No. 18-177

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Based on this Court's precedents, did the Tenth Circuit correctly conclude, first, that Petitioner's right to be free from pretrial detention once he posted bond but before other court-ordered conditions of release on bond were satisfied is not a fundamental right subject to strict scrutiny and second, that Petitioner did not plausibly allege a substantive due process violation?

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INTRODUCTION

"A weekend in jail is no small burden," but neither does it violate substantive due process. Pet. App. 30, Tenth Circuit Opinion (Tymkovich, C.J. concurring). This Court has never held that freedom from pretrial detention once a defendant has posted bond but before the other court-ordered conditions of release are satisfied is a fundamental right requiring strict scrutiny review. Rather, this Court has explicitly "refused to 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.'" *United States v. Salerno*, 481 U.S. 739, 751 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The Tenth Circuit's conclusion that the right to be free from pretrial detention is non-fundamental is consistent with this Court's decisions holding that the government may curtail an individual's generalized interest in liberty and in being at liberty in a variety of particularized circumstances without violating substantive due process. In administrative immigration proceedings, this Court has held that the government may detain resident aliens awaiting deportation proceedings. *See Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (in upholding government's ability to detain resident alien pending deportation proceedings, observing that "[d]etention is a [u]sual feature in every case of arrest on a criminal charge, even when an innocent person [is] wrongfully accused; but it is not imprisonment in a legal sense"); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (no absolute constitutional barrier to detention of potentially dangerous resident

aliens pending deportation proceedings). This is true even when such detentions extend for significant periods of time. *See Zadvydas v. Davis*, 533 U.S. 678, 690, 701 (2001) (holding that six-month detention is presumptively constitutional and continued civil confinement in the deportation context beyond that point is permissible "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future"). Too, the government may make housing decisions for immigrant children, even if that means that they will also be housed in a detention facility. *See Reno v. Flores*, 507 U.S. 292, 301-05 (1993) (rejecting in the immigration context the contention that "a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible," has a right "to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution," and reiterating the requirement from *Salerno* and *Schall* that such decisions be "rationally connection to a government interest" and not punitive, defined as "not excessive in relation to that valid purpose").

In times of civil unrest too, the government may detain individuals. *See Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war). Likewise, the government may use civil proceedings to commit individuals and deprive them of liberty with or without associated criminal charges, *see, e.g, Greenwood v. United States*, 350 U.S. 366, 372, 375-76 (1956) (holding that

defendant deemed incompetent to stand trial can be held by the government indefinitely where the authority to prosecute has not been irretrievably frustrated, even where "at present there may be little likelihood of recovery"); *Jackson v. Indiana*, 406 U.S. 715, 731-39 (1972) (permitting state to hold individual charged with a criminal offense for a reasonable period of time to determine whether there is a substantial probability that he will attain the capacity to proceed to trial); *Addington v. Texas*, 441 U.S. 418 (1979) (government may detain mentally unstable individuals who present a danger to the public upon a showing that commitment is warranted under something greater than preponderance of the evidence but less than proof beyond a reasonable doubt), although the individual's interest in being at liberty grows stronger as the state's rationale for the commitment fades, *see Foucha v. Louisiana*, 504 U.S. 71, 80-84 (1992) (holding substantive due process was violated when individual found not guilty by reason of insanity and committed to a mental health facility was required to prove at the end of his commitment that he was not dangerous in order to be released by imposing punishment absent a criminal conviction and because Louisiana's process did not involve sufficient procedural due process safeguards).

In the criminal context, the government may arrest and hold juveniles and adults suspected of crimes pending administrative or judicial processes so long as it does not inflict punishment on them. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (law enforcement may arrest and hold an individual they suspect of a crime until a neutral magistrate determines whether probable cause exists); *Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979)

(government may permissibly incarcerate a person charged with a crime but not yet convicted to ensure his presence at trial; such individuals may not be punished and must be treated as innocent until proven guilty); *Schall v. Martin*, 467 U.S. 253, (1984) (holding that a juvenile defendant's post-arrest regulatory detention must serve a legitimate state objective under *Wolfish*, and must have adequate procedural safeguards associated with it). In doing so, the government's rationales must reasonably relate to legitimate governmental objectives. *See Salerno*, 481 U.S. at 749 (noting that "[e]ven competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system")

