

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

CATHERINE REGINA HARPER and  
SHANNON JONES, on behalf of  
themselves and those similarly  
situated, and JENNIFER ESSIG,

Plaintiffs,

v.

PROFESSIONAL PROBATION  
SERVICES, INC.,

Defendant.

Case No. 2:17-CV-1791-ACA

(Class Action)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

Table of Contents ..... ii

Table of Authorities ..... iv

I. Introduction.....1

II. Statement of Undisputed Material Facts .....2

    A. PPS Supervision in Gardendale.....3

    B. Court Sentencing to PPS Supervision .....6

    C. PPS Initial Meeting with Supervisees .....7

        1. PPS’s sentencing form .....7

        2. PPS’s additional probation policy documents.....10

    D. PPS Enforcement of Probation Conditions .....11

        1. PPS reporting and payment requirements .....12

        2. PPS responses to supervisees’ inability to pay .....14

    E. PPS Reports on Noncompliance to the Court .....16

        1. PPS noncompliance reports at probation review hearings.....16

        2. PPS use of probation violation warrants .....19

    F. PPS Supervision of Named Plaintiffs.....20

        1. Plaintiff Catherine Harper .....20

        2. Plaintiff Shannon Jones .....24

        3. Plaintiff Jennifer Essig .....27

III. Plaintiffs and the Class Are Entitled to Summary Judgment on their Due Process Claim.....30

    A. The Law of Procedural Due Process Claims and Section 1983.....30

    B. PPS Violated Its Duty of Impartiality to the Putative Class. ....33

        1. PPS imposed two binding financial sentencing conditions not ordered by the court with a financial incentive.....34

        2. PPS’s policy of allocating Class members’ payments first to its own fees violated Class members’ rights to impartial sentencing decisions. ....38

3. PPS performed financially-conflicted law enforcement functions for the Class by enforcing their probation sentences. ....	39
C. PPS Violated Its Duty of Impartiality to Plaintiffs. ....	43
1. PPS performed a financially-conflicted judicial function when it modified Plaintiffs’ payment schedules. ....	43
2. PPS performed a financially-conflicted judicial function when it extended Plaintiffs Harper’s and Jones’ probation sentences from 12 to 24 months. ....	45
3. PPS performed a financially-conflicted judicial or, alternatively, enforcement function when it scheduled Plaintiff Harper’s hearing. ....	47
4. PPS performed a financially-conflicted enforcement function when it reported about Plaintiffs’ alleged noncompliance at review hearings.....	48
5. PPS performed a financially-conflicted judicial function when it denied Plaintiff Harper’s request for community service. ....	49
IV. Conclusion .....	50

**TABLE OF AUTHORITIES**

**Cases**

*Am. Mfrs. Mut. Ins. Co. v. Sullivan*,  
526 U.S. 40 (1999).....31

*In re Armstead Lester Hayes III*,  
No. 49 (Ala. Ct. Jud., filed Nov. 2016) .....38

*Bd. of Cnty. Comm’rs v. Brown*,  
520 U.S. 397 (1997).....34

*Bhd. of Locomotive Firemen & Enginemen v. United States*,  
411 F.2d 312 (5th Cir. 1969) .....32

*Bonner v. City of Prichard*,  
661 F.2d 1206 (11th Cir. 1981) .....32

*Brown v. Vance*,  
637 F.2d 272 (5th Cir. 1981) .....33, 37

*Brucker v. City of Doraville*,  
38 F.4th 876 (11th Cir. 2022) .....*passim*

*Celotex Corp. v. Catrett*,  
477 U.S. 317 (1986).....30

*Dugan v. State of Ohio*,  
277 U.S. 61 (1928).....37

*Gagnon v. Scarpelli*,  
411 U.S. 778 (1973).....40

*Harjo v. City of Albuquerque*,  
326 F. Supp. 3d 1145 (D.N.M. 2018).....33

*Harper v. Professional Probation Services, Inc.*,  
976 F.3d 1236 (11th Cir. 2020) .....*passim*

*Hill v. U.S. ex rel. Wampler*,  
298 U.S. 460 (1936).....36

*Johnson v. Williams*,  
699 F. Supp. 2d 159 (D.D.C. 2010).....40, 41, 48

*Khazali v. Berns*,  
No. C16-1022JLR, 2016 WL 4479915 (W.D. Wash. Aug. 24,  
2016) .....47

*Marshall v. Jerrico, Inc.*,  
446 U.S. 238 (1980).....*passim*

*McNeil v. Cmty. Prob. Servs., LLC*,  
No. 1:18-cv-00033, 2021 WL 366776 (M.D. Tenn. Feb. 3, 2021) .....42, 43

*Monell v. Dep’t of Social Services*,  
436 U.S. 658 (1978).....31, 32, 40

*Pembaur v. City of Cincinnati*,  
475 U.S. 469 (1986).....47

*Sealed Appellee v. Sealed Appellant*,  
937 F.3d 392 (5th Cir. 2019), *as revised* (Sept. 11, 2019) .....31

*Swift v. California*,  
384 F.3d 1184 (9th Cir. 2004) .....41, 48

*Tumey v. Ohio*,  
273 U.S. 510 (1927).....31, 37

*United Church of the Med. Ctr. v. Med. Ctr. Comm’n*,  
689 F.2d 693 (7th Cir. 1982) .....31

*United States v. Davis*,  
151 F.3d 1304 (10th Cir. 1998) .....47

*United States v. Freeman*,  
No. CR 09-00148-KD-N, 2022 WL 1215071 (S.D. Ala. Apr. 25,  
2022) .....38

*United States v. Johnson*,  
48 F.3d 806 (4th Cir. 1995) .....32

*United States v. Major*,  
303 F. App’x 798 (11th Cir. 2008).....35

*Ward v. Village of Monroeville*,  
409 U.S. 57 (1972).....31, 33, 39, 48

*Wright v. United States*,  
732 F.2d 1048 (2d Cir. 1984) .....42

**Statutes**

42 U.S.C. § 1983 .....30, 31

Ala. Code § 12-14-13.....36, 41, 46

**Other Authorities**

Ala. Op. Att’y Gen. No. 98-00043 (Nov. 24, 1997).....36

Ala. R. Crim. P. 27.2.....36

Fed. R. Civ. P. 56.....30

Fed. R. Evid. 801 .....13

Fed. R. Evid. 901 .....13

Fed. R. Evid. 902 .....13

Fed. R. Evid. 1006 .....8

U.S. Const. amend. XIV, § 2 .....2, 39, 50

## **I. INTRODUCTION**

In *Harper v. Professional Probation Services, Inc.*, the Eleventh Circuit ruled that Defendant Professional Probation Services, Inc. (“PPS”), a private company that profits exclusively from supervisees ordered to its control, performed judicial functions with an impermissible financial interest when it “unilaterally lengthened the duration of probation terms, increased associated fines, and added substantive conditions” to Plaintiffs Catherine Harper, Shannon Jones, and Jennifer Essig’s sentences. 976 F.3d 1236, 1243 (11th Cir. 2020). Mere months ago, the court reaffirmed that the strict rule prohibiting financial interests in the administration of justice applies with equal force to those performing law enforcement functions. *See Brucker v. City of Doraville*, 38 F.4th 876, 886–88 (11th Cir. 2022).

Because the undisputed evidence shows that PPS’s business model was predicated on abusing its governmental authority to extract money from its supervisees for its own profit, Plaintiffs are entitled to summary judgment on their due process claim against PPS. Plaintiffs Harper and Jones previously moved to certify a Class of similarly situated supervisees; they now move for summary judgment on behalf of the putative Class as well. Plaintiffs request this Court certify the Class, enter summary judgment for the Class, and set this case for trial on class-wide damages. Even if the Court denies certification or class-wide liability, the

named Plaintiffs are entitled to summary judgment on their individual Fourteenth Amendment claims. Plaintiffs reserve damages and their state law claims for trial.

## **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

When Plaintiff Catherine Harper pled guilty to a traffic ticket in the City of Gardendale, Alabama, in May 2017, *see* Harper Docs. (Ex. 1), ECF 231-1 at 3,<sup>1</sup> she was a single mom to a child with special needs and working full time. Catherine Harper Decl. (Ex. 2), ECF 231-2 ¶ 2. Because Harper could not afford to pay her court debt in full, the Gardendale Municipal Court (“court”) judge ordered her to serve one year on probation. *Ans.*, ECF 120 ¶¶ 7, 117–118. On August 19, 2016, Plaintiff Shannon Jones was also sentenced to one year of probation by the court when she could not pay her fines and court costs in full because of her limited disability income. *Jones Docs.* (Ex. 3), ECF 231-3 at 3, 51–53; *Ans.*, ECF 120 ¶¶ 7, 181; *Shannon Jones Dep.* (Ex. 4), ECF 231-4 at 42:14–43:9. Plaintiff Jennifer Essig was ordered to one year of probation by the court on July 21, 2017, and similarly could not pay her fines in full due to her limited disability income. *Ans.*, ECF 120 ¶¶ 7, 222; *Essig Responses to PPS’s Interrogs.* (Ex. 5), ECF 231-5 at 15–16 ¶ 9. Indeed, the judge sentenced all defendants who pled guilty but could not afford to pay their court debt in full at sentencing (hereinafter, “supervisees”) to probation with Defendant PPS. *See Ans.*, ECF 120 ¶¶ 29, 45; *Breanna Dunn Dep.* (Ex. 6), ECF

---

<sup>1</sup> All docket pin cites refer to the ECF header page number, except for transcript citations.



231-6 at 21:3–13; Jennifer Hayes Dep., vol. I (Ex. 7), ECF 231-7 at 56:13–18, 151:6–16; Sherry Baggett Dep. (Ex. 8), ECF 231-8 at 67:18–69:4; *cf.* Expert Decl. of Dr. Lily Hanrath (Ex. 9), ECF 231-9 at 34 ¶ 28.

Because people were only sentenced to PPS probation if they owed court debt and PPS did not provide mental health or addiction treatment, driving or domestic violence classes, or job training, *see* Baggett Dep., ECF 231-8 at 112:4–113:8; Gardendale Municipal Court Dep. (Ex. 10), ECF 231-10 at 177:24–178:15, PPS’s primary role was to act as a private debt collector backed by the criminal enforcement powers of the State, *see* Expert Decl. of Dr. Sarah Shannon (Ex. 11), ECF 231-11 at 14–15; *cf.* Mun. Ct. Dep., ECF 231-10 at 83:16–24, 140:2–5.

#### **A. PPS Supervision in Gardendale**

Between 1998 and November 2017, PPS contracted with the City of Gardendale (“City”) to be the sole probation provider for the Gardendale Municipal Court. Ans., ECF 120 ¶ 27. The Contract authorized PPS to “[b]ill the offender for program services” at \$30 per month. Contract (Ex. 12), ECF 231-12 at 3 ¶ I, 9; *see* Clay Cox Dep. (Ex. 13), ECF 231-13 at 110:19–111:5.

PPS submitted monthly reports, along with a check, to the court recording its collections of “Court fines, costs, and restitution,” but not what PPS collected in supervision fees. *See* Contract, ECF 231-12 at 3 ¶ K (requiring reports); PPS Resp. to Pls.’ Second Req. for Docs. (Ex. 14), ECF 231-14 at 5 ¶ 7; Dunn Dep., ECF 231-

6 at 83:12–84:10; Mun. Ct. Dep., ECF 231-10 at 133:12–134:12, 134:24–135:18; Baggett Dep., ECF 231-8 at 233:18–234:11. These reports were the only method the court used to monitor PPS’s services. Mun. Ct. Dep., ECF 231-10 at 126:25–127:9.

