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

BRIEF IN OPPOSITION

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March 10, 2017

QUESTION PRESENTED

Ramsey County defrays part of the cost of booking people into its local jail by charging any person arrested and booked into the jail a modest $25 fee. The County collects this fee at the time of booking, which increases the likelihood that it will be able to collect the fee and significantly reduces collection costs. If an arrestee is ultimately not charged with a crime or is found not guilty, he is eligible for a refund and need only submit a simple form provided by the County, and the County will refund him his $25. Every court of appeals to have considered a due process challenge to such a policy has concluded that arrestees were provided sufficient process.

The question presented is:

Whether the Eighth Circuit correctly concluded that Ramsey County's refundable booking fee comports with due process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

This case involves a narrow, splitless question regarding a local government's imposition of a modest refundable fee. To defray some of the costs of arresting and booking individuals into county jail, Ramsey County imposes a $25 booking fee on any arrestee. If, upon being booked into the jail, the arrestee has sufficient cash, the fee is deducted from that cash. If the arrestee ultimately is not charged, if the charges against him are dropped, or if he is acquitted, he is eligible for a refund, which can be claimed by submitting a simple form that the County provides upon the arrestee's release. That form does not require the arrestee to prove his innocence or that his arrest was wrongful. The mere fact that charges were dropped or not brought, or that he was acquitted, suffices to entitle the arrestee to a refund.

Despite the small sums at issue, the County's substantial interest in defraying booking and detention costs, and the availability of a refund, petitioners assert that this policy violates their due process rights because they were not given a "predeprivation hearing" before the booking fee was collected. Petitioners insist that they were entitled to a predeprivation hearing, moreover, even though they have not challenged the adequacy of the County's refund process, or even tried to invoke that process. In a thorough and well-reasoned opinion, a unanimous panel of the Eighth Circuit rejected that claim.

Contrary to petitioners' claims of "widespread disagreement" among the lower courts, that decision accords with the decisions of every other court of

appeals to consider challenges to similar fee policies, as well as with this Court's due process jurisprudence. Indeed, the principal case petitioners cite as evidence of the purported division among the lower courts *upheld* a *non-refundable* booking fee that was assessed even if the arrestee was never charged or convicted. And in that case, even the arrestee who brought that challenge agreed that if a refund were available, his due process claim would fail. Thus, even petitioners' best case for a split underscores the absence of either a split or any need for this Court's review.

Even if the issue were certworthy, this case would make a particularly poor vehicle for examining it because petitioners did not preserve issues that are critical to a full analysis of the due process question. When someone faces a risk of being wrongfully deprived of property, one of the most important factors for determining whether more process is due is the adequacy of the existing process, including postdeprivation process. While petitioners assail the adequacy of the County's postdeprivation refund process as "too burdensome, too confusing, and too intimidating for innocent arrestees to complete," Pet.2, the Eighth Circuit concluded that petitioners failed to challenge the adequacy of that process, and that any such challenge would be premature because neither petitioner tried to invoke that process before bringing suit.

Accordingly, the only question the Eighth Circuit answered was the narrow question of whether due process demands a predeprivation hearing *even assuming* the existing postdeprivation process is

adequate. And the court expressly left open the possibility that a future arrestee could try to prove that the County's refund process is too burdensome to be constitutionally adequate. While the County is skeptical that anyone could do so given the simplicity of that process, to the extent the Court has any concerns about policies like the County's notwithstanding the absence of any circuit split on that issue, it should await a case in which the postdeprivation process was challenged as well, rather than attempting to answer the due process question in an artificially constrained context.

For the same reason, there is no basis to hold this case for *Nelson v. Colorado*, No. 15-1256. *Nelson* involves what *post*deprivation process is due to someone seeking a refund for fines paid as part of a criminal conviction that was later overturned. Again, this case does not present any questions about the adequacy of the County's *post*deprivation process because the Eighth Circuit expressly declined to decide whether that refund process is adequate given petitioners' failure to invoke it. Accordingly, this Court's resolution of *Nelson* will have no impact on this case because the only question decided below was whether due process demands a *pre*deprivation hearing even if there is an adequate *post*deprivation process for arrestees who are not ultimately charged or convicted. The lower court correctly answered that narrow question, and its decision does not conflict with the decisions of this Court or any other, or implicate the *Nelson* case. The petition should therefore be denied.

