**ORAL ARGUMENT NOT YET SCHEDULED**

# United States Court of Appeals
## for the
# District of Columbia Circuit

No. 18-5297

ABDUL RAZAK ALI, Detainee,

*Petitioner-Appellant,*

– against –

DONALD J. TRUMP, President of the United States; JOHN F. HUSSEY, Brigadier General, Commander Joint Task Force - GTMO; PATRICK M. SHANAHAN, Acting Secretary, United States Department of Defense; STEVEN G. YAMASHITA, Army Col, Commander, Joint Detention Group,

*Respondents-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

# CORRECTED BRIEF FOR *AMICUS CURIAE* PROFESSOR ERIC JANUS IN SUPPORT OF PETITIONER-APPELLANT

ANIL VASSANJI
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
7 Times Square
New York, New York 10036
(212) 833-1100
avassanji@fklaw.com

*Attorneys for Amicus Curiae*
*Professor Eric Janus*

May 23, 2019

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

*Amicus curiae*, by and through its undersigned counsel, and pursuant to D.C. Circuit Rule 28(a)(1), hereby states as follows:

### A. Parties and *Amici*

Appellant is Abdul Razak Ali.

Appellees are Donald J. Trump; Patrick M. Shanahan; Timothy C. Kuehhas; and Steven Yamashita.

To *amicus*'s knowledge, all other *amici* are listed in the Brief for Petitioner-Appellant in this case (Doc. No. 1788035), other than *amici* filing briefs this same day.

### B. Rulings Under Review

To *amicus*'s knowledge, references to the ruling and decision at issue appear in the Brief for Petitioner-Appellant in this case (Doc. No. 1788035).

### C. Related Cases

To *amicus*'s knowledge, references to any related cases appear in the Brief for Petitioner-Appellant in this case (Doc. No. 1788035).

*s/Anil K. Vassanji*
Anil K. Vassanji
Attorney for *amicus curiae*

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## GLOSSARY OF ABBREVIATIONS

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|---|---|
| PRB | Periodic Review Board |
| SVP | Sexually Violent Person |

## STATEMENT OF INTEREST OF AMICUS CURIAE

Professor Eric Janus is Past President and Dean of the William Mitchell College of Law (now Mitchell Hamline School of Law). He is a leading national expert on sex offender civil commitment laws and treatment programs whose scholarly work includes three books, chapters in eight books, and numerous law review and journal articles. He has a deep background of litigation and amicus curiae participation in cases involving the constitutionality of civil commitment schemes.

Professor Janus's interest in this case arises out of the significance of the question of how due process limits, or protects against, indefinite non-criminal detention. Professor Janus has written extensively about civil commitment for sexually violent persons, and the limitations the U.S. Constitution imposes on the ability of the government to detain supposedly dangerous people at length without criminal charge or conviction. The status of the remaining detainees at Guantánamo Bay, Cuba, presents many of the same quandaries as with civil commitment. And while the procedures and protections afforded civil detainees are far from perfect, the government's solution now before this Court is a far cry from the minimum safeguards civil committees currently receive.

Professor Janus submits this brief to offer the Court his perspective that, if detainees at Guantánamo are entitled to due process protections, the

procedural structure currently put in place by the executive bears little resemblance to what the judiciary and legislatures have said is required in order to civilly confine individuals. If the Court upholds the government's continued detention of Abdul Razak Ali as consistent with due process, that decision could severely undercut the rights of other civil committees. Thus, *amicus* strongly urges the Court to reverse the District Court's decision and judgment in *Ali v. Obama*, 317 F. Supp. 3d 480 (D.D.C. 2018).

## RULE 29 STATEMENT

Pursuant to D.C. Circuit Rule 29(a), undersigned counsel for *amicus curiae* certifies that all parties have given consent to his participation in the filing of a brief as *amicus curiae.*

Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. This brief is the only amicus brief focusing on the rights to due process afforded to individuals who have been civilly committed in the United States. Accordingly, filing a joint brief would not be practicable.

## SUMMARY OF ARGUMENT

The government may deprive individuals of their liberty for non-criminal purposes in a narrow set of circumstances. The Due Process Clause of the Fifth and Fourteenth Amendments imposes both substantive and procedural hurdles. On top of those baseline limits, state and federal legislatures have imposed further restrictions on when and how the state can confine someone for an indeterminate amount of time.

