No. _____

In the Supreme Court of the United States

KENNETH JEROME DAWSON,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY, COLORADO; JEFFERSON COUNTY, COLORADO, DEPARTMENT OF HUMAN SERVICES; JEFFERSON COUNTY, COLORADO, DIVISION OF JUSTICE SERVICES; JEFFERSON COUNTY, COLORADO, SHERIFF'S OFFICE; AND JEFF SHRADER, IN HIS OFFICIAL CAPACITY AS THE SHERIFF OF JEFFERSON COUNTY, COLORADO,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The due process clause of the fourteenth amendment has a substantive component that protects individual liberty against arbitrary governmental action regardless of the fairness of the procedure involved. When a legislative provision is alleged to violate substantive due process, the level of judicial scrutiny depends upon the nature of the asserted liberty interest. Infringement of a fundamental right is judged under the "strict scrutiny" standard; infringement of a non-fundamental right is gauged under the "reasonably related" standard.

The questions presented here are: When a criminal defendant has posted bond and is entitled to be released from jail subject only to administrative processing, does the defendant's right to be released implicate a fundamental right of liberty; and has Petitioner stated a claim that the legislatively mandated three-day delay in his release unconstitutionally violated his right of liberty?

PARTIES TO THE PROCEEDING

The caption identifies all persons who were parties in the proceedings before the Tenth Circuit.

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INTRODUCTION

Important cases often have humble origins. Kenneth Dawson was arrested in Jefferson County, Colorado, on a criminal charge of violating a restraining order that prohibited him from contacting his wife. He was booked into the Jefferson County jail. He posted bond on a Friday evening. He was not released until the following Wednesday – five nights and five days after posting bond.

The reason for the delay is that County personnel had to fit Mr. Dawson with a GPS monitoring device as a court-ordered condition of his release, and the responsible persons did not bother to do this for five nights and five days. Part of the delay was required by a written County policy ("Delay by Policy"), and part of the delay was due to the neglect of certain individuals ("Delay by Neglect"). This Petition concerns only the constitutionality of the Delay by Policy: the County's legislated policy that a pre-trial detainee who posts bond after 1:00 p.m. on Friday must spend three additional nights and three additional days in jail if he needs to be fitted with a GPS device.

Mr. Dawson filed suit under 42 U.S.C. § 1983 alleging that the County violated his substantive due process rights by making him spend a long weekend in jail unnecessarily pursuant to the Delay by Policy. Both the U.S. District Court for Colorado and the Tenth Circuit Court of Appeals held: (1) Mr. Dawson's liberty interest in freedom from detention after posting bond was non-fundamental; (2) the rational basis (*i.e.* "reasonably related") standard therefore applies; and (3) under that standard Mr. Dawson failed to state a

claim upon which relief can be granted. The Tenth Circuit concluded:

> [U]nder rational basis review, it is more convenient for the Jail to refrain from engaging in a multi-step GPS process and from coordinating with an outside GPS vendor – regardless of how little time the process demands – over the weekend when relevant staff are not available. Thus, the policies relate to at least one legitimate governmental goal.

(App. 20.) In effect, the Tenth Circuit holds that claimed administrative inconvenience – no matter how slight – is a sufficient justification to detain a person for three days, as a matter of law.

The Tenth Circuit's conclusion that Mr. Dawson's asserted liberty interest is non-fundamental is contrary to multiple decisions of this Court. In this regard the Tenth Circuit's opinion also conflicts with *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-81 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2046 (2015), where the Ninth Circuit held that freedom from incarceration absent a criminal conviction is a fundamental right, the infringement of which must be narrowly tailored to serve a compelling state interest. The Ninth Circuit is correct on this point because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

If the County's Delay by Policy is judged under the proper "strict scrutiny" standard, then Mr. Dawson manifestly has stated a claim upon which relief can be granted. Administrative convenience is not a compelling governmental interest, and the mandatory three-day detention under the Delay by Policy is undisputedly longer than is necessary.

