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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY ARGUMENT

I. The County and the Tenth Circuit Have Misapplied this Court's Requirement of a "Careful Description" of the Liberty Interest at Stake.

The County's and the Tenth Circuit's fundamental error lies in rejecting the concept of a "generalized interest in liberty." According to the County and the Tenth Circuit, it is necessary to define any claimed substantive due process liberty interest with great specificity. They find it insufficient to say simply that Mr. Dawson claims a fundamental right to bodily liberty, or even a fundamental right to be released after posting bond; they feel it is imperative to add that he was also "awaiting the fulfillment of another court-ordered release condition" (*i.e.* the GPS fitment). Having defined the claimed right so excruciatingly narrowly, and finding no prior judicial recognition of such a specific right (not surprisingly), they then invoke the need for great caution in "expanding" due process protection to encompass this proposed "new" right. Thus, the County's and the Tenth Circuit's insistence upon great specificity in defining Mr. Dawson's claimed right is a predicate step toward denying recognition of this "new" right in the name of judicial conservatism.

However, if liberty from detention is in fact a generalized and fundamental right – as history and the text of the due process clause certainly indicate – then this form of argument serves only to stymie the protection of this basic right whenever a factually unique situation arises. The government is invited to expand its detention power in myriad new ways,

because the burden is improperly cast upon the detained person to establish a "new" right of liberty for every new detention situation. The basic right of liberty is eroded rather than bolstered because the issue is framed as the detained person attempting to "expand" due process jurisprudence, when in fact the government is simply utilizing a new context for infringement of a historic and fundamental human right.

A review of this Court's opinions shows that the "careful description" requirement applies only in the context of proposed extensions of substantive due process protection to rights not specifically enumerated in the Constitution. The requirement apparently originated in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Court declined to recognize a substantive due process right to engage in homosexual sodomy. "[In] announcing rights *not readily identifiable in the Constitution's text* . . . the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." *Id.* at 191 (emphasis added).

The Court's requirement to clearly define a previously unrecognized substantive due process right was further applied and developed in: *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (asserted right of government employee to a safe working environment); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (asserted right of a child ward of the state to be placed with a private custodian rather than a government institution); *Wash. v. Glucksberg*, 521 U.S. 702, 723 (1997) (asserted right to commit suicide and to have assistance in doing so); *Chavez v. Martinez*, 538 U.S. 760, 775-776 (2006) (asserted right not to be talked to by the police); and *Kerry v. Din*, 135 S. Ct. 2128, 2134

(2015) (asserted right to have a spouse's immigration visa granted; "before conferring constitutional status upon a previously unrecognized 'liberty,' we have required 'a careful description of the asserted fundamental liberty interest'").

Notably, freedom from bodily confinement was not involved in any of the foregoing "careful description" cases. Undersigned counsel have found no instance in which this Court has required a party asserting a right to liberty from detention – or any other well-recognized fundamental right – to "carefully describe" the right as a precondition to its protection. *Cf. Obergefell v. Hodges*, 2015 U.S. LEXIS 4250, 135 S. Ct. 2584, 2602 (2015) ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.").

The "careful description" requirement is thus a tool of judicial conservatism reserved for the evaluation of previously unrecognized substantive due process rights not explicitly appearing in the Constitution. It has no place where, as here, there is an asserted violation of a well-established fundamental right of liberty.

This is not to say that Mr. Dawson's mere assertion of the generalized right of liberty from detention ends the inquiry. Evaluating the County's justification for his detention is where all of the important analysis occurs. And in that context it is indeed crucial to have a "careful description" of the circumstances of the

detention and the government's justification for it. The County asserts that notwithstanding Mr. Dawson's posting of bond, his continued detention was required by an unsatisfied court-ordered GPS fitment requirement, and the County was justified in intentionally postponing the GPS fitment for three days in furtherance of the various purposes of the GPS monitoring Policies. The County wants to define Mr. Dawson's *right* in these specific terms; but it is more intellectually correct to define the County's *justification* in these specific terms, because the County has a very specific justification for infringing Mr. Dawson's generalized right to be free from governmental confinement.

When the issue is reframed in this manner, it becomes evident that Mr. Dawson is not attempting to "expand" the substantive due process right of liberty from detention. Rather, the County is attempting to expand the list of circumstances in which detention is held to be justified. This difference in perspective is ultimately outcome-determinative. Mr. Dawson no longer needs to establish a "new" due process right; the high barrier to recognition of "new" rights is inapplicable; and the question is simply whether the circumstances of this case present a sufficiently compelling governmental interest and sufficiently narrow infringement of Mr. Dawson's liberty interest to pass the strict scrutiny test. Under this approach Mr. Dawson wins, at least at this stage of the proceeding.

