No. 15-1256

In the
Supreme Court of the United States

SHANNON NELSON,

Petitioner,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely respected as an experienced nonprofit legal foundation.[1] Among other matters affecting the public interest, PLF defends the constitutional principles of due process of law and property rights. PLF attorneys have participated as lead counsel or counsel for amici in numerous cases before this Court involving property rights and due process. *See*, *e.g.*, *U.S. Army Corps of Engineers v. Hawkes*, __ U.S. __, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367 (2012).

PLF urges the Court to hold that exonerees are entitled to an automatic refund of payments paid pursuant to a conviction. After that conviction has been invalidated, Colorado no longer has any right to hold onto exonerees' money. Refusing to refund the money absent a showing of innocence inflicts an onerous burden of proof that violates basic notions of fairness rooted in due process of law.

INTRODUCTION

For exonerated individuals in Colorado to get a refund of fees and fines exacted for a wrongful conviction, they must prove by clear and convincing evidence that they did not commit the crime for which

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. And pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

they were exonerated. *See* CRS §§ 13-65-101(1)(a), 102. Colorado reversed Shannon Nelson's conviction after determining on appeal that the trial court had introduced improper expert testimony. *People v. Nelson*, 362 P.3d 1070, 1071 (Colo. 2015). On retrial, a jury acquitted her. *Id.* Nelson had paid $702.10 for restitution, victim and law enforcement funds, and other administrative fees. *Id.* These payments were all predicated on her conviction. *See*, *e.g.*, CRS § 24-4.1-119 (costs "levied on each criminal action resulting in conviction"). She moved for a refund of this money following her acquittal. *Nelson*, 362 P.3d at 1071. But the state insists that—under Colorado's Exoneration Act—she must file a separate civil action and prove her innocence before it will return her money. *See Nelson v. Colorado*, No. 15-1256, Brief in Opposition 22 (Aug. 9, 2016).

Without a valid conviction, the state's taking of Nelson's money has no basis in law. It is a deprivation of property for no reason whatsoever. The Exoneration Act nonetheless lays claim to her money unless she proves her own innocence. This arbitrary deprivation violates due process. Just as a state must release exonerees from detention, the state must refund exonerees the money paid because of a wrongful conviction.

Even if Colorado can require some procedure to obtain a refund, due process requires a fair and reasonable one. Having to prove a negative—that one did not commit a crime—is neither fair nor reasonable, and in some cases, impossible. This requirement is therefore unconstitutional under the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I

COLORADO MUST RETURN MONEY PAYMENTS CONDITIONED ON A WRONGFUL CONVICTION

An exaction based on a wrongful conviction has lost its sole legal predicate. Procedural barriers that prevent an automatic refund following exoneration therefore deprive the exoneree of property without due process of law.

A. Upon Exoneration, a State's Refusal to Refund Conviction-Related Expenses Constitutes an Arbitrary Penalty

An exaction that does not alleviate a harm, punish wrongdoing, or serve any other legitimate public purpose is excessive as a matter of law. An excessive exaction is "plainly arbitrary and oppressive as to be nothing short of a taking of . . . property without due process of law." *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915). Thus, due process sets limits "beyond which penalties may not go." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)). Proportionality—an "ancient and fundamental principle of justice"—is one of these limits. *Id.* at 478 (Scalia, J., dissenting). A penalty or exaction must be proportional to the wrong to be punished or the harm to be alleviated. *See id.*; *see also Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (in the land-use context, an exaction must be proportional "both in nature and extent to the impact of the proposed

development"). And any exaction that serves no public purpose at all is excessive as a matter of law. *See Bennis v. Michigan*, 516 U.S. 442, 471 (1996) (Stevens, J., dissenting) (For the blameless individual, "even a modest penalty is out of all proportion to [that individual's] blameworthiness."); *see also Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference."). Where there are no grounds for the exaction, the proportional penalty is zero and is necessarily excessive and arbitrary.

Here, Nelson's payments to the state are premised on alleviating the harms associated with her alleged crime. Ms. Nelson's payments went to victim restitution, a general victim compensation fund, a victims and witnesses assistance and law enforcement fund, and various court costs. *Nelson*, 362 P.3d at 1071. All of these payments were premised on her conviction. *See* CRS § 13-65-103(2)(e)(V). Once the state determined she was wrongfully convicted, any public purpose animating the exaction vanished. Colorado had a duty at that point to return her money.