As this Court observed in *Salerno*, because "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment," *id.* at 747 (citing *Wolfish*, 441 U.S. at 537), courts should determine whether the challenged "restriction on liberty constitutes impermissible punishment or permissible regulation," *id.* (citing *Schall*, 467 U.S. at 269); *see also Walker v. City of Calhoun, Georgia*, 901 F.3d 1245, 1262 (11th Cir. 2018) ("[T]he *Salerno* Court's analysis was much closer to a relatively lenient procedural due process analysis than it was any form of heightened scrutiny. Rather than asking if preventative detention of dangerous defendants served a compelling or important State interest and then demanding relatively narrow tailoring, the Court employed a general due process balancing test between the State's interest and the detainee's."). Where, as here, there is no plausible allegation that the government intends a restriction to be punitive, this Court has held that the appropriate

standard is whether there is a reasonable relationship between the restriction and a legitimate regulatory goal or whether, instead, the restriction is excessive – that is unreasonable or irrational – in relation to the government's goals. *Salerno*, 411 U.S. at 747-48 (looking to the government's stated legislative intent in its analysis); *cf. Carlson*, 342 U.S. at 536-37 ("The bail clause was lifted with slight changes from the English Bill of Rights Act. In England, that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail."). As a result, the policies at issue here need only reasonably relate to legitimate governmental interests, which this Court indicates should be assessed based on expressed legislative intent.

The lower courts decided this case in a manner entirely consistent with the Court's jurisprudence limiting the application of strict scrutiny to "certain 'fundamental' liberty interests." *Flores*, 507 U.S. at 302. Nor does the Ninth Circuit's decision in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), compel a different result than that reached by the lower courts here or warrant this Court's review in this case. The circumstances at issue in *Lopez-Valenzuela* are simply too different from the instant case to be instructive, both because the legislation at issue in that case sought to categorically deny bail to individuals believed to be in the country illegally and because the Ninth Circuit erred as a result by too broadly describing the right at issue as the right to be free from bodily restraint. *Id.*, 770 F.3d at 788-81.

Here, in contrast, both the district court and the Tenth Circuit carefully described the right at issue as the right to be free from pretrial detention where a defendant has posted a court-ordered bond but the other court-ordered bond conditions have not yet been met. Pet. App. 17, *cf. id.* at 28 (Opinion, Tymkovich, C.J., concurring) ("Dawson attempts to do here what the Supreme Court cautioned courts to watch out for – he attempts to convert his injury into a violation of a 'fundamental right' by articulating the right at too high a level of generality."). Based on the Court's longstanding precedent, the Tenth Circuit correctly concluded that Dawson's substantive due process claim is not subject to strict scrutiny and reviewed it accordingly. Pet. App. 12-18.

In addition, the Petition overstates the circuit split between the Ninth and Tenth Circuits in two ways. First, most state and federal courts that have addressed similar issues agreed with the Tenth Circuit that freedom from pretrial detention is not a fundamental right. Second, very few federal circuit courts have addressed this specific issue. As a result, if this Court believes these cases represent an irreconcilable circuit split, it should nevertheless refrain from clarifying whether pretrial detention is a fundamental right until more federal circuit courts have had an opportunity to address this issue.

STATEMENT OF THE CASE

On Thursday, May 29, 2014, Petitioner Kenneth Jerome Dawson ("Dawson") was arrested and booked in to the Jefferson County Jail (the "Jail") for violating a protection order restraining him from contacting his wife. Pet. App. 69, Am. Compl., ¶ 11. On Friday, May

30, 2014, the Jefferson County District Court advised Dawson of the charges against him and set a $1,500.00 bond as well as a GPS monitoring requirement. Pet. App. 69, Am. Compl., ¶ 13. Due to the GPS monitoring condition imposed by the court, Jefferson County Pretrial Services ("Pretrial Services")[1] placed a pretrial hold on Dawson pursuant to its Pretrial Hold & Release and Electronic Monitoring policies (the "Policies"). Pet. App. 81-94, Am. Compl., Exhibits B & C.

The purpose of GPS monitoring is to allow pretrial detainees to be released into the community while still

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[1] Pretrial Services is a division of Jefferson County Justice Services, which was at the time of this case housed under the Jefferson County Department of Human Services. All of these divisions are housed under the general authority of the Jefferson County Board of County Commissioners, whose authority is distinct from that of the Jefferson County Sheriff. For purposes of this case, the County departments and divisions are collectively referred to as the "County," as distinguished from the Sheriff and Sheriff's Office, which are responsible for the Jail. *See Sisneros v. Cnty. of Pueblo*, Civ. Act. No. 09-cv-1646-PAB-MJW, 2010 WL 1782017, *3 (D. Colo. May 3, 2010) ("Pursuant to Colorado law, 'the [county] commissioners and the sheriff are separately elected officials.") (citations omitted); *Kershaw v. Robinson*, Civ. Act. No. 09-cv-1872-WYD-CBS, 2009 WL 3346673, *1 (D. Colo. Oct. 14, 2009) (differentiating between the duties imposed upon a county sheriff and those imposed upon a board of county commissioners under Colorado statute); *Bd. of Cnty. Comm'rs of Adams Cnty. v. Colo. Dep't of Pub. Health & Env't*, 218 P.3d 336, 344-45 (Colo. 2009) (discussing powers and status of counties); COLO. REV. STAT. § 30-11-103 ("The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners therefor."); COLO. REV. STAT. § 16-4-106 (explicitly authorizing and encouraging "all *counties* . . . to develop a pretrial service program") (emphasis added).