STATEMENT OF THE CASE

A. Ramsey County's Booking Fee Policy

To allow Minnesota counties to defray some of the costs of booking and processing an inmate following his or her arrest, Minnesota law provides that a "county board may require that each person who is booked for confinement at a county or regional jail, and not released upon completion of the booking process, pay a fee to the sheriff's department." Minn. Stat. §641.12(1). This "fee is 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." *Id.* "If the person is not charged, is acquitted, or if the charges are dismissed, the sheriff shall return the fee to the person at the last known address listed in the booking records." *Id*.

Pursuant to this statute, Ramsey County charges a $25 booking fee to all arrestees who are booked for confinement in its detention facilities. Pet.App.2a. As part of the booking process, the County collects and inventories an arrestee's personal property, including the arrestee's cash. *See* Pet.App.4a. The County uses this cash to satisfy the booking fee. Pet.App.2a. If the arrestee is not carrying sufficient cash, the fee is charged to the arrestee's detention-facility account, and the inmate must satisfy this balance before he or she can purchase items from the facility's commissary. *Id.* If the arrestee lacks sufficient funds throughout his or her incarceration, the county "court must order the fee paid to the sheriff's department as part of any sentence or disposition imposed." Minn. Stat. §641.12(1).

Ramsey County refunds the $25 booking fee to any arrestee who later is not charged with a crime, has his or her charges dismissed, or obtains a verdict of acquittal. Pet.App.3a. To facilitate these refunds, the County provides any arrestee released from detention a "Booking Fee Refund Form." *Id.* If an eligible person submits the refund form, the county must mail the applicant a refund within thirty days of receiving the form. Pet.App.12a-13a.[1]

B. Factual Background

Petitioner Erik Mickelson was arrested for violating a noise ordinance. Pet.App.32a. Police booked him into the Ramsey County Law Enforcement Center and inventoried his personal property, including $95 in cash. *Id.* Upon Mickelson's release, the County issued him a prepaid debit card containing $70—the value of his cash minus the $25 booking fee. *Id.* Mickelson never alleged that the police lacked probable cause to arrest him, and he ultimately pleaded guilty to violating a city ordinance. Pet.App.4a. Accordingly, Mickelson was ineligible to apply for a refund of the $25 booking fee. Pet.App.20a.

Petitioner Corey Statham was arrested for disorderly conduct and obstructing the legal process. *Id.* He also was booked into the Ramsey County Law Enforcement Center. *Id.* He was carrying $46 in cash at the time, which the police inventoried before he was incarcerated. *Id.* When he was released,

[1] The Ramsey County Board of Commissioners is currently scheduled to review its booking fee policy at a workshop on April 4, 2017.

Statham received a debit card containing $21. Pet.App.4a-5a. While the charges against Statham were later dismissed, Statham never asserted that police lacked probable cause to arrest him. Pet.App.5a. And though Statham was eligible to apply for a refund of the $25 booking fee, he has never alleged that he requested a refund. Pet.App.20a.

C. Proceeding Below

1. Mickelson and Statham brought a putative class action against Ramsey County and three private companies that work with the County to provide debit cards to arrestees upon their release. Pet.App.5a. Petitioners asserted that the County's policies of (1) assessing booking fees before conducting a hearing and (2) returning arrestees' money on debit cards that can incur small fees, rather than in cash, violate their Fourth and Fourteenth Amendment rights and constitute several state-law torts. *Id.* Respondents acknowledged that they administered and enforced the policies, and petitioners and respondents filed cross motions for judgment on the pleadings.

The District Court granted judgment on the pleadings to respondents. Pet.App.27a-62a. In assessing petitioners' due process claims, the District Court noted that "the Third, Fourth, Fifth, and Sixth Circuits … have held that the collection of nominal fees from arrestees for booking, room and board, or bond—without a predeprivation hearing—does not violate due process …." Pet.App.38a-39a. The District Court then applied the balancing test this

Court set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether more process was due.