PPS’s only source of income in Gardendale was fees paid directly to PPS by supervisees. *See* PPS Resp. to Pls.’ First Interrogs. (Ex. 15), ECF 231-15 at 4 ¶ 1; Contract, ECF 231-12 at 4, 12; Ans., ECF 120 ¶¶ 26, 36, 39, 40, 93; City of Gardendale Dep. (Ex. 16), ECF 231-16 at 96:20–97:7. PPS set the supervision fee it charged to supervisees. Baggett Dep., ECF 231-8 at 39:12–40:3. In 2011, PPS “notif[ied]” the court it was “increas[ing] the PPS basic supervision fee to \$40.00 per month” to “increase [its] per-case revenue.” Letter from Clay Cox (Ex. 17), ECF 231-17 at 3. No further correspondence, contract addendum, or resolution from the City or court addressed PPS’s increase. Cox Dep., ECF 231-13 at 118:20–120:1; City Dep., ECF 231-16 at 96:5–12; Mun. Ct. Dep., ECF 231-10 at 118:10–119:22, 122:9–16; *cf.* PPS RFPs, ECF 231-14 at 4–5 ¶ 5 (no other correspondence).

Rachel McCombs was PPS’s office manager and probation officer in Gardendale from 2014 to 2017. PPS ROGs, ECF 231-15 at 4 ¶ 3. PPS trained McCombs on its Standard Operating Procedure Manual (“SOP Manual”), which detailed company policies on how to perform courtroom intake, schedule and conduct probation check-in appointments, address supervisee noncompliance, address supervisee indigency, schedule hearings and testify in court, create and

recall warrants, and keep records of supervisee compliance and interactions with probation. *See* SOP Manual (Ex. 18), ECF 231-18 at 93–95, 97, 110, 114, 116–17, 126–28, 132; PPS RFPs, ECF 231-14 at 4 ¶¶ 2–4; PPS Dep., designee Keith Ward (Ex. 19), ECF 231-19 at 40:3–13.<sup>2</sup> PPS authorized McCombs to adapt forms in the SOP manual for Gardendale, exercise discretion in enforcing probation, and manage the part-time probation aides who assisted her. PPS Dep., ECF 231-19 at 86:7–87:17, 115:21–119:12, 162:13–164:10, 181:11–182:11; PPS Dep., designee Tom York (Ex. 20), ECF 231-20 at 108:12–109:3; Rachel McCombs Dep., vol. II (Ex. 21), ECF 231-21 at 355:4–12; Tom York Dep. (Ex. 22), ECF 231-22 at 41:3–9; Courtney Waters Dep. (Ex. 23), ECF 231-23 at 49:18–50:13; PPS ROGs, ECF 231-15 at 4 ¶ 3.

PPS paid McCombs two types of bonuses based on how much the Gardendale office collected in supervision fees: (1) an office manager bonus, *see* Keith Ward Dep. (Ex. 24), ECF 231-24 at 60:7–62:18; PPS Revenue Email (Ex. 25), ECF 231-25; PPS Dep., ECF 231-20 at 32:15–34:10, 39:11–16; PPS Pay Statements for Rachel McCombs (Ex. 26), ECF 231-26 at 27 (“Bonus \$”), and (2) a fee incentive bonus, *see* SOP Manual, ECF 231-18 at 167–72; PPS Dep., ECF 231-19 at 126:14–127:3, 130:7–16; PPS Dep., ECF 231-20 at 39:3–10; Pay Statements, ECF 231-26 at 27, 53. PPS praised McCombs as “an excellent employee” who “could increase our reporting and collections.” Email from Jacobs to Cox (Ex. 27), ECF 231-27.

---

<sup>2</sup> PPS designated multiple witnesses for its Rule 30(b)(6) deposition. *See* ECFs 231-19, 231-20.

The court ordered supervisees to cease reporting and making payments to PPS on November 1, 2017, and offered payment plans based on what the defendant could pay, without a monthly fee or reporting requirements. Order of Mun. Ct. (Ex. 28), ECF 231-28 at 2–3; Mun. Ct. Dep., ECF 231-10 at 145:8–146:9; Hayes Dep., ECF 231-7 at 58:17–59:18. PPS then terminated the Contract. Ans., ECF 120 ¶ 11.

### **B. Court Sentencing to PPS Supervision**

When PPS operated in Gardendale, the court convened every other Friday morning and afternoon to hear all court business. Hayes Dep., ECF 231-7 at 17:2–3, 38:1–20, 168:22–24; Dunn Dep., ECF 231-6 at 287:9–14; Waters Dep., ECF 231-23 at 215:14–17. The judge, clerks, CRO officer, and PPS employees all sat at the bench. Hayes Dep., ECF 231-7 at 19:19–20:4; Mun. Ct. Dep., ECF 231-10 at 178:16–179:7 (CRO is state-mandated for drug/alcohol offenses). A clerk assembled the docket before court. Hayes Dep., ECF 231-7 at 168:25–169:10; *e.g.*, 2017-6-16 Court Docket (Ex. 29), ECF 231-29.

All probation conditions and sentence modifications ordered by the judge were recorded in the Order of Probation or the Case Action Summary (“CAS”). Hayes Dep., ECF 231-7 at 61:5–7, 82:8–83:15; Dunn Dep., ECF 231-6 at 21:14–23:11, 37:11–38:2, 241:3–11; Jennifer Hayes Dep., vol. II (Ex. 30), ECF 231-30 at 23:12–25:22; Mun. Ct. Dep., ECF 231-10 at 110:18–111:4, 113:9–17, 122:5–8; Ans., ECF 120 ¶ 44; *e.g.*, Harper Docs., ECF 231-1 at 4 (CAS), 7 (Order of

Probation). The court created both the Order of Probation and the CAS. Dunn Dep., ECF 231-6 at 21:14–23:11, 37:4–10, 105:21–106:2. The Order of Probation and the CAS do not include a supervision fee, *see* Ans., ECF 120 ¶ 56; Dunn Dep., ECF 231-6 at 268:8–14; Hayes Dep., ECF 231-30 at 24:7–14, nor do they specify a required payment amount or frequency, Dunn Dep., ECF 231-6 at 99:3–14, 241:3–11. The judge personally signed the Order of Probation and CAS and kept the originals in the court’s file. *Id.* at 23:9–11, 37:11–38:2, 105:21–106:2; Hayes Dep., ECF 231-7 at 61:5–7; Ans., ECF 120 ¶ 44. The judge gave the defendant a carbon copy of the Order of Probation. Hayes Dep., ECF 231-7 at 63:19–64:1, 66:8–21.

When the court received supervisees’ court debt payments from PPS, court staff recorded the amount of the payment in the CAS under “Payments” and placed a receipt in the court file. Mun. Ct. Dep., ECF 231-10 at 133:19–134:2.

### **C. PPS Initial Meeting with Supervisees**

After the judge completed the Order of Probation and CAS, PPS brought the supervisee and their court file to another room for an intake meeting. Dunn Dep., ECF 231-6 at 46:3–17; Rachel McCombs Dep., vol. I (Ex. 31), ECF 231-31 at 155:12–156:5; Ans., ECF 120 ¶¶ 53–54; Contract, ECF 231-12 at 10 ¶ 3.

#### ***1. PPS’s sentencing form***

“PPS admits it filled out a Sentence of Probation form during the meeting with the probationer following their sentence to probation supervised by PPS. PPS admits

the Sentence of Probation was an internal company form.” Ans., ECF 120 ¶ 54; *see also* Mun. Ct. Dep., ECF 231-10 at 173:11–20; Hayes Dep., ECF 231-7 at 76:7–17. PPS’s form included both mandatory probation conditions (pre-printed, imposed universally) and optional conditions that could be checked off. Ans., ECF 120 ¶ 60; *e.g.*, Harper Docs., ECF 231-1 at 8.

The first mandatory condition on every form ordered the supervisee to “[p]ay a monthly probation service fee” to PPS. Harper Docs., ECF 231-1 at 8; PPS Dep., ECF 231-19 at 89:18–90:5. Forms were either pre-printed with a fee of \$40 or hand-corrected to \$40 from \$35 or \$45. Ans., ECF 120 ¶¶ 54, 56; McCombs Dep., ECF 231-21 at 355:23–356:12; *but see* Composite of Uncorrected Forms (Ex. 32), ECF 231-32 at 3; Summary of Supervisees Charged More (Ex. 33), ECF 231-33.<sup>3</sup>

The second mandatory Sentence of Probation condition was to pay “all fines” at a monthly rate. *E.g.*, Harper Docs., ECF 231-1 at 8. PPS trained its employees to determine the minimum monthly payment amount. PPS Dep., ECF 231-19 at 60:8–13; SOP Manual, ECF 231-18 at 95; *see* Summary of PPS Sentence of Probation Payments (Ex. 35), ECF 231-35 (hundreds of forms suggest a payment pattern);

---

<sup>3</sup> Per Fed. R. Evid. 1006, Plaintiffs include in Exs. 32 and 33 summaries of PPS’s electronic records. PPS produced the summarized data in an Excel spreadsheet, PPS Resp. to Pls.’ Second Interrogs. (Ex. 34), ECF 231-34 at 4 ¶ 5, where each case was given an ID number (“PPSI”), PPS Dep., ECF 231-20 at 68:23–69:4. In Ex. 33, as well as Exs. 35, 36, & 42, Plaintiffs also summarize voluminous writings to prove their content. Fed. R. Evid. 1006. Plaintiffs identify the summarized writings in the exhibits and reproduced them in full with this filing.

Waters Dep., ECF 231-23 at 173:8–174:4. The court authorized PPS to extend the length of probation ordered by the judge if PPS wanted to lower the supervisee’s monthly payment. McCombs Dep., ECF 231-21 at 271:22–273:14, 369:25–370:6. PPS employees extended probation from 12 to 24 months in a consistent manner, McCombs Dep., ECF 231-21 at 272:14–21, 369:16–23, in at least 100 putative Class members’ cases, *see* Summary of Probation Term Changes (Ex. 36), ECF 231-36.

PPS’s standard practice was to check off optional condition 15 on its Sentence of Probation, McCombs Dep., ECF 231-21 at 267:14–24, 355:4–12; Waters Dep., ECF 231-23 at 151:13–152:19; Hanrath Decl., ECF 231-9 at 21–23 ¶ 11, which states PPS supervision terminates upon full payment of court debt, Harper Docs., ECF 231-1 at 8. PPS’s practice was to stop supervising people who paid in full. McCombs Dep., ECF 231-31 at 122:24–123:6, 163:12–15; McCombs Dep., ECF 231-21 at 274:8–10; PPS Dep., ECF 231-20 at 80:14–21.

