No. 16-543

IN THE

Supreme Court of the United States

ERIK MICKELSON AND COREY STATHAM, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

COUNTY OF RAMSEY, KEEFE COMMISSARY NETWORK, LLC, FIRST CALIFORNIA BANK, OUTPAY SYSTEMS, LLC AND JOHN DOES 1-100,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT KEEFE COMMISSARY NETWORK, LLC

RUSSELL S. PONESSA
CHRISTOPHER M. DOUGHERTY
HINSHAW & CULBERTSON LLP
333 South Seventh Street
Suite 2000
Minneapolis, MN 55402
(612) 333-3434

JOEL D. BERTOCCHI
Counsel of Record
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Respondent Keefe Commissary Network, LLC

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QUESTION PRESENTED

As permitted by Minnesota law, Ramsey County ("the County") charges each person who is arrested and detained beyond the booking process a fee of $25. The fee is either collected from funds in the arrestee's possession at the time of arrest or charged to his inmate commissary account if he does not have sufficient funds when arrested. It is refundable to the arrestee if he is ultimately not charged with a crime, or if charges are dismissed, or if he is acquitted. To facilitate such refunds, the County furnishes each arrestee with a "Booking Fee Refund Form" that can be used to obtain a refund.

Petitioners were arrested by the County and detained for at least some period after being booked. The $25 fee was collected from money in their possession at the time.

The question presented by the Petition is whether the County's collection of the $25 booking fee without a pre-deprivation hearing violated Petitioners' due process rights.

RULE 29.6 STATEMENT

Keefe Commissary Network, L.L.C. ("KCN") is a Missouri limited liability company. It is a wholly-owned subsidiary of Centric Group, L.L.C. ("Centric"). Centric is a privately held Missouri limited liability company. No publicly held company owns 10% or more of the stock of either KCN or Centric.

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INTRODUCTION

In the courts below Petitioners challenged the constitutionality of two practices of the County with respect to persons it arrested: collecting a $25 booking fee from arrestees without first providing them with a pre-deprivation hearing; and returning money seized from arrestees by means of prepaid debit cards that, under certain circumstances, charge fees when used. Respondent Keefe Commissary Network, LLC ("KCN") was only alleged by Petitioners to have been involved in the program under which the debit cards are issued. The Eighth Circuit upheld both the collection of the booking fee without a prior hearing and the use of debit cards to refund seized money. Pet. App. 1a-26a. In their Petition, however, Petitioners argue only that the County violated their Due Process rights by collecting the $25 booking fee without first affording them a hearing.

There are four reasons to deny the Petition, generally and with respect to Respondent KCN in particular. *First*, Petitioners' only claim against KCN involves its role in the issuance of debit cards *to* arrestees when they are released to refund money seized when they were arrested. That claim is not fairly encompassed within the question presented by the Petition, which challenges the County's collection of a booking fee *from* arrestees at the time of their arrest, a process in which Petitioners do not claim KCN plays any role. *Second*, and contrary to Petitioners' contention, there is no conflict among the lower courts on the booking fee issue; indeed, the Courts of Appeals that have addressed fees of this type have upheld them, and the only circuit-level "conflict" identified by Petitioners is a conflict *within* a Circuit. *Third*, the Eighth Circuit was correct in applying the balancing test of *Mathews v. Eldridge*,

424 U.S. 319, 335 (1976), to decide that no pre-deprivation hearing is required before the County collects the $25 booking fee because the County has a legitimate interest in collecting it (and doing so up front, while it has possession of the funds), because the amount of the fee is modest and because available post-deprivation procedures are adequate to guard against erroneous determinations and to make refunds available for those who qualify. And *fourth*, and although the Eighth Circuit did not reach the issue, KCN did not act under color of law—indeed, did not act at all—in connection with the collection of the booking fee. For those reasons the Petition should be denied.

STATEMENT

A Minnesota statute permits counties in that State to charge a fee to "each person who is booked for confinement at a county or regional jail, and not released upon completion of the booking process." That fee may be "payable immediately from any money then possessed by the person being booked, or any money deposited with the sheriff's department on the person's behalf." Minn. Stat. § 641.12(1). Under that authority the County collects a $25 fee from every arrestee who is held in custody beyond the time necessary for processing. If the person does not have sufficient funds in his possession to cover the fee at the time of arrest, the amount is charged against his jail commissary account, and he may not make purchases on that account until the fee is paid. Pet. App. 2a-3a.