Even under the more deferential "reasonably related" standard, Mr. Dawson states a claim because the County's Delay by Policy is at least plausibly unreasonable. It reasonably may be inferred that the Delay by Policy actually increases the County's costs and effort due to the need to incarcerate the detainee for three additional days. It appears the true purpose of the Policy is simply to protect the weekend leisure time of County employees.

By holding that the County's mere assertion of administrative inconvenience – no matter how slight – justifies Mr. Dawson's unnecessary detention for three days as a matter of law, the Tenth Circuit has opened the door to local officials justifying all manner of capricious and abusive over-detentions with hollow or trivial claims of inconvenience. That approach is incompatible with this Court's long tradition of carefully protecting the core human right of freedom from incarceration in the absence of criminal conviction.

Even if the Tenth Circuit's reasoning could be confined to extended detentions for the purpose of fitting a GPS device – which it cannot – the opinion has potentially extensive ramifications. Pre-trial GPS monitoring of criminal defendants is a widespread and growing practice. Multiple Colorado counties have

procedures similar to Jefferson County's Delay by Policy; and Colorado is not likely to be alone in this regard. This Court has the opportunity to prevent a great deal of human anguish by liberating future detainees in Mr. Dawson's position so they can spend the long weekend attending to the responsibilities and joys of life, rather than needlessly languishing in jail.

DECISIONS BELOW

The Tenth Circuit's decision is not officially reported but is available at 2018 U.S. App. LEXIS 5946, and 2018 WL 1256477, and is reprinted at App. 1-20. Chief Judge Tymkovich issued a separate concurring opinion reprinted at App. 21-30.

The District Court's decision is not officially reported but is available at 2017 U.S. Dist. LEXIS 215795, and 2017 WL 5188341, and is reprinted at App. 31-63.

JURISDICTION

On May 7, 2018, the Tenth Circuit denied Petitioners' petition for rehearing *en banc*. (App. 64-65.) This Petition is filed within 90 days after denial of rehearing as required by Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

I. Statement of Facts

Because the District Court dismissed Mr. Dawson's claim pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), this Statement of Facts is based solely on the contents of the Amended Complaint ("A.C.") and Exhibits thereto. (App. 66-99.)

On Thursday, May 29, 2014, at approximately 5:30 p.m., Mr. Dawson was arrested at his home by the Lakewood Police Department. (A.C., ¶ 10; App. 69.) The police took him to the Jefferson County Jail in Golden, Colorado, where he was remanded into the custody of the Jefferson County Sheriff's Department. (A.C., ¶ 12; App. 69.) The next morning, Friday, May 30, 2014, Mr. Dawson's bond was set at $1,500 and his

release was authorized subject to his posting of bond and GPS monitoring. (A.C., ¶ 13; App. 69-70.)

At 10:33 a.m. that same morning, the Jefferson County Pretrial Services Department sent a "Hold" to the Jefferson County Sheriff. The Hold stated that Mr. Dawson was to remain in custody until a Pretrial Services Representative sent written notice. (A.C., ¶ 14; App. 70.) Pretrial Services' authorization to issue this Hold is based on two written policies adopted by the County: Policy No. 3.1.43, titled "Pretrial Holds & Releases" (the "Hold Policy"); and Policy No. 3.1.68, titled "Electronic Monitoring" (the "Monitoring Policy"). (A.C., ¶ 15 and Exhibits B and C; App. 70, 81-83, 84-94.)

Generally speaking, the Hold Policy and the Monitoring Policy authorize and require Pretrial Services staff to: (a) place a hold on a defendant to prevent the Sheriff's Office from releasing the defendant pending the fitment of a court-ordered GPS monitoring device; (b) arrange for the fitment of the GPS device upon the defendant; and (c) then release the hold upon the defendant, thereby enabling the Sheriff's Office to release the defendant, subject to any other holds or court-ordered conditions of release. (*Id.*)

On the evening of Friday, May 30, 2014, Mr. Dawson posted his cash bond. (A.C., ¶ 17; App. 70.) At 7:40 p.m. on the 30th, the Sheriff's Department e-mailed Pretrial Services regarding Mr. Dawson, informing them: "The above inmate has bonded and is being held on your hold." (A.C., ¶ 18 and Exhibit D; App. 70-71, 95.) This email informed Pretrial Services that the only unsatisfied condition remaining for Mr.