being closely monitored to maximize victim and public safety. The Policies serve a number of specific purposes, including coordinating electronic monitoring, Pet. App. 81; monitoring defendants closely to maximize victim and/or public safety, Pet. App. 84; permitting County staff to keep a defendant in custody until arrangements are made to fit the defendant with GPS or other electronic monitoring pursuant to a court's order for the same, Pet. App. 85; permitting Pretrial Services staff time to gather the necessary information for GPS monitoring upon the defendant's release, Pet. App. 86; providing a process for Pretrial Services to coordinate with the GPS vendor and the District Attorney's Office regarding the defendant's release, Pet. App. 88; and gathering victim information in order to notify victims of the release as required by Colorado law, Pet. App. 88-89.

Dawson posted bond Friday evening, several hours after Pretrial Service's 1 p.m. deadline for same-day release. *See* Pet. App. 85. As a result, under the Policies, the earliest he could have been outfitted with GPS monitoring was at 4 p.m. on Monday, June 2, 2014. Dawson challenges this delay.

On Friday, May 30, 2014, the Sheriff's Office emailed Pretrial Services to notify Pretrial Services that Dawson had posted bond. That email mistakenly went to an unused general email address that Pretrial Services staff does not check. Pretrial Services did not become aware that Dawson had posted bond and needed to be outfitted with GPS monitoring until after 4 p.m. on Tuesday, June 3, 2014, as a result of follow-up emails from the Sheriff's Office. Pretrial Services outfitted Dawson with GPS monitoring on Wednesday,

June 4, 2014, instead of Monday, a delay of two days. The delay between Monday morning and Wednesday is not at issue in the Petition.

REASONS FOR DENYING THE PETITION

I. THE COURT'S PRECEDENTS MAKE CLEAR THAT THIS CASE DOES NOT INVOLVE A FUNDAMENTAL RIGHT.

In *Salerno*, the Court answered the question of how to analyze substantive due process claims involving pretrial detention and did not apply strict scrutiny. Moreover, three years after deciding *Salerno*, this Court had another opportunity to categorize an individual's interest in pretrial release as a fundamental right but again explicitly declined to do so. *See United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990). This Court should decline to revisit settled law here.

"[T]he substantive component of the [Due Process] Clause . . . protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (substantive due process protects against the exercise of power without any reasonable justification in the service of a legitimate governmental objective). Because "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects," *Planned Parenthood of S.E. Pennsylvania v.*

Casey, 505 U.S. 833, 848 (1992) (citing U.S. CONST. amend. IX), "judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field," *Collins*, 503 U.S. at 125; *see also Casey*, 505 U.S. at 848 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."); *Armstrong v. Squadrito*, 152 F.3d 564, 569 (7th Cir. 1998) (contrasting the "yielding natural grass of substantive due process" with the "stiff astroturf of specific constitutional rights" in reiterating this Court's "reluctance to extend substantive due process") (citations omitted).

"[A]lways . . . reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended," *Collins*, 503 U.S. at 125, this Court has repeatedly stressed the importance of beginning, "as we do in all due process cases, by examining our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (finding no substantive due process protection for the right to assistance in committing suicide) (citations omitted). This Court's "established method of substantive-due-process analysis has two primary features." *Id.* at 720. First, this Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977), and citing *Snyder*, 291 U.S. at 105 ("so rooted in the traditions

and conscience of our people as to be ranked as fundamental")); *see also Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (observing that substantive due process "cannot be used to impose additional requirements upon such of the States' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights") (internal citations omitted); *id.*, 510 U.S. at 281 (Ginsburg, J., concurring) (rejecting petitioner's request "to break new ground" in the field of substantive due process) (internal citations omitted). Second, and as a result, the focus in substantive due process cases must be "how petitioner describes the constitutional right at stake" based "on the allegations in the complaint." *Collins*, 503 U.S. at 125.