II. The Right to Liberty from Detention is Fundamental.

It is unsettling even to have to argue this proposition in 21st century America. The freedom to determine one's location and movement has been considered a basic human right since the Magna Carta, and it was firmly entrenched in English and Colonial law by the mid-1700s. *See Kerry v. Din*, 2015 U.S. LEXIS 3918, 135 S. Ct. 2128, 2133 (2015) ("the 'personal liberty of individuals' 'consist[ed] in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint,'" *quoting* 1 W. Blackstone, Commentaries on the Laws of England 130 (1769)).

As set forth in Mr. Dawson's Petition, this Court has repeatedly characterized the right to be free of imprisonment as fundamental. This Court has never declared that this right is non-fundamental. The County selectively quotes from *United States v. Salerno*, 481 U.S. 739 (1987), for the proposition that the right is non-fundamental. However, a fuller quotation shows that this Court unambiguously recognized that liberty from detention is a fundamental right that may be subjugated only to compelling governmental interests:

> 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. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. 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).

481 U.S. at 750-51.

This Court should grant certiorari and reverse the Tenth Circuit's manifestly erroneous ruling that Mr. Dawson's right to freedom from detention is non-fundamental.

III. The County's Asserted Justification for Mr. Dawson's Detention Does Not Survive Any Level of Scrutiny.

The Tenth Circuit held that the County's legislative Policy requiring Mr. Dawson to spend three days in jail awaiting GPS fitment was justified by administrative convenience: the County's preference to not perform GPS fitment over the weekend when relevant staff are not available. *See* App. 20. In its Opposition brief, the County does not defend this "administrative convenience" rationale for Mr. Dawson's weekend detention, perhaps recognizing that "administrative

convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974).

Instead, the County itemizes various governmental purposes that are evident from the face of the GPS monitoring Policies – such as monitoring defendants to maximize victim and/or public safety – and the County then caricatures Mr. Dawson's position: "In the face of these expressed goals, Dawson's allegations that the Policies serve no purpose are not plausible." Opposition at 23. The County's argument fails in two respects.

First, Mr. Dawson has never contended that the County's GPS Policies serve no purpose; rather, he acknowledges that the Policies are generally laudable. Mr. Dawson challenges only the mandatory three-day delay in GPS fitment for defendants who happen to post bond after 1:00 p.m. on a Friday. And, Mr. Dawson acknowledges that even this aspect of the Policies has a purpose: to protect the weekend leisure time of County employees. Mr. Dawson contends simply that this governmental purpose is not remotely sufficient to justify a three-day infringement of Mr. Dawson's fundamental right of bodily liberty.

Second, the County has not explained how any of the worthy purposes underlying the GPS Policies are advanced by a mandatory three-day delay in GPS fitment. The three-day delay – which occurs only on weekends – obviously serves only one purpose, which is unspoken in the Policies: to promote the convenience of County staff by not requiring them to work on the weekend. The Tenth Circuit relied on this

governmental purpose because it is the only purpose that is rationally promoted by the three-day weekend delay. The County's invocation of various meritorious purposes for the GPS Policies is a misdirection to avoid confronting the inconvenient truth that the three-day weekend delay advances only a relatively trivial governmental interest in avoiding work on the weekend.

This Court should grant certiorari and hold that "administrative convenience" in the form of taking the weekend off from work is an insufficient justification for the government to detain a person for three days – no matter what level of scrutiny applies.

IV. There Is a Split Between the Ninth and Tenth Circuits that Calls for this Court's Resolution.

The County argues that there is no real split between the Tenth Circuit's decision here and the Ninth Circuit's decision in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014), because *Lopez-Valenzuela* is factually distinguishable. This is yet another variant of the County's misapplication of the "careful description" requirement. Viewed through the County's "careful description" prism, *Lopez-Valenzuela* holds that a criminal defendant has a fundamental right to be released on bond even when illegally present in the United States; *Dawson* holds that there is no fundamental right to be released from detention after posting bond but prior to satisfying other court-ordered conditions of release; *voila*, there is no conflict because the two cases involve entirely different rights! This is mere sophistry.

