IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROXANNE REYNOLDS, RODNEY WARE, and EDWARD "TYLEE" WILLIAMS,

Plaintiffs,

v.

JUDICIAL CORRECTION SERVICES, INC., STEVEN RAYMOND, and CITY OF CLANTON,

Defendants.

Case No. 2:15-cv-00161-MHT-CSC

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs bring this action to challenge the extortionate and abusive treatment they suffered on "pay-only" probation with Defendant Judicial Correction Services, Inc. (JCS) after being placed under JCS supervision by the Clanton Municipal Court to pay outstanding fines, costs, and restitution. Through the accompanying Motion and this Memorandum, Plaintiff Edward Williams further seeks to void the contract between JCS and Defendant City of Clanton ("JCS-Clanton Contract") which facilitated the abusive practices conducted by JCS, both because the contract establishes an exclusive franchise that was not competitively bid, and because it is contrary to Alabama's public policy that prohibits charging a fee to persons placed on probation through a municipal court. Mr. Williams seeks to have the contract voided on his own behalf as well as on behalf of a class of similarly situated persons.[1]

[1] Plaintiffs are contemporaneously filing a motion for class certification. That class is proposed to be defined as: All individuals who are now or who will in the future be assigned to private

Granting a preliminary injunction is appropriate. The contract is illegal under Alabama law because it is exclusive and was not competitively bid, and because it is contrary to public policy. Mr. Williams and the Plaintiff class, as well as the public at large, are suffering irreparable injury because: (1) the JCS-Clanton Contract is violating a fundamental constitutional right to be free from exclusive franchises that are not subjected to competitive bidding; (2) the contract requires class members to pay a $10 set-up fee and $40 monthly probation fee out of their already limited income and resources, diminishing their ability to provide for basic necessities like food, housing, and power each month; and (3) the contract requires class members to spend more time on probation until they pay off their court debt and face the onerous reporting conditions imposed by JCS. Enjoining the contract is in the public interest and the balance of hardships also favors enjoining the contract, precisely because it is impeding a fundamental constitutional right that is designed to protect the public from the abuses of monopolies and because it is contrary to public policy.

For all of these reasons, the issuance of a preliminary injunction is warranted.

FACTUAL BACKGROUND

A. Clanton Municipal Court

The City of Clanton operates a municipal court, referred to herein as the Clanton Municipal Court, whose jurisdiction is limited to violations of city ordinances and traffic violations committed within the corporate limits of the City of Clanton. Ala. Code § 12-14-1; Clanton Website, *Municipal Court* (attached as Ex E to Brooke Decl.). Unlike district, circuit, and appellate judges and supreme court justices in Alabama who are elected, municipal judges are appointed by the mayor or city council. Ala. Code § 12-14-30. Clanton has a part-time

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probation through JCS and the Clanton Municipal Court, and who are required to pay fees to JCS.

municipal judge named Judge John Hollis Jackson, III. *See* Clanton Advertiser, *Clanton Municipal Court implements video conferencing* (Feb. 18, 2013) (attached as Ex. F to Brooke Decl.).

Defendant JCS first contracted with Defendant City of Clanton on February 9, 2009. JCS-Clanton Contract (attached as Ex. C to Brooke Decl.).[2] The contract was executed by JCS and the Mayor of Clanton, Billy Joe Driver. *Id.* at 2. Mayor Driver remains the Mayor of Clanton today. Clanton Website, *Leadership* (attached as Ex. D to Brooke Decl.). The contract automatically renews each year unless one party gives notice prior to 30 days before the expiration date. JCS-Clanton Contract at 1.