For the first *Mathews* factor—the private interests at stake—the District Court determined that petitioners' interest in the $25 booking fee and smaller debit card fees were "relatively modest." Pet.App.41a. The District Court then found that the risk of erroneous deprivation and the probable value of additional safeguards weighed against petitioners' challenge. Pet.App.42a-45a. The court noted that the fee assessment was a simple administrative task that involved no employee discretion. Pet.App.42a. And the court held that the County's policy of refunding the fee to arrestees who are not charged, are acquitted, or have their charges dismissed was "an adequate post-deprivation remedy, given the nature and weight of the private interests at stake." Pet.App.43a. The court likewise held that Ramsey County Adult Detention Center's internal grievance policy, which allows arrestees to complain of wrongful deductions, provided an adequate postdeprivation remedy. *Id.*

Turning to the third *Mathews* factor, the District Court found "that the government's interest in 'sharing the costs of incarceration and furthering offender accountability are substantial.'" Pet.App.45a (quoting *Sickles v. Campbell Cty.*, 501 F.3d 726, 732 (6th Cir. 2007)). The court also found that Ramsey County had a substantial "interest in avoiding an additional hearing … after it assesses the $25 booking fee," which "would likely involve substantial … costs," including the time of the court, prosecutor, and arrestee. Pet.App.45a. The court

also found that the County had a substantial interest in returning arrestees' funds to them on a debit card, rather than cash or check. Pet.App.46a. The court thus granted judgment to respondents.

2. Petitioners appealed the District Court's due process ruling, and the Eighth Circuit unanimously affirmed. Pet.App.1a-26a. Like the District Court, the Court of Appeals held that the *Mathews* factors all militated against petitioners' challenge. Drawing support from other circuits that have considered similar fees, the Eighth Circuit first concluded "that the private interest at stake—the lost use of the $25 booking fee taken from each arrestee—is 'small in absolute and relative terms.'" Pet.App.8a (quoting *Sickles*, 501 F.3d at 730). The court reasoned that harm to an erroneously deprived arrestee arising from the temporary deprivation of $25 "'does not begin to approach the kinds of government conduct'" that this Court has held require a predeprivation hearing. Pet.App.8a-9a (quoting *Sickles*, 501 F.3d at 730). The Court of Appeals thus concluded "that the private interest is relatively modest." Pet.App.9a.

The court likewise agreed with the Sixth Circuit's "conclusion that the county's interest in collecting the fees at booking is substantial." *Id.* The Eighth Circuit reasoned that "[c]ollecting the fee from those required to pay" it both "allows the county to manage the costs of serving and policing the community and 'furthers offender accountability.'" *Id.* (quoting *Sickles*, 501 F.3d at 731). As the court noted, upfront collection greatly increases the likelihood that the County will be able to collect the fee from those who owe it, as waiting until either

release or conviction "would allow the detained arrestee to exhaust the funds in his or her commissary account prior to conviction." Pet.App.10a. Further, the current policy imposed "little or no discernable collection costs," while "the county would inevitably incur costs in post-conviction attempts to collect this modest fee." *Id.* These collection costs would undermine the entire purpose of imposing the fee as a means to offset booking expenses. *Id.* The court thus "conclude[d] that the county's interest in upfront collection of this fee weighs more heavily than the relatively modest private interests of the arrestees." Pet.App.11a.

Finally, the court turned to the likelihood of an erroneous deprivation. The court first noted that the fee was collected only from persons who had been arrested, which "requires probable cause to support the belief that an arrestee has committed or was committing a crime." Pet.App.12a. The court recognized that some arrestees will ultimately not be convicted of a crime and thus will not be liable for the fee, but the court noted that Ramsey County had sufficient policies in place to refund the fee to each such person. Because every inmate charged a booking fee receives a refund form upon release, and "submission of the form is the only prerequisite" for an eligible person to receive a refund, "the risk of error is minimal, limited only to the possibility that some arrestees temporarily will lose the use of $25." Pet.App.12a-13a. The court could find no "constitutionally significant value in the appellants' proposed alternative—delaying collection until after conviction—that would outweigh the state's valid interest in upfront collection of the fee." Pet.App.13a.