This situation is different from asset forfeiture. Unlike Colorado's Exoneration Act, the use of asset forfeiture is at least attached to "the conviction of the offender." *The Palmyra*, 25 U.S. 1, 9 (1827). Although such forfeitures can afflict innocent owners, this Court holds they still serve a genuine public purpose when connected to a conviction. In *Bennis v. Michigan*, this Court upheld a law that did not offer an innocent owner's defense to a joint owner of a forfeited vehicle where the other owner had committed the crime at issue. 516 U.S. at 446. The Court reasoned that such

seizures served legitimate government interests even as applied to the innocent joint owner. *Id.* at 452. Forfeiture encouraged vigilance in preventing misuse of property by others, and it offered a surer means of addressing potential collusion between the property owner and the criminal defendant. *Id.*

No such rationale can justify the exaction here because no valid conviction exists with regard to Ms. Nelson or anyone connected with her. By retaining exonerees' money without a showing of innocence, the state imposes an arbitrary and excessive penalty that violates due process.

B. Money Exacted on the Premise of a Wrongful Conviction Violates "Due Process of Law" Because No "Law" Supports the Exaction

Ms. Nelson's exoneration vacates the sole legal basis for the fees and fines she was required to pay. This deprives her of due process of law because no law supports the state's interest in her money.

Due process demands that a deprivation of property may occur only in accordance with "law." An arbitrary government action with no rational principle is not a law. Timothy Sandefur, *The Conscience of the Constitution* 79-84 (2014). As constitutional historian and scholar Edward Corwin put it, a government act "may at times part company with 'true law' and thereby lose its title to be considered a law at all." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 11 (1955). Justice Chase famously espoused this view in *Calder v. Bull*: "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social

compact; cannot be considered a rightful exercise of legislative authority." 3 U.S. (3 Dall.) 386, 388 (1798). This Court has since affirmed this understanding of "due process of law" as "something more than mere will exerted as an act of power." *Hurtado v. California*, 110 U.S. 516, 535-36 (1884). A deprivation of rights may only occur through an act authorized by a legitimate law, not an act of arbitrary will.

The founders shared this understanding of due process of law. The people who drafted and ratified the Fifth and Fourteenth Amendments were steeped in a historical tradition that granted substantive meaning to "law." This tradition stemmed from influential British interpretations of the Magna Carta's "law of the land" clause. *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283, 287 (2012) [hereinafter *In Defense*]. Lord Edward Coke's treatise, *The Institutes*—which deeply influenced the founding generation—equated this "law of the land" language with "due process of law." *Id.* at 288; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process*, 58 Emory L.J. 585, 607, 662 (2009). Coke believed that "law of the land" or "due process of law" meant that the sovereign could only deprive someone of their rights through a law rooted in rationality. Sandefur, *In Defense*, *supra*, at 288. He said the Magna Carta forbade an irrational government act because it lacked the foundation of genuine law. His contemporary, Francis Bacon, made a similar observation: "In Civil Society, either law or force prevails. But there is a kind of force which pretends to law, and a kind of law which savours of force rather than equity." Francis Bacon, Aphorism 1, *reprinted in The Philosophical Works of Francis Bacon* 613

(John M. Robertson ed. 1905). The founding generation—intimately familiar with "force which pretends to law"—embraced this view. Gedicks, *supra*, at 611-12, 618.

A government action that lacks a coherent explanatory principle is arbitrary and violates Coke's rule of rationality. Sandefur, *In Defense*, *supra*, at 292, 302, 328-29. If a government act does not serve a legitimate end—including fundamental notions of justice—that act violates due process of law. As James Madison wrote, in his essay on property: "[T]hat alone is a just government which impartially secures to every man whatever is his own." James Madison, *Property*, *reprinted in James Madison: Writings* 515 (Jack N. Rakove, ed. 1999). And the corollary: "[T]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." *Id.*

An exaction that lacks any legally valid basis is just such an arbitrary seizure. Once the original predicate for the deprivation is no longer valid, retaining the property violates due process. Absent a conviction, only arbitrary whim supports the state's refusal to automatically refund Ms. Nelson's money—"an assertion of authority that rests on no basis other than the fact that the authority has asserted it." Sandefur, *In Defense*, *supra*, at 292. In this case, no explanatory principle exists to satisfy Coke's rule of rationality. Nor does the procedure for obtaining a refund make this less of an arbitrary deprivation. Plunder is not absolved of its unlawful character by offering back the stolen property if the owner can prove they deserve it. The refusal to return property

rightfully belonging to the exoneree is merely "the kind of force which pretends to law"—an act of mere political will with no root in the public good.