The City of Clanton did not put out a request for bids or otherwise advertise and solicit bids for probation services prior to executing the contract with Defendant JCS in 2009, nor at any time after executing the contract with JCS. *See* Brooke Decl. ¶¶ 8–9 & Open Records Req. and Response (attached as Exs. A–B to Brooke Decl.). Instead, the City Council in Clanton simply debated and ultimately approved the contract with JCS. *See* Clanton Advertiser, *Clanton to offer probation for some offenses* (Feb. 9, 2009) (attached as Ex. G to Brooke Decl.). No bids or requests for proposals were discussed in this report of the meeting. *Id.*

The purpose of the JCS-Clanton contract is to establish a "pay-only" probation system. Though JCS purports to provide probation services, its primary purpose is to collect fines, costs, restitution (and its own fees) from probationers. Thus, during the City Council meeting in 2009, both Judge Jackson and Clanton Chief of Police Brian Stilwell expressed their support for the contract with JCS because it would allow the Municipal Court to have defendants pay their court

[2] The contract is a single page with three "Exhibits" appended: Exhibit A related to "Uniform Standards of Probation Supervision," Exhibit B related to "Services Provided by JCS," and Exhibit C related to "Compensation to JCS." JCS-Clanton Contract.

fines and costs over a period of probation instead of being jailed for non-payment. *Id.*

Pursuant to the contract, JCS collects payments of fines, costs, fees, and restitution assessed by the Clanton Municipal Court. Ex. B, ¶ 4, to JCS-Clanton Contract. The contract provides that JCS's services will be cost-free to Defendant City of Clanton, stating that "JCS agrees that it will not invoice the City or Court for its services." Ex. C. to JCS-Clanton Contract. The contract goes on to say that, "[i]n consideration of the probation services provided by JCS, the Court agrees that each Court Order shall provide for the following: 1. Probation fee of $40.00 per month flat fee. (Basic or intensive supervision)[, and] 2. One time probationer set-up fee of $10.00 . . . ." *Id.* This relationship is exclusive, providing that "JCS will supervise all probated cases sentenced by the Court." Ex. A, ¶ 5, to JCS-Clanton Contract (emphasis added).

Persons are assigned to pay-only probation with JCS when they cannot afford to pay the full amount owed to the Municipal Court on the day they are adjudicated. *See* Reynolds Decl. ¶ 3; Ware Decl. ¶¶ 3, 4, 7; Williams Decl. ¶ 2. Individuals placed on pay-only probation with JCS are by definition of a lower economic status, since they are being put on this payment plan only because they cannot afford to pay the full amount of fine or costs on the day they appear in municipal court.

B. Individual Plaintiffs' Experiences

Plaintiff Roxanne Reynolds, a lifetime resident of Clanton, pled guilty to three traffic tickets in February 2013. Reynolds Decl. ¶¶ 1–2. Judge Jackson asked if she could pay the amount owed that day, or if she wanted a payment plan. *Id.* ¶ 3. When she said that she could not pay that day, Judge Jackson told her to talk to Defendant Raymond, an employee of JCS, for a payment plan. *Id.*

Ms. Reynolds was required to pay $145 per month, including a $40 monthly supervision fee to JCS, and also had to pay a $10 set-up fee to JCS. *Id.* ¶¶ 4–5. She struggled to make these payments on her limited income. *Id.* ¶ 6. She sacrificed meals and groceries to pay JCS, and paid her utility bill late, resulting in a shut off of her power at least once during the time she was on JCS. *Id.* ¶ 8. She was told to report often, sometimes twice in one week when she was behind on payments to JCS. *Id.* ¶ 7. However, because she did not have a valid driver's license, she was forced to rely on friends to pick her up or take her money to the JCS office, an approximately 50 minute round trip drive, or else drive illegally. *Id.* ¶ 10.

In May 2014, Ms. Reynolds was able to finish paying the fines, costs, and fees owed to the Clanton Municipal Court and catch up on her monthly JCS fees. *Id.* ¶ 12. JCS told her that her probation was then completed. *Id.* However, because of her limited income, Ms. Reynolds knows that she will end up back on JCS probation if she gets another traffic ticket or owes money to the Municipal Court. *Id.* ¶ 13.