*First*, the right to substantive due process in the Constitution requires that civil detention must be for a particular reason; confinement cannot be arbitrary or without purpose. As soon as the basis for detention has expired, the detainee must be released. For instance, detention of people the state deems sexually violent is permitted, so long as the state can prove the person is currently dangerous, or likely to commit harm to themselves or others, and suffers mental abnormality. Holding sexually violent persons after they are no longer dangerous or suffer mental abnormality violates substantive due process. Similarly, pre-trial detention of those who are incompetent to stand trial is permissible, but only for a limited period of time.

*Second*, to protect against arbitrary or wrongful detention, constitutional due process and civil commitment statutes require the government to overcome several procedural hurdles before it can confine someone as a sexually

violent person or incompetent to stand trial. Most importantly, the detainee must be allowed to regularly challenge the ongoing basis of their detention; once committed does not mean always committed. Moreover, at any hearing addressing the validity of continued detention, the government must typically prove its case to at least a clear and convincing evidentiary standard, if not beyond reasonable doubt. Other typical procedural protections include rights to: a jury; counsel; cross examine witnesses; present witnesses of one's own, including experts; and appeal.

At Guantánamo, the rights afforded to detainees to protect against their unjustified and indefinite detention pale in comparison to what civil committees receive or are entitled. *First*, although detainees at Guantánamo have the right to seek *habeas corpus* relief, courts considering *habeas* petitions have been thus far unwilling to review whether a detainee remains dangerous and detention is necessary. Detainees have no right to judicial review of whether their ongoing confinement serves any proper purpose. *Habeas corpus* review is also procedurally limited. Courts have made factual findings using a preponderance of the evidence standard, admitted hearsay evidence, and accepted the government's evidence without allowing cross-examination or other methods of challenging reliability. *Second*, although the Periodic Review Boards ("PRBs") determine whether continued detention "is necessary to protect against a significant threat to the security of the United States," the due process this review provides is scant. A

PRB decision is not binding one way or another; detainees' ongoing confinement is purely at the discretion of the executive branch. Detainees have no mechanism to challenge the current basis of their detention outside of *habeas corpus*. They are not entitled to a hearing before an Article III judge, let alone a jury; nor do they have a right to their own attorney. The PRB reviews evidence to a preponderance standard, rather than clear and compelling evidence (or beyond reasonable doubt). And there is no possibility of cross examination, presentation of witnesses, or experts at the PRB hearing. The process available to current detainees at Guantánamo to challenge their ongoing detention falls severely short of what due process requires.

## ARGUMENT

### I.
### THE DUE PROCESS CLAUSE PROVIDES SUBSTANTIVE SAFEGUARDS AGAINST UNLIMITED DETENTION FOR INDIVIDUALS WHO ARE CIVILLY COMMITTED.

The Due Process Clause of the United States Constitution contains a substantive element that forbids arbitrary or purposeless detention. U.S. Const. Amends. V; XIV, §1; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Usually, the purpose of detention is to punish and deter criminal acts. Only in narrow circumstances may the government detain people at length without criminally charging and convicting them of crimes. *Id.* Outside of the criminal context, a "civil commitment for any purpose constitutes a significant deprivation of liberty

that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979).

Unlike criminal imprisonment, the purpose for civil detention should not be punitive. "Confinement of such individuals is permitted . . . provided there is no object or purpose to punish." *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J. concurring). The Constitution does not generally allow civil confinement, unlike criminal punishment, to last a lifetime. Under the Due Process Clause, civil commitment is permissible for only specific, narrow purposes, and once the purpose for civil detention has been fulfilled, due process mandates release. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975).

One permitted purpose that has been found to warrant civil commitment is the protection and restraint of individuals with a mental abnormality that makes them highly likely to harm others sexually, who are denominated "Sexually Violent Persons" ("SVPs"). *Jones v. United States*, 463 U.S. 354, 365-66 (1983). As another example, the state may also civilly commit individuals who are dangerous due to serious mental illness. *Jackson v. Indiana*, 406 U.S. 715, 731 (1972). In all contexts, substantive due process forbids limitless detention. Once an SVP is no longer sexually violent or no longer suffers a mental abnormality, or as soon as an individual is no longer mentally ill or dangerous, due

process requires that the state release them. *Jones*, 463 U.S. at 368; *Jackson*, 406 U.S. at 731.

