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 1-10,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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The question presented in this case is simple but important: Does the Due Process Clause allow the government to confiscate money or property from an individual *before* the hearing that adjudicates that individual's liability—and then force the individual to ask for a refund if he later prevails? For centuries, the answer was clear: No. At least not unless some unique, exigent circumstance requires urgent action. In the ordinary course, the state cannot take property until *after* a meaningful hearing has resolved its claim of entitlement. But in recent years, there has developed a "national trend to extract fees and fines from people who find themselves enmeshed in the criminal justice system"—even before any conviction. Adam Liptak, *Charged a Fee for Getting Arrested, Whether Guilty or Not*, N.Y. TIMES, at A13 (Dec. 27, 2016). Respondent Ramsey County has jumped on that bandwagon—imposing a $25 booking fee upon *arrest* and allowing the arrestee to seek a refund if he is not ultimately convicted. *See id.*

Below, the Eighth Circuit upheld that inverted sequence as consistent with due process. This Court should grant certiorari, because that decision erred on a basic constitutional question that is growing in importance and that has vexed lower courts. This petition is an ideal vehicle to reaffirm and clarify the core principle that individuals cannot be deprived of property *preemptively* unless there is a compelling reason (*and* an adequate after-the-fact remedy). For the state, it is always preferable to seize money up-front, but contrary to the view of the Eighth Circuit, that cannot overcome the presumptive requirement of a pre-deprivation hearing.

I. THE COURT BELOW ERRED ON A FOUNDATIONAL QUESTION OF CONSTITUTIONAL LAW.

In urging this Court to deny review, the County derides the question presented as unimportant and "narrow." Cty.BIO 1. Actually, it is foundational. Can the state seize private property *before* it proves its entitlement, so long as it allows the individual to ask for a refund later? Or is the very "root" of due process, as this Court has long held, the right to a hearing "*before* [one] is deprived" of property? *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). It is hard to imagine a less "narrow" due process question.

That question arises, moreover, in a context that reflects its growing importance. As state and local governments struggle to fill looming budgetary holes, they have taken ever-more aggressive steps to extract revenue from arrestees and criminal defendants. *See* Liptak, *Charged a Fee*, *supra*. The pending case of *Nelson v. Colorado* (No. 15-1256) reflects one such step. Ramsey County's practices reflect another, and are hardly one-off. They are authorized by a state law that extends to all counties in Minnesota. Minn. Stat. § 641.12(1). Nor is Minnesota alone. *E.g.*, Colo. Rev. Stat. § 30-1-104(1)(n) (authorizing booking fee to be "collected directly from prisoners at the time of commitment, but shall be refunded to any prisoner who is not convicted"); Wash. Rev. Code § 70.48.390 (booking fee up to $100 is "payable immediately from any money then possessed by the person being booked" but shall be returned "if the person is not charged, is acquitted, or if all charges are dismissed"). The question presented is thus of broad significance around the country.

And in answering it—upholding these seize-first-convict-later schemes as consistent with the Due Process Clause—the Eighth Circuit strayed from this Court's jurisprudence. Under Minnesota's law (not to mention the constitutional principle of presumption of innocence), the County is entitled to the $25 fee only if the arrestee is proved guilty of a crime. But instead of proving guilt and *then* charging the fee, the County presumes guilt, seizes the cash, and tells the arrestee to ask for it back if no charges are successful.

That is backwards. This Court has long affirmed that, "[i]f the right to notice and a hearing is to serve its full purpose, … it is *clear* that it *must* be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (emphases added). Even though a "later hearing" could allow for one's property to be "returned to him" if "unfairly or mistakenly taken in the first place," that does not suffice: "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 81-82. Accordingly, only in "extraordinary situations"—when there is a "special need for very prompt action" in order to "secure an important governmental or general public interest"—can a pre-deprivation hearing be "postpon[ed]." *Id.* at 90-91 (quoting *Boddie*, 401 U.S. at 379); *see also United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850)*, 461 U.S. 555, 562 n.12 (1983) ("The general rule … is that absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified.").

The County (Cty.BIO 20) cites two cases that invoked the exigency exception. In *FDIC v. Mallen*, the Court explained that "in limited cases demanding prompt action," the opportunity to be heard may be deferred "until after the initial deprivation." 486 U.S. 230, 240 (1988). Prompt action was necessary there, "to protect the interests of depositors" from the risks posed by indicted bank officials remaining in their posts. *Id.* at 240-41; *see also Barry v. Barchi*, 443 U.S. 55, 64-65 (1979) (state's "acute" interest in preserving integrity of racing allowed brief suspension of license when horse failed drug test). But the County cannot and does not claim that any "extraordinary situation" compels prompt action in seizing booking fees before conviction. There may well be a "significant public interest in having responsible persons offset the costs of their incarceration." Cty.BIO 20. But the point is that until an arrestee is charged and convicted, we do not know if he *is* "responsible." The question here is whether there is a compelling interest in collecting fees from arrestees *before* a determination is made concerning their guilt. Plainly not.