An arrestee who is either acquitted or not charged, or whose charges are dismissed, may obtain a refund of the booking fee by submitting a "Booking Fee Refund Form." The form is provided to all released inmates. Pet. App. 3a. Nowhere in their amended complaint or

its exhibits (Pet. App. 64a-104a) do Petitioners allege that KCN is involved in the collection of the booking fee.

It is the policy of the County to seize all cash in the possession of arrestees at the time they are booked. Rather than returning cash or issuing a check upon release, though, the County returns seized funds, less the booking fee, in the form of prepaid debit cards. The cards incur fees for certain uses, including ATM and maintenance fees, but they are free to activate, and if used within 36 hours of issuance they incur no maintenance fee. See Pet. App. 3a-4a (listing fees). According to the Eighth Circuit, KCN "coordinates the Ramsey County inmate trust-fund and release services program," while the actual issuance of debit cards and resulting transactions are handled by other defendants. Pet. App. 4a. In their complaint, Petitioners alleged that KCN "contracted with the Ramsey County defendants to provide prepaid debit card services to persons booked in Ramsey County detention facilities." Pet. App. 65a-66a; see also Pet. App. 68a, 70a.

Petitioners were both arrested and detained beyond booking in the County. When Petitioner Mickelson was arrested he had $95 in his possession. The County collected the $25 booking fee, and when he was released he was issued a $70 debit card. He incurred $5 in fees using it. Petitioner Mickelson ultimately pled guilty to an ordinance violation. Pet. App. 4a. When Petitioner Statham was arrested he had $46 in his possession. The County collected the $25 fee, and when he was released he was issued a debit card with a $21 balance. He paid $7.25 in fees to use it. Charges against Petitioner Statham were dismissed. Pet. App. 4a-5a. The Eighth Circuit indicated that Petitioner Statham "did

not receive a refund of the $25 booking fee," Pet. App. 5a, but his complaint does not say whether he did or didn't, nor does it indicate whether he took any steps to obtain a refund of the fee. See Pet. App. 20a (Eighth Circuit observes that "Statham, though eligible, did not allege in the complaint that he applied for return of his funds using the Booking Fee Refund Form or the jail grievance procedure").

On their own behalf and on behalf of a purported class of plaintiffs, Petitioners sued the County, KCN and two other private defendants, First California Bank ("FCB") and Outpay Systems, LLC ("Outpay"), in federal court, alleging both that collecting the booking fee without a pre-collection hearing and using debit cards that could charge fees to refund seized money violated their due process rights. See Pet. Ap. 81a-82a. They also pled state law counts of conversion, civil theft and unjust enrichment. Pet. App. 83a-84a. The United States District Court for the District of Minnesota dismissed their complaint. Pet. App. 27a-62a. In doing so the District Court observed that the booking fee "is imposed and collected solely by Ramsey County and not the corporate Defendants." Pet. App. 54a n.4.

On appeal, a panel of the Eighth Circuit affirmed. Pet. App. 1a-26a. Initially considering the booking fee issue, the Court acknowledged that Petitioners had a property right in the $25 collected from them. Pet. App. 7a. Applying the balancing approach adopted in *Mathews*, and relying on the Sixth Circuit's decision in *Sickles v. Campbell Cty.*, 501 F.3d 726 (6th Cir. 2007), which had upheld a similar fee against a due process challenge, the Eighth Circuit ruled that the balancing of interests did not require a hearing before the booking fee was collected. The Court held that while the

$25 collected from Petitioners was "not an insubstantial amount," its collection was not the sort of government conduct that had been held to require a pre-deprivation hearing. Pet App. 8a-9a, citing, *inter alia*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 (1978) ("cessation of essential services"). The Court also concluded that the fee furthered a substantial interest of the County in helping manage incarceration costs and furthering offender accountability, and that allowing it to be collected at arrest furthered that interest by permitting the County to collect it at the best opportunity and with the lowest administrative cost. Pet. App. 9a-11a. Completing its *Mathews* balancing, the Court concluded that the likelihood of an erroneous deprivation was lessened both by the requirement that probable cause exist in order to make an arrest and by the ability of an inmate who qualified to obtain a refund by completing the refund form provided upon release. Pet. App. 11a-13a. And the Court rejected Petitioners' contention that all deprivations that "occur[] pursuant to an established state policy" require a pre-deprivation hearing as inconsistent with its own and this Court's precedent, including the balancing approach endorsed in *Mathews*. Pet. App. 16a-18a.