## A. The Right to Due Process Is a Right to Be Free from Arbitrary, Limitless Detention.

Substantive due process forbids detention without proper purpose. This principle applies at the outset of internment, and governs the duration of confinement. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson*, 406 U.S. at 737; *Seling v. Young*, 531 U.S. 250, 265 (2001). "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal citations omitted). In the criminal context, lengthy, even indefinite, incarceration is permissible for the purposes of deterrence or retribution. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring); *Jones v. United States*, 463 U.S. 354, 369 (1983) ("The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.").[1]

[1] This is all separate from the protections for criminal defendants afforded by procedural due process, which safeguards them against wrongful incarceration or detention without purpose. *Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.") Well-known examples of procedural due process include a criminal

The Constitution limits noncriminal detention to narrow and rare circumstances. *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Those instances cannot be for deterrence or punishment; those are purposes to be uniquely invoked within the criminal justice system, where they are subject to the constitutional protections described above. *Jones,* 463 U.S. at 369 ("As [defendant] was not convicted, he may not be punished.")

But even if the purpose of noncriminal confinement is valid, *ab initio*, once that valid basis for detention no longer applies, substantive due process requires the state to release the detainee. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975).

## B. Sexually Violent Predators May Only Be Held as Long as They Are Dangerous, and Continue to Suffer from Mental Abnormality.

One example of civil commitment involves SVPs. Their incarceration is limited by substantive due process. SVPs may only be held so long as they are

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defendant's right to a jury, prohibitions against double jeopardy, indictments by a grand jury, immunity against self-incrimination, and probable cause, among other constitutional protections. *See, generally*, U.S. Const. amends. IV, V, VI; *United States v. Halper*, 490 U.S. 435, 440 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Smith v. United States*, 360 US. 1, 6-7 (1959); *Salinas v. Texas*, 570 U.S. 178, 183 (2013); *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975).

dangerous and continue to suffer from mental abnormality. Once that initial basis for detention expires, so too does its legality.

### 1. The Only Constitutionally Valid Purpose of Detention Under Sexually Violent Predator Laws Is to Prevent Future Harm, or to Treat Illness, not to Punish.

"Sexually Violent Predator" laws, and their predecessor, "sexual psychopath laws" have existed in this country since at least 1937.[2] These laws have allowed the state to civilly confine sex offenders outside of the "charge and conviction" paradigm of criminal law. In 1979, the Supreme Court addressed the twin purposes of civil commitment statutes, observing that "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. Under these laws, "confinement rests on [a detainee's] continuing illness and dangerousness." *Jones*, 463 U.S. at 356-59.

Therefore, in order to constitutionally commit someone under these statutes, the state must establish that both these conditions – protection of the

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[2] David DeMatteo et al., "A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice," International Journal of Forensic Mental Health, Oct. 2015.

individual and the community, and mental illness – exist. "The state may . . . confine a mentally ill person if it shows by clear and convincing evidence that the individual is mentally ill and dangerous." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Jones*, 463 U.S. at 362); *Addington*, 441 U.S. at 433. "Proof of dangerousness" must be "coupled with the proof of some additional factor, such as a mental illness or mental abnormality." *Hendricks*, 521 U.S. at 357 (internal citations omitted); *Kansas v. Crane*, 534 U.S. 407, 409-10 (2002).

But punishment is not a valid purpose for civil confinement; punishment is reserved for instances where the state achieves a criminal conviction. *Foucha*, 504 U.S. at 80. Under civil commitment laws, "the State has no such punitive interest." *Id*. "Civil commitment" may not "become a mechanism for retribution or general deterrence – functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412 (internal citations omitted). *See also Jones*, 463 U.S. at 356-59 ("as [defendant] was not convicted, he may not be punished . . .).

**2. <u>Once Detainees Under SVP Laws Are No Longer Dangerous, or No Longer Suffer from Mental Abnormality, the State Must Release Them.</u>**

Even if someone is properly subject to civil commitment *ab initio*, substantive due process requires that the detainee be released when the basis for commitment – for SVPs, current dangerousness and mental abnormality – is no

longer valid. The Supreme Court first made this clear in *O'Connor*, in which an individual was civilly committed against his will for nearly 15 years, and "repeatedly, but unsuccessfully, demanded his release, claiming that he was dangerous to no one [and], that he was not mentally ill." 422 U.S. at 564-65. A jury agreed that he "was neither dangerous to himself nor dangerous to others." *Id.* at 573. The Supreme Court held that his continued confinement, for no valid purpose, violated his substantive right to liberty. *Id*. at 576. "The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. . . . [E]ven if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." *Id*. at 574-75.