Dawson's release was to fit him with the GPS monitor as required by the district court. (*Id*.)

The Monitoring Policy contains a "Release Schedule" which states in relevant part: "Defendants who post bond after 1 PM on Friday and before 1 PM on Monday will be outfitted [with the GPS monitor] on Monday at 4 PM." (A.C., ¶ 19 and Exhibit C at ¶ 3(c); App. 71, 85.) The Monitoring Policy further states: "All referral paperwork must be provided to the vendor no later than **2 PM** in order to have the defendant outfitted with the equipment by 4 PM that same day. The vendor will arrive at the jail at 4 PM to place the electronic monitoring unit on the defendant . . . ." (A.C., ¶ 19 and Exhibit C at ¶ 5; App. 71, 86; emphasis in original.)

From Friday evening, May 30, 2014, until Monday afternoon, June 2, 2014, in accordance with this official Policy, no one made any effort to fit Mr. Dawson with a GPS device or otherwise to facilitate his release. (A.C., ¶ 20; App. 71.) This Delay by Policy required Mr. Dawson to languish in jail for three nights (Friday, Saturday, and Sunday), and three days (Saturday, Sunday, and Monday) after he posted bond. (*Id.*) (He remained incarcerated until the late afternoon of Wednesday, June 4, 2014, as a result of the ensuing Delay by Neglect, which is not at issue in this Petition.)

The Delay by Policy inflicted upon Mr. Dawson (and untold other victims of this Policy) was completely unnecessary and unconscionable in light of modern technology and standards of efficiency and decency. (A.C., ¶ 21; App. 71-72.) There is no valid reason why the Defendants could not develop methods and protocols to fit detainees with GPS monitors within

hours of posting bond – or even before posting bond, for that matter. (*Id.*) In the 21st century, for County institutions and staff to intentionally subject certain criminal defendants – who are presumed innocent until proven guilty – to an automatic three nights and three days in jail awaiting the simple fitment of a GPS device reflects nothing short of shocking indifference toward these defendants' constitutional right to liberty. (*Id.*)

Each of the Defendants knowingly and willfully created, promulgated, and/or implemented the Hold Policy and the Monitoring Policy, which had the purpose and effect of inflicting the Delay by Policy upon Mr. Dawson (and other similarly situated detainees). (A.C., ¶ 39; App. 76.)

II. Course of Proceedings

In the U.S. District Court for the District of Colorado, Mr. Dawson filed a Complaint and an Amended Complaint as a matter of course. (App. 66-99.) The District Court granted Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (App. 31-63.)

A panel of the Tenth Circuit affirmed. (App. 1-20.) Chief Judge Tymkovich issued a concurring opinion. (App. 21-30.) Mr. Dawson petitioned for rehearing *en banc*, which the court denied without opinion on May 7, 2018. (App. 64-65.)

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Is Contrary to This Court's Precedent Recognizing that Freedom from Detention in the Absence of a Criminal Conviction is a Fundamental Right.

"Fundamental rights" are those rights that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court considered the constitutionality of a statute authorizing the denial of bail to criminal defendants who presented a danger of future criminal activity. After describing the government's "compelling" interest in preventing crime, 481 U.S. at 749, the Court stated:

> On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and *fundamental nature of this right*. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. . . . Under these circumstances, *we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as*

> *fundamental." Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Id. at 750-51 (all emphasis added). The Tenth Circuit's decision quotes the second italicized passage, but not the first, in arriving at the conclusion that *Salerno* does not recognize the fundamental nature of pretrial liberty. (*See* App. 15-16.) Reading *Salerno* in its entirety, however, the Court clearly recognized the fundamental nature of this right and allowed it to be subordinated in that case only because the statute was "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming." 481 U.S. at 750. *Salerno* employs the analysis and language of fundamental rights and strict scrutiny, not the "reasonably related" standard applicable to non-fundamental rights.