Court clerks usually signed the PPS Sentence of Probation with their initials and the judge’s name. Mun. Ct. Dep., ECF 231-10 at 112:12–25, 170:8–171:2; Dunn Dep., ECF 231-6 at 44:12–22; Hayes Dep., ECF 231-7 at 74:25–75:6. Not every form was signed by someone from the court. *E.g.*, Composite of Unsigned Forms (Ex. 37), ECF 231-37; Hanrath Decl., ECF 231-9 at 35 ¶ 30. PPS placed the top copy of the Sentence of Probation in the court file, typically prior to the defendant signing it. Hayes Dep., ECF 231-7 at 59:19–60:5; Waters Dep., ECF 231-23 at 140:9–23;

*see* Hanrath Decl., ECF 231-9 at 36 ¶ 31. PPS modified some Sentence of Probation forms after the copy was placed in the court file. *E.g.*, Composite of Form Changes (Ex. 38), ECF 231-38 at 3–6 (PPS form and printout include probation term and monthly payment not on court’s copy). PPS reviewed the Sentence of Probation with the supervisee during the intake meeting and usually had them sign. Ans., ECF 120 ¶¶ 59, 61; McCombs Dep., ECF 231-31 at 148:3–11.

## ***2. PPS’s additional probation policy documents***

During the intake meeting, PPS scheduled the supervisee’s first probation appointment at the PPS office (“check-in”), Ans., ECF 120 ¶¶ 61, 65, and gave the supervisee a PPS Enrollment Form, *id.* ¶¶ 61, 63; *e.g.*, Essig Enrollment Form (Ex. 39), ECF 231-39; PPS Dep., ECF 231-19 at 51:9–53:10; *id.* at 35:2–36:5, 41:4–41:23 (referring to form as “map/appointment notice”); SOP Manual, ECF 231-18 at 103, 106. The form states: “**MONTHLY PAYMENT DUE AT FIRST VISIT!!!**”; “[t]he conditions of your sentence are **not** negotiable, and will be strictly enforced”; PPS will not reschedule the “first appointment or [appointments on] the Deadline Date (the day all money is due)”; and supervisees “will be required to report weekly” if noncompliant. Essig Form, ECF 231-39; Ans., ECF 120 ¶¶ 62–65.

PPS explained the Probation Violation Policy, printed on PPS letterhead, and required supervisees to sign it. McCombs Dep., ECF 231-31 at 160:2–15; Dunn Dep., ECF 231-6 at 45:7–46:25, 50:13–16; *e.g.*, Harper Docs., ECF 231-1 at 9. The



policy, also displayed in PPS's office, threatened jail time: 24 hours (first violation), 48 hours (second), and revocation (third). Ans., ECF 120 ¶ 83; *see also* Letter from McCombs to Baggett (Ex. 40), ECF 231-40 at 3 (“I tried to have a guy’s probation revoked (per our policy, 3 chances) . . .”).

PPS collected an optional “down payment” from the supervisee. Waters Dep., ECF 231-23 at 121:23–122:8; Hayes Dep., ECF 231-7 at 91:7–15. PPS applied all payments first to its own fee and any surplus to the supervisee’s court debt. Ans., ECF 120 ¶¶ 9, 77, 89; PPS Dep., ECF 231-19 at 63:7–65:12 (included in training). PPS decided how to allocate payments. Mun. Ct. Dep., ECF 231-10 at 128:14–130:10; *cf.* Baggett Dep., ECF 231-8 at 41:20–42:12; Dunn Dep., ECF 231-6 at 80:10–17; Ans., ECF 120 at ¶ 41. After intake, PPS escorted the supervisee out of the courthouse. Waters Dep., ECF 231-23 at 101:6–25, 121:18–122:8.

#### **D. PPS Enforcement of Probation Conditions**

PPS input sentences from its Sentence of Probation form into its proprietary software, Offender Tracking System (“OTS”), and recorded all contacts with supervisees, including payments, check-ins, review hearings, and phone calls. SOP Manual, ECF 231-18 at 94, 116–17; McCombs Dep., ECF 231-31 at 112:14–23, 114:18–115:4, 174:5–16; *id.* at 115:11–116:20, 117:5–118:15 (describing OTS printout in Essig PPS File (Ex. 41), ECF 231-41 at 2); PPS Dep., ECF 231-19 at 41:24–42:4; Ans., ECF 120 ¶ 91; York Dep., ECF 231-22 at 101:2–102:4. PPS

trained McCombs how to use OTS. PPS Dep., ECF 231-19 at 41:24–43:11. PPS’s internal audit reviewed every case file and OTS note. *Id.* at 110:23–111:16, 131:19–132:22; York Dep., ECF 231-22 at 50:9–16, 50:21–51:1, 57:2–8. Each note contains the author’s initials, date, and common abbreviations. McCombs Dep., ECF 231-31 at 114:13–18; McCombs Dep., ECF 231-21 at 279:13–24; *see* Summary of OTS Abbreviations (Ex. 42), ECF 231-42.

### ***1. PPS reporting and payment requirements***

PPS’s Sentence of Probation required all supervisees to report to PPS as directed. *E.g.*, Harper Docs., ECF 231-1 at 8 (condition 4). PPS set reporting requirements. Ans., ECF 120 ¶ 73; Baggett Dep., ECF 231-8 at 170:16–19; Hayes Dep., ECF 231-7 at 102:2–103:17; Mun. Ct. Dep., ECF 231-10 at 128:2–9; *cf.* York Dep., ECF 231-22 at 98:9–12, 99:11–18; Contract, ECF 231-12 at 9 ¶ 2.

PPS’s Gardendale Office was open weekdays 9:00am–12:00pm and 1–4:30pm, except on Fridays that PPS employees were in court. *See* Essig Enrollment Form, ECF 231-39 at 2; McCombs Dep., ECF 231-31 at 39:4–7. When supervisees arrived at the office, PPS required them to sign in and write the amount they were paying. Ans., ECF 120 ¶ 175. The appointment took place through a window and typically consisted of PPS asking for the supervisee’s payment, scheduling the next check-in, and giving the supervisee a receipt. *Id.* ¶¶ 79, 80, 81; SOP Manual, ECF 231-18 at 110, 116 (policies on check-ins). If a supervisee could not pay, PPS gave

a receipt stating “NON-PAYMENT.” McCombs Dep., ECF 231-31 at 177:11–178:14; *e.g.*, Harper Docs., ECF 231-1 at 30. PPS wrote the amount the supervisee owed to “catch up” on missed payments on the receipt. McCombs Dep., ECF 231-31 at 178:15–24, 179:22–180:7, 181:7–17; *e.g.*, Harper Docs., ECF 231-1 at 30.

If a supervisee could not pay the full monthly payment at the first check-in, PPS required them to report weekly. Ans., ECF 120 ¶¶ 62, 76; SOP Manual, ECF 231-18 at 126; PPS Dep., ECF 231-19 at 179:10–180:12; McCombs Dep, ECF 231-31 at 126:4–127:5, 138:11–23; Waters Dep., ECF 231-23 at 167:1–16, 168:11–169:17; *e.g.*, PPS Case Notes on Weekly Reporting (Ex. 43), ECF 231-43.<sup>4</sup> PPS marked missed check-ins as failures to report, even if the supervisee had reported earlier that month. McCombs Dep., ECF 231-31 at 191:10–192:24. PPS allowed family members to report for supervisees if making a payment. McCombs Dep., ECF 231-31 at 162:25–163:11, 186:8–187:16; Waters Dep., ECF 231-23 at 75:22–76:5, 123:5–16; *e.g.*, PPS Case Notes on Proxy Reporting (Ex. 45), ECF 231-45. PPS praised McCombs for “[g]reat compliance on monthly payment requirements” and “scheduling appointments according to payment, arrearages, etc.” PPS Caseload Audits (Ex. 44), ECF 231-44 at 6; PPS Dep., ECF 231-19 at 73:16–74:8.

---

<sup>4</sup> Exhibits 43, 45–51, 58, & 61 are summaries of electronic records PPS produced under oath, *see supra* note 33. PPS’s custodian can authenticate the notes at trial. Fed. R. Evid. 901, 902. Statements of PPS employees in the notes are admissible against PPS for their truth. Fed. R. Evid. 801 (d)(2).

PPS decided whether to reschedule check-ins or count a missed check-in as a violation of probation for failure to report. McCombs Dep., ECF 231-31 at 183:14–185:16, 191:25–192:24; Waters Dep., ECF 231-23 at 212:17–213:5. PPS told supervisees who missed check-ins that PPS would “sen[d] [them] back to court and [they] will serve 24 hours” or “issue a warrant due to [them] missing appts,” *see* PPS Case Notes on Sanctions (Ex. 46), ECF 231-46 at 2, 5.

If a supervisee owed supervision fees for multiple months, PPS applied all payments first towards its outstanding supervision fees. *E.g.*, PPS Case Notes on Arrears (Ex. 47), ECF 231-47 at 2 (applying \$80 to supervision fees for 99991014538). PPS imposed the \$40 monthly supervision fee on every putative Class member, *see* Hanrath Decl., ECF 231-9 at 16 ¶ 5, even when the court did not sign the Sentence of Probation form or when the form specified a \$35 fee, *e.g.*, ECFs 231-33, 231-37 (examples of forms with payment histories).

## ***2. PPS responses to supervisees’ inability to pay***

Supervisees repeatedly told PPS they had difficulty affording payments, *e.g.*, PPS Case Notes on Difficulty Paying (Ex. 48), ECF 231-48, and requested alternatives to payments, *e.g.*, PPS Case Notes on Community Service (Ex. 49), ECF 231-49. PPS probation officers had discretion in how to respond, including whether to provide the Financial Review Package PPS created to assess indigency. SOP Manual, ECF 231-18 at 127–131; McCombs Dep., ECF 231-21 at 331:23–332:2; *cf.*

Cox Dep., ECF 231-13 at 96:1–20 (package’s use was not mandated). The SOP Manual directed probation officers “to identify folks under our supervision who possess this actual inability to pay, which is different, as we all know, than a refusal to pay,” ECF 231-18 at 127, and to “[h]elp to determine those who are truly indigent and allow Community Service in lieu of fines if applicable,” *id.* at 126; *see also* Cox Dep., ECF 231-13 at 97:20–98:4. PPS created a form to convert fines to community service that says nothing about remitting its fees. SOP Manual, ECF 231-18 at 132.

The court did not operate a community service program; PPS managed coordination and compliance for community service. Mun. Ct. Dep., ECF 231-37 at 154:3–10, 156:1–14; Dunn Dep., ECF 231-6 at 52:12–14, 130:8–131:2; Contract, ECF 231-12 at 15 ¶ 7; *see* SOP Manual, ECF 231-32 at 187–191, 207–12. The court did not instruct PPS when to raise a supervisee’s indigency or community service request. Mun. Ct. Dep., ECF 231-10 at 157:25–158:13, 165:18–24.

PPS employees required some supervisees to apply to “10 jobs” upon a request for community service, *see* PPS Case Notes on Job Logs (Ex. 50), ECF 231-50; Waters Dep., ECF 231-23 at 166:2–11, 167:1–16, or denied the request because the supervisee worked full-time, was disabled, or had missed check-in appointments with PPS, *see* PPS Case Notes on Comm. Serv., ECF 231-49. PPS employees also decided whether to unilaterally waive PPS’s fees by placing fees and payments on “hold.” Waters Dep., ECF 231-23 at 191:6–192:5; McCombs Dep., ECF 231-31 at

89:6–14 (“on hold” means supervision fees not collected); *e.g.*, PPS Case Notes on Holds (Ex. 51), ECF 231-51 at 4 (placing supervisee 99991012965 on hold); Bearden PPS File (Ex. 52), ECF 231-52 at 3 (file for supervisee 99991012965); *but see* Bearden CAS (Ex. 53), ECF 231-53 (no fee hold or waiver ordered by judge). For some supervisees, PPS approved a request to complete community service in lieu of payments prior to the court entering an order: McCombs gave supervisee Graham the Financial Review Package in August 2017 and had her sign PPS’s internal community service forms (ordering 20 hours) nearly two weeks before a clerk signed an order modifying her sentence, *see* Graham PPS File (Ex. 54), ECF 231-54 at 9–10 (case notes), 15–20 (package), 22–23 (forms), 21 (order).