In *Foucha*, a criminal defendant was found not guilty by reason of insanity, and was civilly committed to a psychiatric hospital. 504 U.S. at 73-75. The state did "not contend that Foucha was mentally ill at the time of the trial court's hearing." *Id*. at 78. Rather, it claimed that Foucha's civil commitment could continue until he could prove he was no longer dangerous. *Id*. The Supreme Court ordered Foucha's release, reasoning that "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis." *Id*. at 78 (citing *O'Connor* at 574-75). The Court further explained that the state's position was invalid because "[i]t

would also be 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 reasonable doubt to have violated a criminal law." *Id.* at 83.

The Supreme Court has upheld this reasoning on several occasions. *See, e.g.*, *Jones*, 463 U.S. at 356-58 ("the committed [detainee] is entitled to release when he has recovered his sanity or is no longer dangerous."); *Hendricks*, 521 U.S. at 358 ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," and upholding statute as not punitive because "[i]f, at any time, the confined person is adjudged 'safe at large,' he is statutorily entitled to immediate release."). *See also United States v. Comstock*, 627 F.3d 513, 515 (4th Cir. 2010) (upholding facial constitutionality of statute that mandates "discharge" if "the court finds by a preponderance of the evidence that a committed person is no longer sexually dangerous to others.") (internal citations omitted). Courts that are asked the question are unequivocal: once committed SVPs are no longer dangerous or suffer from a mental abnormality, they must be released.

### C. Individuals Deemed Incompetent to Stand Trial May Only Be Held as Long as they Remain Incompetent.

The same substantive due process principle applies for those found to be mentally incompetent to stand trial. The sole purpose for such detention is to

hold defendants charged with crimes until they can be returned to competency. If that basis for detention expires—for example, if the defendant will never become competent—the state must either institute civil commitment proceedings (such as those discussed in Section I.B above), or release the defendant.

The Supreme Court first established this rule in *Jackson*. In that case, a mentally disabled defendant was deemed incompetent to stand trial, and the trial court committed him to the Indiana Department of Mental Health "until such time as that Department should certify to the court that the defendant is sane," pursuant to Indiana's pretrial commitment statute. 406 U.S. at 716. The defendant claimed his detention violated due process; doctors had testified that he was unlikely to ever become competent to stand trial, and his detention "amounted to a life sentence without his ever having been committed of a crime." *Id*. at 719. The Court agreed. It recognized that the state has the power to restrain a person's liberty in certain narrow circumstances, for specific purposes, but "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id*. at 738. A lifetime in prison in order to determine whether someone is fit for trial fails that standard miserably. Thus, the Court held

> that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a

> substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

*Id*. The Court declined to impose an "arbitrary time limit," but noted that the defendant had already been "confined for three and one-half years on a record that sufficiently establishes the lack of a substantial probability that he will ever be able to participate fully in a trial." *Id*. at 738-39.

## II.
## CIVIL COMMITMENT STATUTES PROVIDE PROCEDURAL MECHANISMS FOR DETAINEES TO CHALLENGE THEIR DETENTION, AND REQUIRE THE STATE TO REGULARLY JUSTIFY THEIR CONTINUED CONFINEMENT.

As described, the Supreme Court has emphasized that substantive due process restricts indefinite civil commitment. State and federal civil commitment statutes apply this rule by providing procedural protections to ensure that civil commitments end when constitutionally required.

### A. Detainees Are Entitled to Regularly Petition for their Release.

Arguably the most important among the procedural protections found in civil commitment statutes is the requirement that detainees be given the chance to periodically petition a court to justify the basis of their detention. Eighteen states out of the nineteen with SVP laws provide for a hearing at which a court is

required to evaluate whether continued detention is proper.[3] Courts have regularly cited such provisions as supporting the constitutionality of these laws.

In *Jones*, the Supreme Court considered a District of Columbia statute that required civil commitment of criminal defendants who are acquitted under the insanity defense. 463 U.S. at 356. The statute entitled the person committed to a judicial hearing within 50 days of commitment, at which he may "prov[e] by a preponderance of the evidence that he is no longer mentally ill or dangerous." *Id*. at 357. The statute also allowed the person to request new judicial hearings every six months. *Id*. at 358. The Supreme Court stated that the Due Process Clause requires a defendant's "release when he has recovered his sanity or is no longer dangerous." The Court upheld the statute, noting that "a hearing is provided within 50 days of the commitment" and the law provides for "periodic review of the patient's suitability for release," and emphasizing that there is "assurance that