In *Foucha v. Louisiana*, 504 U.S. 71 (1992), the petitioner was acquitted of criminal charges by reason of insanity and committed to a mental hospital. He later regained his sanity, and then challenged a state statute that permitted his continued detention because he was a dangerous person. This Court observed:

> *Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause* from arbitrary governmental action. . . . We have always been careful not to "minimize the importance and *fundamental nature*" of the individual's right to liberty. *Salerno*, *supra,* at 750.

504 U.S. at 80 (emphasis added). The Court recognized that in "certain narrow circumstances persons who pose a danger to others or to the community may be

subject to limited confinement," *id.*, but the Louisiana statute violated substantive due process because it was "not carefully limited." *Id.* at 81. Furthermore, the Court found an equal protection violation because: "*Freedom from physical restraint being a fundamental right*, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill." 504 U.S. 86 (emphasis added). *Foucha* unmistakably holds that freedom from incarceration in the absence of a criminal conviction is a fundamental right. Mr. Dawson cited *Foucha* to the Tenth Circuit, but its decision does not mention *Foucha*.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court considered a statute that arguably authorized the government to detain indefinitely an illegal immigrant who could not be deported because no country would accept him. The Court noted that such an interpretation of the statute would present serious constitutional problems. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Id.* at 690. The Court questioned the constitutionality of giving "an administrative body the unreviewable authority to make determinations implicating fundamental rights," *id.* at 692, and the Court noted that such an infringement would require "narrow" circumstances and "special justification," *id.* at 690. Although *Zadvydas* involved statutory construction and not a claimed due process violation, the Court's analysis explicitly depended upon the principle that freedom from detention in the absence of a criminal conviction

is a fundamental right. Mr. Dawson cited *Zadvydas* to the Tenth Circuit, but its decision does not mention *Zadvydas*.

The freedom to determine one's location and movement is foundational to the exercise of all other rights. One cannot effectively speak, associate, worship, bear arms, raise children, or exercise other fundamental rights when bodily restrained. The prohibition against detention without due process of law can be traced back to American colonial statutes, English statutes, and the Magna Carta. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 428 (2010). Accordingly, freedom from detention in the absence of criminal conviction is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.) ("[T]he most elemental of liberty interests [is] the interest in being free from physical detention by one's own government."); *Reno v. Flores,* 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."); *Schall v. Martin*, 467 U.S. 253, 288 (1984) (Brennan, J. dissenting) ("If the 'liberty' protected by the Due Process Clause means anything, it means freedom from physical restraint.").

The Tenth Circuit's decision relies substantially on *Bell v. Wolfish*, 441 U.S. 520 (1979), where pretrial detainees challenged the conditions of their confinement such as sleeping arrangements and search

protocols. In *Wolfish*, this Court found no fundamental liberty interest at stake. "[T]o the extent the court [of appeals] relied on the detainee's desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in [our prior cases.]" 441 U.S. at 534. The regulation of prison conditions and procedures is permissible so long as those regulations do not constitute punishment. *Id.* at 535-36. If a prison restriction or condition is not reasonably related to a legitimate goal, a punitive purpose may be inferred. *Id*. at 538-39. The Court concluded that the challenged conditions were not impermissibly punitive because they reasonably advanced valid objectives. *Id*. at 541-62.

The Tenth Circuit's decision acknowledges that "Wolfish addressed conditions of confinement – an issue distinct from the one before us." (App. 13.) Nevertheless, the decision reasons that "[t]he [Supreme] Court's directive pertaining to the constitutional analysis of confinement conditions applies with equal force here[.]" (*Id*.) The decision emphasizes the government's "legitimate operational concerns" and the need to "preserve internal order and discipline and to maintain institutional security." (App. 15.) The decision concludes that the liberty interest asserted by Mr. Dawson is not fundamental. (App. 17.) *Wolfish* does not support this conclusion for two reasons.

