

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**

**MOTION FOR LEAVE TO FILE AND BRIEF
OF PROFESSOR ALEXES HARRIS AS *AMICA
CURIAE* IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO
FILE AN *AMICA CURIAE* BRIEF**

Professor Alexes Harris files this motion, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amica curiae* brief in support of the Petitioners in the above-styled case presently before this Court on petition for writ of *certiorari*. In support of this motion, counsel for Professor Harris state that they requested the parties' consent to the filing of an *amica curiae* brief. Petitioners consented to the filing of the accompanying brief, but consent was expressly withheld by Respondent, County of Ramsey, Minnesota.

Amica curiae Alexes Harris is a professor of sociology at the University of Washington. She is one of the country's leading researchers and authors on the effects of government-issued fines, fees, and other legal financial obligations on the poor. Recently, she authored *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (2016), which examines state and local governments' increasing use of fines, fees, and other monetary exactions and how these mechanisms punish and marginalize the poor. Along with Katherine A. Beckett and Heather Evans, she is a co-author of *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *Am. J. Sociology* 1753 (2010), which examined national and state-level court data to assess the social and legal consequences of the imposition of fines and fees. Professor Harris also co-authored *The Assessment and Consequences of Legal Financial Obligations in Washington*

State (2008), published by the Washington State Minority and Justice Commission. This study analyzed the assessment and consequences of fines, fees, and restitution in Washington State and examined the effect these measures had on convicts, their reentry process, and the extent to which they achieved the goals set by the Washington Legislature in imposing them. In addition, Professor Harris was a speaker at a two-day discussion of Incarceration and Poverty convened by the White House and the U.S. Department of Justice in 2015 – exactly the important question of federal law implicated in this case.

Professor Harris's accompanying brief in support of the petition for writ of certiorari argues that the Eighth Circuit's decision below neglects the effect that the expansion of fines and fees has had on the American justice system. The brief discusses the growth in the number and severity of fines and fees levied by state and local governments in the past few decades and the effect this growth has had on defendants, policing, municipal governments, and society at large. Professor Harris specifically discusses how the Eighth Circuit's narrow focus on the particular fee at issue here obscured the fact that its ruling creates incentives for the government to seize money from the poorest Americans and leave them with only time-consuming and complex mechanisms to get their money back. The national implications of the Eighth Circuit's decision are substantial: If the government may seize money from arrestees without process, then many municipalities will simply do just that. This will send many

defendants into a spiral of debt and impoverishment that can tether them to the criminal justice system for years, if not decades. Professor Harris urges this Court to grant the Petition and consider the full, nationwide consequences of permitting the government to seize money from poor defendants, without any pre-deprivation process, and without any automatic mechanism for returning their money if they are acquitted.

Wherefore, Professor Harris respectfully requests that her motion for leave to file an *amica curiae* brief be granted.

Respectfully submitted,

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INTEREST OF AMICA CURIAE¹

Amica curiae Alexes Harris is a professor of sociology at the University of Washington. She is one of the country's leading researchers and authors on the effects of government-issued fines, fees, and other legal financial obligations on the poor. Recently, she authored *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (2016), which examines state and local governments' increasing use of fines, fees, and other monetary exactions and how these mechanisms punish and marginalize the poor. Along with Katherine A. Beckett and Heather Evans, she is a co-author of *Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *Am. J. Sociology* 1753 (2010), which examined national and state-level court data to assess the social and legal consequences of the imposition of fines and fees. Professor Harris also co-authored *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008), published by the Washington State Minority and Justice Commission. This study analyzed the assessment and consequences of fines, fees, and

¹ No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the *amica curiae* and her counsel – contributed money that was intended to fund preparing or submitting this brief. Pursuant to Supreme Court Rule 37.2(a), all counsel of record received timely notice of *amica's* intent to file this brief. Petitioners consented to *amica's* filing of this brief, but consent was expressly withheld by Respondent, County of Ramsey, Minnesota.

restitution in Washington State and examined the effect these measures had on convicts, their reentry process, and the extent to which they achieved the goals set by the Washington Legislature in imposing them. In addition, Professor Harris was a speaker at a two-day discussion of Incarceration and Poverty convened by the White House and the U.S. Department of Justice in 2015 – exactly the important question of federal law implicated in this case.