In a separate section of its opinion the Eighth Circuit addressed Petitioners' claims about the County's use of debit cards to refund seized funds. The Court initially concluded that the use of debit cards represented a lesser "deprivation" of those funds because they actually made returned funds immediately available, as distinguished from the County's prior system of issuing checks that could not be cashed until they were verified. Pet. App. 22a. The Court also considered the various fees that might be charged in connection with the use of the debit cards (listed at Pet. App.

3a-4a), but noted that a released inmate could avoid paying any maintenance fee by spending the funds within 36 hours and that he could convert the cards to cash either (a) with no fee at certain compatible banks, or (b) with only a $2.75 ATM fee at listed ATMs. See Pet. App. 23a ("According to the fee schedule provided to each inmate, fees may be avoided by the vast majority of, and perhaps all, arrestees."). Given these ways to avoid or minimize fees, the Court held that the use of debit cards amounted to, if anything, a *de minimis* deprivation. Pet. App. 23a-25a. And the Court finally noted that Petitioners' claims that use of the debit cards denied them due process also failed because they had not identified any factual dispute with respect to the debit cards and fees that additional legal "process" would resolve. Pet. App. 25a, citing *Codd v. Velger*, 429 U.S. 624 (1977).

Because the Eighth Circuit panel held that Petitioners had not alleged a constitutional violation, it did not reach arguments advanced by KCN, FCB and Outpay that they were not liable for any constitutional violations because they had not acted under color of law. Pet. App. 26a n.8. The Eighth Circuit denied both panel and *en banc* rehearing. Pet. App. 63a. This Petition followed.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CLAIMS AGAINST KCN ARE NOT FAIRLY ENCOMPASSED BY THE QUESTION PRESENTED IN THE PETITION.

One reason to deny the Petition, at least as to Respondent KCN (and likely as to all three private party Respondents), is that the issues Petitioners raised below about KCN, which center around its

involvement in the process of issuing debit cards for the purposes of returning funds *to* arrestees like Petitioners upon their release, are not fairly encompassed by the question presented in the Petition, which involves only the County's collection of the booking fee *from* arrestees upon their arrest. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Accordingly where an issue raised by a party is not "fairly encompassed" within the question presented by a petition for *certiorari*, the Court will not address that argument. *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). That is the case with respect to KCN.

As explained *supra* p. 2-3, Petitioners did not allege in their complaint that KCN was involved in any way in the County's collection of the booking fee. But the collection of that fee is the sole focus of the Petition, both as to the question presented and the arguments that support it. The question presented by the Petition makes no reference to debit cards at all, much less to any purported constitutional violation connected to their issuance or use. After stating that "Ramsey County confiscates $25" from arrestees and requires them to "navigate a bureaucratic obstacle course in order to get their money back," and asserting that the Eighth Circuit's holding expanded supposed disagreement among the lower courts about "what limits, if any, due process imposes on *municipal fees*," the Petition asks "[w]hether due process allows governments to *confiscate money from* innocent people on the basis of an arrest and then force those people to prove that they are entitled to have their money returned." Pet. at i (emphases added). This question is plainly directed at the County's collection of the booking fee as a result of an arrest, an act with which KCN is not

alleged to have been involved. Nor do the question's references to a "bureaucratic minefield" or to requiring arrestees to "prove that they are entitled to have their money returned" draw in KCN; nothing in Petitioners' complaint or the Petition suggests that KCN is involved in the accepting and evaluating of such "proof" or that KCN's alleged causing of the issuance of a debit card to refund other money is anything more than ministerial.

Were there any room for doubt as to the scope of the question presented, the supporting arguments in the Petition remove it. The Petition does not include *any* arguments with respect to either the conduct of KCN or the part of the Eighth Circuit's opinion that discussed the use of debit cards. Instead it addresses only the part of the opinion that considered whether the County could collect the booking fee without a pre-deprivation hearing. On that issue the Petition argues that a pre-deprivation hearing is always required before a booking fee is collected and that the Eighth Circuit erred in applying *Mathews'* balancing test. Pet. at 8-18. The remainder of the Petition argues that there is division among the lower courts on the issue and that it is an issue of importance. But other than in their description of the underlying facts, see Pet. at 3-5, Petitioners do not mention KCN or the debit cards in the body of the Petition.