Plaintiff Rodney Ware, a longtime resident of Clanton, pled guilty to two traffic tickets in March 2011. Ware Decl. ¶¶ 1, 3. Judge Jackson asked him if he could pay the amount owed or if he wanted a payment plan, and Mr. Ware stated that he could not pay that day. *Id.* ¶ 4. Judge Jackson told him to talk to JCS to set up his payment plan. *Id.* ¶ 4. In September 2011, Mr. Ware was again assigned to probation after he learned that he had cashed a check that was a scam and sought to pay back the money he owed. *Id.* ¶ 7. He was told to pay JCS the money he owed in order to avoid prosecution; he was not convicted that day nor did he speak to the judge. *Id.* Both times, he was required to pay $145 each month, including a $40 monthly probation fee to JCS, and also had to pay a $10 set-up fee. *Id.* ¶¶ 5, 8.

Mr. Ware struggled to make these payments. He skipped paying other bills to make these payments, skipped lunch, and took out high-interest loans. *Id.* ¶ 10. He was forced to declare bankruptcy in April 2012, in the middle of his second probation period. *Id.* When he could not pay the full amount owed, he was told to report more frequently, as often as once per week. *Id.* ¶ 9. This required him to leave work early in order to make it to JCS before the office closed. *Id.*

Mr. Ware was told that he had successfully completed probation after he had paid off the fines that he owed to the Municipal Court and was current on the probation fees accumulating monthly for JCS. *Id.* ¶¶ 6, 11. However, because of his limited income, Mr. Ware knows that he will end up on probation with JCS again if he obtains any traffic tickets or owes money to the Municipal Court. *Id.* ¶ 12.

Plaintiff Edward "Tylee" Williams, a resident of Clanton, is currently under JCS supervision for traffic tickets. Williams Decl. ¶¶ 1–2. He was placed on JCS because when he was asked by Judge Jackson if he could pay the fines and costs that day, Mr. Williams admitted that he could not; Judge Jackson then told him to talk to JCS to get a payment plan. *Id.* ¶ 2. He has been reporting to JCS since May 2014. *Id.*

Mr. Williams was told to pay $140 per month, which includes a $40 monthly probation fee to JCS, and also was required to pay two $10 set-up fees. *Id.* ¶ 3. It is difficult for Mr. Williams to make these payments on his low and inconsistent income. *Id.* ¶¶ 4, 5. He was forced to give up his cell phone, his only reliable means of communication with family, friends, and current and potential employers. *Id.* ¶ 4. He was told by JCS to report frequently,

sometimes twice in one week, when he did not bring them sufficient money.[3] *Id.* ¶ 5. Because he does not have a valid driver's license, he has to find family or friends who can take him to the JCS office, a 40-minute round trip drive, and find money to pay them for gas. *Id.* He has had to choose between missing work and missing JCS appointments when he has been able to find temporary jobs. *Id.* Because of his limited income, he would be forced to request another payment plan and be placed on JCS if he obtains any traffic tickets or owes money to the Municipal Court. *Id.* ¶ 7.

LEGAL STANDARD

Plaintiffs seeking a preliminary injunction must show:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.

Grizzle v. Kemp, 634 F.3d 1314, 1320 (11th Cir. 2011). The court may employ a "sliding scale" by "balancing the hardships associated with the issuance or denial" of the injunction against "the degree of likelihood of success on the merits." *Fla. Med. Ass'n v. U.S. Dep't of Health, Educ. & Welf.*, 601 F.2d 199, 203 n. 2 (5th Cir. 1979).[4]

ARGUMENT

I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE MERITS OF THEIR CONTRACT CLAIMS.

[3] Mr. Williams currently has an Achilles tendon injury which is preventing him from working, and as a result JCS has temporarily told him to report only monthly and that he is not required to pay any money. This reprieve will continue only as long as he is unable to work due to his injury and limited mobility. *Id.* ¶ 6.