Professor Harris submits this brief in support of the Petition for Certiorari because the Eighth Circuit’s decision below neglects the effect that the expansion of fines and fees has had on the American justice system. It also severely underestimates the effect that even minor monetary exactions can have on the lives of the poor. A small-dollar fine or fee can be the first step into a spiral of debt and impoverishment that can tether the arrestee to the criminal justice system for years, if not decades. Professor Harris urges this Court to grant the Petition and consider the full, nationwide consequences of permitting the government to seize money from poor defendants, without any predeprivation process, and without any automatic mechanism for returning their money if they are acquitted.



SUMMARY OF ARGUMENT

The Eighth Circuit concluded that Ramsey County, Minnesota, (the “County”) could constitutionally collect a \$25.00 booking fee from each arrestee

without a predeprivation hearing so long as it provides some form of process after it confiscates the arrestee's money. Pet. App. 2a, 13a. The Petitioners have demonstrated that this conclusion contradicts the long-established rule that the government must provide some sort of process before confiscating a person's property unless there are exigent circumstances. Pet. 9-10. This brief explains that the booking fee at issue here must be considered in the context of the nationwide explosion of monetary sanctions and how these sanctions harm both the poor and the American justice system.

In concluding that the post-deprivation process was sufficient, the Eighth Circuit failed to appreciate just how extensive fines and fees have become in the American justice system. For the past twenty-five years, states have steadily expanded the use, number, and severity of monetary sanctions. Defendants now face a long list of financial penalties and surcharges when they enter the justice system (even when they are innocent). Fines and fees have become a major source of revenue for state and local governments, to the point where the collection of revenue, and not the pursuit of justice or protecting the public, has become the driving force for criminal and civil enforcement.

The result for defendants has been devastating. Contact with the justice system for even minor infractions can force a defendant into long-term debt, impoverishment, and marginalization from society. The cost to the nation in terms of harm to the defendant's family, the loss of the defendant's ability to contribute to

society, and a growing (and often deadly) distrust between the police and the communities that they purport to serve is significant as well.

The Eighth Circuit’s decision gives revenue-hungry states and municipalities an incentive to continue these policies by permitting the government to seize a defendant’s money with no predeprivation process. If the government may seize funds from an arrestee without any process and be forced to return those funds only after the arrestee pursues a lengthy and complicated process, then the government will continue to impose fines and fees on our poorest citizens. Given the harm caused by these sanctions, the Due Process Clause demands more than just a complex and time-consuming post-deprivation remedy. This Court should therefore grant the Petition and consider the issue within the context of the nationwide devastation that the growth in fines and fees has caused for both the poor and our criminal justice system.



ARGUMENT

The Eighth Circuit, quoting approvingly from a decision of the Sixth Circuit, concluded that “the private interest at stake – the lost use of the \$25.00 booking fee from each arrestee – is ‘small in absolute and relative terms.’” Pet. App. 8a (quoting *Sickles v. Campbell Cty.*, 501 F.3d 726, 730 (6th Cir. 2007)). The court acknowledged that this sum can be meaningful for

some arrestees, but concluded that \$25.00 is not so significant that the government must conduct a hearing before it seizes the money. Pet. App. 8a-9a. The Eighth Circuit's conclusion disregards the broader implications for defendants charged with crimes or civil penalties, however. For many defendants, \$25.00 is significant. Moreover, that amount represents just one of the fines, fees, and expenses an arrestee faces when arrested. While a particular fine or fee may, by itself, appear low enough to avoid the need for predeprivation process, when an almost never-ending number of them are added together, they become the means by which defendants are impoverished, incarcerated, and marginalized. Viewed in context, every fine and fee contributes to a harsh system of punishment that requires robust due process protections at every step.

This brief argues that this Court should recognize the nationwide consequences of the Eighth Circuit's decision, grant the Petition, and reverse the Eighth Circuit. The first section of this brief discusses the growth in fines and fees in the American justice system over the past few decades. The second section analyzes the effect that overreliance on fines and fees has had on policing, defendants, and society at large.

I. Fines and Fees Have Become Ubiquitous in the Criminal and Civil Justice System

Fines and fees have long been an aspect of punishment in both Europe and America. Alexes Harris, et al.,

Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Sociology 1753, 1758 (2010) (hereinafter “*Drawing Blood From Stones*”). By World War II, however, the use of monetary sanctions in the U.S. had waned. *Id.* But the postwar rise in crime, and the concurrent rise in the cost of administering the criminal justice system, created a need to use penalties and fees to supplement state and local budgets. See Council of Economic Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf. In 1991, 25% of inmates reported receiving legal financial obligations. Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 23 (2016) (hereinafter “*A Pound of Flesh*”). By 2004, the number of inmates reporting receiving such obligations had risen to 66%. *Id.* That number is undoubtedly higher today.