Accordingly the nature and scope of the arguments in the Petition make clear that the question it presents simply does not involve debit cards or KCN, even as a "subsidiary" issue to those involving the booking fee. See Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27,

30-31 (1993) (*per curiam*) ("Unless we can conclude that the question of the denial of petitioner's motion to intervene in the Court of Appeals was 'fairly included' in the question relating to the vacatur of final judgments at the parties' request, Rule 14.1 would prevent us from reaching it.").

Because the Petition does not raise any issues with respect to the use of debit cards to return seized funds, and because KCN is neither alleged nor argued to have been involved in the collection of the booking fees that petitioners *do* challenge, no issue or argument about KCN is fairly included within the question the Petition presents. The booking fee question actually raised by Petitioners is "analytically and factually distinct," see *Izumi Seimitsu*, 510 U.S. at 34, from the issue of whether the County is permitted to use debit cards to refund money upon release; the former addresses taking money from arrestees at the outset of the arrest process, while the latter concerns returning money to them at a distinct later stage in the process—and, critically, not the same money. Indeed, as is clear from the way the issues were separately addressed by the Eighth Circuit, it is possible to decide the booking fee question—whether additional process is required to *collect* booking fees from arrestees—without addressing whether the way other money (collected for other reasons) is later *refunded* passes constitutional muster.

Granting the Petition with respect to KCN would thus run afoul of the important concerns behind Rule 14.1(a), including providing adequate notice to respondents of the issues and arguments to be raised and allowing the Court to decide whether to take the case based on an accurate description of its scope. See *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992).

Accordingly the Petition should be denied to the extent that it purports to seek any relief against KCN.

II. PETITIONERS' PURPORTED "WIDESPREAD DISAGREEMENT IN THE LOWER COURTS" DOES NOT EXIST.

Petitioners claim there is "spreading disagreement" among lower courts that have considered whether a municipality can charge a fee to arrested persons without a pre-deprivation hearing in order to defray the cost of their incarceration. Pet. at 18. A closer examination of Petitioners' arguments on this point demonstrates that there is no such conflict *among* the lower courts, even if Petitioners do identify a lively one *within* a single court.

As their "marquee example of disagreement within the lower courts" Petitioners cite *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545 (7th Cir. 2014), an *en banc* decision in which the ten judges of the Seventh Circuit unquestionably fractured into four voting groups over the validity of a $30 fee charged to arrestees by an Illinois village. Because it represents the views of judges of a single Circuit, though, it is more precisely described as a marquee example of disagreement within *a* lower court. The end result in *Markadonatos* was the affirmance, without a majority opinion, of a district court ruling dismissing a case that, like Petitioners', challenged a booking fee. 760 F.3d at 545. Of course an intra-Circuit conflict, whatever internal disagreement it may expose within a single court, does not provide grounds for granting *certiorari*. See, *e.g.*, *Taylor v. United States*, 493 U.S. 906 (1989) (Stevens, J., concurring in denial of *certiorari*) ("Because the petition does not identify any *inter-Circuit* conflict concerning the question presented . . . the Court's denial of certiorari today is entirely consistent with rules governing the

management of our certiorari docket.") (emphasis original).

Because in the end it affirmed the dismissal of a case like this one, and however many separate opinions it generated *within* the Seventh Circuit, *Markadonatos* nonetheless stands on the side of upholding the constitutionality of such fees.[1] And a brief canvass of the other cases Petitioners cite reveal that *Markadonatos* reflects no "disagreement" with other Courts of Appeals. As Petitioners acknowledge, Pet. at 20, the Sixth Circuit's decision in *Sickles,* 501 F.3d at 732, on which the Eighth Circuit relied, also upheld the booking fee there considered. And so did the Third Circuit's decision in *Tillman v. Lebanon Cty. Corr. Facility*, 221 F.3d 410, 422 (3d Cir. 2000), a case also cited by the Eighth Circuit (Pet. App. 13a, 18a) but not mentioned by Petitioners. Indeed, the only case Petitioners cite that actually held that a booking fee was unconstitutional is a district court case from Ohio. See Pet. at 20, citing *Allen v. Leis*, 213 F. Supp. 2d 819, 831-34 (S.D. Ohio 2002). But even that purported conflict of views is illusory, given that *Allen* is no longer good law in the Sixth Circuit after *Sickles*—a case that Petitioners themselves cite *on the same page*. See Pet. at 20.