Shortly after declining "to 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.'" *Salerno*, 481 U.S. at 751 (quoting *Snyder*, 291 U.S. at 105), the Court again reviewed a pretrial detention case under the Bail Reform Act of 1984, and again declined to categorize the right to pretrial release as a fundamental right. In *Montalvo-Murillo*, both the district court and the Tenth Circuit found that the suspect posed a flight risk and a danger to the community. 495 U.S. at 713. Both courts nevertheless found that a failure to observe the Bail Reform Act of 1984's directions for a timely hearing mandated the suspect's release. *Id.* "To no one's great surprise, the suspect became a fugitive after his release and is still at large." *Id.* In its decision holding that the Act did not mandate release because of procedural delays, this Court again stopped short of using fundamental rights language to describe the asserted

liberty interest. Instead, it acknowledged that, "[t]hough we did not refer in *Salerno* to the time limits for hearings as a feature which sustained the constitutionality of the Act, we recognize that a *vital* liberty interest is at stake." *Id.* at 716 (emphasis added). In upholding "the substantive right to detain based upon the Government's meeting the burden required by the statute," this Court again refused to identify a fundamental right to be free from pretrial detention. *Id.*

In the face of this Court's explicit and continued "refus[al] to 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,'" *Salerno*, 481 U.S. at 751 (quoting *Snyder*, 291 U.S. at 105), Dawson seeks to cobble together a fundamental right to be free from pretrial detention from "a couple of fractured Supreme Court opinions that hint, but do not hold, that *Salerno* may have meant something it never said." *Lopez-Valenzuela*, 770 F.3d at 800 n.3 (Tallman, J., dissenting). In service of this task, the Petition invokes a generalized "liberty" interest under the Fourteenth Amendment and relies on this Court's recognition of "the important and fundamental nature of" "the individual's strong interest in liberty," writ large, from *Salerno*, 481 U.S. at 749, *Foucha*, 504 U.S. 71, and *Zadvydas*, 533 U.S. 678.

The Constitution, however, speaks only in the most general terms "of liberty and prohibits the deprivation of liberty without due process of law." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937). While this Court has recognized that "[t]he Due Process Clause

guarantees more than fair process," and that "the 'liberty' it protects includes more than the absence of physical restraint," *Glucksberg*, 521 U.S. at 719 (citations omitted), "the Constitution does not recognize an absolute and uncontrollable liberty," *West Coast Hotel Co.*, 300 U.S. at 391-92; *and see Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (holding that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant," in finding that a "mere detention" decision by the government in that context is constitutional); *Snyder*, 291 U.S. at 105 (holding state "procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar"). Rather, "[l]iberty in each of its phases has its history and connotation . . . [b]ut the liberty safeguarded is *liberty in a social organization* which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people." *West Coast Hotel Co.*, 300 U.S. at 391-92 (emphasis added). Because "[l]iberty under the Constitution is thus necessarily subject to the restraints of due process, . . . regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.*

Dawson's allegation that the lower courts here selectively read *Salerno* to reach the conclusion that this case involves a non-fundamental right ignores the fact that this Court knows how to say that it is applying strict scrutiny when it means to do so. *See, e.g., Johnson v. California*, 543 U.S. 499, 507 (2005) (explaining that the Court is applying strict scrutiny to a claim of racial segregation in the prison context); and

cf. Flores, 507 U.S. at 302 (citing *Salerno*, as well as *Collins*, 503 U.S. at 125, and *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), for the general proposition that the Due Process Clause contains a substantive as well as procedural component); *Foucha*, 504 U.S. at 80–83 (discussing *Salerno* but not elucidating its standard and explicitly observing, "*Salerno*, unlike this case, involved pretrial detention"); *see also Simpson v. Miller*, 387 P.3d 1270, 1277 (Ariz. 2017), *cert. denied sub nom Arizona v. Martinez,* 138 S. Ct. 146 (2017) (disagreeing with Ninth Circuit in *Lopez-Valenzuela* that *Salerno* established due process prerequisites for offense-specific pretrial detention procedures and reviewing this Court's decisions in finding that strict scrutiny is not the appropriate standard for pretrial detention regulations).

Similarly, Dawson attempts to conflate this Court's holdings in *Foucha*, which involves a civil commitment proceeding following an individual's criminal acquittal by reason of insanity, and *Zadvydas*, which deals with administrative detention in the immigration context, with those applicable to criminal cases such as *Salerno*.

In contravention of this Court's clear directive, Dawson identifies the right at issue in his case in improperly broad terms. It is this tactic that allows Dawson to draw broadly from this Court's decisions addressing civil and administrative confinements to find a fundamental right to be free from bodily restraint generally. This Court has repeatedly emphasized the need for a "careful description of the asserted fundamental liberty interest" in the substantive due process arena. *See, e.g.*, *Glucksberg*, 521 U.S. at 703, 723 (defining the liberty interest at

stake as the "right to commit suicide which itself includes a right to assistance in doing so," and finding it to be non-fundamental); *Lawrence v. Texas*, 539 U.S. 558 (2003), (holding that individuals' private homosexual conduct is protected by substantive due process and applying non-fundamental rights analysis in holding that the challenged Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of an individual"); *Schall*, 467 U.S. at 281 (finding that New York statute authorizing pretrial detention of accused juvenile delinquents based on risk of future criminal conduct did not violate due process); *Foucha*, 504 U.S. at 77 (reaffirming its holding from *Jones v. United States*, 463 U.S. 354, 368, 370 (1983), that, "the Constitution permits the Government, on the basis of the insanity judgment, to confine [an individual acquitted by reason of insanity] to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society," but that once that individual is no longer mentally ill or dangerous, the government is no longer entitled to confine him); *Zadvydas*, 553 U.S. at 701 (finding that a six-month post-removal-determination detention of a removable alien is presumptively constitutional in the immigration context and that period may be extended so long as the government determines that there is no significant likelihood of removal in the reasonably foreseeable future).

