

No. 20-888

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**In the  
Supreme Court of the United States**

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ABDUL RAZAK ALI,

*Petitioner,*

– v. –

JOSEPH R. BIDEN, JR., President of the United States, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF OF PROFESSORS ERIC JANUS, MICHAEL L. PERLIN,  
IRA ELLMAN, CHRYSANTHI LEON AND WAYNE A. LOGAN  
AS *AMICI CURIA* IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>**

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.

Michael L. Perlin is Professor of Law Emeritus at New York Law School. He is a founding director of New York Law School's International Mental Disability Law Reform Project in its Justice Action Center. He is also the co-founder of Mental Disability Law and Policy Associates. He has written 31 books and more than 300 articles on all aspects of mental disability law, many of which deal with the overlap between mental disability law and criminal law and procedure.

Professor Ira Ellman is a Distinguished Affiliated Scholar at the Center for the Study of Law and Society at the University of California, Berkeley, and is the Charles J. Merriam Distinguished Professor of Law, Affiliate Professor

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<sup>1</sup> No party or counsel for any of the parties has authored any part of this brief. No party or counsel for any of the parties has made a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted upon consent of the parties.

of Psychology, and Faculty Fellow for the Center of Law, Science & Innovation all at Arizona State University. He is an interdisciplinary scholar with expertise in criminal justice and family law.

Professor Chrysanthi Leon is Associate Professor of Sociology at the University of Delaware. Her work focuses on sex crimes and punishment, criminal court reform and corrections, and the sociology of law. In particular, she has analyzed and discussed the relationship between punishment and society, and she is the author of the book “Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America.”

Wayne A. Logan is Steven M. Goldstein professor of law at Florida State University, College of Law. He teaches and writes in the areas of criminal law, criminal procedure, and sentencing. His research focuses on a broad array of subjects, including police search and seizure, Megan’s Laws, and issues relating to the interplay of the state, local and federal criminal justice systems.

*Amici’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. Professors Janus, Perlin, Ellman, Leon, and Logan have written extensively about civil commitment for sexually violent persons, 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, and the

limitations on when, how, and why society should punish or detain its citizens.

The status of the remaining detainees at Guantánamo Bay, Cuba, presents many of the same quandaries as with civil commitment.

*Amici* submit this brief to offer the Court their perspective that the Court should address whether detainees at Guantánamo are entitled to due process protections and, if so, what substantive and procedural protections they are due.

## SUMMARY

Does the Constitution really permit a lifetime of detention without charge? The U.S. government has confined Petitioner Ali at Guantánamo for nearly two decades, outside the reach of the criminal justice system. His ongoing detention raises profound questions for both substantive and procedural due process, the two branches of the Fifth and Fourteenth Amendments' Due Process Clause: does the Due Process Clause apply to those men held at Guantánamo? If so, does it permit the government to hold them indefinitely without charge, even for life? What rights do they have to challenge the validity of their ongoing detention, and what does due process require to enable these men to make those challenges?

This Court has explained the due process protections for non-criminal deprivation of liberty in other contexts, such as for civil commitment for so-called sexually violent predators (“SVPs”) or those who pose a danger because of severe mental illness. But there is no clear explanation of whether the Due Process Clause applies and what due process rights exist for the prisoners at Guantánamo, or others who might be held outside the territorial jurisdiction of the United States. Failing to address this lacuna in the due process jurisprudence, and effectively allowing the Government to indefinitely curtail liberty without Constitutional

constraint, risks ongoing and future violations of civil rights, and erosion of the protections against arbitrary and unjustified deprivation of liberty.

### ARGUMENT

The Constitution places severe limits on the government's ability to deprive individuals of their liberty for non-criminal purposes. The Due Process Clauses of the Fifth and Fourteenth Amendments impose both substantive limits and procedural hurdles. The right to substantive due process means that the government may only confine someone outside of the charge-and-conviction paradigm for a minimal set of purposes, and confinement may continue only so long as the purpose for captivity remains valid. Punishment is not a valid purpose, nor is an unadorned goal of protecting against future harm. Procedural due process places guardrails to ensure detainees are not improperly and unjustly confined.