### **E. PPS Reports on Noncompliance to the Court**

PPS gave probation officers discretion in whether and how to report alleged probation violations to the municipal court. PPS Dep., ECF 231-19 at 115:21–119:12, 162:13–164:10, 181:11–182:11; PPS Dep., ECF 231-20 at 108:12–109:3; York Dep., ECF 231-22 at 105:17–106:2.

#### ***1. PPS noncompliance reports at probation review hearings***

One way PPS reported about supervisees’ compliance was through scheduling and testifying at probation review hearings. Ans., ECF 120 ¶ 99; PPS Dep., ECF 231-19 at 178:1–8. PPS instructed employees how to testify in compliance hearings, and what to testify about. SOP Manual, ECF 231-18 at 232–43. PPS directed

probation officers to “[s]chedule compliance Hearings for those who are 60–90 days in arrears on their minimum monthly fine payments.” *Id.* at 126, *see also id.* at 95; *cf.* York Dep., ECF 231-22 at 98:13–24; Cox Dep., ECF 231-13 at 93:9–20; PPS Dep., ECF 231-19 at 56:14–17, 59:1–7, 162:13–25, 178:1–8, 181:19–182:1. The court allowed PPS to add or remove supervisees from the docket. Baggett Dep., ECF 231-8 at 155:24–156:6; Dunn Dep., ECF 231-6 at 137:14–19; Hayes Dep., ECF 231-7 at 116:18–24; Mun. Ct. Dep., ECF 231-10 at 195:11–14; *e.g.*, 2017-6-16 Court Docket, ECF 231-29 at 6–8 (“added by Rachel”). McCombs scheduled review hearings for supervisees she deemed noncompliant, McCombs Dep., ECF 231-31 at 197:3–19, 200:18–22; Waters Dep., ECF 231-23 at 204:19–206:9; *e.g.*, PPS Case Notes, ECF 231-46; Email from McCombs to Clerks (Ex. 55), ECF 231-55, and canceled them for supervisees she deemed compliant, McCombs Dep., ECF 231-31 at 201:5–19; *e.g.*, Email from McCombs to Hayes (Ex. 56), ECF 231-56.

If a supervisee missed a probation review hearing, the supervisee could receive a failure to appear (“FTA”) warrant. Baggett Dep., ECF 231-8 at 196:23–197:17; Hayes Dep., ECF 231-7 at 128:16–18, 129:23–130:7; *e.g.*, Docket, ECF 231-29 at 3 (noting “FTA” next to supervisee Wyteria Davis); PPS Case Notes on Sanctions, ECF 231-46 at 9 (note for supervisee 99991013553: McCombs gave court date “due to non compliance” and court issued FTA when he “missed it”). The FTA would then be adjudicated as a separate charge. *See, e.g.*, Composite of Forms, ECF

231-38 at 11–13 (supervisee Simpson put on probation for “FTA” offense); Docket, ECF 231-29 at 10 (supervisee Adaris Davis on docket for “prob review” with charges of “failure to appear” and “probation violation”).

Supervisees were given notice these hearings were going to occur via receipts and verbal reminders from PPS, but PPS did not provide written notice of the substance of its testimony or copies of the notes PPS brought to hearings. McCombs Dep., ECF 231-21 at 248:2–249:21, 254:5–21, 340:22–24, 389:18–391:3; Waters Dep., ECF 231-23 at 215:18–216:4; *e.g.*, Harper PPS File (Ex. 57), ECF 231-57 at 10–17. Supervisees without counsel at sentencing were typically unrepresented in these hearings. Dunn Dep., ECF 231-6 at 154:5–14. PPS did not testify under oath, McCombs Dep., ECF 231-21 at 245:15–18, and spoke with the judge out of open court, Baggett Dep., ECF 231-8 at 249:12–250:2 (discussing ECF 231-40 at 3).

The judge sentenced supervisees to jail, or revoked their probation, based on PPS’s unsworn allegations of probation noncompliance during review hearings. *E.g.*, PPS Case Notes on Rev. Hrg. Sanctions (Ex. 58), ECF 231-58 at 2 (notes stating supervisees ordered to serve 24 or 48 hours in jail for noncompliance); *id.* at 3 (note for PPSI 99991013622: “judge was notified def has continued to miss appts after being warned numerous times along with not keeping updated contact information to be reached. probation was revoked.”); Baggett Dep., ECF 231-8 at 180:25–181:15; Mun. Ct. Dep., ECF 231-10 at 196:8–11. Supervisees were returned



to PPS probation after being jailed for noncompliance. Dunn Dep., ECF 231-6 at 232:15–23; PPS Case Notes on Hrg. Sanctions, ECF 231-58 at 2 (note for PPSI 99991014449: “ordered to serve 48 hours due to missed appts” and PPS scheduled their next office visit for 10-27-17); *infra* Parts II.F.1–3 (Plaintiffs jailed).

## ***2. PPS use of probation violation warrants***

PPS provided documents to supervisees stating a warrant would issue for noncompliance. *See supra* Part II.C.2. PPS directed employees to create probation violation warrants using a company form. *See* SOP Manual, ECF 231-18 at 97, 126, 203; *e.g.*, PPS Probation Violation Warrant (Ex. 59), ECF 231-59; Mun. Ct. Dep., ECF 231-10 at 180:10–20 (describing ECF 231-59 as a PPS form). The court did not set criteria for PPS warrant requests, Mun. Ct. Dep., ECF 231-10 at 182:21–183:10, and probation officers exercised discretion as to when to seek a warrant, *see* York Dep., ECF 231-22 at 98:25–99:10; McCombs Dep., ECF 231-21 at 229:25–230:13, 231:22–232:11; *e.g.*, Email from McCombs to Clerk (Ex. 60), ECF 231-60; Hayes Dep., ECF 231-7 at 126:9–127:20 (reviewing ECF 231-60); *e.g.*, PPS Case Notes on Warrants (Ex. 61), ECF 231-61 at 3 (noting “probation violation” issued for supervisee 99991012965). PPS filled out the warrants using OTS. McCombs Dep., ECF 231-21 at 226:3–228:13, 229:1–9, 333:12–334:7, 384:6–18.

Supervisees who received probation violation warrants could be convicted of a new charge of “probation violation” and sentenced to a new, “consecutive” term

of probation. McCombs Dep., ECF 231-21 at 223:8–224:1; *e.g.*, Pierce PPS File (Ex. 62), ECF 231-62 at 3–4, 7 (supervisee jailed on probation violation warrant, convicted of probation violation, re-sentenced to PPS); Bradberry PPS File (Ex. 63), ECF 231-63 at 3, 10 (same); Harrell PPS File (Ex. 64), ECF 231-64 at 3–4 (same).

PPS had a policy and created a form to “recall” probation violation warrants if the supervisee, or someone on their behalf, paid all PPS fees and court debt listed in the warrant. *See* SOP Manual, ECF 231-18 at 97, 205; PPS Dep., ECF 231-19 at 156:15–157:3; York Dep., ECF 231-22 at 31:3–34:25; *e.g.*, Bearden PPS File, ECF 231-52 at 4, 6; *e.g.*, PPS Case Notes on Warrants, ECF 231-61 at 2. PPS faxed its recall form to the court and police department simultaneously, who then recalled the warrant. McCombs Dep., ECF 231-21 at 385:13–386:23; Hayes Dep., ECF 231-7 at 141:18–142:12; Mun. Ct. Dep., ECF 231-10 at 187:5–20.

## **F. PPS Supervision of Named Plaintiffs**

### ***1. Plaintiff Catherine Harper***

The judge filled out and signed an Order of Probation ordering Harper, who was unrepresented, to 1 year of probation and 90 days of suspended jail time. *See* Harper Docs., ECF 231-1 at 7; Dunn Dep., ECF 231-6 at 36:20–37:10, 37:25–38:11, 39:16–22; Mun. Ct. Dep., ECF 231-10 at 166:20–167:5. The judge filled out and signed a CAS, noting the same sentence and court debt totaling \$715. Dunn Dep., ECF 231-6 at 21:14–23, 23:6–11, 24:13–25:19, 38:22–39:5; Harper Docs., ECF

231-1 at 4. Neither of the judge's orders include a supervision fee, monthly payment, or any other probation conditions. Harper Docs., ECF 231-1 at 4, 7.

Next, PPS brought Harper to another room in the courthouse where PPS admits it filled out a Sentence of Probation form, changing her term of probation to 24 months, setting her payment at \$80, and checking conditions 10, 11, and 15. Ans., ECF 120 ¶¶ 53–54; Catherine Harper Dep. (Ex. 65), ECF 231-65 at 66:2–10, 86:1–12; Harper Docs., ECF 231-1 at 8; Dunn Dep., ECF 231-6 at 39:23–40:15, 276:18–277:3; McCombs Dep., ECF 231-21 at 369:4–370:11 (“That is my writing.”). The judge did not sign Harper's Sentence of Probation; a clerk did. Mun. Ct. Dep., ECF 231-10 at 169:20–170:1. PPS also reviewed and gave Harper copies of the PPS enrollment form and probation violation policy. Ans., ECF 120 ¶¶ 128, 131–32; Harper PPS File, ECF 231-57 at 20. Harper paid \$30, which PPS applied only to its fee. Harper PPS File, ECF 231-57 at 2, 32. PPS told Harper she was required to report to PPS on May 12. *Id.* at 2; Harper Dep., ECF 231-65 at 115:14–17.

Starting at intake, Harper asked PPS for community service instead of payments. Harper Decl., ECF 231-2 ¶ 15. She asked again at her first appointment, and PPS gave her its Financial Review Package. Harper PPS File, ECF 231-57 at 3 (2017-5-16 note). PPS scheduled a review hearing for Harper when she returned on May 22 with her completed Package. *Id.* at 3 (2017-5-17 note; 2017-5-22 note); McCombs Dep., ECF 231-31 at 197:14–198:5; Docket, ECF 231-29 at 7.

Harper attended a review hearing at the court on June 16, 2017, as instructed by PPS. Harper PPS File, ECF 231-57 at 4; Ans., ECF 120 ¶ 142. McCombs informed the judge that Harper filled out community service paperwork. Harper 6-16-17 Audio (Ex. 66), ECF 231-66 at 0:12–0:40.<sup>5</sup> The judge asked if community service was even an option, and McCombs stated it was “an option through probation.” *Id.* at 1:32–1:39. McCombs recommended that Harper could do “half and half”—pay half of her fines and do community service for the other half—but that she would “still have to be current,” *i.e.*, pay her outstanding balance. *Id.* at 1:40–2:02; *see* McCombs Dep., ECF 231-31 at 119:24–120:3. McCombs also stated Harper had not paid anything since her down payment. ECF 231-66 at 2:50–3:18. The judge never mentioned the Financial Review Package, Harper Dep., ECF 231-65 at 128:7–129:6, nor does it appear in her court file, *see* Harper Mun. Ct. File (Ex. 69), ECF 231-69; *but see* Mun. Ct. Dep., ECF 231-10 at 162:24–163:13.