Though petitioners complained that the County's policy is too burdensome because it requires an arrestee to complete and submit the refund form, the Eighth Circuit held that petitioners "failed to raise the argument on appeal that the county must change or improve its post-deprivation procedure in order to comply with the due process requirement that the remedy be adequate." Pet.App.19a. The court also concluded that neither petitioner could have raised such an argument because neither "alleged in their complaint that they submitted the Booking Fee Refund Form." Pet.App.20a. Indeed, Mickelson was ineligible for a refund because he pleaded guilty. *Id.* And although Statham was eligible for a refund, he never alleged that he applied for one. *Id.* Because Statham did not exhaust "the available process," the court concluded that "we cannot know whether the current system would fail to yield a return of Statham's $25." *Id.*

"In sum, in view of the modest private interests at stake, the substantial state interests in the current withholding system, and the appellants' failure to complete the existing refund process and demonstrate its alleged inadequacies," the court concluded that petitioners failed to demonstrate that they were denied due process. Pet.App.20a-21a. The court likewise rejected petitioners' claim that they were denied due process because the money that was returned to them was returned on debit cards, rather than in cash, a holding that petitioners do not challenge before this Court. Pet.App.21a-26a.

3. The Eighth Circuit denied petitioners' request for rehearing. Pet.App.63a.

REASONS FOR DENYING THE PETITION

I. Petitioners' Challenge Satisfies None Of The Traditional Criteria For Granting Certiorari.

Petitioners seek review of the Eighth Circuit's well-reasoned disposition of a narrow challenge to a modest and sensible government policy. There is no reason for this Court to grant that request. The decision below does not conflict with the decisions of any other court, and it was decided on narrow grounds that make this case a particularly poor vehicle for consideration of the arguments petitioners seek to press.

A. Courts of Appeals Have Unanimously Upheld the Upfront Collection of Refundable Booking Fees.

Petitioners claim that there is "widespread disagreement" among lower courts on the question presented, Pet.18, but their own petition refutes that claim. While cases "like this one … are relatively rare" (which is itself a reason to deny review), Pet.28, the few that have made their way to the courts of appeals have produced an unbroken chain of decisions affirming the constitutionality of similar fee policies. Petitioners thus are correct about one thing: The Eighth Circuit "is not alone." Pet.18. The Fourth, Fifth, and Sixth Circuits—in unanimous decisions—have all upheld policies that allowed for the upfront collection of modest fees from arrestees where a postdeprivation refund process is available for those who are not later convicted. Each court rejected the argument that a temporary deprivation

of a small amount of money requires a predeprivation hearing.

In *Sickles v. Campbell County*, 501 F.3d 726 (6th Cir. 2007), the Sixth Circuit rejected a due process challenge to a policy materially indistinguishable from Ramsey County's. Campbell County charged a booking fee of $20 (later $30) to inmates and would collect the fee either from inmates' cash when they were booked into the jail or from their commissary account as friends and family sent money. *Id*. at 728-29. The County also charged a $20-a-day fee for room and board. *Id*. at 729. The Sixth Circuit rejected the plaintiffs' argument that the Due Process Clause required a hearing before the County could assess those fees. *Id*. at 730-33. The court found "the private interests at issue" to be "small in absolute and relative terms," *id*. at 730, and deemed the risk of erroneous deprivation to be minor because collection of the fees involved only simple administrative tasks. *Id*. at 730-31. And the court saw little to no value in adding a predeprivation hearing given that plaintiffs could not explain why "postdeprivation procedures fail to protect their interests in preventing a flawed withholding." *Id*. at 731.

The court also found that two "substantial" interests—"sharing the costs of incarceration and furthering offender accountability"—supported the collection of the fees. *Id*. And the County's decision to collect the fees upfront was warranted because "inmates could drain their canteen accounts of funds prior to a hearing, a strategy some Campbell County inmates previously used to limit the funds available

for withholding." *Id*. Finally, the court held that the plaintiffs could not complain that the withholding policy prejudiced wrongfully arrested people "because [plaintiff] point[ed] to no evidence that the county would retain the withheld funds if he is acquitted." *Id*. at 732-33. The court thus affirmed that a working refund policy—like the one used by Ramsey County—provides constitutionally sufficient process.