The County speculates, as did the Eighth Circuit, that *advance* collection may improve the odds of *successful* collection. Cty.BIO 17; Pet.App. 10a. But that "hardly compares to state action furthering a war effort or protecting the public health." *Fuentes*, 407 U.S. at 93; *see also id.* at 90 n.22. And because acting before a hearing will *always* be more "sensible" for the state (Cty.BIO 11), such reasoning would eviscerate the "general rule requiring predeprivation notice and hearing," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

The County's real argument—adopted by the Eighth Circuit—is that "postdeprivation process is adequate." Cty.BIO 19; *see also* Pet.App.13a (seeing no "constitutionally significant value" in pre-deprivation process). According to the County and court below, there are no "hard-and-fast rules" of due process: Everything, including entitlement to pre-deprivation process, hinges on "balancing" competing public and private interests. Cty.BIO 19.

That is fundamentally mistaken, and it warrants correction by this Court. Balancing of interests may justify "variances in the *form* of a hearing." *Fuentes*, 407 U.S. at 82. Not every deprivation demands trial by jury beyond a reasonable doubt. But "the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect." *Id.* (emphasis added); *see also Boddie*, 401 U.S. at 378-79 ("That the hearing required by due process … is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations ….").[1]

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[1] This constitutional flaw infects the scheme even accepting the County's dubious claim (wrongly taken as gospel by the courts below in granting judgment on the pleadings) that its post-deprivation refund remedy is adequate. *See* Cty.BIO 19; Pet.App.13a-14a. In fact, arrestees must affirmatively seek a refund, even by obtaining "a letter from the police agency that arrested them, on official letterhead, stating the agency 'did not and will not formally charge them.'" *Booking Fees and the Supreme Court: Our View*, USA TODAY (Jan. 8, 2017). Shifting the burden is not an adequate substitute process.

In short, by holding that interest-balancing a la *Mathews v. Eldridge*, 424 U.S. 319 (1976), can justify pre-hearing deprivations even *absent* the exigent or extraordinary circumstances that this Court has long demanded, the court below rejected a central tenet of due process. *See James Daniel Good*, 510 U.S. at 53 ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'").[2]

The County responds that the conflict with this Court's jurisprudence does not warrant review, since there is no direct circuit conflict. *See* Cty.BIO 11-15. The former suffices for certiorari, however. Plus, there is considerable confusion among lower courts over this issue. Some have found pre-trial seizure of booking fees to be unconstitutional. *See Huss v. Spokane Cty.*, 464 F. Supp. 2d 1056, 1061-62 (E.D. Wash. 2006) ("Defendant has not shown it has a compelling interest in collecting a booking fee prior to a determination of guilt."); *Allen v. Leis*, 213 F. Supp. 2d 819, 833 (S.D. Ohio 2002) (ruling that county "should wait until a conviction or a plea of guilty before assessing" its "thirty dollar booking fee"). And the splintered decision in *Markadonatos v. Village of*

[2] The County also suggests, with no explanation or support, that a pre-deprivation hearing is not required for "temporary" deprivations. Cty.BIO 19. This Court has rejected that theory. The Constitution "draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Fuentes*, 407 U.S. at 86. The potential right to a later refund thus "is not decisive of the basic right to a prior hearing of some kind." *Id.*

Woodridge, 760 F.3d 545 (7th Cir. 2014) (en banc), reflects the variety of conflicting approaches that judges have taken to these statutes. *See* Pet.19 & n.2.

Nor, contrary to the County's claims, do all of the federal circuits uniformly align with the court below. The Sixth Circuit upheld prison fees as applied to *convicted* prisoners; but as to those who were held pending trial but not ultimately convicted, the court found no ripe dispute and declined to address the question. *Sickles v. Campbell Cty.*, 501 F.3d 726, 732-33 (6th Cir. 2007). The County also cites *Enlow v. Tishomingo County*, 45 F.3d 885 (5th Cir. 1995) (per curiam), but that case involved a statute that imposed a charge to *leave* prison (on bond), not a charge to be forced *into* prison (like the booking fee here). *See id.* at 886. And the court's reasoning was a mere sentence. *Id.* at 889. These other decisions give no cover to the Eighth Circuit's doctrinal error.

* * *

When a police officer stops a driver for speeding, he does not rifle through the driver's car for cash or property to satisfy the speeding ticket and advise the driver to seek a refund later if he contests his guilt. Doing so could surely reduce collection costs. But everyone understands that due process requires an opportunity to be heard *before* a fine can be collected. That principle has no less force in the arrest context. By holding otherwise, the Eighth Circuit upended longstanding constitutional rules and greenlighted the increasingly aggressive practices of states and localities. This Court's review is needed to clarify the governing Due Process Clause principles, which have confused and divided the lower courts.

II. THIS PETITION IS A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case is a good vehicle for resolving the due process issue because the constitutional claims were preserved, passed upon, and resolved on the papers, thus crystallizing the legal question. *See* Pet.26-29.