Harper appeared for another review hearing on August 4, 2017. Ans., ECF 120 ¶ 150. McCombs did not raise community service with the court, so Harper again inquired. *Id.* ¶ 151. The judge said the court did not offer community service, Harper 8-4-17 Audio (Ex. 70), ECF 231-70 at 1:48–1:52, and told her to speak to PPS about community service, Harper PPS File, ECF 231-57 at 6 (2017-8-10 note).

---

<sup>5</sup> The Gardendale Municipal Court authenticated Exs. 66, 70–71, 76–77, 84. *See* Certification (Ex. 67), ECF 231-67; Breanna Dunn Decl. (Ex. 68), ECF 231-68 (also filed at ECF 196-26).

At her next PPS check-ins in August and September, Harper asked McCombs about community service, as directed in court, and McCombs stated that PPS would not “help” by offering community service because Harper had missed appointments. Harper PPS File, ECF 231-57 at 6 (2017-8-25 note); McCombs Dep., ECF 231-21 at 365:18–366:10; *see also* Ans., ECF 120 ¶¶ 154, 156–57.

On September 15, 2017, Harper appeared in court for a probation review hearing without counsel. Ans., ECF 120 ¶ 158; McCombs Dep., ECF 231-21 at 297:22–298:1; Harper Dep., ECF 231-65 at 152:15–21. In the four months she had been on probation prior to the hearing, Harper reported to PPS 14 times and made three payments, which PPS applied to its fees. Harper PPS File, ECF 231-57 at 2 (payment history), 3–7 (office visits); Ans., ECF 120 ¶¶ 137, 139, 141, 147, 154, 156–57. Harper began the hearing by asking the judge about community service, and McCombs responded, “Harper continues to miss appointments.” Harper 9-15-17 Hearing Audio (Ex. 71), ECF 231-71 at 0:11–0:22. McCombs stated PPS would not “do any type of community service or something with someone who is noncompliant and not putting forth the effort to make those appointments and do what needs to be done.” *Id.* at 0:22–0:34. Harper disputed PPS’s assertions about her missed appointments, noting she rescheduled and had reported only two days earlier, *id.* at 0:34–0:46, as well as McCombs’ allegation that Harper worked only part time and refused to take on another job, *id.* at 1:01–1:32; *see also* Harper Dep., ECF 231-65

at 147:13–148:6. The judge then ordered Harper “5 days to serve” in jail for missed appointments. 9-15-17 Audio, ECF 231-71 at 2:42–2:48; Dunn Dep., ECF 231-6 at 26:16–27:10 (reading the judge’s notes in Harper Docs., ECF 231-1 at 4).

Harper reported to PPS 19 times over six months, until the court removed all supervisees from PPS. *See* Harper PPS File, ECF 231-57 at 3–9; Order, ECF 231-28. PPS required Harper to report weekly because she was “behind” on her payments. Harper PPS File, ECF 231-57 at 5 (2017-7-12 note). After she was jailed in her probation review hearing, Harper feared “going back to jail due to PPS’s assessment” of her “complian[ce].” Harper Decl., ECF 231-2 ¶ 63.

## ***2. Plaintiff Shannon Jones***

On August 19, 2016, when the judge sentenced Plaintiff Jones to probation, he filled out, signed, and gave her an Order of Probation, imposing 30 days in jail, a one-year probationary period, and CRO. *See* Jones Order of Probation (Ex. 72), ECF 231-72; Hayes Dep., ECF 231-30 at 18:22–19:5; *cf.* Mun. Ct. Dep., ECF 231-10 at 166:20–22. The judge filled out and signed a CAS for each of her four charges. Jones Docs., ECF 231-3 at 11–14; Hayes Dep., ECF 231-7 at 85:18–86:8; Dunn Dep., ECF 231-6 at 22:23–23:11. None of the judge’s orders required a supervision fee or monthly payment. Jones Docs., ECF 231-3 at 3, 11–14.

Jones then met with McCombs in another room where “McCombs filled out a Sentence of Probation form in Jones’ presence.” Ans., ECF 120 ¶ 186; Jones Dep.,

ECF 231-4 at 58:1–12. McCombs crossed out the \$35 supervision fee pre-printed on the form and handwrote \$40; wrote that Jones was sentenced to serve 240 days in jail and 24 months of probation; calculated a monthly payment; and selected conditions 10, 11, and 20. Ans., ECF 120 ¶ 186; McCombs Dep., ECF 231-21 at 314:25–315:6, 372:1–22, 374:3–25 (wrote “two years” to lower monthly payments), 377:11–378:15; Jones Sentence of Probation (Ex. 73), ECF 231-73.

McCombs reviewed and gave Jones copies of the Probation Violation Policy, Jones Dep., ECF 231-4 at 82:4–83:3 (referencing Jones Probation Violation Policy (Ex. 74), ECF 231-74), and Enrollment Form, which required she report for a first check-in on August 25, 2016, Ans., ECF 120 ¶¶ 61, 65; Jones PPS Case Notes (Ex. 75), ECF 231-75 at 4 (2016-8-23 note). McCombs applied Jones’ \$2000 bond to PPS’s fee for August 2016, and then to her court fines and interlock. Jones Case Notes, ECF 231-75 at 2 (2016-8-23 payment history), 4 (2016-8-23 note).

Jones could not make her full payment at her November 11, 2016, check-in, so PPS required her to report again before the November “deadline” and “advised that if she missed the deadline she would go back to court.” Jones Case Notes, ECF 231-75 at 4 (2016-11-11 note); *see* Ans., ECF 120 ¶ 76. PPS returned Jones to monthly payments after her mother reported for her on November 22 and paid in full for the month. *See* Jones Case Notes, ECF 231-75 at 4 (2016-11-11, 2016-11-22, and 2016-12-15 notes). PPS did not record that Jones had failed to report in its notes.

*See id.* Nor did PPS report that she had missed the November 22 appointment at her next review hearing on January 6, 2017. *See* 1-6-2017 Hearing Audio (Ex. 76), ECF 231-76 at 01:25:15–01:27:22 (no mention during hearing).

During a probation review hearing on March 17, 2017, McCombs asserted that Jones “made a remark in [the PPS] office when [McCombs] was not there about how it was stupid that [McCombs] return[s] people for reviews often.” Hearing Audio (Ex. 77), ECF 231-77 at 1:55:25–1:55:44;<sup>6</sup> *but see* Jones Dep., ECF 231-4 at 114:5–118:19; 119:18–120:4. A second later, the judge responded, “Oh, I know what I’ll do. I’ll just revoke your probation. Probation revoked. How’s that? I can solve that.” ECF 231-77 at 1:55:45–1:56:03; *see also* Jones Dep., ECF 231-4 at 114:5–21; Jones CRO Form (Ex. 78), ECF 231-78 (noting Jones was “Revoked 3/17/17, and taken into custody”). The judge later reduced the sentence to 5 days when a family friend contacted the court. Jones Docs., ECF 231-3 at 24; Jones Dep., ECF 231-4 at 118:1–15. Once she was released from jail, Jones “just showed up for reviews, because after [she] got thrown in jail, [she] was scared every time [she] would go to court.” Jones Dep., ECF 231-4 at 137:9–18; *id.* at 164:2–10.

Jones appeared, unrepresented, for seven probation review hearings. Ans., ECF 120 ¶¶ 193, 201, 203, 208, 217; Jones Case Notes, ECF 231-75 at 4–7; Jones Docs., ECF 231-3 at 10, 20, 25, 27, 30, 31, 41 (court notices listing “probation”);

---

<sup>6</sup> Jones’ full probation review hearing runs from 1:52:47 to 1:56:10. 3-17-17 Audio, ECF 231-77.



Jones Dep., ECF 231-4 at 178:21–179:1, 182:14–16. Jones also reported to PPS 13 times, as directed by PPS, and paid in full every month, including \$520 in PPS supervision fees. Jones Case Notes, ECF 231-75 at 2, 4–7. She struggled to report and pay because she could not drive and had limited disability income. Jones Dep., ECF 231-4 at 93:16–23, 102:8–22, 147:23–149:6, 205:11–13. After the court removed supervisees from PPS, the judge lowered Jones’ payments from \$445 to \$50. Jones Dep., ECF 231-4 at 136:11–137:8; Jones Docs., ECF 231-3 at 38–40.

### ***3. Plaintiff Jennifer Essig***

The judge sentenced Plaintiff Essig on one charge to fines and court costs totaling \$382, 30 days of suspended jail time, and 1 year of probation. Essig CAS (Ex. 79), ECF 231-79; Hayes Dep., ECF 231-7 at 81:23–82:21, 83:16–22, 84:19–85:14, 87:24–88:4. Essig was unrepresented. *See* Essig Order of Probation (Ex. 80), ECF 231-80 at 2; Hayes Dep., ECF 231-7 at 63:15–18. The judge filled out and signed a CAS as well as an Order of Probation, each imposing 1 year of probation. Hayes Dep., ECF 231-7 at 61:8–62:11, 63:1–6, 64:20–24, 66:8–10, 84:3–8; Essig Order of Probation, ECF 231-80 at 2. None of the judge’s orders included a supervision fee or monthly payment. Essig CAS, ECF 231-79; Essig Order of Probation, ECF 231-80 at 2.

Afterward, “one of [PPS’s] employees filled out the Sentence of Probation form with Essig” in another room. Ans., ECF 120 ¶ 228; *id.* ¶¶ 53–54. PPS imposed

payments of \$80 per month and probation conditions 10, 11, 15, and 19. Ans., ECF 120 ¶ 228; Essig Sentence of Probation (Ex. 81), ECF 231-81 at 2; Hayes Dep., ECF 231-7 at 68:9–70:17, 72:1–15; Hayes Dep., ECF 231-30 at 61:6–18. Essig paid PPS \$40 toward her first monthly payment, which PPS applied to its fee only. Ans., ECF 120 ¶ 234; Essig Receipt (Ex. 82), ECF 231-82; Essig PPS File, ECF 231-41 at 2 (2017-7-26 payment history), 3 (2017-7-26 note). A clerk signed the Sentence of Probation. Hayes Dep., ECF 231-7 at 74:3–11. PPS also gave Essig a Probation Violation Policy, which she signed, *see* Essig Probation Violation Policy (Ex. 83), ECF 231-83, and an Enrollment Form, which ordered her to report to PPS a week later to pay \$40, *see* Essig Form, ECF 231-39; Ans., ECF 120 ¶¶ 61, 63, 65.

Essig reported to PPS a day early and paid \$40. Ans., ECF 120 ¶ 235; Essig PPS File, ECF 231-41 at 5. PPS required her to report again five days later, on August 1. Ans., ECF 120 ¶ 237; Essig PPS File, ECF 231-41 at 6. Between August 1 and 3, Essig left five voicemails and spoke twice with PPS employees by phone but did not report in person. Essig PPS File, ECF 231-41 at 6. PPS recorded in its OTS notes that she failed to report twice during this three-day period. *Id.* Essig reported in person on August 11 and 17 and paid \$48; PPS applied \$40 to its fee. *Id.* at 13, 15 (receipts); Ans., ECF 120 ¶¶ 238–39.