To shift the cost of criminal justice from taxpayers to defendants, state and local governments created new, and often novel, financial penalties for defendants. All 50 states mandate that fines be levied upon conviction. *Id.* at 26. This is just the beginning of the payments a defendant must make, however. In addition to actual fines, state and local governments have added so-called “user fees,” such as court costs, the cost of public defense, filing fees, jury costs, charges for witnesses, warrants, criminal laboratory costs, charges related to the collection, recording, and storage of DNA,

court security fees, special court costs, and even, in North Carolina, a “cost of justice fee.” *Id.* at 27, 42.

These costs occur across the country. For example, in Massachusetts, a defendant is subject to an almost-never ending list of charges: “He’ll incur a fee for court-appointed counsel (even if he’s indigent), a fine (if he’s guilty of the underlying crime), a victim/witness assessment (even if the crime is victimless), a monthly supervision fee (if he’s put on probation), a daily monitoring fee (if he has to wear a GPS device), court costs (because courts are expensive to run), a default fee (if he defaults on a court date), and so on.” Mass. Senate Comm. on Post Audit and Oversight, *Fine Time Massachusetts: Judges, Poor People, and Debtors’ Prison in the 21st Century*, Mass. S. Docket No. 2734, at 10 (Nov. 7, 2016).

Moreover, state and local governments have not just increased the number of monetary sanctions, they have increased the amount a defendant must pay to satisfy each fine, fee, and charge. *A Pound of Flesh*, at 23-24. In California, for instance, a \$100.00 fine for a traffic infraction requires the defendant to pay \$490.00 to the state. That is, the infraction costs the defendant \$100.00, but the state takes advantage of the fact that the defendant is now in the justice system to ladle on an additional \$390.00 in charges for such things as a “criminal surcharge,” a court construction fund, and a fee for EMS operations. Lawyers’ Comm. for Civil Rights of the San Francisco Bay Area, et al., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California* 10 (Lawyers’ Comm. for Civil Rights

2015), <http://lccr.com/not-just-ferguson-problem-how-traffic-courts-drive-inequality-in-california/>. If the defendant misses his or her initial deadline for paying the fine and related fees, the \$100.00 citation now costs the defendant \$815.00. *Id.* If the defendant fails to pay this amount or is late in paying the amount, the state will suspend the defendant's driver's license, thus depriving the defendant of the ability to get to work to earn money to pay the citation, leading to more charges. *Id.* at 11. This seemingly irrational system continues because fines and fees fund large amounts of California governmental activities. The list of state, county, and municipal funds receiving money from fines and fees is staggering – everything from the State Optometry Fund to the Underground Storage Tank Cleanup Fund. Mac Taylor, *Improving California's Criminal Fine and Fee System*, Cal. Legislative Analyst's Office Rep. No. 3322, at 9 (Jan. 5, 2016).

Put simply, legal financial obligations have become plentiful in number and steep in dollars. Nonetheless, in the Eighth Circuit's view, the government may constitutionally seize these fees and charges immediately, based on nothing but the say-so of the government enforcement agent. If the defendant wants his money back because he is innocent or because the government chooses not to prosecute, he must undertake a complex and time-consuming journey through the County's bureaucracy. The question then becomes, does this present sufficiently serious punishment to warrant a predeprivation hearing? The next section of this brief answers that question, "yes."

II. The Consequences of Over-Reliance on Fines and Fees

The growth of monetary sanctions has created numerous harmful consequences. For defendants and their families, legal financial obligations can often cause impoverishment, a spiral of debt, marginalization from society, homelessness, unnecessary incarceration, and the loss of the defendant's ability to contribute to the tax base and, indeed, society at large. For governments, the ability to raise funds from criminal and civil enforcement creates a perverse incentive for governments to identify, ticket, try, and convict people not to protect the public, but to raise revenue. The increasing use of the police not to protect and serve, but to ticket and collect has eroded trust in law enforcement, often with deadly consequences.

In sum, the over-reliance on fines and fees is creating severe, nationwide problems for the people arrested, the governments that rely on them, and the people who live in communities where revenue drives enforcement. Allowing governments to seize first and justify their actions later creates incentives to continue to balance their budgets on the backs of poor defendants.