II

COLORADO'S PURPORTED REFUND PROCEDURE CANNOT SAVE THE STATUTE

Even if the state's refusal to refund exonerees' money is not a substantive violation of due process, Colorado's onerous procedure for exonerees to get a refund still fails procedural due process.

The classic formulation of the procedural due process test comes from *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test looks to three factors:

> 1. The private interests at stake;
>
> 2. The government interests involved; and
>
> 3. The fairness and reliability of the current procedure and the likely benefits of improved procedural safeguards. *Id.* at 335.

The *Mathews* analysis involves a "judicious balancing" of these factors. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

A. *Mathews v. Eldridge* Applies to This Case Because Nelson's Due Process Claim Does Not Challenge a Conviction or Defend Against an Indictment

The proper test for procedural due process depends on whether the deprivation at issue occurs in the context of a criminal proceeding. While *Mathews*

represents the general approach in the civil context, a test laid out by *Medina v. California*, 505 U.S. 437 (1992), applies to criminal proceedings. Here, however, *Mathews* applies because this case does not involve a challenge to an underlying conviction or criminal charge.

Medina imposes a tougher test for the due process claimant to satisfy. In *Medina*, a criminal defendant argued that the government violated his due process rights by requiring him to show by a preponderance of the evidence that he was mentally incompetent to stand trial. 505 U.S. at 442. The Court held that *Mathews* does not apply to criminal cases because the Constitution already provides enumerated guarantees regarding criminal procedure. *Id.* at 443. Because of these explicit protections, expanding procedural rights "under the open-ended rubric of the Due Process Clause invited undue interference with both considered legislative judgments and the careful balance the Constitution strikes between liberty and order." *Id.* Due process must allow space for state criminal procedure to operate because "preventing and dealing with crime is much more the business of the States than it is of the federal government." *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). The Court therefore relied on a test that demanded more of a due process claimant in the criminal law context than *Mathews*. The *Medina* test requires a showing that the challenged procedure violates a tenet of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* This Court's reluctance to recognize fundamental but unenumerated rights in the substantive due process setting speaks to the difficulty of satisfying *Medina*. *See*, *e.g.*, *Washington v.*

Glucksberg, 521 U.S. 702, 728 (1997) (rejecting the right to die as a right under substantive due process); *see also Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.").

The *Medina* test, however, does not apply to matters ancillary to a criminal proceeding. For instance, in *Krimstock v. Kelly*, the Second Circuit declined to apply *Medina* to a challenge to a pretrial seizure of a vehicle for evidence in building a criminal case. 464 F.3d 246, 254 (2d Cir. 2006). Since the due process challenge did not bear on an underlying conviction or indictment, the Court applied *Mathews*. *Id.*; *see also Harvey v. Horan*, 285 F.3d 298, 316 n.6 (4th Cir. 2002) (Wilkinson, J., concurring in denial of request for rehearing en banc) (reasoning that *Medina* should not apply to a post-trial due process challenge regarding access to evidence because the claim was not a challenge to an underlying conviction). Supreme Court practice supports this approach. In *United States v. James Daniel Good Real Property*, this Court addressed—in the context of a drug-related offense—whether post-trial forfeiture of a house without notice or hearing violated due process. 510 U.S. 43, 47 (1993). This Court applied *Mathews*, not *Medina*. *See id.* at 53. This approach makes sense because pre-trial and post-trial proceedings regarding property do not enjoy the many enumerated protections for criminal proceedings found in the Bill of Rights, such as the right against self-incrimination. Moreover, *Medina*'s stricter test applied only to the work of "preventing and dealing with crime." *Medina*, 505 U.S. at 445. Due process disputes over property

that do not seek to overturn a conviction or dispute an indictment do not relate to that goal.