Contrary to Petitioners' wishful contention, then, there is no meaningful disagreement in the lower

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[1] As the Eighth Circuit noted, *Markadonatos* is also critically distinguishable from this case because the county defendant in that case "provided *no* post-deprivation remedy through which arrestees could receive a refund." Pet. App. 14a, citing *Markadonatos*, 760 F.3d at 567 (emphasis added). Even had the Seventh Circuit struck down the fee in that case, then, its decision would not have supported a similar result in this case, where the County provides a post-collection mechanism by which eligible inmates can obtain refunds.

courts with respect to the question they present in this case. Accordingly the Court need not step in to resolve a conflict that does not exist.

III. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE *MATHEWS* BALANCING TEST TO DETERMINE THAT NO HEARING WAS REQUIRED BEFORE THE RAMSEY COUNTY BOOKING FEE IS COLLECTED.

Petitioners' central contention with respect to the collection of the booking fee is that the Eighth Circuit erred in applying the *Mathews* balancing test to decide whether they were entitled to a pre-deprivation hearing before the fee was collected because the *Mathews* test is only to be used to "determin[e] *how much* process is due," rather than "whether pre-deprivation process is required *at all*," and that "[t]he requirement that governments must generally provide process before confiscating property is a *rule*, not a suggestion that is up for case-by-case reevaluation." Pet. at 6 (emphases original). This contention, that a government must *always* provide pre-deprivation legal process, is plainly wrong. It is fundamentally inconsistent with the Court's repeated admonition that due process is a flexible concept, and that the nature of legal process required by the constitution, as to whether, when and how much, depends on the circumstances. The Eighth Circuit's opinion to that effect was thus correct and is not in need of review.

The Eighth Circuit initially recognized that Petitioners had a property interest in the booking fees collected from them, and thus that "'the question remains what process is due.'" Pet. App. 7a, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Having described the process provided by the County—the

refund procedure available to eligible inmates upon release—the Court then considered "whether the process afforded is sufficient," a task that required balancing three factors: the private interest at stake; the governmental interest; and the risk of erroneous deprivation under the process offered. Pet. App. 7a. In doing so the Court cited its decision in *Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 690 (8th Cir. 1998), which in turn had cited *Mathews* for the proposition that those interests should be balanced in evaluating the process afforded by the government in depriving someone of a protected interest. Pet. App. 7a.

Contrary to Petitioners' claim, and although the Court has at times held that pre-deprivation process is required under certain circumstances, it has never prescribed a "rule" that it is always required, regardless of the scope of private and governmental interests and the actual risk of error. Rather, the Court has long held that the concept of due process is "flexible" and that it "'calls for such procedural protections as the particular situation demands.'" See, *e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Morrissey*, 408 U.S. at 481). And the Court has "rejected the proposition that [the principle that due process requires the opportunity to be heard] 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986) (emphasis added).

Where, as here, a deprivation occurs in connection with interaction with the criminal process the Court has invoked the protections of that process specifically to hold that pre-deprivation process is not always required. In *Gilbert* a state university police officer

was suspended without pay the day after being arrested and charged with a felony drug offense, and was not given a hearing on his suspension until after the criminal charges against him were dismissed. The officer sued the university president and other school officials, alleging that his suspension without prior notice and hearing violated his due process rights. 520 U.S. at 927-28. The Court observed that, as in this case with the booking fee, the parties did not dispute that the officer's suspension infringed on a protected property interest. *Id.* at 929. Balancing interests in accordance with *Mathews*, though, the Court held that no pre-deprivation hearing was necessary. Distinguishing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), a case that also involved a government employee's termination without a prior hearing, the Court observed that a suspended employee's interest is "relatively insubstantial" as long as the employee receives "a sufficiently prompt postsuspension hearing," while calling the State's interest in immediately suspending officials in positions of public trust who are charged with felonies "significant." *Gilbert*, 520 U.S. at 932.