The Tenth Circuit's decision in this case is substantively and methodologically irreconcilable with *Lopez-Valenzuela*. The Tenth Circuit relied upon *Salerno* in rejecting a generalized right of liberty from detention and employed the "careful description" approach in refusing to recognize a "new" right of liberty framed in the specific facts of the case. The Ninth Circuit relied upon *Salerno* in recognizing a generalized right of liberty from detention and declined to "carefully describe" the right in terms of the specific facts of the case. *See* 770 F.3d at 779-80 (majority op.), 799-800 (Tallman, J., dissenting). Regardless of one's views on the merits of these questions, it is undeniable that *Dawson* and *Lopez-Valenzuela* conflict on these fundamental legal issues.

Tellingly, the Tenth Circuit's *Dawson* opinion has not even brought clarity within the Tenth Circuit, as subsequent opinions attest. *See Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018) (expressing continuing "uncertainty about when we apply these various [substantive due process] tests"); *Moya v. Garcia*, 887 F.3d 1161, 1174 (10th Cir. 2018) (McHugh, J., concurring in part and dissenting in part: "I . . . cannot resolve the crosswinds in our [substantive due process] case law.").

While the law remains unclear and conflicting in the circuit courts, the district courts continue to receive substantive due process challenges to over-detention practices similar to the one involved here. *See Lynch v. City of New York*, __ F. Supp. 3d __, 2018 U.S. Dist. LEXIS 168153, *16 (S.D.N.Y. 2018) (declining to dismiss substantive due process claim based on detention of defendants after posting bond for no

apparent reason other than administrative convenience; "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

In sum, the conflict between the Tenth Circuit and Ninth Circuit on these issues is emblematic of a more widespread lack of clarity and uniformity in the analysis of substantive due process claims involving detention. This Court's guidance is badly needed.

V. Much of the Case Law Cited by the County is Inapposite.

Given the length limitation for this Reply brief, it is not feasible to address in meaningful detail the numerous cases cited by the County. Nonetheless, two summary points are in order.

First, the thrust of the County's argument appears to be that the right to liberty from detention has been subjected to so many exceptions in so many different contexts – from civil unrest to mental incapacity to enemy combatants – that the right cannot possibly be fundamental. It is true that this Court and others have upheld the constitutionality of detentions in numerous specific contexts, but this demonstrates only that the government has a compelling interest in detention in numerous settings; it does not logically follow that detention is inevitably constitutional. It is also false logic to conclude that the right of liberty from detention is non-fundamental because it has been subordinated in numerous specific settings. The fundamental nature of the right derives from its deep historical roots and the recognition that the word "liberty" in the due

process clause means first and foremost liberty from imprisonment. These facts remain unassailable no matter how frequently liberty might be sacrificed to a greater social need.

Second, even if the County's logic was tenable, many of its citations are not. For example, *Snyder v. Mass.*, 291 U.S. 97 (1934) – cited five times in the Opposition brief – involved the utterly irrelevant question of whether due process is violated when a criminal defendant is not allowed to attend a site visit with the jury; moreover, *Snyder* was expressly overruled in *Malloy v. Hogan*, 378 U.S. 1, 14 (1964). The County relies upon multiple irrelevant Fourth Amendment cases – *Gerstein v. Pugh*, 420 U.S. 103, (1975); *Flemister v. City of Detroit*, 358 Fed. Appx. 616, 621 (6th Cir. 2009); and *Sanchez v. Swyden*, 139 F.3d 464, 465 (5th Cir. 1998) – and even a minimum wage case, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). Such distracted legal analysis further shows that the current unsettled state of substantive due process jurisprudence is causing widespread bewilderment.

* * *

The power to detain a single person without justification is the power to control an entire population through intimidation. Of course we are not immediately at risk of such dire consequences. But the arc of history is very long. Times can change quickly. History teaches that the institutions and values necessary to defeat despotism must be firmly in place before the despot asserts power, because liberal reform rarely occurs afterwards except by force.

Right now in this country, or at least in the Tenth Circuit, it is apparently permissible for the government to detain a person for three days (if not longer) solely because it would be inconvenient to process the person's release. Presumably any less trivial justification would be more than sufficient. The prospects for abuse are obvious – not now, of course, but perhaps someday in a dystopian future . . . where the judiciary has been delegitimized and an autocrat coopts law enforcement to advance his accretion of power. As a matter of tri-cameral house-keeping and Bill of Rights hygiene, it would be exceptionally helpful for this Court to clarify *at this time* that freedom from detention is a fundamental right, the infringement of which must be narrowly tailored to serve a compelling governmental interest. In addition to buttressing our most basic freedom for the long term, this would prevent innumerable daily injustices of the type that Mr. Dawson endured.

This case presents an ideal vehicle to accomplish these vitally important tasks for our future safety, dignity, and prosperity.

For these reasons, this Petition should be granted.

Respectfully submitted.

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