A. Even Low-Dollar Fines and Fees Can Have Devastating Consequences for the Poor

“Fines and fees create large financial and human costs, all of which are disproportionately borne by the

poor.” Council of Economic Advisors, *Fines, Fees, and Bail*, at 4. As the Civil Rights Division of the U.S. Department of Justice recently explained, “[T]he harm caused by [unlawful fines and fees] can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.” U.S. Dep’t of Justice, *Dear Colleague Letter Regarding Law Enforcement Fees and Fines* (March 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

For many poor Americans, \$25.00 is a lot of money to lose. Twenty-five dollars can mean missing rent payments, incurring bank overdraft fees, or missing payments (and thereby accruing interest) on other legal debts. See *A Pound of Flesh*, at 56. “It is not unusual for debtors . . . to sacrifice food, clothing, utilities, sanitary home repairs, and other basic necessities of life in order to scrape together money to pay off their [legal financial obligations] in order to avoid imprisonment.” Tamar R. Birkhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1657 (2015) (internal quotations omitted). Many legal debtors view a \$25.00 payment as simply a set up for future violations and other legal consequences: “‘And yet I’m not going to be released until I sign that paper and set myself up for a violation [by] saying I’ll pay \$25 a month. . . . Why don’t I just sign another violation paper? Cuz I don’t have \$25 a month, you know?’” *A Pound of Flesh*, at 60.

When they can make payments, legal debtors remain under judicial supervision, even if all other aspects of their interaction with the justice system are concluded. *Id.* at 48-49. If they cannot, their inability to pay off the legal financial obligations often triggers warrants for the debtor's arrest, preventing the debtor from holding down a regular job, attending school, or even visiting the hospital for fear of being arrested and sent to jail. *Id.* at 49. Many states suspend legal debtors' driver's licenses, sometimes automatically. *E.g.*, Fla. Stat. § 322.245(1). Two recent law suits, one in California and another in Virginia, challenge the constitutionality of suspending legal debtors' driver's licenses without hearings on their ability to pay. *See* Compl., *Stinnie v. Holcomb*, No. 3:2016cv00044 (W.D. Va. July 6, 2016); Compl., *Rubicon Programs v. Sup. Ct.*, No. FCS047212 (Cal. Sup. Ct. Solano Cnty., June 15, 2016). While other types of debt may be discharged in bankruptcy, debt owed to the government for fines and fees cannot be discharged.

The credit rating of legal debtors also suffers and makes it difficult for them to qualify for a mortgage or receive a student loan. *Drawing Blood From Stones*, at 1786-87. This exacerbates the reduction in income that comes from legal debt, which often makes debtors choose between paying their fines and fees and obtaining food, housing, transportation, supporting their children, and other necessities of life. *Id.* As the Council of Economic Advisors put it,

High fines and fee payments may force the indigent formerly incarcerated to make difficult

trade-offs between paying court debt and other necessary purchases. Unsustainable debt coupled with the threat of incarceration may even encourage some formerly incarcerated individuals to return to criminal activity to pay off their debts, perversely increasing recidivism.

Council of Economic Advisors, *Fines, Fees, and Bail*, at 4.

The harm to debtors is not entirely financial. Seventeen states prohibit legal debtors from voting until their debts are paid in full, while another thirteen only grant debtors a provisional right to vote, which can be stripped if they do not keep up their payments. *A Pound of Flesh*, at 49.

To the harm that falls directly on the debtor, one must add the harm to the defendant's family, who face reduced income, dwindling economic opportunities, fewer educational choices, and familial disruption because of unpaid legal debt. Society pays a price as well, as police resources are diverted from protecting the public to monitoring and often apprehending people who are not dangers to the community, but who have instead simply fallen behind in their payments to the government. These individuals are also walled off from participating in the work force, leading to reduced tax revenue and more spending on welfare programs and, often, homelessness. *See Drawing Blood From Stones*, at 1780-82.

Contrary to the Eighth Circuit’s conclusion, seizing \$25.00 from a defendant can be part of a destructive and overwhelming system of payments required from an arrestee. This is not just a question of how the County treats its arrestees – it is a nationwide issue of how the government treats the poor. “[A] debt must be capable of being paid, if it is not instead a lifetime yolk of servitude.” U.S. Dep’t of Justice, *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty* (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and>. Before the government sets an arrestee on that path, however, the Constitution requires that he gets to argue that the government should never start him on the path in the first instance.