[4] Cases that were decided by the Fifth Circuit prior to the close of business on September 30, 1981, are binding precedent in this Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

A. Plaintiffs Are Likely To Prevail on Their Claim that the Contract Is Void as an Exclusive Franchise that Was Not Competitively Bid.

Plaintiffs are substantially likely to succeed on the merits of their claim that the contract between JCS and the City of Clanton for probation services violates Section 22 of the Alabama Constitution by granting an exclusive franchise without following the procedures of the Competitive Bid Law, which is codified at section 41-16-50(a) of the Alabama Code.

Section 22 of the Alabama Constitution prohibits any law "making any irrevocable or exclusive grants of special privileges or immunities," and provides that "every grant of franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." Ala. Const., art. I, § 22. To avoid running afoul of Section 22, a public contract that creates an "exclusive franchise" must be publicly bid. *See Beavers v. Cnty. of Walker*, 645 So. 2d 1365, 1373–74 (Ala. 1994) (exclusive solid waste contract); *Brown's Ferry Waste Disposal Ctr., Inc. v. Trent*, 611 So. 2d 226, 229–30 (Ala. 1992) (same); *Kennedy v. City of Prichard*, 484 So. 2d 432, 433–35 (Ala. 1986) (exclusive city towing contract).

Thus, to comply with the Constitution, any exclusive franchise must "be subjected to a free, open, and competitive market." *Kennedy*, 484 So. 2d at 434. And, "the minimum *constitutional* requisite for upholding the . . . franchise consists substantially in its compliance with the *statutory* [bid law] requisites." *Id*. (emphasis in original). Contracts that violate the constitution because they were not competitively bid are void. *Beavers*, 645 So. 2d at 1373, 1376; *Brown's Ferry*, 611 So. 2d at 228–29. Finally, Alabama's Competitive Bid Law requires that any contract subject to its requirements "shall be made under contractual agreement entered into by free and open competitive bidding." Ala. Code § 41-16-50(a).

The contract between JCS and the City of Clanton is exclusive. The Alabama Supreme Court has held that contracts were exclusive when they provide an entity with exclusive rights to

conduct the business that is the subject of the contract for a fixed period of time. *See Beavers*, 645 So. 2d at 1375 (contract exclusive because it "expressly prohibits [any other] agreement or arrangement such as the franchise granted to" defendant); *Brown's Ferry*, 611 So.2d at 227 (contract exclusive because it was "fixed at three years and included a provision that during those three years the Commission would direct that [all] solid waste collected in Limestone County be placed in the landfill to be developed by Brown's Ferry"). The contract between JCS and the City of Clanton provides that "JCS will supervise *all* probated cases sentenced by the Court." Ex. A, ¶ 5, to JCS-Clanton Contract (emphasis added). Thus, by the terms of the contract, the City of Clanton may not enter into any agreement or arrangement with any other party related to the provision of municipal probation services. This exclusive franchise lasts for a period of one year, and renews automatically each year. JCS-Clanton Contract at 1.

The City of Clanton did not request bids before awarding this contract in February 2009, or at any time when it renewed the contract. A report of the City Council meeting in February 2009, when the City Council approved the contract, does not discuss any requests for bids. *See* Clanton Advertiser, *Clanton to offer probation for some offenses* (Feb. 9, 2009) (attached as Ex. G to Brooke Decl.). In an open records request sent in December 2014, Counsel for Plaintiffs requested "all proposals, plans, or bids made to, and all agreements or contracts executed with Clanton, regarding the provision of private probation services, court fee collection, and related services . . . in effect from January 1, 2005, to present." Ltr. from SPLC to Ms. Orange (Dec. 10, 2014) (attached as Ex. A to Brooke Decl.). In response, the City sent an email attaching only the contract with JCS. Email & Attachment from Ms. Orange to Mr. Denney (Dec. 23, 2014) (attached as Ex. B to Brooke Decl.).