In contrast to Dawson, the district court and Tenth Circuit carefully described the right at issue as the "right to be free from pretrial detention having paid court-ordered bond but awaiting the fulfilment of another court-ordered release condition," Pet. App. 17,

and correctly determined it was not a fundamental right. Proper identification of the right at issue makes clear that this decision is not contrary to this Court's precedent. Having made that determination, both courts then properly determined that the Policies reasonably relate to the County's identified legitimate objectives.

II. EVEN IF THERE IS SOME UNCERTAINTY IN THIS COURT'S SUBSTANTIVE DUE PROCESS JURISPRUDENCE, THE COURT SHOULD ALLOW ADDITIONAL CIRCUITS TO WEIGH IN BEFORE ADDRESSING THE ISSUE.

Dawson urges this Court to grant the Petition based on a circuit split between the Ninth and Tenth Circuits. Specifically, Dawson argues that the split between the Ninth Circuit's *Lopez-Valenzuela* decision and the Tenth Circuit's decision in his case warrants this Court's review. This Court should refrain from granting the Petition in this case in favor of allowing the circuit courts to develop a more comprehensive body of case law for its review.

To emphasize the circuit split, the Petition ignores that several state and federal district courts, as well as some federal circuit courts, have already addressed the intersection between due process and detention in the criminal context and have, by and large, reached the same conclusion as the Tenth Circuit. *Accord United States v. Briggs*, 697 F.3d 98, 101 (2d Cir. 2012) ("We have consistently held that due process places no bright-line limit on the length of pretrial detention."); *United States v. Millan*, 4 F.3d 1038, 1044 (2d Cir. 1993) (holding length of pretrial detention is not

dispositive in a due process claim and "will rarely by itself offend due process") (internal citations omitted); *Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018) ("Pretrial release and detention decisions implicate a liberty interest – conditional pretrial liberty – that is entitled to procedural due process protections."); *Welch v. Ashcroft*, 293 F.3d 213, 221 (4th Cir. 2002), abrogated by *Demore v. Kim*, 538 U.S. 510 (2003) ("The liberty interest implicated by incarceration pending a final removal order is unquestionably significant. Yet the Supreme Court has never added freedom from incarceration to the short list of fundamental rights."); *Little v. Frederick*, No. 6:17-CV-00724, 2017 WL 9772104, at *7 (W.D. La. Dec. 6, 2017), report and recommendation adopted in part, rejected in part, 2018 WL 1221119, at *5 (W.D. La. Mar. 8, 2018) (analyzing *Salerno* in holding, "this Court is not persuaded that the right to pretrial release is a fundamental right created by the Constitution"); *Sanchez v. Swyden*, 139 F.3d 464, 465 (5th Cir. 1998) (holding twenty-six-hour detention of individual whose name and general description matched that in warrant amounted to no more than mere negligence and thus did not state a constitutional violation); *Flemister v. City of Detroit*, 358 Fed. App'x 616, 621 (6th Cir. 2009) (in the wrongful arrest context, holding that a four-and-a-half-day detention is "materially indistinguishable from *Baker* [*v. McCollan*, 443 U.S. 137 (1979)], and . . . conclud[ing] that plaintiff cannot establish a constitutional deprivation of liberty without due process of law"); *Squadrito*, 152 F.3d at 569 (prolonged detention of fifty-seven (57) days offends substantive due process); *Golberg v. Hennepin Cty.*, 417 F.3d 808, 812-13 (8th Cir. 2005) (no § 1983 liability for failure to timely release detainee upon posting of bail based on its

adoption of administrative procedures that allegedly slowed the bail posting and release process, absent a showing that those procedures were facially invalid or were intended to deprive detainees of their constitutional rights); *United States v. Edwards*, 430 A.2d 1321, 1354-55 (D.C. 1981) (noting that "once pretrial detention is properly imposed . . . due process bars only 'punishment,' a term the Supreme Court now defined by reference to the government's purpose, not to impact on the accused").