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[3] Ariz. Rev. Stat. Ann. § 36-3709(A); Cal. Welf. & Inst. Code § 6605, 6608(i); Fla. Stat. Ann. § 394.919(2); 725 Ill. Comp. Stat. Ann. 207/65(a)(2); 229A.8A. Iowa Code Ann. § 229A.8(6)(d); Kan. Stat. Ann. § 59-29a08(f); Mass. Gen. Laws Ann. ch. 123A, § 9; Mo. Ann. Stat. § 632.498; N.H. Rev. Stat. Ann. § 135-E:12(II) (order for commitment is valid for 5 years, after which state is required to hold new hearing); N.J. Stat. Ann. § 30:4-27.32(a); N.Y. Mental Hyg. Law § 10.09(h); N.D. Cent. Code Ann. § 25-03.3-18; 42 PA. Cons. Stat. Ann. § 6404(c)(3), (4); S.C. Code Ann. § 44-48-120(B); Tex. Health & Safety Code Ann. § 841.103(c); VA. Code Ann. § 37.2-910(C); Wash. Rev. Code Ann. § 71.09.090(3)(c); Wis. Stat. Ann. § 980.09(3–4). To obtain a hearing, usually a detainee must first show there is probable cause for one. *See, e.g.*, Wash. Rev. Code Ann. § 71.09.090; Wis. Stat. Ann. § 980.04.

every acquittee has prompt opportunity to obtain release if he has recovered." *Id*. at 366. In other words, a detainee's periodic entitlement to petition a court to end their continuing commitment provides procedural protection for their substantive due process right to be free from indefinite detention without purpose.

More recently, in *Hendricks* the Supreme Court upheld Kansas's SVP statute, which provided three different methods for review of the ongoing validity of a civil commitment. 521 U.S. at 353. The committing court had to conduct an annual review to determine whether continued detention is warranted; the Secretary of Social and Rehabilitation Services could, at any time, "decide that the confined individual's condition had so changed that release was appropriate"; and "the confined person could at any time file a release petition" with the committing court. *Id*. The Court emphasized that "[w]e have consistently upheld such involuntary commitment statutes *provided the confinement takes place pursuant to proper procedures and evidentiary standards*." *Id*. at 357 (emphasis added).

Other courts have highlighted the right to regular judicial review of the then-current justification for ongoing detention as a key feature of civil commitment statutes. *See, e.g.*, *Foucha*, 504 U.S. at 79 (criticizing Louisiana's civil commitment statute under which committed person "is not now entitled to an adversary hearing," and noting that "even if [the person's] continued confinement were constitutionally permissible, keeping him against his will in a mental

institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."); *Gilbert v. McCulloch*, 776 F.3d 487, 493, 498 (7th Cir. 2015) (denying *habeas* challenge to commitment under SVP statute that allows detainee "to petition [the committing court] for discharge at any time," and requires "a yearly re-examination" to determine whether the detainee still meets the commitment standards.); *Comstock*, 627 F.3d at 516 (finding federal SVP statute not facially unconstitutional, where "the Act offers a person committed to a federal facility pursuant to [the statute] several avenues to discharge," including that "counsel for the committed person or a legal guardian may move for discharge and, if denied, renew that motion repeatedly every 180 days after a denial."); *Milinich v. Ahlin*, 2014 WL 5793959, at **3-4 (N.D. Cal. Nov. 6, 2014) (upholding civil commitment statute that provided detainee right to "unilaterally petition for release," by showing "the person's condition has so changed that he no longer meets the definition of an SVP."); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) ("Minnesota's commitment system provides for periodic review and reevaluation of the need for continued confinement," and therefore did not violate due process.).

## B. At a Minimum, the State Usually Must Justify Continued Detention by Clear and Convincing Evidence, if not Beyond a Reasonable Doubt.

Nearly all states with SVP statutes place the burden on the state to prove that the civilly committed still suffer the conditions that lead to their initial

detention, and should continue to be confined. Although the precise standard varies, nearly all states require at least clear and convincing evidence.