First, the rights asserted in *Wolfish* were qualitatively different from the right asserted here. Mr. Dawson asserts the right to be free from detention after posting bond. The plaintiffs in *Wolfish* asserted

rights to better jail conditions. As the Tenth Circuit's decision admonishes: "First, we must careful[ly] descri[be] . . . the asserted fundamental liberty interest." (App. 11, *quoting Seegmiller v. LaVerkin City*, 528 F.2d 762, 769 (10th Cir. 2008)). The decision acknowledges that the rights involved in *Wolfish* and this case are different, but the decision then treats these vitally different rights as constitutionally equivalent, apparently because both involve "pretrial detention" and "operational concerns." However, the fundamental nature of a right is not determined by the nature of the governmental interest asserted in opposition to it; the fundamental nature of a right depends solely on how deeply rooted it is. *Wolfish* did not consider and does not illuminate the question of whether or not the right to be *free* from detention in the absence of a criminal conviction is fundamental.

Second, *Wolfish* was decided prior to *Salerno*, *Foucha*, and *Zadvydas*, all of which characterized freedom from detention in the absence of criminal detention as a fundamental right. Obviously *Salerno*, *Foucha*, and *Zadvydas* would not have so held if *Wolfish* established that all rights associated with detention are non-fundamental. These cases collectively establish that the right to be *free* from detention is qualitatively different from the right to be *comfortable* while lawfully detained. The former right is fundamental; the latter is not.

This is not to say that *Wolfish* is irrelevant here. The concept that unjustified treatment of a detainee constitutes impermissible punishment is a valid and helpful construct. However, in applying that construct it is essential to utilize the level of scrutiny that is

appropriate to the right asserted. Because Mr. Dawson asserts a fundamental right, the County's Delay by Policy must be narrowly tailored to serve a compelling governmental interest. On this record and in this procedural posture, it is impossible to conclude that is the case. Accordingly, Mr. Dawson has at least stated a plausible claim that his detention after posting bond pursuant to the Delay by Policy lacks the *compelling* justification that is required, and therefore it is tantamount to the infliction of punishment prior to conviction.

II. The Tenth Circuit and the Ninth Circuit Are Split on the Question of Whether Freedom from Detention in the Absence of a Criminal Conviction is a Fundamental Right.

In *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2046 (2015), the Ninth Circuit considered the constitutionality of state laws prohibiting the release on bail of arrestees who were undocumented immigrants. The court held that freedom from incarceration absent a criminal conviction is a fundamental right, the infringement of which must be narrowly tailored to serve a compelling state interest. 770 F.3d at 780-81.

See also Welchen v. Cnty. of Sacramento, 2016 U.S. Dist. LEXIS 140860, *27-28 (E.D. Cal. Oct. 10, 2016) (pretrial liberty interest is a fundamental right subject to heightened scrutiny); *Barnes v. Dist. of Columbia*, 793 F. Supp. 2d 260, 278 (D.D.C. 2011) (over-detention policy violated fundamental right of liberty prior to conviction).

The Tenth Circuit's majority opinion in this case does not address *Lopez-Valenzuela*. Chief Judge Tymkovich's concurring opinion concludes that *Lopez-Valenzuela* is mistaken for two reasons.

First, the concurring opinion asserts that this Court adopted a non-fundamental rights approach to pre-trial detention schemes in *Wolfish*, *Salerno*, and *Schall v. Martin*, 467 U.S. 253 (1984). (App. 29-30.) *Wolfish* and *Salerno* are addressed above: *Wolfish* did not involve a detained person's right to be released; even accepting that *Salerno* may be ambiguous, the later cases of *Foucha* and *Zadvydas* clearly recognize the fundamental nature of the right to be free from detention. *Schall* is distinguishable because it involved the detention of juveniles, who do not have the same liberty rights as adults.

> [J]uveniles, unlike adults, are always in some form of custody. . . . They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. . . . [T]he juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.

Schall, 467 U.S. at 265 (citations and quotation punctuation omitted). To apply the approach of *Schall* in the present context would be to treat adults like children.