Although a few outliers exist, *see, e.g.*, *Paquette v. Comm.*, 795 N.E.2d 521, 527 (Mass. 2003) (holding "freedom from physical restraint is fundamental," and restrictions on it must be "narrowly tailored to further a legitimate and compelling governmental interest"); *United States v. Powell*, 813 F. Supp. 903, 906 (D. Mass. 1992) (same); *cf. Atkins v. Michigan*, 644 F.2d 543, 550 (6th Cir. 1981), cert. denied 452 U.S. 964 (1982) (where Michigan court rules required that lower court's grant of bail remain in effect absent an abuse of discretion, reviewing court's cancellation of bond without explanation "constitutes arbitrary denial of . . . fundamental interest in liberty pending trial and therefore violated [plaintiff's] right to due process of law"); *but see Bryer v. Creati*, 915 F.3d 1556, 1556 (1st Cir. 1990) (drawing the punitive/regulatory distinction when weighing pretrial detainee's liberty interest against the state's relevant interests), *Lopez-Valenzuela* is by far the most prominent. However, *Lopez-Valenzuela* does not create a compelling circuit split given that it is readily factually distinguishable from this case and given that it is the only federal circuit court opinion that even comes close to

addressing substantive due process policies related to pretrial detentions.

The Ninth Circuit's decision in *Lopez-Valenzuela*, 770 F.3d 772, does not compel a different result than that reached by the lower courts here or warrant this Court's review in this case. The circumstances at issue in *Lopez-Valenzuela* are too factually distinguishable from the instant case to be instructive. First, in *Lopez-Valenzuela*, the Ninth Circuit minimized this Court's repeated edicts that substantive due process analysis "must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Flores*, 507 U.S. at 302 (quoting *Collins*, 503 U.S. at 125) (alteration in original). Relying upon concurring and dissenting opinions in this Court's subsequent decisions referencing *Salerno*, the Ninth Circuit concluded that case announced a generalized fundamental right to "freedom from bodily restraint" writ large. *See Lopez-Valenzuela*, 770 F.3d at 780 (citing *Flores*, 507 U.S. 292, 316 (O'Connor, J., concurring); *Foucha*, 504 U.S. at 93 (Kennedy, J., dissenting)).

In *Lopez-Valenzuela*, the Ninth Circuit confronted Proposition 100, the regulation at issue in that case, which proposed to categorically deny bond to certain cohorts of individuals charged with crimes whose presence in the United States was illegal under the country's immigration laws. *Id.* That regulation, unlike the Policies here, created a prolonged pretrial detention system and the Ninth Circuit responded with a similarly general entitlement not to be so detained. *Id.*

Based on this highly-generalized formulation of the asserted liberty interest at issue and "dubious constitutional analysis," *Cty. of Maricopa, Arizona v. Lopez-Valenzuela*, 135 S. Ct. 2046, 2046 (Mem) (2015) (Thomas, J., dissenting from denial of writ of certiorari), the Ninth Circuit found that the Fourteenth Amendment's guarantee of "liberty" means "freedom from bodily restraint." *Lopez-Valenzuela*, 770 F.3d at 788-81; *contra Cty. of Maricopa, Arizona*, 135 S. Ct. at 2047 (citing *West Coast Hotel Co.*, 300 U.S. at 391 (emphasizing that "the Constitution does not recognize an absolute and uncontrolled liberty")). In formulating the asserted liberty interest at issue in this manner, the Ninth Circuit deviating from this Court's requirement that it carefully describe the right at issue to conclude that substantive due process offers broad protections against freedom from bodily restraint. *See Lopez-Valenzuela*, 770 F.3d at 776 (noting that plaintiffs alleged that "(1) arrestees have a liberty interest in being eligible for release on bond pending resolution of criminal charges and the Proposition 100 laws are not narrowly tailored to serve a compelling governmental interest" and that "(2) the laws impermissibly impose punishment before trial"); *contra, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) ("[A]rrestees whose bail have been set have a protected liberty interest in posted bail and being freed from detention and, thus, depriving such arrestees of that liberty interest may violate due process" if government lacks a "legitimate goal" related to the deprivation); *Holland*, 895 F.3d at 293 (while recognizing that "substantive due process protects freedom 'from government custody, detention, or other forms of physical restraint prior to any determination of guilt,'" also recognizing that "an arrestee's right to

freedom from pretrial detention is subordinated where there has been an adjudication that detention is necessary because an arrestee presents an identified and articulable threat to an individual or the community") (internal citations omitted).