The Fifth Circuit has also rejected a due process challenge virtually identical to the one pressed by petitioners. *Enlow v. Tishomingo County* involved a plaintiff who was arrested and required to pay a $60 bond fee to be released from jail. 45 F.3d 885, 886 (5th Cir. 1995). Like petitioners, Enlow argued that the bond-fee statute "violated procedural due process because the taking of the money occurred prior to a hearing and because it punished a pretrial detainee prior to an adjudication of guilt." *Enlow v. Tishomingo Cty.*, Civ. A. No. EC 89-61-D-D, 1990 WL 366913, at *5 (N.D. Miss. Nov. 27, 1990). The district court rejected Enlow's call for a "blanket prohibition on post-deprivation remedies" in favor of predeprivation hearings. *Id*. The court held that because the statute "included sufficient procedures and standards whereby a person acquitted could seek the return of the fee," it "did not violate procedural due process." *Id*. at *6. On appeal, the Fifth Circuit expressly adopted the district court's due process analysis. *Enlow*, 45 F.3d at 889.

The Fourth Circuit reached a similar conclusion in *Slade v. Hampton Roads Regional Jail*, 407 F.3d 243 (4th Cir. 2005). Slade challenged the jail's policy of charging inmates a dollar a day to help defray the

costs of their housing. *Id*. at 246. While the court held that Slade's complaint had not adequately alleged a violation of his procedural due process rights, the court went on to say that if it reached the question, it would hold that the fee did not violate due process. *Id*. at 253. Like the Fifth, Sixth, and (now) Eighth Circuits, the court found the property interest limited, the government's interest in defraying costs and collecting the fee substantial, and the risk of erroneous deprivation that a predeprivation hearing could ameliorate minimal. *Id*. at 253-54. Finally, the court noted that "Slade ha[d] not alleged the absence of a post-deprivation remedy," and that he could seek a refund if he was found not guilty. *Id*. at 254 n.9.

Petitioners are thus left to point to *Markadonatos v. Village of Woodridge*, 760 F.3d 545 (7th Cir. 2014) (en banc), as their "marquee example of disagreement within the lower courts." Pet.18. But in fact, that case only reinforces the Eighth Circuit's conclusion that an adequate postdeprivation remedy is the most process due to an arrestee charged a modest booking fee. Indeed, the reason that case produced a "fractured nondecision" from the en banc court, 760 F.3d at 556 (Sykes, J., dissenting), is because the booking fee policy at issue there "ma[d]e[] no provision for refunds." 760 F.3d at 549 (Posner, J., concurring in the judgment); *id*. at 559 (Sykes, J., dissenting) ("Markadonatos's claim … rests on a premise that the fee cannot be imposed without a predeprivation hearing" or "some postdeprivation procedure so that those who are wrongfully arrested, never charged, or found not guilty may obtain a refund.").

Accordingly, the court was not divided over whether predeprivation process is necessary when, as here, a postdeprivation process exists. To the contrary, even Markadonatos himself conceded that, if a refund process had been available to him, his constitutional claim would fail. *See id.* at 557, 559. The court was divided over the distinct question of whether due process demands *some* sort of process beyond the arrest itself when a booking fee is charged. And even in that circumstance, the court found that due process did not demand a predeprivation hearing. Thus, the lone court of appeals decision petitioners cite to demonstrate the purportedly "widespread disagreement" among the lower courts actually just reinforces the consensus that a local government may charge arrestees modest booking fees at least when, as here, it provides adequate postdeprivation process.

B. This Case Is an Especially Poor Vehicle for Considering Whether a Policy Like the County's Comports With Due Process.

Even if there were any division among the lower courts for this Court to resolve, this case would be a particularly poor vehicle for considering what process is due when a booking fee is charged. Pet.i. The adequacy of *post*deprivation process is a vital factor for determining whether more *pre*deprivation process is due. Indeed, this Court has held that to assess whether due process demands a predeprivation hearing, it must "examin[e] … the promptness and adequacy of later proceedings." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53

(1993). Yet, here, neither petitioner actually challenged the adequacy of Ramsey County's refund process—or even tried to use it. Petitioners' various complaints about the purported "bureaucratic obstacle course" that the refund process entails thus not only are wholly unfounded (eligible persons need only submit a form that the County itself provides), but are not properly before this Court.