This dispute resembles *James Daniel Good Real Property* and *Krimstock*: a due process challenge that does not bear on an underlying conviction. Like in *Krimstock*, no conviction exists here. Indeed, the case for *Mathews* is stronger here, since in *Krimstock* the seizure occurred in an ongoing criminal investigation aimed at an ultimate conviction. Here, the deprivation does not even flirt with criminal charges or conviction. Therefore, the *Mathews* due process test applies.

B. An Interest in Traditional Property Such as Money Deserves Heightened Protection

The first *Mathews* factor calls upon courts to weigh the private interest at stake. An interest in traditional property rights long-recognized at common law—including money—deserves heightened due process protections as exemplified by this Court's treatment of government entitlements and other property interests.

This Court's landmark procedural due process jurisprudence was built in the context of government entitlements. *Goldberg v. Kelly* involved the termination of benefits under the federal program Aid to Families with Dependent Children. 397 U.S. 254, 255-56 (1970). *Board of Regents v. Roth* involved tenure rights at a public college. 408 U.S. 564, 566 (1972). *Mathews v. Eldridge* itself arose from a dispute over social security disability benefits. 424 U.S. at 323. This case presents an opportunity for the Court to affirm the greater process due where the property

interest inheres in common-law rights rather than a government entitlement.

Unlike classic property interests such as income, real estate, or chattels, a government entitlement exists at the behest of the legislature. Courts have recognized therefore that government enjoys more control over the procedures involved in taking away the entitlements it creates. The grant of government entitlements is often "inextricably intertwined with the limitations on the procedures which are employed" in protecting that entitlement. *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974). The substantive property right granted by the state is "itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155. Thus, the due process claimant in cases involving government entitlements must often "take the bitter with the sweet." *Id.* at 153-54. To some extent, what the state gives, the state may take away.

Government has less leeway, however, in controlling traditional property interests, like land and money. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the state argued that a purchaser of property should not have a valid regulatory takings claim if they bought the property with notice of the pre-existing regulation. *Id.* at 611. It based this conclusion on the notion that "[p]roperty rights are created by the State." *Id.* at 626. The Court refused to countenance this attempt to put a "Hobbesian stick into the Lockean bundle" of traditional property. *Id.* at 627. That Hobbesian stick is the right to redefine the nature of traditional property in a manner that restricts constitutional rights.

The Ninth Circuit drew a similar conclusion in *Schneider v. California Department of Corrections*. 151 F.3d 1194 (9th 1998). There, the court addressed whether the state could take interest earned on inmates' accounts. *Id.* at 1195. The lower court had found no property interest granted by statute. The Ninth Circuit held that traditional property in one's earned money exists independently of legislative decree. *Id.* at 1199 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)). The court then made a crucial distinction between entitlements and traditional property: "States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional 'old property' interests found within the core." *Id.* at 1200-01. The state could not control the inmates' interest income—a type of "old" property—to the same extent as government entitlements.

This Court has employed a stricter procedural due process approach to cases involving the "Lockean bundle" of traditional property interests. For example, in *Fuentes v. Shevin*, the court examined the constitutionality of a replevin statute that allowed private parties to have property seized without a pre-deprivation hearing and only a minimal showing of an ownership interest. 407 U.S. 67, 69-70 (1972). The plaintiff in *Fuentes* had been deprived of kitchen appliances and furniture through the replevin procedure. *Id.* The Court demanded a strict showing from the state that the deprivation was "directly necessary to secure an important governmental or general public interest." *Id.* at 91.

That demanding language asks more of the government than what seems typical in the government entitlement cases. Indeed, the *Mathews* Court said—in the context of government entitlements—that the financial and administrative burdens imposed on the government were weighty interests that could suffice to override a claimant's due process interest. *Mathews*, 424 U.S. at 348. The Court considered such costs significant even though the government could not quantify them: "We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate cost in terms of money and administrative burden would not be insubstantial." *Id.* at 347. This forgiving approach to evaluating the government interest in entitlement cases pales compared to the strict requirement in *Fuentes* that the government show direct necessity to secure an important government interest. *Fuentes*, 407 U.S. at 91. Where government deprives someone of an interest in traditional property, like money, the government must make a stronger showing of its own interest as a counterbalance.