These rights are intertwined. The substantive limits on non-criminal confinement arise directly out of the "great safeguards" put in place to restrain the awesome power of the government's ability to punish. *Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)). And, in turn, those substantive limits are meaningless without judicial review in the form of procedural due process. In this case, in which Petitioner faces a lifetime of captivity without criminal charge, both due process branches are

implicated and both are at risk of being shorn. This is a threat to his right to liberty, and to the proper limits on governmental power.

**A. Substantive Due Process Protections, Which Tightly Constrain Civil Confinement, Are at Risk of Being Undermined**

The Constitutional right to substantive due process is grounded in the principle that confinement cannot be arbitrary or without valid purpose. U.S. Const. Amends. V; XIV, §1; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Punishment is a valid purpose for criminal detention, but not for civil detention. *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J. concurring) (“Confinement of such individuals is permitted . . . provided there is no object or purpose to punish.”) Indeed, the Constitution constrains civil detention even more than criminal detention, restricting the practice to a few, narrowly defined purposes. But the confinement at Guantánamo appears to be limitless and beyond the Constitution’s reach. Without guidance from this Court, the principles that only the criminal law may be used to punish, and that release is mandated once the legitimate purpose for confinement has expired, are endangered.

Under this Court’s jurisprudence, civil detention is constitutional only if it begins with one of the constitutionally approved purposes. And as Petitioner Ali’s case highlights, such detention is constitutional only so long as that purpose remains valid. As soon as the goal for a civil detention has been satisfied, due process mandates release. *O’Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975).

For example, one permitted purpose for 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”). *Hendricks*, 521 U.S. at 356-57; *Jones v. United States*, 463 U.S. 354, 365-66 (1983). As another example, the state may civilly commit individuals who are dangerous due to serious mental illness. *Foucha*, 504 U.S. at 80. But once an individual is no longer sexually violent, no longer suffers a mental abnormality, or is no longer mentally ill or dangerous, substantive due process requires that the state release them. *Jackson v. Indiana*, 406 U.S. 715, 731 (1972), *Jones*, 463 U.S. at 368; *Jackson*, 406 U.S. at 731.

The specter of a lifetime of imprisonment, without charge or conviction, raises serious questions of whether the government is detaining for an appropriate purpose. Petitioner has been civilly committed for almost twenty years. He could spend the rest of his life imprisoned, never having faced a criminal charge. The government contends the Constitution permits his confinement based solely on their assertion that the *initial* decision to detain him was proper. But the government’s position does not address whether due process permits his *ongoing* detention, potentially for life. As the Court held in *O’Connor v. Donaldson*:

Nor is it enough that Donaldson’s original confinement was founded upon a constitutionally adequate basis, if in

fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.

422 U.S. 563, 573 (1975). For the integrity of the Court's civil confinement jurisprudence, the Court should explain whether substantive due process allows the government to continually hold someone based solely on the initial decision to hold him, whether the government's reasons for continuing to hold Mr. Ali are constitutionally valid, and whether the government must release him once its objective in holding him is no longer applicable.

Failure to provide clarity on these questions will create a no-man's-land in the due process jurisprudence, and permit people to be held at Guantánamo under a constitutional fog. Furthermore, the ensuing legal confusion will cast a pall over the continuing integrity and strength of the Court's civil confinement jurisprudence in other contexts that unequivocally insists that no government may civilly detain people without constitutionally imposed limits.

More broadly, condoning this constitutional limbo will call into question the purpose of the criminal law, and the legitimacy of the criminal legal system as the sole means by which government is permitted to punish individuals. The legitimacy of the criminal justice system depends on adherence to the strict constitutional constraints that are central to our constitutional system. But those constraints, and hence the system's legitimacy, are worthless if the government

may dispense with them at will. A shadow criminal justice system through which the government can make an end-run around these strict protections undermines the integrity of this careful balance.

Perhaps most importantly, looking away from this case will mean that Mr. Ali, and others in his situation, will continue to languish in an American prison for the rest of his life, based solely on a decision to detain him made a generation ago, even if the government has acknowledged it no longer needs to keep him.