For instance, Arizona, California, Iowa, Kansas, Massachusetts, South Carolina, Texas, and Washington all require the state to prove at discharge hearings that SVPs still pose a danger to themselves or others, and suffer from mental abnormality, beyond a reasonable doubt.[4] Florida, Illinois, Missouri, North Dakota, New Hampshire, New Jersey, New York, Pennsylvania, Virginia, and Wisconsin place the burden on the state to justify continued detention by clear and convincing evidence.[5]

In upholding civil detention "provided the confinement takes place pursuant to proper procedures and evidentiary standards," the Supreme Court in *Hendricks* cited the Kansas statute's requirement that the state prove the conditions

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[4] Ariz. Rev. Stat. Ann. § 36-3709(C); Cal. Welf. & Inst. Code § 6605; Kan. Stat. Ann. § 59-29a19(f); Mass. Gen. Laws Ann. ch. 123A, § 9; *Commonwealth v. Walsh*, 376 Mass. 53, 55 (1978); S.C. Code Ann. § 44-48-120(B); Tex. Health & Safety Code Ann. § 841.103(c); Wash. Rev. Code Ann. § 71.09.090(3)(c). Iowa first requires "the committed person to prove by a preponderance of the evidence that there is relevant and reliable evidence to rebut the presumption of continued commitment." Iowa Code Ann. § 229A.8.

[5] Fla. Stat. Ann. § 394.919(2); 725 Ill. Comp. Stat. Ann. 207/65(a)(2); Mo. Ann. Stat. § 632.498(3); N.D. Cent. Code Ann. § 25-03.3-18; N.H. Rev. Stat. Ann. § 135-E:12(II); N.J. Stat. Ann. § 30:4-27.32(a); N.Y. Mental Hyg. Law § 10.09(h); 42 PA. Cons. Stat. Ann. § 6404(c)(3), (4); VA. Code Ann. § 37.2-910(C); Wis. Stat. Ann. § 980.09(3). The Federal SVP statute employs a preponderance of the evidence standard. 18 U.S.C.A. § 4248(e).

for continuing detention were met beyond a reasonable doubt. 521 U.S. at 357. In *Foucha*, the Supreme Court described disapprovingly how Louisiana's SVP statute "places the burden on the detainee to prove that he is not dangerous." *Foucha*, 504 U.S. at 82. The procedures described in Louisiana's statute, in which "the State need prove nothing to justify continued detention," are "not enough to defeat [a committed person's] liberty interest under the Constitution in being freed from indefinite confinement in a mental facility." *Id*. The Seventh Circuit upheld a clear and convincing evidence standard for a discharge hearing, with the burden of proof placed on the State. *Gilbert*, 776 F.3d at 403 (noting that the "Supreme Court has not spoken to the level of proof required at a release hearing for a civilly committed person," and approving a clear and convincing standard). *See also Call v. Gomez*, 535 N.W.2d 312, 318-19 (Minn. 1995) (holding that detainee's ongoing commitment "should continue if the state proves by clear and convincing evidence that he does not meet the statutory discharge criteria . . .").

### C. Other Procedural Protections

Civil commitment statutes contain a range of other procedural mechanisms that provide some protection against continued, unjustified confinement. At discharge hearings, detainees often have the right to a jury.[6]

[6] Cal. Welf. & Inst. Code § 6605; 725 Ill. Comp. Stat. Ann. 207/65; Mass. Gen. Laws Ann. ch. 123A, § 9; Mo. Ann. Stat. § 632.505; N.H. Rev. Stat. Ann.

Indigent defendants must be provided an attorney.[7] In many states, the committed person has the right to present witnesses, either at the discharge hearing itself, or to support probable cause for a hearing.[8] This often includes experts,[9] and the right to cross-examine witnesses.[10] And committed persons may appeal final determinations.[11]

Provisions like these have been approvingly cited by courts when evaluating whether civil commitment statutes provide adequate due process to those indefinitely detained. *See, e.g.*, *Karsjens v. Piper*, 845 F.3d 394, 409-10 (8th Cir. 2017) (finding that Minnesota civil commitment "provides proper procedures

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§ 135-E:11; S.C. Code Ann. § 44-48-110; Tex. Health & Safety Code Ann. § 841.124; Wash. Rev. Code Ann. § 71.09.090(3)(a); Wis. Stat. Ann. § 980.095.

[7] Mass. Gen. Laws Ann. ch. 123A, § 9; Mo. Ann. Stat. §§ 632.492, .498; N.H. Rev. Stat. Ann. § 135-E:9, 14, N.Y. Mental Hyg. Law § 10.08; S.C. Code Ann. § 44-48-110; Wash. Rev. Code Ann. §§ 71.09.050(2), .090(3)(a); Wis. Stat. Ann. § 980.09.

[8] Mass. Gen. Laws Ann. ch. 123A, § 9; Neb. Rev. Stat. § 71-1226; N.J. Stat. Ann. § 30:4-27.30, N.Y. Mental Hyg. Law § 10.08; N.D. Cent. Code Ann. § 25-03.3-18; Tex. Health & Safety Code Ann. §§ 841.061, .103(c); Wash. Rev. Code Ann. §§ 71.09.050(2), .090(3)(a); Wis. Stat. Ann. § 980.09.

