasing economic activities that are in the realm of interstate commerce. Or, conversely, if an action once brought someone into federal jurisdiction, such as committing a federal crime, then an unconditional release must mean that the federal government has relinquished control. That control cannot return without another action sufficient to bring the citizen back into Congress's jurisdiction. This dynamic is all the more important because Congress's power within its jurisdiction is generally thought to be "plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

II. MR. KEBODEAUX'S DETENTION IS IMPROPER BECAUSE IT CANNOT BE JUSTIFIED WITHOUT GIVING CONGRESS UNLIMITED AUTHORITY TO REGULATE VIRTUALLY ALL AMERICANS

In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), this Court held that an inactive person could not be brought under federal jurisdiction pursuant to the Commerce and Necessary and Proper Clauses if that person was not engaging in economic activity. "The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *Id.* at 2586. To hold otherwise, "would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and . . . empower Congress to make those decisions for him." *Id.* at 2587.

In *NFIB*, this Court understood that inactive individuals have a direct link to commerce and that compelling their behavior was arguably "necessary" to regulating commerce. As Chief Justice Roberts wrote, "[t]o an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce." *Id.* at 2589. Nevertheless, this Court found such a legal command to be improper, even if necessary: If "Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it," then "[e]ven if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective." *Id.* at 2592. To uphold the government's arguments "would erode those limits, permitting Congress to reach beyond the natural

extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" *Id.* at 2589 (quoting *The Federalist* No. 48 (James Madison)).

The theory by which the government seeks to regulate Mr. Kebodeaux would also improperly extend the "sphere" of congressional power to a nearly boundless degree. In *NFIB*, the government unsuccessfully argued that the possibility that uninsured individuals may seek health care in the future made them "active in the market for health care" and thus regulable prior to actually entering the market. *NFIB*, 132 S. Ct. at 2589-90. Yet, because the class of those who may possibly enter the market for health care is co-extensive with the class of all U.S. citizens, Congress would by this theory obtain a general police power akin to that possessed by the states.

The government claims that its assertion of jurisdiction over Kebodeaux is not a major assertion of federal power because it is just an extension of a previous registration requirement. Pet. Br. 20-27. But this argument would justify the gradual imposition of endless new requirements on anyone who had previously been subject to federal jurisdiction. If the federal government can use the initial registration requirement imposed on Mr. Kebodeaux to justify the supposedly modest new requirements of SORNA, it can then use SORNA itself to justify still further additional impositions, and so on. Each further step might be modest in itself, but cumulatively they would amount to unlimited federal authority over anyone who has ever been held in federal custody or subject to any federal registration requirements.

In this case, the theory proposed by the Petitioner is equally boundless, equally unprecedented, and equally as improper as the theory rejected by this Court in *NFIB*. At the time he was arrested for failing to register his change of address, Mr. Kebodeaux had no special relationship with the federal government. His past crime had once placed him under federal power. But, as the en banc Fifth Circuit held, he was later properly released from that jurisdiction.

Whether or not Congress "has the power to require federal sex offenders to register with state sex-offender registries following their release and to penalize their failure to do so," Pet. Br. at 33, because Mr. Kebodeaux was *unconditionally* released from federal control, he was not in a category *properly* under federal jurisdiction. It would thus be improper to permit Congress to compel him to act merely because he was *once* convicted of a federal crime—at least without a further jurisdictional hook, such as interstate travel. This jurisdictional gap follows from the word "unconditionally." The theory proposed by the government is "no different from saying that Congress has such an interest over anyone who ever committed *any* federal crime, because there is nothing that is constitutionally special about sex crimes." *Kebodeaux*, 687 F.3d 232, 242.

The government seeks to connect the likelihood of a sex offender's future criminal behavior to its justification for asserting jurisdiction and, in so doing, articulate a limiting principle that confines that jurisdiction to sex offenders. It hopes this Court will rely on "Congress's judgment that the federal government has greater ties to former federal sex

offenders than it does to other members of the general public, whether those sex offenders were under federal criminal supervision at the time or had completed their criminal terms[,]" Pet. Br. at 34, as well as the "direct tie between the sexual nature of the conviction and the resulting regulation obligation." *Id.* at 36. But sex offenders are far from the only ex-convicts who might commit additional crimes in the future. It is not clear why their ties to the federal government are necessarily "greater" than those of people once imprisoned for murder, theft, securities fraud, or tax evasion.