The County principally responds that this case is a poor vehicle because petitioners did not challenge "the adequacy of [the County's] refund process" or try to use it. Cty.BIO 16. That simply misapprehends the question presented. Petitioners' argument is that the state cannot seize their property until *after* a hearing resolves their obligation to pay the fee. The availability of a *post hoc* refund is thus irrelevant, as this Court's cases have recognized. *See Fuentes*, 407 U.S. at 81-82 ("'later hearing" cannot satisfy due process even if it entitles the individual to have his property "returned" because this cannot "undo" the violation). Moreover, to the extent that the refund process bears on the analysis, its salient feature is undisputed: The "onus" is on "the deprived arrestee to complete and submit a refund form." Pet.App.13a. Petitioners have consistently argued that so shifting the burden makes the absence of a pre-deprivation hearing particularly egregious. *See supra* n.1.

The County's other waiver argument fares no better. It criticizes petitioners for failing to identify any record evidence *rebutting* the County's supposed concern that, absent advance collection, inmates will drain their canteen accounts to avoid paying the fee. Cty.BIO 17. But the courts below granted judgment for the County *on the pleadings*. If this state interest can suffice to override the requirement of a pre-

deprivation hearing, the proper disposition on the merits is to vacate and remand so the County can try to meet *its burden* of proving it. In no way is that a barrier to resolving the question presented.

Nor does the County's apparent plan to "review its booking fee policy at a workshop" (Cty.BIO 5 n.1) threaten to moot this case, as the County hints. It is well settled that voluntary cessation of a challenged practice does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007). Furthermore, this action seeks damages, not just injunctive relief. Pet.App.84a-86a. So even if the County changes its policy and thereby moots the requests for prospective relief, that does not moot a retrospective claim for damages. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987). This case will therefore remain a suitable vehicle for evaluating the requirements of due process even if the County chooses to alter its policy.

Finally, one private respondent argues that it bears no liability for any due process violation by the County in connection with enforcing the arrest fee. *See* Keefe.BIO 6-10, 18-22. Even if so, that is not a reason to deny certiorari. The private entities who were defendants below are respondents in this Court by rule. S. Ct. R. 12.6. If they maintain no interest in the question presented, they need not participate in the case. *See id.* The County surely does, however, and nothing further is necessary to ensure a complete, adversarial presentation of the issues.

III. IN THE ALTERNATIVE, THIS PETITION SHOULD BE HELD FOR *NELSON V. COLORADO*.

For the reasons set forth above, this Court should grant certiorari and address the due process constraints on state and local booking fees imposed pre-conviction. At minimum, however, this petition should be held for *Nelson v. Colorado*, which is likely to shed new light on how due process applies to monetary fees in the criminal justice system.

Nelson involves certain fines, restitution costs, and other financial penalties that are imposed when a criminal defendant is convicted of a crime. Under Colorado law, such a defendant is not automatically refunded those penalties if his conviction is reversed on appeal. Rather, the defendant must file an action in court and prove his actual innocence by clear and convincing evidence. *See People v. Nelson*, 362 P.3d 1070, 1075 (Colo. 2015). This Court is presently considering whether that scheme comports with due process, or whether the Constitution restricts the State's handling of those funds—including whether the State has an affirmative duty to return them. That decision may well undermine the Eighth Circuit's reasoning below. Indeed, if a duly convicted felon has a due process right to the prompt return of fines imposed upon conviction after the conviction is overturned, it ought to follow *a fortiori* that a presumptively innocent arrestee has the same right in connection with fees imposed anticipatorily upon arrest. *But see* Pet.App.13a-14a (finding that placing the "onus" on innocent arrestee to seek return of the fee is not "so cumbersome" as to violate due process).

The County retorts that a hold is not warranted because *Nelson* concerns *post-deprivation* procedures whereas this case challenges only the absence of *pre-deprivation* procedures. Cty.BIO 21-22. The Eighth Circuit, however, repeatedly linked the two inquiries. *See* Pet.App.17a ("[A]n adequate post-deprivation process may satisfy the Fourteenth Amendment in a case such as this one."); *id.* at 19a ("Of course, for the specific post-deprivation remedy in place to satisfy due process, the remedy must be adequate."). To be sure, the court did not consider whether the County would violate due process by "not follow[ing] its policy as written," because no such argument was made. *Id.* But the court obviously considered—and premised its decision on—the adequacy of the refund process as written. Should *Nelson* call that adequacy into doubt, a remand for further proceedings would be in order.

* * *

Earlier this month, Justice Thomas observed that when police are enabled to seize property "without any predeprivation judicial process" and to retain the funds "for their own use," serious "abuses" are bound to occur. *Leonard v. Texas*, 580 U.S. ____ (2017) (Thomas, J., respecting denial of certiorari). That is why, for over a century, this Court has held that only truly extraordinary exigent circumstances justify skipping a pre-deprivation hearing. *See N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908). By jettisoning that rule in favor of ease of collection for police, the Eighth Circuit turned the Due Process Clause on its head. This Court's review is needed to stop in its tracks this discomfiting "national trend," Liptak, *Charged a Fee*, *supra*.

Respectfully submitted,

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