[9] Ariz. Rev. Stat. Ann. § 36-3709(C); N.D. Cent. Code Ann. § 25-03.3-18; S.C. Code Ann. § 44-48-110; Tex. Health & Safety Code Ann. § 841.124.

[10] Neb. Rev. Stat. § 71-1226; N.Y. Mental Hyg. Law § 10.08; N.D. Cent. Code Ann. § 25-03.3-18; 18 U.S.C. § 4248(e), Tex. Health & Safety Code Ann. §§ 841.061, .103(c).

[11] Minn. Stat. Ann. § 253B.19(5); Wis. Stat. Ann. § 980.095.

and evidentiary standards for a committed person to petition for a reduction in [their] custody or [their] release from confinement," including "the right to be represented by counsel," including court-appointed counsel) (internal citations omitted); *Comstock*, 627 F.3d at 515 (referring to provisions under federal civil commitment statute that allow "rights to counsel, to present evidence, and to subpoena and cross-examine witnesses"); *Gilbert*, 776 F.3d at 493 (noting that Wisconsin SVP statute requires access to counsel at discharge hearing).

## III.
## DETAINEES AT GUANTÁNAMO RECEIVE FAR FEWER PROCEDURAL SAFEGUARDS AGAINST INDEFINITE DETENTION THAN PERSONS WHO ARE CIVILLY COMMITTED.

The procedural protections for persons subject to civil commitment, as discussed in Section II, *supra*, may not be constitutionally sufficient to ensure that detention is not without purpose and indefinite, but they are substantially greater than those afforded to detainees held at the prison in Guantánamo Bay, Cuba.

*First*, there is no provision whereby detainees at Guantánamo who are no longer deemed dangerous or for whom detention is no longer necessary must be released. A PRB determines whether continued detention "is necessary to protect against a significant threat to the security of the United States." Exec. Order 13567, 76 Fed. Reg. 13277, Mar. 7, 2011.[12] Substantive due process, as applied to

[12] *See also* Policy Memorandum: "Implementing Guidelines for Periodic Review of Detainees Held at Guantánamo Bay per Executive Order 13567,"

individuals who are civilly committed, mandates release when the purpose for detention no longer exists. But unlike those held under civil commitment statutes, who *must* be released if a factfinder determines they no longer are dangerous or suffer from mental illness, transfer or release from Guantánamo is entirely at the discretion of the United States Secretary of Defense. Exec. Order 13823, 83 Fed. Reg. 4831, at § 3(a) (Jan. 30, 2018); Exec. Order 13567, at § 3. The PRB makes only recommendations. *Id*.[13] Indeed, some detainees are still in confinement even though the United States government has effectively deemed such confinement to not be "necessary."[14] This clearly violates the constitutional durational principle.

*Second*, there is no procedural mechanism by which detainees at Guantánamo may periodically petition a court for their release. *See* Section II.A., *supra.* Detainees have the right to petition for *habeas corpus*, *see Boumediene v.*

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Periodic Review Secretariat, United States Department of Defense, Mar. 28, 2017 (cited hereafter as "PRB Guidelines"), Attachment 3 at §3, *available at:* https://www.prs.mil/Portals/60/Documents/2017_PRB_Policy_Memo_Signed.pdf.

[13] *See also id.* at §8 ("The process established under this order does not address the legality of any detainee's law of war detention. If, at any time during the periodic review process established in this order, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.").

[14] *See, generally,* "Initial Review," Periodic Review Secretariat, U.S. Department of Defense, *available at*: https://www.prs.mil/Review-Information/Initial-Review/. *See also* Resp'ts' Opp'n to Pet'rs' Mot. for Order Granting Writ of Habeas Corpus, at 6-10, *Nasser v. Trump*, No. 04-cv-1194 (D.D.C. Feb. 16, 2018).

*Bush*, 553 U.S. 723, 769-71 (2008), but this review has severe substantive and procedural limitations. Courts considering *habeas* petitions have thus far been unwilling to assess whether a detainee's continued detention is necessary or serves a constitutionally valid purpose—for instance, if the detainee remains dangerous. *See, e.g.*, *Al Wirghi v. Obama*, 54 F. Supp.3d 44, 46-47 (D.D.C. 2014). Detainees cannot seek relief from the PRB either. Rather, detainees are at the mercy of the PRB, which is only required to conduct evaluations every three years. Exec. Order 13567, at §3(b).