The government performed an "about-face" on the Commerce Clause in the en banc Fifth Circuit. *Kebodeaux*, 687 F.3d. at 247 (calling it an "about-face" that "the Solicitor General has expressly denied that §2250(a)(2)(A) is constitutional as a regulation of the channels of interstate commerce[.]"). Yet the government still partially relies on the Commerce Clause explicitly, see Pet. Br. at 50-51, by advancing the theory that the government may monitor persons in the class of persons who had previously been adjudicated federal sex offenders because they *might* "use the channels of interstate commerce" to "evad[e] a State's reach." *Carr v. United State*s, 130 S. Ct. 2229, 2238 (2010). In other words, part of the federal government's justifiable interest in the class of sex offenders is predicated on interstate commerce concerns.

Ultimately, all of the government's analysis goes to the potential "necessity" of reaching this previously adjudicated but now released class of felons. "SORNA's registration provision and criminal penalty for federal sex offenders are 'means . . . "*reasonably adapted*" to the attainment of a

legitimate end under' the enumerated powers that justify the creation of the offenders' statutes of conviction. Pet. Br. at 31-32 (internal citations omitted) (emphasis added). "Section 2250(a)(2)(A) is *reasonably adapted* to serve those legitimate ends, enforcing sex-offender-registration obligations for individuals whose underlying federal offenses were of a sexual nature." *Id.* at 33 (emphasis added). The government never addresses whether the rationale by which it can reach these former offenders can be sufficiently limited to be a "proper" assertion of federal power.

But it would be improper for Congress to assert perpetual jurisdiction over those unconditionally released from federal jurisdiction based on the theory that the *previous reason* for asserting jurisdiction over them creates "greater ties" to the federal government that can justify imposing mandates on this class. Yet this is precisely what the government unabashedly argues here: "The *logical basis* for attaching a collateral registration consequence to a federal criminal conviction *does not disappear at the moment of a prisoner's release*. As the Court's decision in *Smith* confirms, a post-release imposition of a registration requirement serves the *same valid public-protection purposes* as the registration requirement imposed during supervised release." Pet. Br. at 35 (citing *Smith v. Doe*, 538 U.S. 84 at 103-04 (2003) (holding that sex-offender registration does not violate the Ex Post Facto Clause) (emphasis added). In short, it is "public protection" that provides "the logical basis" for asserting a *new* federal jurisdiction over previously released offenders. But such a rationale is nothing more than the assertion of a police power over the general

public akin to that possessed by the States. And such a rationale cannot be limited to previously-released offenders.

The government uses this Court's sex-offender registry precedents—e. g. *Carr v. United States*, 130 S. Ct. 2229 (2010); *Smith v. Doe*, 538 U.S. 84 (2003); *United States v. Comstock*, 130 S. Ct. 1949 (2010)—to underscore the special relationship between the federal government and sex-offenders within federal jurisdiction. In this way, the federal government seeks to breach the enumerated powers scheme of Article I by stretching this Court's previous decisions to ratify the government's theory that "once in a special relationship; always in a special relationship." If permitted, this theory has no limits.

That this Court has previously given special attention to a sub-class of people who are presently within federal jurisdiction (e.g. sex offenders) does not mean that those who were *previously* in that sub-class, but are no longer, carry that special relationship with them forever. Recidivism is common with many categories of crimes. Under the government's theory that "a post-release imposition of a registration requirement serves the same valid public-protection purposes as the registration requirement imposed during supervised release," Pet. Br. at 35, Congress can assert its perpetual authority over anyone who has committed a federal crime whenever it decides that a class of previously released criminals pose a sufficient risk of future criminal conduct.

The "necessary" element of the "Necessary and Proper Clause" may allow Congress to make such determinations about which class of criminals

currently under federal jurisdiction pose signification risks of future criminal conduct. The "proper" element, however, does not allow Congress to apply this logic in such a limitless manner to extend to those who are no longer within its jurisdiction.

At bottom, the government bases its claim of power to compel the respondent's conduct on the fact that he was previously under the jurisdiction of the United States and poses a greater risk to public safety than does the citizenry at large. Stripped to its essence, the government's argument would ultimately allow perpetual jurisdiction over *anyone* merely because they were *once* subject to federal jurisdiction and are now deemed to be dangerous to the public.

Moreover, the government's theory cannot be limited to past federal criminals. After all, anyone who was once under Congress's jurisdiction for any reason may later pose a threat or an obstacle to a future congressional goal. To allow Congress to regulate any citizen who was ever in federal jurisdiction on this premise is to improperly give Congress a vast and unbounded power.