Second, the concurring opinion reasons that "our decision keeps federal courts from supervising all pretrial detention policies. Were we to find a right as broad as the Ninth Circuit suggests, all jail procedures relating to bail could become subject to strict scrutiny." (App. 30.) To the contrary, recognizing that freedom from unwarranted detention is a fundamental right does not threaten to unsettle established precedent regarding bail schemes or the conditions of detention. For example, *Salerno* (bail) and *Wolfish* (jail conditions) are easily harmonized with the broad recognition of freedom from bodily restraint as a fundamental right in *Foucha* and *Zadvydas*, as shown above. This Court's precedents demonstrate that sufficiently important and tailored restrictions often justify the infringements of fundamental rights, with the details of the analysis depending on the specific context. In the present context – the extended, unnecessary detention of a defendant who had posted bond and is entitled to immediate release subject only to administrative processing – a little more supervision by the lower courts with the benefit of guidance from this Court would not be such a bad thing.

Granting certiorari will enable this Court to resolve the conflict between the Ninth and Tenth Circuits on the larger fundamental right issue, and to articulate for the first time what does or does not justify intentionally delaying the release of a defendant after he or she has posted bond.

III. Even if No Fundamental Right Is Involved Here, the Tenth Circuit Misapplied the "Reasonably Related" Standard and the Principles Governing a Motion to Dismiss.

Even under the deferential "reasonably related" level of scrutiny, restrictions on liberty must *reasonably* relate to a legitimate governmental goal. *Glucksberg*, 521 U.S. at 734-735. "[W]hether [the plaintiff's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (citations and quotation punctuation omitted). *See also Wolfish*, 441 U.S. at 561-562 (upholding jail protocols because they were "reasonable responses" to security concerns); *Flores*, 507 U.S. at 305 (requiring a "reasonable fit" between governmental purpose and the means chosen to advance that purpose). Thus, even when non-fundamental rights are involved, substantive due process analysis requires a balancing of interests to ensure that the challenged restriction on liberty is at least reasonable.

Mr. Dawson acknowledges that, as a general proposition, the government has a legitimate interest in efficiency and convenience in everything it does. Mr. Dawson contends, however, that his interest in three days of freedom to roam the earth – even if non-fundamental – vastly outweighs the County's relatively trivial asserted inconvenience in fitting him with a GPS device over the weekend. The necessary balancing analysis requires a fair understanding of: (a) the discomforts, dangers, indignities, and inconveniences of detention in the Jefferson County

jail; and (b) the County's costs, resources, challenges, and options in GPS fitment procedures. At present, the record does not remotely contain the evidence required to conduct this balancing of interests. It is possible only to consider the plausible range of outcomes.

Mr. Dawson alleges:

> The Delay by Policy . . . was completely unnecessary . . . in light of modern technology and standards of efficiency and decency. There is no valid reason why the County could not develop methods and protocols to fit defendants with GPS monitors within hours of posting bond – or even before posting bond, for that matter. . . .

(App. 71-72). At this stage of the proceeding, these allegations must be accepted as true. These are not "mere legal conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement,'" of the type that may be disregarded under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, these allegations relate to concrete factual matters such as the state of modern technology and efficiency, the necessity of Delay by Policy, and the feasibility of fitting Mr. Dawson promptly after his posting bond if not before-hand.

Mr. Dawson's allegations, the contents of the County's written policy, common sense, and human experience reasonably support the following inferences, which in turn support the conclusion that Delay by Policy is not reasonable:

- The County's GPS fitment procedures take no more than three hours to complete, as evidenced by the Monitoring Policy provision

that detainees who post bond by 1:00 p.m. on a weekday will be outfitted with the GPS at 4:00 p.m.

○ The County's professed interests in convenience and efficiency would be better served by promptly fitting detainees with GPS devices and releasing them. Postponing the GPS fitment does not make it any less involved or time consuming; it only results in additional cost and effort for the County to feed and care for the detainee for an additional three days. Increased detention time also increases the risk of misfortune to the detainee and liability to the County.

○ The County's true interest and motivation underlying the Delay by Policy is weekend leisure. County agents value their own weekend leisure time more than they value the liberty interests of detainees under their care. It is not a coincidence that the Delay by Policy applies only over the weekend.

○ Detention in jail is a humiliating, inconvenient, uncomfortable, and frightening experience. A detained person cannot work, care for family, or attend to any other affairs of life. Under modern American standards of decency, the human misery caused by jailing a (presumed) innocent person for three days far outweighs the inconvenience of three hours of work by someone whose job it is to process the detainee for release.