On August 18, Essig appeared for a probation review hearing. Essig PPS Case Notes, ECF 231-41 at 3 (8-21-2017 note); Ans., ECF 120 ¶ 240. The day prior, a

PPS employee printed a PPS Probationer Information sheet from the OTS system and wrote “FTR” next to August 1, 2, and 3. Essig PPS File, ECF 231-41 at 6 (date stamp 8/17/2017 10:49 AM). At the hearing, which lasted 91 seconds,<sup>7</sup> McCombs told the judge that Essig had “been warned about her appointments” and had missed three. 8-18-2017 Hearing Audio (Ex. 84), ECF 231-84 at 5:38:25–5:38:36; Ans., ECF 120 ¶ 241. The judge committed Essig to jail for 24 hours, stating: “I have to do this because you missed three appointments.” ECF 231-84 at 5:39:18–5:39:22; *see also* Essig PPS File, ECF 231-41 at 3 (2017-8-21 note); Essig CAS, ECF 231-79; Hayes Dep., ECF 231-7 at 88:5–15; Ans., ECF 120 ¶ 107. McCombs did not mention that Essig had reported in person three times and communicated with PPS by phone 10 times within the preceding month, nor that she paid her entire July payment and half her August payment. *See* Hearing Audio, ECF 231-84.

Essig reported to PPS five days after her release from jail and paid \$20. Essig Court Return Forms (Ex. 85), ECF 231-85 at 2; Ans., ECF 120 ¶ 245. On September 7, PPS informed Essig by phone that Essig could not reschedule her appointment because “she [was] behind so she [was] on weekly,” so if she did not report that day, “she need[ed] to be in” the next day. Essig PPS File, ECF 231-41 at 4 (2017-9-7 note); Ans., ECF 120 ¶¶ 238, 251. Essig reported on September 8 and 14 and paid \$30, which PPS applied to its supervision fee, not her \$12 fine balance for August.

---

<sup>7</sup> Essig’s hearing runs from 5:37:57 to 5:39:28. 8-18-2017 Hearing Audio (Ex. 84), ECF 231-84.

Ans., ECF 120 ¶ 247; Essig PPS File, ECF 231-41 at 17–18 (receipts). Essig reported two more times in September before paying in full on October 3. *Id.* at 4; Ans., ECF 120 ¶ 247; Essig Court Return Forms, ECF 231-90 at 2 (note in corner).

Essig reported in person to PPS nine times and paid four monthly supervision fees, in addition to her fines and court costs, for 74 days of probation. Essig PPS File, ECF 231-41 at 2–4; Ans., ECF 120 ¶¶ 235, 239, 245, 247, 253. The monthly collection reports PPS provided the court reported none of Essig’s supervision fee payments. Essig Collection Activity Reports (Ex. 86), ECF 231-86 at 2–5.

### **III. PLAINTIFFS AND THE CLASS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR DUE PROCESS CLAIM**

Plaintiffs are entitled to summary judgment under Fed. R. Civ. P. 56 because there are no genuine issues of material fact, and they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

#### **A. The Law of Procedural Due Process Claims and Section 1983**

PPS is liable for violating the due process rights of Plaintiffs and the putative Class because (1) a policy or custom attributable to PPS caused the constitutional violation, *Harper*, 976 F.3d at 1244 n.10; (2) pursuant to policy or custom, PPS performed at least one judicial function *or* enforcement function, *id.* at 1241–42; *Brucker*, 38 F.4th at 882, 886–88; and (3) PPS had a pecuniary interest that could improperly influence its exercise of discretion in performing either judicial or enforcement functions, *Harper*, 976 F.3d at 1244. Because Plaintiffs satisfy these

three elements for at least one of the functions detailed below, PPS is liable for subjecting them “to a fatally biased decisionmaking process [which] is in itself a constitutional injury.” *United Church of the Med. Ctr. v. Med. Ctr. Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982); accord *Harper*, 976 F.3d at 1244; cf. *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972) (subsequent process is no remedy).<sup>8</sup>

First, liability is governed by *Monell v. Dep’t of Social Services*, 436 U.S. 658 (1978), because Plaintiffs sue PPS in its official capacity as the probation provider for Gardendale pursuant to the Contract. See *Harper*, 976 F.3d at 1240 n.5; see also Ans., ECF 120 ¶¶ 19, 27, 29. PPS is liable for the actions of its Gardendale employees that were taken pursuant to PPS policies, practices, or customs. See *Harper*, 976 F.3d at 1244 n.10; see also *Brucker*, 38 F.4th at 882.

Second, the “judicial-impartiality requirement” prohibits any entity—even a private company standing in the shoes of the government—from performing a judicial function with “a ‘direct, personal, substantial, pecuniary interest.’” *Harper*, 976 F.3d at 1241–42 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *id.* at 1243. Judicial functions include resolving “disputed factual or legal questions,” including both “the final decision” and the steps leading up to it, such as “hear[ing] witnesses.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247, 250 (1980); see also *Sealed Appellee*

---

<sup>8</sup> Plaintiffs also show that PPS’s actions were under color of law. See 42 U.S.C. § 1983; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 n.8 (1999) (Section 1983 under color of law requirement converges with the state action requirement under the Fourteenth Amendment).

*v. Sealed Appellant*, 937 F.3d 392, 400 (5th Cir. 2019) (imposition of a sentence, including conditions of supervised release, is a non-delegable judicial function), *as revised* (Sept. 11, 2019); *United States v. Johnson*, 48 F.3d 806, 808 (4th Cir. 1995).

Likewise, the Eleventh Circuit recently reaffirmed that actors performing enforcement functions also owe a duty of impartiality under the Due Process Clause. *Brucker*, 38 F.4th at 886–88 (applying “the same standard of impartiality” to police, prosecutors, and private code enforcement officers); *see also Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969)<sup>9</sup> (prosecutors may not have “conflicting claims of undivided fidelity”). “[T]he decision to enforce—or not to enforce” probation conditions, is an enforcement function, *see Marshall*, 446 U.S. at 249–50.

Finally, when a defendant is sued in its official capacity under *Monell*, the Eleventh Circuit has directed courts to “look[] to the financial interests of the for-profit company as an entity” to determine whether the company violated its duty of impartiality. *Brucker*, 38 F.4th at 882–83 (citing *Harper*, 976 F.3d at 1244 n.10). A “fee system” creates an unconstitutional pecuniary interest if it presents “a ‘possible temptation’” to consider impermissible factors in the exercise of judicial discretion.

---

<sup>9</sup> Former Fifth Circuit cases decided prior to October 1, 1981, are binding precedent in this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

*Brown v. Vance*, 637 F.2d 272, 279 (5th Cir. 1981) (quoting *Ward*, 409 U.S. at 60); *Marshall*, 446 U.S. at 243 (“stringent rule” precluding judges without “actual bias”).

The only difference between the impartiality requirement for enforcement functions and judicial functions is the degree of financial conflict the Constitution tolerates: the test is whether there is a “realistic possibility that the [actor’s] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts.” *Marshall*, 446 U.S. at 250; *Brucker*, 38 F.4th at 886. Relevant factors include how much control PPS exercised over collecting and allocating supervision fees, the proportion of PPS’s revenue from fees, and whether PPS collected fees in excess of operating costs. *See Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1184–85 (D.N.M. 2018); *Marshall*, 446 U.S. at 250–51.

**B. PPS Violated Its Duty of Impartiality to the Putative Class.**

Plaintiffs move for summary judgment on behalf of themselves and the putative Class based on PPS’s policies, customs, and practices of performing four functions with a financial conflict of interest, any one of which is sufficient for Plaintiffs to prove PPS’s liability: (1) PPS modified the Class’s probation conditions to impose (a) a supervision fee and (b) payment schedule not ordered by the judge; (2) PPS allocated the Class’s payments first to its own fees; and (3) PPS enforced the Class’s probation sentences. *See also* Pls.’ Mot. Class Cert., ECF 186 at 29–40.

**1. PPS imposed two binding financial sentencing conditions not ordered by the court with a financial incentive.**

Through PPS's Sentence of Probation form, PPS imposed two mandatory probation conditions on each putative Class member not ordered in the judge's Order of Probation or CAS: a monthly supervision fee and a required minimum monthly payment. Setting terms of probation is a judicial function that requires a duty of neutrality. *Harper*, 976 F.3d at 1243 n.9 ("PPS was performing a judicial function when it . . . prescribed and *modified* the accompanying terms." (emphasis added)). PPS violated the Class's due process rights because it could directly profit from exercising its judicial authority to impose these probation terms.

*i. PPS employees imposed two sentencing conditions per PPS policy.*

PPS had a policy, practice, or custom of modifying Class members' probation conditions and is therefore the "moving force" for resulting due process injuries. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404–05 (1997).

First, PPS had a written policy of charging a \$40 supervision fee to Plaintiffs and every other supervisee in Gardendale between December 2015 and November 2017, which PPS printed as a mandatory term on the Sentence of Probation form it created. *See supra* Part II.A; Contract, ECF 231-12 at 3 ¶ I, 9; Ans., ECF 120 ¶¶ 54, 56; *e.g.*, Essig Sentence of Probation Form, ECF 231-81 (condition 1). Second, PPS included as a mandatory term of probation on its Sentence of Probation form the condition to "[p]ay all fines which include surcharges . . . at a rate of \$\_\_ per month."



Essig Sentence of Probation Form, ECF 231-81 (condition 2). PPS had a practice of filling out Sentence of Probation forms after the judge sentenced supervisees, *see* Ans., ECF 120 ¶¶ 53–54, and calculating the monthly payments, *supra* Part II.C.1.

*ii. PPS imposed a fee and monthly payment, which are judicial functions.*

The Eleventh Circuit held on appeal in this case that imposing financial sentences and setting payment schedules are judicial functions if they are not subject to “plenary factual and legal review in court.” *Harper*, 976 F.3d at 1242–43 (citations omitted); *see also United States v. Major*, 303 F. App’x 798, 801 (11th Cir. 2008). The undisputed evidence shows both that PPS, not the judge, imposed these conditions, and that the court, through its Contract with PPS, delegated the authority to impose, increase, modify, or waive its fee without judicial review. *Supra* Part II.A. Because “pre-authorization doesn’t render a probation officer’s sentence enhancement either non-final or non-binding,” PPS is responsible for performing judicial functions when it modified Plaintiffs’ and the putative Class’s sentencing conditions. *Harper*, 976 F.3d at 1243.

PPS imposed probation supervision fees and set monthly minimum payments in its Sentence of Probation form that were not imposed by the judge in any of the written orders he filled out and signed. *See supra* Parts II.B (court’s sentencing orders), II.C.1 (PPS form). Alabama law does not expressly allow municipal courts to impose probation supervision fees, nor is such a fee permitted to be charged “as

an additional court cost.” *See* Ala. Op. Att’y Gen. No. 98-00043 at 2–3 (Nov. 24, 1997) (discussing Ala. Code § 12-14-13) (copy in SOP Manual, ECF 231-18 at 28–30). Thus, any such fee must be expressly ordered by the judge as a condition of probation. *Id.*; *see also* Ala. Code § 12-14-13(d)(7)–(8) (installment payments may be ordered by judge as probation condition); *cf. Hill v. U.S. ex rel. Wampler*, 298 U.S. 460, 464 (1936) (“The only sentence known to the law is the sentence or judgment entered upon the records of the court.”).