In evaluating the risk of erroneous deprivation and need for procedural safeguards, the *Gilbert* Court reasoned that it had noted in *Loudermill* that the purpose of requiring a pre-termination hearing before terminating an employee in some circumstances was to determine whether reasonable grounds to believe the charges against the employee were true and supported the proposed action. *Id*. at 933 (citing *Loudermill*, 470 U.S. at 545-46). But in *Gilbert* the Court held that the "reasonable grounds" requirement was satisfied by the arrest and filing of charges. *Gilbert*, 520 U.S. at 933. *Gilbert* thus represents an instance in which the Court applied *Mathews* balancing to determine that, while in some cases suspension or termination may require a

pre-deprivation hearing, in a different situation the balancing might yield a different result. See also *FDIC v. Mallen*, 486 U.S. 230, 242 (1988) ("appropriate" to use the *Mathews* balancing test "[i]n determining how long a delay is justified in affording a post-suspension hearing and decision" where FDIC suspended bank president after he was indicted for making false statements without hearing).

The Court has also held that pre-deprivation process is not required where practical concerns suggest otherwise, and in doing so has also applied a balancing approach. For example, in *Parratt* the Court held that the ability to pursue a post-deprivation tort claim afforded sufficient process to a Nebraska prison inmate who claimed the loss of his property resulting from an unauthorized, negligent act by a prison employee. 451 U.S. at 541. The Court acknowledged prior cases in which it had held that a hearing was required before a state interfered with its citizens' liberty or property interests, but also cited cases holding that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id*. at 539. Again adopting a flexible approach that looked to individual circumstances, the Court observed that "we have rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property," and cited *Mathews* for that proposition. *Parratt,* 451 U.S. at 540 and n.5; see also *Hudson v. Palmer*, 468 U.S. 517 (1984)

(extending *Parratt* to an inmate's claim for an unauthorized intentional deprivation of property by state employees).

In addition to cases in which the Court has held that pre-deprivation process is, on balance, not required, the Court has also suggested, in cases where it *was* required, that the balance might come out differently in different circumstances. See, *e.g.*, *Zinermon v. Burch*, 494 U.S. 113, 128, 132 (1990) (calling *Parratt* and *Hudson* "special case[s] of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide"; "in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake… or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process"); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 ("On occasion, this Court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional 'advance procedural safeguards.'", citing, *inter alia*, *Mathews*, 424 U.S. at 339-49). Contrary to Petitioners' contention, these cases simply reflect different balancing rather than some limited "exigency" exception.

Accordingly the Court has often applied the balancing approach invoked in *Mathews* to determine that post-deprivation process may be adequate in certain circumstances, consistent with its "flexible" approach to due process questions. Indeed, as the Eighth Circuit

pointed out, Petitioners' suggestion that only exigent circumstances justify dispensing with pre-deprivation process "conflicts with the rule that where only property rights are involved mere postponement of the judicial enquiry is usually not a denial of due process if the opportunity for ultimate judicial determination of liability is adequate." Pet. App. 16a, citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (citation, internal alteration and internal quotation marks omitted), and *Ewing v. Mytinger & Castleberry*, 339 U.S. 594, 599 (1950) ("It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."). That Petitioners can invoke cases where the Court *has* required pre-deprivation process proves nothing other than that in some cases, such as where, for example, the seizure of real property is concerned (see Pet. at 12, citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)), the result may be different.

Having argued that pre-deprivation process is *always* required, though, Petitioners never really argue that the Eighth Circuit got the *Mathews* balancing wrong when it held that the County's booking fee did not require it. Instead they merely take issue, consistent with their all-or-nothing approach, with that Court's invocation of the County's interest in collecting the fee at the time of arrest. Their claims on this point are a bit overheated. Brushing past the very obvious notion that collecting a fee from money it already has in its possession as a result of making an arrest is far more certain for the County than trying to collect it later, Petitioners argue, with neither logic nor support, that the reason behind collecting the fee at the time of arrest is because people will be "too unsophisticated,

too busy, or too fearful of the government to successfully reclaim their money later." Pet. at 15. In addition to ignoring the undeniable administrative convenience in collecting money that is in hand, that assertion rings a bit hollow coming from one Petitioner who does not dispute that he was liable for the fee (because he pled guilty) and another who, so far as he alleges, did not even try to invoke the County's refund process. See *supra* p. 3-4. Nor did the Eighth Circuit sweepingly hold, as Petitioners claim, that "pre-deprivation process is unnecessary *whenever* 'the Government has an interest in collecting owed funds,'" Pet. at 15 (quoting Pet. App. 17a) (emphasis added); rather, what the Court actually held is that, given the amount of money at issue, the County's interest in collecting it (both generally and while it is in the County's possession), the existence of a refund process available upon release and the fact that the criminal process attendant to the arrest would help guard against erroneous determinations, the fee was, on balance, constitutional *under these circumstances*. It is Petitioners, rather than the court below, who have ignored the inherent flexibility that is part of every due process analysis in favor of a categorical approach. Because the Eighth Circuit got it right, this Court need not intervene.