In a sense, the government's theory treats federal jurisdiction like the Hotel California: You can enter any time, you may even be able to check out, "[b]ut you can never leave." The Eagles, "Hotel California," on *Hotel California* (Asylum Records 1977). Virtually everyone has entered federal jurisdiction at some point in the past and will likely reenter it in the future. But Congress lacks the ability to "regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions," *NFIB*, 132 S. Ct. at 2591. For the same

reasons, Congress cannot regulate an individual from cradle to grave simply because he was once within its jurisdiction. That cannot be the proper standard for a Congress whose powers are "few and defined." *The Federalist* No. 45 (James Madison) (Clinton Rossiter ed., 1961).

III.MR. KEBODEUX'S DETENTION IS IMPROPER UNDER *UNITED STATES V. COMSTOCK*

In *United States v. Comstock*, this Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. 130 S. Ct. at 1956-67. That provision gave federal prison officials the power to detain "sexually dangerous" federal prisoners after the completion of their sentences. 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965; Cf. Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power,* 2009-2010 Cato Sup. Ct. Rev. 239, 260-67 (discussing the five factor test in detail).

We fully endorse the arguments offered by Respondent, Br. of Resp't at 23-40, as well as those articulated by the Fifth Circuit en banc decision, *Kebodeaux*, 687 F.3d at 236-45, that explain why the *Comstock* factors cut against Kebodeaux's detention.

Here, we highlight how the factors not only support Respondent's position, but also relate to constitutional standards of propriety.

A. The Five *Comstock* Considerations Weigh Against Mr. Kebodeaux's Detention.

1. Mr. Kebodeaux's detention is not justified by any long history of federal involvement in the relevant field.

Comstock described the post-detention civil-commitment of prisoners *already in federal custody* as a "modest addition" to a "longstanding history of related federal action." *Comstock*, 130 S. Ct. at 1958. There is nothing "modest" about the government's efforts to claim an endless "special relationship" with anyone ever convicted of a federal crime.

Examining the federal government's "long history of involvement" in an area is primarily an inquiry into the propriety of a law. *Id.* at 1965. A "long history" strongly implies that Washington, D.C. has been properly respecting the traditional powers of the states. It certainly cannot be considered an inquiry into necessity, since novel extensions of federal power may often be "convenient" or "useful" for a variety of federal purposes.

Alexander Hamilton, who took a broader view of federal power than almost any other Framer, made this aspect of propriety very clear in *Federalist* 33. To illustrate the concept of an improper law, he referred to one that "attempt[ed] to vary the law of decent in any state," or one that "undertake[s] to abrogate a land tax imposed by the authority of the state." *The Federalist* No. 33 (Alexander. Hamilton)

(Clinton Rossiter ed., 1961). Obviously, state inheritance laws and land taxes affect interstate commerce. Abrogating those laws could surely be "useful" or "conducive" to some end sought by Congress pursuant to its interstate commerce power. But it would be improper for Congress to intrude in matters of traditional state concern. Here there is no question of degree; it is a question of kind.

In Mr. Kebodeaux's case, being turned into a permanent ward of the federal government in the area of criminal law intrudes on the traditional state authority over criminals within a state's borders. Unquestionably, state authority over local criminal laws has historically been greater than federal authority. Yet allowing Mr. Kebodeaux to be imprisoned under the government's theory flips that relationship on its head.

What the government seeks here has never been asserted before. In the words of the en banc lower court, "The Department of Justice cannot find a single authority from more than two hundred years of precedent, for the proposition that it can reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime." *Kebodeaux*, 687 F.3d at 238.

2. The government lacks "sound reasons" for maintaining control over Mr. Kebodeaux.

In *Comstock*, this Court held that Congress's continued commitment of "sexually dangerous" inmates for a period after their sentence ended was a "reasonably extended" use of longstanding federal

powers over its inmates. *Comstock*, 130 S. Ct. at 1961. It therefore had "sound reasons" for seeking to maintain control over Mr. Comstock. *Id.* at 1965. That reasoning only applies to those currently in federal custody. If the government believed that Mr. Kebodeaux continues to pose a threat to those around him, then it should not have unconditionally released him from federal control in the first place.