Mickelson's failure to engage with the County's postdeprivation process is understandable. He pleaded guilty and thus could not challenge either the imposition of the fee or the adequacy of a refund process for which he was never eligible. *See* Pet.App.20a. As Judge Posner remarked about Markadonatos, who likewise pleaded guilty after paying a $30 booking fee, "what difference would it have made to him had he paid it after rather than before" his plea hearing. *Markadonatos*, 760 F.3d at 552 (Posner, J., concurring in the judgment).

Statham might have been better suited to test the adequacy of the County's postdeprivation process since the charges against him were dismissed—but he has never alleged that he even *applied* for a refund. Pet.App.20a. The Eighth Circuit therefore reasonably concluded that, "[a]bsent his exhaustion of the available process, we cannot know whether the current system would fail to yield a return of Statham's $25." *Id*. "Thus, any allegation that the current system is inadequate as a post-deprivation procedure is not properly before" this Court, *id*., making this case an exceptionally poor vehicle for determining how much process is due.

The petition is also riddled with other waived arguments, each highlighting why the Court should pass on this case. For example, petitioners suggest that the County's interest in upfront collection is pretextual and that "the only reason" for the policy "is to confiscate money from innocent people who are too unsophisticated, too busy, or too fearful of the government to successfully reclaim their money later." Pet.15. If true, that allegation could be relevant to whether the process provided is adequate. But petitioners never attempted to establish that dubious proposition below.

Likewise, petitioners insist that "[t]here is no serious possibility that an arrestee who has $25 when he is arrested will spend all his money prior to conviction (and never again earn any money) as a means of cheating the County out of its $25 fee." Pet.17. But petitioners have never attempted to prove that premise either, and it is hardly a self-evident proposition. As the Sixth Circuit noted in *Sickles*, before Campbell County instituted its similar upfront booking fee policy, some inmates would "drain their canteen accounts of funds prior to a hearing … to limit the funds available for withholding." 501 F.3d at 731; *see also* Pet.App.10a. Perhaps some future litigant will show that the cost of forgoing upfront collection of booking fees is minimal, which could shed light on "whether the government has an interest in seizing the particular property *right now*." Pet.14. But petitioners did not attempt to make that showing below. Pet.App.11a n.3 ("Although we could conceive of a situation in which the county's interest might be minimal, the appellants here did not seek any discovery related to

the county's interest in the current system."). If the Court is to assess whether a policy like Ramsey County's sufficiently balances the interests of the government and arrestees, it should do so based on a fully developed record, not empty rhetoric.

Finally, petitioners' focus on illegal arrests and "profit-driven policing" are, once again, divorced from this case. Pet.22-25. As for the former, petitioners have never alleged that the police lacked probable cause to arrest them, or that the County would not refund the fee in such situations, making any concerns about illegal arrests wholly inapposite here. As for "profit-driven policing," there is no suggestion in the record that any portion of the fee is used to reward the arresting officer. Moreover, petitioners' own complaint conceded that "Ramsey County's booking fee recoups only a very small portion of the funding Ramsey County allocates for booking at its detention facilities." Pet.App.77a. Indeed, the County estimates that the cost incurred in booking an inmate at its detention facility is more than $65 per inmate. Pet.App.45a n.1. The parties thus agreed that each arrest and booking is a net *cost* for the County, not an effort to turn a profit. Petitioners' policy concerns should be reserved for a case that actually presents them.[2]

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[2] This case is a poor vehicle for reviewing the constitutionality of upfront booking fee policies for the added reason that Ramsey County is scheduled to review its policy next month. *See supra* p. 5 n.1. Respondents will advise the Court should the County make any changes to the policy while the petition remains pending.