Because a reasonable person could conclude that the Delay by Policy does not reasonably advance the County's professed interests in convenience and efficiency – rather, the Delay by Policy unreasonably increases the County's costs and the indignities suffered by detainees for the sole purpose of letting County employees enjoy carefree weekends – Mr. Dawson states a claim. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The decision below bypasses the constitutionally required balancing of interests by holding that the County's asserted interest in convenience prevails, as a matter of law, *no matter how trivial it is*, without consideration of Mr. Dawson's countervailing liberty interest or the inferences that the Delay by Policy does not reasonably advance any legitimate interest. It is a balancing "scale" with only one pan.

The decision also turns the "plausibility" pleading standard around 180 degrees. Instead of considering whether the plaintiff has pleaded a plausible claim of arbitrary action, the decision considers whether the defendant has asserted a plausible justification in its motion to dismiss. This is not only procedurally erroneous: it is an invitation to abusive post-bond detentions by willful officials who can avoid liability simply by incanting that a prompt release would have imposed some inconvenience, knowing that this will secure dismissal of any claim without the detained person having any opportunity to test the assertion through discovery.

Granting certiorari will enable this Court to clarify the principles for assessing the sufficiency of a plaintiff's pleading under the "reasonably related" standard – if the Court determines that is the correct standard – so a government official's talismanic recital of "inconvenience" in a motion to dismiss does not result in the automatic dismissal of a meritorious claim.

IV. These Issues Are Likely to Arise in Numerous Real-World Situations.

Although the Tenth Circuit's decision is not officially published and therefore is not binding on lower courts, the decision nevertheless may be cited for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

If the Tenth Circuit's decision is interpreted broadly, it could affect innumerable future "over-detention" cases, which are arising with increasing frequency in a variety of specific contexts. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) ("Plaintiff's claim falls into a category of claims which unfortunately have become so common that they have acquired their own term of art: 'overdetention,' *i.e.*, when 'the plaintiff has been imprisoned by the defendant for longer than legally authorized, whether because the plaintiff's incarcerative sentence has expired or otherwise."); *Berry v. Baca*, 379 F.3d 764, 769 (9th Cir. 2004) (delays in release of 26-29 hours precluded summary judgment on § 1983 claim); *ODonnell v. Harris Cnty*, 227 F. Supp. 3d 706, 730 (S.D. Tex. 2016) (due process challenge to post-arrest detention policies stated a claim); *Barnes, supra,* 793 F. Supp. 2d at 278 (D.D.C. 2011) (over-detention policy

violated fundamental right); *Holder v. Town of Newton*, 638 F. Supp. 2d 150 (D.N.H. 2009) (motion to dismiss denied when pretrial detainee held for nine hours pursuant to governmental policy); *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001) (affirming § 1983 jury verdict of $35,000 for a thirty minute over-detention as not excessive).

Even if the Tenth Circuit's decision is interpreted very narrowly to address only extended detention for GPS fitment, a significant number of people may be affected. As noted, Mr. Dawson is informed and believes that multiple Colorado counties have adopted versions of the Delay by Policy. The use of GPS monitoring as a condition of pre-trial release is increasing rapidly across the country. *See, e.g.,* http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply#0-overview; https://www.usnews.com/news/articles/2016-09-07/use-of-ankle-monitors-surges-but-effectiveness-an-open-question; https://truthout.org/articles/you-re-still-in-jail-how-electronic-monitoring-is-a-shackle-on-the-movement-for-decarceration/.

Granting certiorari will enable this Court to provide much-needed guidance in this now unsettled and blossoming area of the law and to improve the lives of untold numbers of citizens by sparing them from the humiliation and distress of arbitrary over-detention.

As we as a Nation become increasingly divided in peripheral battles over polarizing issues, this case presents an opportunity to bring together the Court and the People around the most deeply rooted human value that we surely all share. Freedom from arbitrary bodily restraint is fundamental to human dignity. It is the first liberty to be subjugated by autocratic governments. If we cannot come together even for the purpose of shoring up this core value, then what will become of us?

CONCLUSION

For these reasons, this Petition should be granted.

Respectfully submitted.

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