PPS’s sentence enhancements in the Sentence of Probation “were consistently treated as binding additions to the probationers’ sentences,” *Harper*, 976 F.3d at 1243, despite absence of a judicial order from the judge. Unlike in *Marshall*, where the prosecutor’s financial penalty was “not final” because, prior to having to pay, the defendant received notice of the sanction and “*de novo* review of all factual and legal issues” by a judge in a separate hearing, *Marshall*, 446 U.S. at 244–45, PPS immediately enforced its new conditions on supervisees during the intake meeting, including through collection and allocation of down payments towards its supervision fee, *see supra* Part II.C.2; *cf. Ala. R. Crim. P. 27.2*. Supervisees who did not comply with PPS’s sentence modifications faced criminal consequences. *See supra* Parts II.E (Class facts), II.F.1–3 (named Plaintiffs).

iii. *PPS had an impermissible financial incentive.*

Unlike a system in which the judicial decisionmaker “receives a salary which is not dependent” on collecting a fee from the litigants before it, and where “fines accumulated from [the] court under all laws contribute . . . [to] a general fund,” *Dugan v. State of Ohio*, 277 U.S. 61, 65 (1928) (upholding system of salaried judge), PPS’s contractual probation scheme in Gardendale violated the Constitution because PPS’s entire budget came from fees that were paid directly to PPS by those whom it ordered to pay a monthly fee, *see supra* Part II.A.

PPS’s contractual probation scheme is similar to the system struck down by the Supreme Court in *Tumey v. Ohio*. Like the unsalaried judge compensated solely by fees he imposed on those he convicted, PPS “ha[d] a direct personal pecuniary interest” in modifying the sentence of each supervisee to include its monthly supervision fee, “which [PPS] would not have received” unless it imposed that term of probation, *see* 273 U.S. at 523; Contract, ECF 231-12 at 4. Because PPS could exercise discretion to impose its supervision fee—or change the fee from what it originally ordered, *see supra* Parts II.A, II.D.2—“the fee system create[d] a possible temptation for [PPS] to be biased against defendants,” *Brown*, 637 F.2d at 281; *see also Harper*, 976 F.3d at 1243–44 (PPS’s financial model meant “it couldn’t determine probation sentencing matters impartially”).

**2. PPS's policy of allocating Class members' payments first to its own fees violated Class members' rights to impartial sentencing decisions.**

PPS violated due process because it allocated supervisee payments first to PPS's fees and, if there was any surplus, thereafter to supervisees' underlying municipal court debt. *Supra* Parts II.C.2, II.D.1. The court did not have a payment allocation policy, and the judge only ordered defendants to probation *after* imposing the fine, court costs, and restitution if the supervisee could not pay at sentencing. *See supra* Parts II.B, II.C.2; Ans., ECF 120 at ¶ 41. PPS created the policy, because without prioritizing its fee, PPS couldn't operate its business. PPS Dep., ECF 231-19 at 63:7–19, 64:4–65:12; *Brucker*, 38 F.4th at 882.

Deciding how to allocate payments between financial sentencing obligations is a judicial function. *See In re Armstead Lester Hayes III*, No. 49 at 82–85 (Ala. Ct. Jud., filed Nov. 2016) (“determin[ing] the amount of each payment credited to court-ordered assessments versus credited to [probation supervision] fees” is a judicial function); *cf. United States v. Freeman*, No. CR 09-00148-KD-N, 2022 WL 1215071, at \*2 (S.D. Ala. Apr. 25, 2022) (changing priority of defendant's payments is “a motion to modify a final judgment” where priority of restitution specified in sentencing order). PPS therefore owed Class members a duty of impartiality.

PPS violated its duty by prioritizing PPS's profits over the supervisee's court-ordered debt. For example, though Plaintiff Harper paid \$90 while on probation with PPS, PPS applied all of her payments to its own fees. Ans., ECF 120 ¶ 177. And

because PPS collected its fee only if the supervisee still owed court debt, *supra* Part II.C.1, allocating partial payments first to PPS’s fees could result in a supervisee spending longer on supervision and paying more in PPS fees. Therefore, PPS had a “possible temptation” “to forsake [its] obligation of impartiality” by exercising its judicial discretion to favor its financial interest, rather than supervisees’ obligation to pay off their court debt. *Harper*, 976 F.3d at 1241 (quoting *Ward*, 409 U.S. at 60).

**3. PPS performed financially-conflicted law enforcement functions for the Class by enforcing their probation sentences.**

PPS executed and administered probation sentences imposed by the Municipal Court, but because its performance of these functions “inject[ed its] . . . [financial] interest . . . into the enforcement process” and thus “br[ought] irrelevant or impermissible factors” into its enforcement decisions, it violated due process, *see Marshall*, 446 U.S. at 249–50. Even if the Court finds that PPS did not perform a judicial function for the Class, *see supra* Parts III.B.1–2, PPS is still liable for violating the putative Class’s Fourteenth Amendment rights to impartial enforcement as an alternative theory of liability. *See Brucker*, 38 F.4th at 886–88.

*i. PPS employees enforced probation conditions pursuant to PPS policy.*

The Contract charged PPS with enforcing the terms of supervisees’ court-ordered probation, specifying that PPS would provide “orientation/instruction regarding compliance with the Court’s ordered conditions of probation” for all supervisees, attend probation revocation hearings, and “investigate probation

violations and recommend appropriate sanctions.” ECF 231-12 at 10 ¶ 3. PPS promulgated written company policies and procedures for the enforcement of probation. *See* SOP Manual, ECF 231-18 at 94, 114, 117 (instructions for recording interactions with supervisees); *id.* at 110, 116 (check-in procedures); *id.* at 97, 126, 203 (responses to noncompliance); *id.* at 126–28, 132 (how to address indigency); *id.* at 232–43 (court demeanor and testimony). PPS is therefore liable for any enforcement action taken pursuant to PPS’s admitted policies, *see supra* Parts II.C–E. *Harper*, 976 F.3d at 1244 n.10 (citing *Monell*, 436 U.S. at 694).

*ii. PPS performed enforcement functions for the Class.*

The impartiality requirement applies to those who exercise “the decision to enforce—or not to enforce” probation conditions, *see Marshall*, 446 U.S. at 249–50; *cf. Johnson v. Williams*, 699 F. Supp. 2d 159, 168 (D.D.C. 2010) (“[P]arole supervision” is “investigatory in nature, and therefore [] analogous to a law enforcement function.”),<sup>10</sup> *aff’d sub nom. Johnson v. Fenty*, No. 10-5105, 2010 WL 4340344 (D.C. Cir. Oct. 1, 2010). Gardendale hired PPS to enforce probation sentencing conditions, which PPS did for every supervisee starting in the intake meeting, in which it scheduled the first mandatory check-in, demanded payment, and reviewed probation noncompliance policies. *Supra* Part II.C; Ans., ECF 120

---

<sup>10</sup> There is no difference between the duties of probation and parole officers, or in the liberty interests of people on probation and parole. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782–84 (1973).

¶¶ 53–54, 61–62, 65, 83. These enforcement tasks are also assigned to probation officers under state law. *See* Ala. Code § 12-14-13(e).

PPS continued to enforce supervisees’ compliance with sentencing conditions by requiring supervisees to report to PPS as directed and make payments, *supra* Part II.D, and through reporting on supervisees’ noncompliance to the court, *supra* Part II.E. Supervisees who never reported to any PPS check-in appointments, never made a payment, or never attended their probation review hearings were nonetheless subject to PPS’s enforcement powers to report on noncompliance at a review hearing or seek a probation violation warrant. *Supra* Part II.E; *see Marshall*, 446 U.S. at 247 (enforcement functions include “act[ing] as the complaining party” and bearing the burden of proof in judicial proceedings); *Johnson*, 699 F. Supp. 2d at 168 (investigation of parole violations and preparation of violation “analogous to a law enforcement function”); *Swift v. California*, 384 F.3d 1184, 1192 (9th Cir. 2004) (parole officers perform enforcement functions when they investigate violations, have parolees arrested, and recommend revocation). Thus, every putative Class member—even supervisees who absconded from probation the day after being sentenced to PPS’s control—were subject to PPS’s enforcement powers.

*iii. PPS had an impermissible financial incentive when it performed law enforcement functions.*

Because of the wide-ranging enforcement power PPS wielded, it owed the putative Class a duty of impartiality. To prove that PPS violated that duty, Plaintiffs

need not show that PPS “had an interest in opposition to [its] proper one” as the probation authority; “it is rather that [PPS] had *an additional and impermissible* reason” in taking those enforcement steps, *Wright v. United States*, 732 F.2d 1048, 1056 n.7 (2d Cir. 1984) (emphasis added); *accord Marshall*, 446 U.S. at 250.

In a similar case, a district court applied the impartiality standard from *Marshall* and held that a private probation company (CPS) violated a class of supervisees’ due process rights to impartial decisionmakers due to its profit motive. *See McNeil v. Cmty. Prob. Servs., LLC*, No. 1:18-cv-00033, 2021 WL 366776 (M.D. Tenn. Feb. 3, 2021). The court denied CPS’s motion to dismiss because the supervisees alleged facts identical to the undisputed facts here: the contract between CPS and the government permitted CPS “to perform a traditional court function—probation—and, critically, made the resolution of Plaintiff’s case contingent on the demands, advice, recommendations, discretionary decisions, enforcement actions, testimony, and representations of these private entities.” *McNeil*, 2021 WL 366776, at \*18; *accord Contract*, ECF 231-12. Because CPS could threaten supervisees “with arrest, jailing, and extension of supervised probation, resulting in more fees owing to the company,” *McNeil*, 2021 WL 366776, at \*24; *accord supra* Parts II.C.2, II.E, the court held “that CPS’s 100% funding arrangement with Giles County creates an impermissible conflict of interest,” *McNeil*, 2021 WL 366776, at \*24; *accord supra* Part II.A. Where the undisputed evidence in this case mirrors the allegations in



*McNeil*, Plaintiffs have proven PPS’s compensation structure and enforcement discretion create a “realistic possibility” that PPS’s “judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts,” *Marshall*, 446 U.S. at 250, in violation of due process.

### **C. PPS Violated Its Duty of Impartiality to Plaintiffs.**

PPS violated the Plaintiffs’ rights to due process through the performance of additional judicial and enforcement functions with a financial conflict.

#### ***1. PPS performed a financially-conflicted judicial function when it modified Plaintiffs’ payment schedules.***

PPS violated Plaintiffs Harper, Jones, and Essig’s rights to an impartial judicial decisionmaker when its employees, acting pursuant to a written PPS policy, *see* SOP Manual, ECF 231-18 at 126; *e.g.*, Essig Enrollment Form, ECF 231-39 ¶ 2, changed their payment schedules to impose more onerous conditions when they could not pay PPS. *See Brucker*, 38 F.4th at 882–83. Though PPS referred to its policy as a “weekly reporting” policy, the policy was effectively a weekly payment policy: PPS required weekly reporting only when a person could not pay, and paying all arrears was the only way to return to a monthly reporting schedule. *See* SOP Manual, ECF 231-18 at 126; Ans., ECF 120 ¶¶ 62, 76; *supra* Part II.D.1.

As discussed *supra*, *see* Part III.B.1, PPS performed a judicial function when it set a monthly payment schedule for all supervisees—including the Plaintiffs—through its Sentence of Probation form. But even if there is a genuine dispute as to

whether it was PPS or the judge who imposed a payment schedule for all Class members, it is undisputed that PPS later modified the named Plaintiffs' payment schedules pursuant to its policy, which is a judicial function. *Harper*, 976 F.3d at 1243 n.9 (modifying sentence is judicial function); *see supra* Part II.F; *see also* Ans., ECF 120 ¶¶ 172, 238; Jones Case Notes, ECF 231-75 at 4.