**B. Procedural Due Process Protects Against Arbitrary and Purposeless Detention**

The doctrine of procedural due process safeguards and preserves the substantive due process limits on civil confinement. 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). The Due Process Clause imposes numerous requirements and protections before the government can lock someone up, and in order to continue doing so. Those requirements are well-defined under both criminal and civil-commitment law. Failing to address what procedural due process requires in this case, particularly when those protections are available to individuals in other schemes of confinement, risks creating an uneven Due Process jurisprudence, a greater likelihood of arbitrary and unjustified detention, and a Constitutional black hole where the government is able to operate with little Constitutional or judicial oversight.

Procedural due process is necessary to ensure that civil confinements adhere to the limits of substantive due process: that they adhere *ab initio* to proper purposes, and that they end when the purpose for detention is no longer valid. This Court’s civil commitment jurisprudence has recognized several basic procedural protections.

*First*, detainees may periodically challenge the basis of their detention. *See, e.g., Jones*, 463 U.S. at 356 (upholding statute requiring judicial hearing within 50 days of commitment for those acquitted under insanity defense and subsequently committed, and permitting detainee to request hearings every six months); *Hendricks*, 521 U.S. at 353 (holding that involuntary civil commitment statute was consistent with due process where committing court had to conduct annual review and “the confined person could at any time file a release petition” with the committing court).

*Second*, numerous states require that the government must establish that continued detention is necessary and justified by at least a clear and convincing evidentiary standard, if not beyond a reasonable doubt.<sup>2</sup> In *Hendricks*, this Court approvingly cited Kansas’s requirement that the state satisfy the conditions for continuing detention beyond a reasonable doubt as an example of

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<sup>2</sup> *See, e.g.,* Ariz. Rev. Stat. Ann. § 36-3709(C), Cal. Welf. & Inst. Code § 6605, Kan. Stat. Ann. § 59-29a19(f) (reasonable doubt); 725 Ill. Comp. Stat. Ann. 207/65(a)(2), N.Y. Mental Hyg. Law § 10.09(h), VA. Code Ann. § 37.2-910(C) (clear and convincing evidence).

civil “confinement tak[ing] place pursuant to proper procedures and evidentiary standards.” 521 U.S. at 357.

*Finally*, there is a patchwork of mandatory procedures across different jurisdictions, including a trial by jury at discharge hearings,<sup>3</sup> access to counsel,<sup>4</sup> and cross-examination of witnesses.<sup>5</sup> Courts have cited provisions like these approvingly 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 statute “provides proper procedures and evidentiary standards for a committed person to petition for a reduction in [their] custody or [their] release from confinement,” such as “the right to be represented by counsel”) (internal citations omitted); *United States v. Comstock*, 627 F.3d 513, 515 (4th Cir. 2010) (referring to provisions under federal civil commitment statute that allow “rights to counsel, to present evidence, and to subpoena and cross-examine witnesses”); *Gilbert v. McCulloch*, 776 F.3d 487, 493 (7th Cir. 2015) (noting that Wisconsin SVP statute requires access to counsel at discharge hearing).

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<sup>3</sup> Cal. Welf. & Inst. Code § 6605.

<sup>4</sup> Mass. Gen. Laws Ann. ch. 123A, § 9

<sup>5</sup> Tex. Health & Safety Code Ann. §§ 841.061, .103(c).

These protections are necessary in order to protect against arbitrary and unjustified detention. Without a clear jurisprudence about what the Constitution requires for civil detention at Guantánamo, there is a severe risk of unjust and punitive confinement, and an erosion of the strength of the Due Process Clause as a protector of liberty. The clouding of the Due Process Clause's scope also creates a danger that, in future situations where the contours of procedural due process remain undefined, government actors act as if there are no limitations at all. When the executive is in charge of determining the procedures by which it can prosecute and prove the validity of detention, an absence of judicial guidance is a recipe, and even an invitation, for abuse.

## CONCLUSION

*Amici* support granting of certiorari in order to answer whether the Due Process Clause applies to Mr. Ali's detention at Guantánamo, and if so, what substantive and procedural due process rights he has.

Dated: February 3, 2021

Respectfully Submitted,

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