IV. PETITIONERS DID NOT ALLEGE THAT KCN ACTED UNDER COLOR OF STATE LAW.

Because it ruled that the County's booking fee procedures did not violate Petitioners' due process rights, the Eighth Circuit did not reach KCN's additional argument that Petitioners had not alleged that it had acted under color of state law. Pet. App. 26a n. 8. On this record—and particularly given the scope of the

Petition—KCN's argument was plainly correct, and provides an additional ground to deny the Petition as to KCN.

In their complaint Petitioners tried to tie KCN to the County's alleged constitutional violation in collecting the booking fee—the only constitutional violation they complain of in their Petition, as explained above—by alleging the following:

> [KCN] contracted with the Ramsey County defendants to provide prepaid debit card services to persons booked in Ramsey County detention facilities. Due to KCN's position, entanglements, and the nature of the services it provides, KCN is a willful participant with the Ramsey County defendants in depriving Plaintiffs and those similarly situated of their constitutionally protected rights. Therefore, it acted under color of state law at all times relevant to this action.

Pet. App. 65a-66a. Those bare assertions constitute the only allegations in Petitioners' complaint that expressly address whether KCN acted under color of state law. Moreover, Petitioners did not allege any conduct of KCN other than contracting with the County for the issuance of debit cards. See Pet. App. 68a ¶ 9, 70a ¶ 31. As an initial matter, then, because the Petition does not make any arguments about the County's use of debit cards, see *supra* p. 7-8, it is clear that Petitioners are no longer pressing any claims with respect to conduct in which KCN even allegedly acted under color of law. For that reason the Petition should be denied as to KCN.

"Section 1983 provides a cause of action against any person who deprives an individual of federally

guaranteed rights 'under color' of state law. Anyone whose conduct is 'fairly attributable to the state' can be sued as a state actor under § 1983." *Filarsky v Delia*, 566 U.S. 377, 383 (2012) (citations omitted). "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999), quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). With respect to private entities like KCN, liability under § 1983 is possible only if "the deed of an ostensibly private organization or individual is to be treated . . . as if a State had caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The issue is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.'" *Rendell–Baker v. Kohn*, 457 U.S. 830, 838 (1982), quoting *Lugar v. Edmondson Oil Co*., *Inc.*, 457 U.S. 922, 937 (1982).

Thus "state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad.*, 531 U.S. at 295 (citation and internal quotation marks omitted). A two-part approach determines whether there is state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained

> significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937.

The allegations with respect to KCN in Petitioners' complaint do not make out a case that KCN was acting under color of law. First, as noted above, KCN is not alleged (or even argued) to have played *any* role in the collection of the booking fee by the County, which is all Petitioners actually challenge in this Court. But even if arguments about the use of debit cards to return seized funds were still in the case, Petitioners have never alleged conduct of KCN that is attributable to the State. According to Petitioners, the County chose to contract for the issuance of debit cards to inmates to refund money to inmates upon their release. But it is not the *providing* of debit cards (instead of refund checks or cash) that Petitioners challenged below; rather, their issue was the charging of fees for certain uses of those cards, which Petitioners claim violated their due process rights. See Pet. App. 23a.

The collection of *those* fees, though, was not the result of state action. There is no allegation that the County required those fees to be collected, or that any part of those fees were returned to the County, or that those fees were not akin to fees ordinarily charged to private debit card users. The collection of debit card fees was thus inherently private conduct, and was not attributable to the County. Nor can the County's mere acquiescence in the collection of those fees place the imprimatur of "state action" on that conduct. A plaintiff seeking to tie private conduct to a government entity must allege "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly

treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Petitioners' allegations do not describe such a nexus.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

RUSSELL S. PONESSA
CHRISTOPHER M. DOUGHERTY
HINSHAW & CULBERTSON LLP
333 South Seventh Street
Suite 2000
Minneapolis, MN 55402
(612) 333-3434

JOEL D. BERTOCCHI
Counsel of Record
HINSHAW & CULBERTSON LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
jbertocchi@hinshawlaw.com

Counsel for Respondent
Keefe Commissary Network, LLC

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