Because PPS performed a judicial function, it owed Plaintiffs a duty of impartiality. But PPS's financial interest in collecting its supervision fee from Plaintiffs meant there was a possibility PPS would not impartially exercise its discretion to impose "additional obligations that made it more difficult for [Plaintiffs] to complete" their terms of probation. *See Harper*, 976 F.3d at 1243. PPS's policy regarding weekly or bi-weekly check-ins required Plaintiffs to report to PPS double or quadruple the number of times they would have had to report if they could pay in full. The additional obligations also created more opportunities for Plaintiffs to miss an appointment, which PPS could then report to the judge as a violation of probation for failing to "report," though in reality the issue was that Plaintiffs were not *paying* the amount PPS demanded.

PPS's improper financial incentive is readily apparent in the difference between how PPS treated Plaintiff Jones, who paid in full, and Plaintiffs Harper and Essig, who did not. After placing Jones on biweekly payments because she could not pay in full, PPS returned her to monthly payments because her mother reported for

her and paid in full for the month. PPS did not record that Jones had failed to report in its notes, in accordance with PPS's custom allowing relatives to report for supervisees when they made a payment, *see supra* Part II.D.1, nor did PPS report that Jones had missed a check-in at her next review hearing. *See supra* Part II.F.2.

But for Plaintiffs Harper and Essig, who were unable to get "current" with their payments, PPS's application of the policy resulted in penalties for missing weekly appointments. At Harper's probation review hearing on September 15, 2017, PPS told the judge only about the check-ins she missed but did not report that she had reported six times in the six weeks prior to the hearing. *See supra* Part II.F.1. Similarly, during Essig's first probation review hearing on August 18, 2017, PPS reported only that she had missed three appointments, even though she had also reported three times in the 28 days between her sentencing and the hearing. *See supra* Part II.F.3. The judge sentenced both Harper and Essig to jail for missed PPS appointments. Dunn Dep., ECF 231-6 at 26:16–27:10 (reading the judge's notes on Harper's CAS, ECF 231-1 at 4); Hearing Audio, ECF 231-84 at 5:39:18–5:39:22.

***2. PPS performed a financially-conflicted judicial function when it extended Plaintiffs Harper's and Jones' probation sentences from 12 to 24 months.***

PPS violated Plaintiffs Harper and Jones' rights to a disinterested adjudicator when it added 12 months to the probation sentence ordered by the judge, pursuant to its policy, custom, or practice and pre-authorization from the court, in a manner that could enable PPS to collect double its supervision fees. Because PPS employees

admitted to “a ‘pattern of similar constitutional violations,’” *Harper*, 976 F.3d at 1244 n.10 (quoting *Connick v. Thompson*, 563 U.S. 51, 62 (2011)), Plaintiffs have established that PPS is liable for its employees’ conduct of changing probation sentences to 24 months in the Sentence of Probation form, *see supra* Part II.C.1; Ans., ECF 120 ¶ 54; *e.g.*, Summary of Probation Term Changes, ECF 231-36.

PPS performed a judicial function when it “lengthened the duration of [Plaintiffs’] probationary terms.” *Harper*, 976 F.3d at 1243; *see also* Ala. Code § 12-14-13(g) (“The period of probation or suspension of execution of sentence shall be determined by the court[.]”). There is no dispute that the judge filled out, signed, and handed Plaintiffs Orders of Probation imposing 12 months of probation. *See supra* Parts II.F.1–2; Harper Docs., ECF 231-1 at 7 (Order); Jones Order, ECF 231-76. The judge also ordered 1 year of probation on Harper’s CAS and on one of Jones’ CASs. Harper Docs., ECF 231-1 at 4 (CAS); Jones Docs., ECF 231-3 at 11.

But PPS employees changed both Plaintiffs’ probation sentences to 24 months on the PPS Sentence of Probation—neither of which was signed by the judge—to reduce their payments, pursuant to “pre-authorization from a judge,” *Harper*, 976 F.3d at 1243. *See supra* Parts II.F.1–2. Thus, because PPS modified Plaintiffs’ probation terms *after* the judge sentenced them, in accordance with PPS’s custom and delegated authority from the court, *supra* Part II.C.1, PPS owed Plaintiffs Harper and Jones a duty to exercise its sentencing discretion impartially. *See Harper*, 976

F.3d at 1243. The Eleventh Circuit has already held that PPS violated that duty when its decisions “maximiz[e] the length of probation.” *Id.* at 1233–34.

**3. PPS performed a financially-conflicted judicial or, alternatively, enforcement function when it scheduled Plaintiff Harper’s hearing.**

PPS violated Harper’s rights to an impartial adjudicator or, in the alternative, enforcement actor, when its employees scheduled her probation review hearing, pursuant to PPS’s policy directing probation officers to “[s]chedule compliance hearings” when supervisees were “in arrears” on payments, SOP Manual, ECF 231-18 at 126. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

Scheduling court hearings is a “core judicial function.” *Khazali v. Berns*, No. C16-1022JLR, 2016 WL 4479915, at \*3 (W.D. Wash. Aug. 24, 2016). Indeed, when a probation officer, not the court, issues a summons for probation hearings, the probation officer exercises the “judicial power” of “the sentencing court[] [who has] primary responsibility for such proceedings.” *United States v. Davis*, 151 F.3d 1304, 1307 (10th Cir. 1998) (internal quotations and citation omitted); *but see Bernardine*, 237 F.3d at 1283 (no judicial function when probation officer issued summons because court retained ultimate authority).

In the alternative, scheduling probation review hearings is an enforcement function akin to a prosecutor initiating criminal proceedings. *See Marshall*, 446 U.S. at 247. Because there is no dispute that PPS unilaterally scheduled at least one review

hearing for Harper, *see supra* Part II.F.1; *see also* Part II.E.11, PPS owed Harper a duty to exercise its discretion to schedule court hearings impartially.

Under either the judicial or enforcement standard for impartiality, PPS's incentive to leverage review hearings to generate revenue created an impermissible risk of distorting its discretion. *See Ward*, 409 U.S. at 60 ("possible temptation"); *Marshall*, 446 U.S. at 250 ("realistic possibility"). As detailed in the facts, scheduling review hearings granted PPS enormous power: if a supervisee missed the hearing, the court would issue an FTA warrant, but if the supervisee attended, PPS would have an opportunity to allege noncompliance before the judge and influence the sanctions imposed—among them, a new probation violation charge. Both FTA and Probation Violation charges could result in a consecutive probation sentence that allowed PPS to collect additional supervision fees. *See supra* Part II.E.1

***4. PPS performed a financially-conflicted enforcement function when it reported about Plaintiffs' alleged noncompliance at review hearings.***

PPS reported on all three named Plaintiffs' probation noncompliance during review hearings, pursuant to PPS policy and custom of testifying during probation review hearings. SOP Manual, ECF 231-18 at 243; *see supra* Part II.E.1. Because there was a realistic possibility that its employees' testimony could result in more fees for PPS, PPS violated due process. *Harper*, 976 F.3d at 1244 & n.10.

Reporting on probation violations is a law enforcement function subject to the impartiality requirement. *See Johnson*, 699 F. Supp. 2d at 168; *Swift*, 384 F.3d at

1192; *cf. Marshall*, 446 U.S. at 247 (“act[ing] as the complaining party”). PPS reported on Plaintiffs’ alleged noncompliance in review hearings, and the judge sentenced each Plaintiff to jail based on PPS’s testimony. *See supra* Part II.F.1–3.

PPS violated its duty to deliver these reports impartially because there was a “realistic possibility” PPS would testify in a manner to increase the fees it could collect: the district court routinely found supervisees guilty of “probation violations” and re-sentenced them to PPS for an additional term of probation based on PPS’s allegations, which resulted in more fees for PPS. *See supra* Part II.E.1; *see Marshall*, 446 U.S. at 250; *accord Brucker*, 38 F.4th at 886.

***5. PPS performed a financially-conflicted judicial function when it denied Plaintiff Harper’s request for community service.***

PPS violated Plaintiff Harper’s rights to an impartial judicial decisionmaker when its employees refused her request to convert her payments to community service, pursuant to PPS’s SOP Manual and its custom requiring reporting compliance prior to approval. *See supra* Part II.D.1; *Brown*, 520 U.S. at 404–05.

While PPS sometimes exercised its discretion to grant supervisee requests for community service, in Harper’s case, PPS denied her repeated requests because PPS had determined Harper was “noncompliant” and therefore ineligible under its criteria. *Compare* Part II.D.1 (examples of PPS waiving fees and converting fines to community service), *with* Part II.F.1 (Harper). The court did not undertake its own independent review, *cf. supra* Part II.D.1 (no court criteria), and instead delegated

the decision regarding Harper to PPS, which exercised this judicial power to deny Harper's request to do community service in lieu of paying her fines, *see Harper*, 976 F.3d at 1242–43 (delegation not valid defense).

PPS therefore owed Harper a duty of impartiality, but there was a “realistic possibility” that PPS would consider its fees in the exercise of its discretion, *see Marshall*, 446 U.S. at 250. After the court delegated the decision to PPS, McCombs denied Harper's request because she missed some of the numerous extra appointments PPS scheduled when she couldn't afford her payments. *Supra* Parts II.D.1, II.F.1. Denying her request in August allowed PPS to collect more supervision fees from Harper. *See Harper PPS File*, ECF 231-57 at 2. PPS's pecuniary interest compromised PPS's impartiality. *See Harper*, 976 F.3d at 1244.

#### **IV. CONCLUSION**

Because PPS's income, in the form of the monthly fees, depended directly on whether it charged supervisees a fee and how long it could keep them on probation through more onerous conditions, “[i]n the eyes of the law, it couldn't determine probation sentencing matters impartially.” *Harper*, 976 F.3d at 1243–44. For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment as to PPS's liability on the Fourteenth Amendment Claim for Plaintiffs and the putative Class and set this case for a jury trial as to damages and the named Plaintiffs' state law abuse of process claims.



DATED: September 22, 2022. Respectfully Submitted,

s/Alexandra Jordan

---

Alexandra Jordan (*she/her*) (ASB-4624-X00X)

Ellen Degnan (*she/her*) (ASB-3244-L12V)

Kirsten Anderson (*she/her*) (FBN-17179)\*

SOUTHERN POVERTY LAW CENTER

400 Washington Avenue

Montgomery, AL 36104

P: (334) 956-8200

F: (334) 956-8481

alexandra.jordan@splcenter.org

ellen.degnan@splcenter.org

kirsten.anderson@splcenter.org

Thomas Jurgens (*he/him*) (Ga. Bar No. 103911)\*

Malissa Williams (*she/her*) (Ga. Bar No. 964322)\*

Miriam Gutman (*she/her*) (Ga. Bar No. 170768)\*

SOUTHERN POVERTY LAW CENTER

150 E. Ponce de Leon Ave., Ste. 340

Decatur, GA 30030

P: (470) 436-7194

F: (404) 221-5857

tom.jurgens@splcenter.org

malissa.williams@splcenter.org

miriam.gutman@splcenter.org

\* *admitted pro hac vice*

***Attorneys for Plaintiffs***

**CERTIFICATE OF SERVICE**

I hereby certify that on this date the foregoing was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including:

Bryan A. Grayson  
Stephen K. Whitehead  
Allison Rae Bendall  
LLOYD, GRAY, WHITEHEAD & MONROE, P.C.  
880 Montclair Road, Suite 100  
Birmingham, Alabama 35213

bgrayson@lgwmlaw.com  
steve@lgwmlaw.com  
abendall@lgwmlaw.com

Dated: September 22, 2022.

s/Alexandra Jordan