C. The Decision Below Is Correct.

The petition should also be denied because the decision below is plainly correct. Because petitioners did not challenge the adequacy of the County's postdeprivation process, they are forced to argue that due process *always* demands a predeprivation hearing, even when postdeprivation process is adequate. Pet.9. That categorical approach finds no support in this Court's precedents, which eschew such hard-and-fast rules. As the Court has explained repeatedly, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "is compounded of history, reason, [and] the past course of decisions." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001). Accordingly, "'[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Id.* at 196 (quoting *Cafeteria & Rest. Workers v. McElroy,* 367 U.S. 886, 895 (1961)). The due process inquiry thus requires a careful balancing of competing public and private interests, not sweeping categorical rules. *See Mathews*, 424 U.S. at 335.

Consistent with that flexible approach, while the Court has stated "that some form of hearing is required before an individual is *finally* deprived of a property interest," *id.* at 333 (emphasis added), it has never extended that rule to cover all *temporary* deprivations of property. And while the Court has stated that a hearing is "*[o]rdinarily*" required before "the deprivation of a *significant* property interest," *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S.

1, 19 (1978) (emphasis added), that pronouncement necessarily suggests that the deprivation of some property interests may *not* require a predeprivation hearing. And in fact, this Court has held on multiple occasions that significant state interests can justify prehearing deprivations of even significant property interests. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 241 (1988) (upholding prehearing suspension of plaintiff's right to work as a bank president); *Barry v. Barchi*, 443 U.S. 55, 65-66 (1979) ("To establish probable cause" and justify an interim suspension of a horse trainer's license, "the State need not postpone a suspension pending an adversary hearing to resolve questions of credibility and conflicts in the evidence").

By striking a careful balance between public and private interests, the Eighth Circuit's decision fits seamlessly into this Court's due process jurisprudence. Ramsey County's policy does not deprive arrestees of a "significant" property interest, it does not "finally" deprive them of anything until they have received a hearing on the charges against them, and it clearly promotes the significant public interest in having responsible persons offset the costs of their incarceration. Petitioners thus were given all the process they were due. Indeed, the only reason they did not get their booking fees refunded is because one of them pleaded guilty, thus admitting that the fee was *not* erroneously imposed, and the other never requested the refund to which the County entitled him. There is thus no injustice for this Court to correct.

II. The Court Should Not Hold This Case For *Nelson v. Colorado*.

Petitioners' request to hold this case for *Nelson v. Colorado* is misplaced, as the questions before the Court in *Nelson* have no relevance to the narrow question decided below. *Nelson* involves a Colorado Supreme Court decision that held that when a person has been forced to pay money as part of a criminal conviction that is later reversed, (1) due process does not require the state to return the money, and (2) the state can condition return of the money on the person proving her innocence by clear and convincing evidence. *See People v. Nelson*, 362 P.3d 1070, 1078-79 (Colo. 2015). The decision thus turns entirely on what sort of *post*deprivation process, if any, is due in a very different situation. Whether the Court affirms the Colorado decision, holds that the state must return funds to acquitted defendants, or lands somewhere in between, its decision will have no bearing on this case, as no challenge to the adequacy of the County's *post*deprivation process was pressed or passed upon below. Instead, the Eighth Circuit resolved only the narrow question of whether due process demands a *pre*deprivation hearing even when an adequate *post*deprivation process exists.

Ignoring the record below, petitioners assert that a hold is appropriate because this case addresses "whether innocent people can be forced to satisfy *any* burden—including the administrative, practical burdens that accompany any post-deprivation bureaucratic undertaking—to obtain the return of their property." Pet.28. That describes a different case. This case is about the only issue that

petitioners have not waived: whether a hearing must precede a temporary deprivation of a modest property interest even if, as the Eighth Circuit assumed, an adequate postdeprivation remedy exists. Pet.9; *see also* Pet.App.16a ("Mickelson and Statham argue on appeal that *only* a pre-deprivation hearing can satisfy due process."). Petitioners cannot recast their request for *pre*deprivation process as an attack on a *post*deprivation process that they failed to challenge below. A hold for *Nelson* thus will achieve nothing but delaying the inevitable denial of a petition that simply does not present the issues petitioners now seek to press.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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