*Third*, both *habeas* proceedings and PRB review lack most of the procedural protections available to other persons held in civil commitment. *See* Section II.C *supra.* For instance, on *habeas* review, the government need only establish the validity of detention to a preponderance of the evidence, not with clear and convincing evidence as is the minimum usually required for civil commitment. *Ali v. Obama*, 736 F.3d 542, 550 (D.C. Cir. 2013); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010). "[H]earsay is always admissible." *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010). And *habeas* courts have routinely accepted the validity of evidence used against the detainee without providing an opportunity for cross-examination or other evidentiary challenge, or despite serious credibility questions. *See, e.g.*, *Latif v. Obama*, 677 F.3d 1175, 1179, 1206 (D.C. Cir. 2011) (government's evidence has "presumption of regularity," despite district

court's finding "a serious question as to whether [testimony] accurately reflect[ed] [the subject's] words."); *Al-Bihani*, 590 F.3d at 881 (holding that detainee had no right to fact hearing at which he could challenge evidence used against him).

PRB procedures also fall far below the standards adopted by states in their civil commitment discharge hearings. For instance, instead of court-appointed counsel, detainees at Guantánamo "[s]hall be assisted in proceedings before the PRB by a Government-provided personal representative." Exec. Order 13567, at §3(a)(2). This representative is a member of the United States military, and is not required to be a lawyer. PRB Guidelines, Attachment 3, at §5(f).[15] Senior officials "from the Departments of Defense, Homeland Security, Justice, and State, and the Offices of the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence" make factual determinations, not Article III judges, and certainly not juries. Exec. Order 13567, at §9(a); PRB Guidelines, Attachment 3 at §5(a)(1). As a further example, no evidentiary standard is described at all in the PRB Guidelines, and certainly not a standard of clear and convincing evidence or beyond reasonable doubt. As an additional example,

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[15] *See also* The Periodic Review Board, Periodic Review Secretariat, United States Department of Defense, ("PRB Summary") *available at*: https://www.prs.mil/About-the-PRB/ ("In every PRB proceeding, the detainee will be provided with a uniformed military officer (referred to as a personal representative) to assist the detainee during the PRB process.")

detainees at Guantánamo are unable to even see much of the evidence against them, let alone cross-examine witnesses or bring witnesses of their own. *Id.*, at §5; PRB Guidance, Attachment 3, at §6. As a final example, detainees may not appeal the final determination of the PRB. *See* PRB Summary ("Once a PRB determination becomes final, the detainee may not appeal.").

The PRB procedures bear little resemblance to the statutory and constitutional protections against arbitrary and unjustified confinement that are afforded to persons who are civilly committed.

## CONCLUSION

Amicus supports reversal of the District Court's decision in *Ali v. Obama*, 317 F. Supp. 3d 480 (D.D.C. 2018).

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Respectfully Submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

s/*Anil K. Vassanji*
Anil K. Vassanji (avassanji@fklaw.com)
7 Times Square
New York, New York 10036-6516
(212) 833-1100

Attorneys for *Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rules 29(a)(5), 32(a)(2) of the Federal Rules of Appellate Procedure, and Rule 32(e)(3) of the D.C. Circuit Rules. The brief contains 6,384 words, and was prepared in 14-point Times New Roman font using Microsoft Word.

s/*Anil K. Vassanji*
Anil K. Vassanji
Attorney for *amicus curiae*

## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically served on the parties listed below and filed by using the appellate CM/ECF system. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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Jonathan Wells Dixon
Shayana Devendra Kadidal
Pardiss Kebriaei
Baher A. Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
wdixon@ccrjustice.org
kadidal@ccrjustice.org
pkebriaei@ccrjustice.org
bazmy@ccrjustice.org

H. Candace Gorman
LAW OFFICE OF H. CANDACE GORMAN
hcgorman@igc.org

George M. Clarke, III
BAKER & MCKENZIE LLP
george.clarke@bakermckenzie.com

Michael Shih
Sonia M. Carson
Sharon Swingle
U.S. DEPARTMENT OF JUSTICE
(DOJ) CIVIL DIVISION, APPELLATE STAFF
michael.shih@usdoj.gov
sonia.m.carson@usdoj.gov
sharon.swingle@usdoj.gov

Thomas Anthony Durkin
DURKIN & ROBERTS
tdurkin@durkinroberts.com

Dated: May 23, 2019

*s/Anil K. Vassanji*