The impetus behind the Ninth's Circuit holding is understandable: Proposition 100 categorically and indefinitely denied bail to individuals charged with serious felony offenses who entered or remained in the United States illegally, regardless of individualized flight risk or danger to the community. *Lopez-Valenzuela*, 770 F.3d at 775-76. The regulation also created an irrefutable presumption that individuals who are in the United States illegally are unmanageable flight risks such that no safeguards could ensure either their appearance at trial or community safety if they were released. *Id.* The Ninth Circuit responded to the absolutism of Proposition 100 with its own form of absolutism, by deviating from this Court's guidance regarding the analytical framework appropriate in substantive due process cases in the criminal justice context. *See, e.g., Salerno*, 481 U.S. at 748-751 (refusing to categorically state that freedom from pretrial detention is a fundamental right); *Foucha*, 504 U.S. at 81 (distinguishing *Salerno*, which involved pretrial detention in the criminal context, from a situation where the individual in question has been acquitted of all criminal charges by reason of insanity and has been deemed by the state to no longer be insane and thus cannot be held by the state under a civil commitment scheme); *Zadvydas*, 533 U.S. at 682, 689 (distinguishing that "[t]he proceedings at issue here are civil, not criminal," as in *Salerno*, in deciding that the post-removal-period regulation codified in

8 U.S.C. § 1231(a)(6) authorizes the federal government to detain a removable alien "only for a period *reasonably necessary* to secure the alien's removal") (emphasis original). Based on this Court's decisions, the formulation of the asserted liberty interest to which the Ninth Circuit concluded should have been refined to something closer to freedom from bodily restraint unless an individualized risk analysis, which may consider immigration status among other factors, indicates that the individual poses a threat to community safety or an unmanageable flight risk. However, given that *Lopez-Valenzuela* is an outlier among federal circuit court opinions and involves highly distinct factual circumstances from the instant case, there is no compelling circuit court split to warrant this Court's review.

At this juncture, this Court's review is premature. While correctly decided and in line with this Court's precedents, the Tenth Circuit's decision in this case is unpublished. Its value is persuasive rather than binding to the lower courts that comprise the Tenth Circuit. Nor have many other circuit courts addressed the specific issue in this case: whether freedom from pretrial detention absent satisfaction of all bond conditions is a fundamental right. As a result, this Court should refrain from granting the Petition in this case in favor of allowing the circuit courts to develop a more comprehensive body of case law for its review.

III. DAWSON'S FAILURE TO PLAUSIBLY PLEAD THE "REASONABLY RELATED" STANDARD FOR THE NON-FUNDAMENTAL RIGHT AT ISSUE DOES NOT WARRANT THIS COURT'S REVIEW.

Finally, because the district court and Tenth Circuit resolved the claims at issue here on a motion to dismiss for failure to state a claim, the question before this Court should it grant the Petition will be whether the allegations in the Amended Complaint are "sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). They are not.

The County explicitly identifies its objectives in the Policies. *See, e.g.,* Pet. App. 81 (to coordinate electronic monitoring services and/or mental health competency evaluations ordered/directed by the courts); 82 (coordinating service with the electronic monitoring vendor); 83 (determining whether the defendant's release poses a risk to the community and coordinating with other agencies, including the district attorney's office, to address that risk); 84 (to monitor defendants to maximize victim and/or public safety); 84-85 (to permit time for Pretrial Services case managers to meet with defendants to explain the electronic monitoring program and defendant's responsibilities so monitored defendants can be successful under supervision); 86 (permitting case managers time to gather necessary information to permit appropriate participation in the program). In the face of these expressed goals, Dawson's allegations that the Policies serve no purpose are not plausible. *Compare Gaylor v. Does*, 105 F.3d 572, 576-77 (10th Cir. 1997) (citing *Salerno* for the proposition that regulations must not

infringe on liberty interest in being released once bail is set in a manner that is unreasonable and unrelated to a legitimate goal); *Dodds*, 614 F.3d at 1193 (where defendant government officials did not identify any government objectives for a policy, the court can easily conclude that the policy does not reasonably relate to a legitimate government objective and therefore violates due process).

The Court will only reach the issue of whether the Amended Complaint meets the applicable standard of review once it affirms that the right to be free from pretrial detention having paid a court-ordered bond but while other court-ordered bond conditions are outstanding is not a fundamental right. On the other hand, if the Court determines it is a fundamental right, then the Court would be unable to reach the question of whether Dawson has plausibly pled that the Policies violate the strict scrutiny standard because neither of the lower courts addressed that issue. However, if this Court concludes that the right at issue is not a fundamental right, the Tenth Circuit properly applied the correct standard in reviewing a motion to dismiss and this Court's review of the reasonably related standard, particularly at this stage of litigation, establishes no new or clarifying precedent. Accordingly, this Court should deny the Petition.

A complaint may escape dismissal under Rule 12(b)(6) only if it contains enough allegations of fact "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard requires that a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S.

at 555 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004), for the proposition that "the pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action"); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007), for the holding that "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims") (emphasis original).