B. Fines and Fees Create Perverse Enforcement Incentives

“An inappropriate and misguided mission has been thrust upon the police in many communities: the need to generate large sums of revenue for their city governments.” Police Executive Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County* 7 (April 30, 2015), <http://www.policeforum.org/assets/stlouis.pdf>. The most notorious example of a municipal government using its police force to collect revenue is Ferguson, Missouri. The Department of Justice’s report on Ferguson demonstrated that the town’s police and municipal courts operated as little more than

sophisticated revenue collection vehicles. Every aspect of life in Ferguson was regulated by the Ferguson Municipal Code, the violation of which would result in a plethora of fines, fees, and surcharges. U.S. Dep't of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* 7 (March 4, 2015); see also Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, Mother Jones, Sept. 12, 2014, <http://www.motherjones.com/politics/2014/09/ferguson-might-have-break-its-habit-hitting-poor-people-big-fines> (documenting how rolling through a stop sign in Ferguson could easily result in incarceration and impoverishment). The desire for revenue drove the overcriminalization of mundane conditions, heavy-handed enforcement, biased policing, and a municipal court operated to wring every cent it could out of defendants, who were often unable to satisfy the city's unquenchable desire for money.

The result, of course, was violence and civil unrest. But Ferguson is not an outlier. In St. Louis County, municipalities routinely treated the people they purported to serve as revenue generators. The cities of Calverton Park, Bella Villa, Vinita Terrace, and Pine Lawn all derived around half or more than half of the general revenue from fines and fees. Better Together, *Public Safety – Municipal Courts* 8 (Oct. 2014), <http://www.bettertogetherstl.com/studies/public-safety/municipal-courts-report>.

When the state of Missouri capped the amount of money municipalities could retain from traffic fees, municipalities resorted to ticketing people for things

like having a barbeque in the front yard or basketball hoops in the street. Jennifer S. Mann, *Municipalities ticket for trees and toys, as traffic revenue declines*, St. Louis Post-Dispatch, May 25, 2015, http://www.stltoday.com/news/local/crime-and-courts/municipalities-ticket-for-trees-and-toys-as-traffic-revenue-declines/article_42739be7-afd1-5f66-b325-e1f654ba9625.html. These ticketing practices are the subject of a federal class action by residents of Pagedale, Missouri, that alleges that their city threatens

finer and imprisonment for code violations in their homes that include, for example, failing to install screens on every door and window opening to the outside, hang drapes or blinds that match and 'are neatly hung, in a presentable appearance,' repair driveway cracks or chipped or aging paint on a home's exterior, or paint foundations and wood fences.

Whitner v. City of Pagedale, No. 4:15 CV 1655 RWS, 2016 WL 915303, at *1 (E.D. Mo. Mar. 10, 2016); see also Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. Times, Nov. 4, 2015, at A15, available at <http://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html>.

This over-reliance on fines and fees as a source of state and municipal revenue is not limited to Missouri. For example, in Colorado, five towns receive more than 30% of their revenue from traffic tickets and fines, with one town receiving 93% of its revenue from traffic tickets. Editorial, *Limit cities' reliance on revenue*

from *traffic fines*, Denver Post, May 15, 2015, <http://www.denverpost.com/2015/05/15/limit-cities-reliance-on-revenue-from-traffic-fines/>.

When state and local governments derive so much revenue from imposing fines and fees, the goal of the justice system quickly becomes raising revenue and not protecting the public or ensuring that justice is done. When that revenue can be obtained without any sort of hearing, the incentive to use the criminal justice system as a revenue-generating mechanism becomes acute. In these instances, due process dictates that the government provide defendants with sufficient procedural protections before confiscating their funds.

◆

CONCLUSION

As James Baldwin recognized, “[a]nyone who has ever struggled with poverty knows how extremely expensive it is to be poor.” James Baldwin, *Fifth Avenue, Uptown*, Esquire, July 1960, available at <http://www.esquire.com/news-politics/a3638/fifth-avenue-uptown/>. Procedures like the one used by the County here contribute to that cost. If allowed to stand, poor defendants across the country will soon find that their poverty has become even more expensive than before.

The government violates the Due Process Clause when it seizes cash from an arrestee before there is any determination that such a seizure is warranted. Innocent defendants who are acquitted should not have to go through a complex, costly process to retrieve money

that should not have been taken from them in the first place. This Court should grant the Petition and overturn the Eighth Circuit's decision because it seriously understates the effect fines and fees have on the poor, both as they navigate the criminal justice system and as they get on with life after leaving it.

Respectfully submitted,

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