Exonerees deserve the robust protections afforded traditional property under *Fuentes*. The weight of Ms. Nelson's private interest in her own money demands a strong showing that the onerous procedural burden placed on exonerees is directly necessary to further an important government purpose. The government cannot make such a showing here.

C. Under *Mathews*, the Government Has No Legitimate Interest at Stake in Retaining the Money Exacted from Nelson as a Consequence of Her Wrongful Conviction

The second *Mathews* factor—the government interest involved—does not favor the state in this case. The government cannot show that requiring exonerees to prove their own innocence to retrieve their money is directly necessary to further an important government purpose, as required by *Fuentes*. The Supreme Court of Colorado upheld the Exoneration Act's procedure on the grounds that the legislature enjoyed primacy in controlling appropriations and the general budget. *Nelson*, 362 P.3d at 1076-78. The court worried that an equitable power in courts to draw money from the general fund and refund exonerees would impinge on core separation of powers principles. *Id.* But that separation of powers concern does not meet the *Fuentes* standard of government interest required to counterbalance the strong private interest in traditional property.

Separation of powers does not exist to protect government prerogatives. Government structure "exists not to look after the interests of the respective branches, but to protect individual liberty." *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring). As James Madison observed, dividing the powers of government is essential to protect freedom. Federalist No. 51. The framers separated the departments of government and gave them power to protect against encroachments by one another in order to prevent the abuse of power. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

Colorado has no legitimate interest in protecting the legislature's domain at the expense of individual liberty. The specific guarantee of an enumerated constitutional right serves as the boundary of the broader structural protection of liberty. Colorado cannot exalt the legislature's prerogative above liberty's precepts.

Nor will Colorado face any daunting financial or administrative burdens by granting automatic refunds. In the typical due process case, plaintiffs seek an increase in procedural bells and whistles—hearings, notice, oral testimony, cross-examination, etc. These things can be costly. Here, though, exonerees want less procedure. They simply want their money back. The removal of red tape will not tax Colorado's financial or administrative resources. Nor is Colorado likely to release such a deluge of exonerees needing refunds as to have a material impact on the public fisc. The respective balance of interests in this case tilt sharply toward the exonerees who have already suffered enough at the hands of the state.

D. A Requirement That Exonerees Prove Their Innocence to Get Back Their Money Defies Basic Notions of Fair Play

Fairness is the watchword of due process. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). The third *Mathews* factor thus considers "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards." *Mathews*, 424 U.S. at 321. The Exoneration Act's demand that exonerees prove their own innocence by clear and convincing evidence to get

back their own money is neither fair nor reliable. Exonerees deserve a presumption of innocence when it comes to protecting both their liberty and their property.

This Court is a steady champion of the presumption of innocence. That presumption, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). This "axiomatic and elementary" right ought to apply to both liberty and property deprivations. *Coffin v. United States*, 156 U.S. 432, 453 (1895). After all, the due process requirement applies equally to "life, liberty, or property." This Court has said these rights are inextricably intertwined: "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). If the presumption of innocence is indispensable to protect life and liberty, then property deserves nothing less.

The Exoneration Act's abandonment of this basic presumption undermines both the fairness and reliability at the heart of due process. First, it misplaces the burden of proof. The onus of proving that a taking of property is justified should rest with the one taking it. Moreover, innocent exonerees may be unable to prove their innocence by clear and convincing evidence. Even if no evidence exists that they committed an offense, a mere inability to present a high quantum of evidence could present an insuperable barrier to retrieving their property. And for many exonerees, the cost of pursuing a refund

through a civil action will exceed the refund's value. This onerous procedure does not comport with the notions of fair play central to due process.

CONCLUSION

Due process "reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes*, 407 U.S. at 81. Colorado has no legal predicate for keeping exonerees' money, paid pursuant to an invalid conviction. Nevertheless, the state lays claim to their property unless they can prove their own innocence. This arbitrary demand serves no public interest. It imposes a profound burden on exonerees who have already suffered unjustly, and it does so where their interests far exceed any interests of the state. This Court should reverse.

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