Moreover, because "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation,'" the successful complaint must provide "more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Nor can a plaintiff elude the plausibility requirement through expansiveness: allegations are not plausible "if they are so general that they encompass a wide swath of conduct, much of it innocent." *Robbins*, 519 F.3d at 1247. Where "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.[2]

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[2] In contrast to "conceivable" and its synonym "imaginable," *see* Merriam-Webster, "conceivable," https://www.merriam-webster.com/dictionary/conceivable (last visited Oct. 29, 2018), plausible means "true or successful; possibly correct or even likely; reasonable," BLACK'S LAW DICTIONARY, "plausible" (10th ed. 2014).

From the outset of this action, Dawson has insisted that the Policies serve no purposes – compelling, legitimate, or otherwise – that would not be better served by the County outfitting individuals with GPS monitoring and releasing them over the weekends. App. 71-72, Am Compl., ¶¶ 20 ("This Delay by Policy required Plaintiff to languish in jail for three nights (Friday, Saturday, and Sunday) and three days (Saturday, Sunday, and Monday) after he posted bond and satisfied all other conditions of his release."); 21 ("The Delay by Policy inflicted upon Plaintiff (and untold other victims of the Policy) was completely unnecessary and unconscionable 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 monitoring within hours of posting bond – or even before posting bond, for that matter.") (emphasis added). The district court and the Tenth Circuit both properly rejected these allegations in the face of the explicit rationales provided by the challenged Policies themselves, which were attached to the Amended Complaint as exhibits. *See, e.g.,* App. 18-19, Order and Judgment of the Tenth Circuit (listing identified legitimate governmental interests for the Policies, including conserving money and effort, coordinating electronic monitoring services and/or mental health competency evaluations, monitoring defendants for victim and/or public safety, obtaining administrative convenience and efficiency, honoring court orders and following state laws, assuring a defendant's appearance for trial, efficiently coordinating between different governmental entities, and obtaining prison security). Where, as here, a plaintiff's conclusory allegations run up against explicitly expressed alternative

explanations, they are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (rejecting conclusory allegations in the face of "more likely explanations," in holding "[a]s between th[e] 'obvious alternative explanation,' *Twombly*, 550 U.S. at 567, for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion").

Nor can the Court substitute the arguments Dawson proffers in the Petition itself for the allegations in the Amended Complaint. *See, e.g.*, Pet. at 19-20. In the Petition, Dawson now argues that a court cannot even analyze his claims without "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." Pet. at 18-19. But this is exactly the type of pleading based on optimism rather than "reasonably founded hope," *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)), that *Twombly* and *Iqbal's* plausibility standard seeks to avoid. *See Twombly*, 550 U.S. at 561 (noting that previously, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery" in rejecting the "no set of facts" standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (alteration in original).

Similarly, Dawson's attempts to substitute his beliefs regarding the County's motivations for the County's explicitly stated rationales is insufficient to state a plausible Fourteenth Amendment substantive due process claim for a non-fundamental right. In the face of the County's explicit policy rationales, the Amended Complaint needed do something more than raise "naked assertions devoid of further factual enhancement" to survive a motion to dismiss for failure to state a claim. *See Iqbal*, 556 U.S. at 678-80, *and contrast* Pet. at 21 ("[T]he 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").

Even if the Court finds that Dawson's Petition highlights a need to clarify the nature of the right at issue, the implausibility of the allegations in the Amended Complaint and the Petition create a situation where this Court would either (1) not be able to determine how the strict scrutiny standard applies to the Policies if it determines the right is fundamental, or (2) simply affirm the Tenth Circuit's determination that Dawson failed to set forth plausible allegations to challenge the reasonably related standard for a non-fundamental right. Assuming this Court were to issue writ of certiorari and affirm the lower courts' determinations that this case involves a non-fundamental right, the result would be that this Court would not issue any new or clarifying precedent because Dawson's allegations are not plausible in the face of the expressed purposes for which the Policies were enacted. *Accord Ashcroft*, 556 U.S. at 681 (rejecting conclusory allegations in the face of "more likely explanations," in holding that where an obvious

alternative explanation exists, inferring support for a plaintiff's claim is not a plausible conclusion). This is particularly true because of the procedural posture of this case, which was resolved on a motion to dismiss. In turn, the procedural posture of the case eliminates the viability of many of the arguments Dawson makes to support his position that this Court should review his case in the first place. Accordingly, the Court should decline to issue a writ of certiorari.

There is simply no need for the Court to review the question presented by the Petition considering the Court's well-established case law and the ability to distinguish this case from *Lopez-Valenzuela*. Moreover, because the lower courts decided this case on a motion to dismiss, this Court may take up the case only to resolve it on the sufficiency of the pleadings, which is highly unlikely to result in new or clarifying precedent. As a result, the lower courts' application of law to the allegations in this case does not warrant this Court's review.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted.

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