Given that Mr. Kebodeaux had been out of federal custody for many years when the government sought to reassert control over him, it is difficult to see why there is any federal interest in detaining him that would not also apply to anybody in the United States who might be considered dangerous in some way.

Moreover, it would be improper to allow Congress to expand its jurisdiction so broadly and so limitlessly merely because it "reasonably" believes that someone outside of its jurisdiction poses a threat to public safety. It is certainly reasonable to believe that once-convicted criminals pose a greater threat to public safety than ordinary citizens. Again, however, this chain of reasonable links only applies to the "necessary" part of the Necessary and Proper Clause. Even if reasonable, it would be improper to give Congress such a great substantive, independent, and boundless power.

That this would be improper was admitted by then-Solicitor General Elena Kagan in *Comstock,* when she conceded that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." *Id.* at 1965. "Thus," as the en banc Fifth Circuit put it, "in the instant case the government is reneging on

precisely those concessions that caused the Court to reason that the civil-commitment statute" was narrowly tailored to the government's role as "custodian in the responsible administration of its prison system." *Kebodeaux*, 687 F.3d at 241 (quoting *Comstock*, 130 S. Ct. at 1965).

3. Federal detention of Mr. Kebodeaux and others similarly situated does not properly accommodate state interests.

The third *Comstock* factor asks whether a "statute properly accounts for state interests." *Comstock*, 130 S. Ct. at 1962. Like the consideration of whether a statute is part of a longstanding federal involvement, this factor is relevant to propriety rather than necessity. It can certainly be "useful" and "convenient" for Congress to ignore state interests—and Congress often does. Yet in matters of core state concern, such as criminal law, it is improper for Congress to trample state prerogatives merely because it might be convenient to do so.

"When Congress criminalizes conduct already made illegal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973)). That change can mean that Congress is punishing conduct more harshly than the state wishes. When it comes to criminal law—which is partially based on the theory that the community is signaling its opprobrium for a type of conduct—it is proper to allow for variance in the level of punishment among the different communities that make up the United States.

Unlike the statute at issue in *Comstock*, there is no provision here "by which someone federally prosecuted under SORNA can be subjected to state penalties or transferred to state custody instead." *Kebodeaux*, 687 F.3d at 243. As the Fifth Circuit noted, Texas does not wish to penalize Kebodeaux's conduct as harshly as the federal government. *Id.* at 244 n.36 ("Texas and forty-six other states do not substantially comply with SORNA.") It is improper not to allow a state to deal with its own resident on its own terms if that resident has done nothing to put himself back in federal jurisdiction.

4. The sweeping federal authority asserted by the government is not narrow in scope.

A fourth *Comstock* consideration is whether the link between the statute and "an enumerated Article I power is not too attenuated" and the application of the statute is not "too sweeping in its scope." *Comstock*, 130 S. Ct. at 1963. As explained *supra*, the logic behind that application gives rise to a "great" and "independent" power that is essentially boundless. Moreover, the necessary link is not just "attenuated," it is nonexistent.

The concern for a statute's narrowness is also highly related to propriety rather than necessity. Under a pure means/end analysis, both broad and narrow statutes might be useful or conducive to carrying into execution an Article I power. Instead, concerns about narrowness are more concerns about improperly unbounded powers given to a government with limited power. Giving Congress perpetual jurisdiction over anyone who has ever committed a

federal crime or, possibly, anyone who has ever entered federal jurisdiction is an expansive and broad power.

5. The scope of the Necessary and Proper Clause.

Although the scope of the Necessary and Proper Clause is unquestionably relevant to any inquiry into the Clause, it cannot decide this or any case by itself. Since this factor is identical in every case, it cannot by itself justify upholding a statute. If it could, the other four considerations would be superfluous. In this case, all four other factors count against the federal government's position, and that position cannot be saved by relying on platitudes about the broad scope of the Clause. Furthermore, the scope of the Clause cannot be merely asserted as a "factor" in a "test" when the reach of the Clause is precisely the question at issue. See Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper: Comstock's Errors & Limitations*, 61 SYRACUSE L. REV. 413, 419 (2011).

In sum, four of the five *Comstock* factors cut against the government in this case. And the only one that does not cannot be determinative.

CONCLUSION

For the foregoing reasons, we respectfully ask this Court to affirm the decision of the en banc Fifth Circuit.

Respectfully submitted,

ILYA SOMIN
Counsel of Record
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive,
Arlington, VA 22201
(703) 993-8069
isomin@gmu.edu

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

APRIL 3, 2013