The evidence shows that the JCS-Clanton Contract is exclusive, and that the City did not follow the competitive bidding procedures. The contract runs afoul of Section 22 of the Alabama Constitution, which requires that every exclusive franchise "be subjected to a free, open, and competitive market." *Kennedy*, 484 So. 2d at 434. Thus, Plaintiffs are substantially likely to succeed on their claim that the contract is void as an exclusive franchise.

B. Plaintiffs Are Likely To Prevail on Their Claim that the Contract Is Void Because It Requires Illegal Fees.

Plaintiffs are also substantially likely to prevail on the merits of their claim that the contract is illegal and void because it requires a $40 per month fee and a $10 set-up fee to persons assigned to probation with JCS, even though Alabama law does not permit collection of any probation fee for persons placed on probation through municipal court. The JCS-Clanton Contract is therefore void, for "it has long been the law of this State that every contract adverse to the enactments of the legislature, is illegal and void." *Perdue v. Green*, 127 So. 3d 343, 358 (Ala. 2012), *on reh'g* (July 11, 2012) (internal quotations, citation, and emphasis omitted).

Longstanding Alabama Supreme Court precedent provides that "[c]osts and fees can only be taxed when expressly provided by law." *Melton v. State*, 1 So. 2d 920, 921 (Ala. Ct. App. 1941); *see also State, for Use & Ben. of Morgan Cnty. v. Norwood*, 26 So. 2d 577, 582 (Ala. 1946); *Cabler v. Mobile County*, 159 So. 692, 694 (Ala. 1935) ("No proposition is better settled than that the law of fees and costs is penal, to be strictly construed; no fee to be charged nor paid except in the manner provided by law."); *Hawkins v. State ex rel. O'Brien*, 27 So. 215, 216 (Ala. 1899) ("[W]hen any public officer demands a fee for services rendered by him, he must point to some clear and definite provision of the statute, which authorizes him to make the charge and demand. Statutes giving costs or fees, must be strictly construed and not extended beyond their letter.").

Consistent with these requirements, the Alabama legislature has "expressly provided by law" the fines and costs that may be imposed by municipal courts. Alabama law explicitly permits the imposition of penalties for violation of municipal ordinances, which include fines in addition to terms of imprisonment or hard labor. Ala. Code § 11-45-9.[5] Alabama law also explicitly permits municipal courts to impose court costs. Ala. Code § 12-19-153(a). The court costs that may be imposed are set out in various statutes, which also designate the state, county, or municipal funds to which the costs must be sent.[6]

The Alabama legislature has also "expressly provided by law" numerous instances where a supervision, user, or other fee can be assessed to a criminal defendant. *See, e.g.*, Ala. Code § 15-22-2(a)(1) (persons "subject to supervision by the Board of Pardons and Paroles" "shall be required to contribute forty dollars ($40) per month toward the cost of his or her supervision and rehabilitation."); § 12-23-7 (persons "convicted of an alcohol or drug-related offense and . . . placed on probation or parole" must do testing "at his own expense"); § 12-23-12 (persons

[5] These ordinances can provide penalties of fines, imprisonment, hard labor, or one or more of such penalties, with no sentence of imprisonment or hard labor exceeding six months except for DUIs. Ala. Code § 11-45-9(a), (b). Most offenses are punishable by a maximum $500 fine, but some misdemeanors, including criminal mischief, theft of property, theft of services, receiving stolen property, and others, are punishable by up to a $1,000 fine. *Id.* § 11-45-9(b), (d). DUIs are punishable by up to one year imprisonment or hard labor and a fine of $5,000. *Id.* § 11-45-9(c).

[6] A compilation of costs can be found on a standard form utilized by municipal courts. *See* Ala. Unified Judicial Sys., *Distribution Schedule of Costs, Fees and Fines in Municipal Courts* (revised June 26, 2014) (attached as Ex. I to Brooke Decl.). Many are sent to various state and county funds, though money is also retained by the municipality. *See* Ala. Code § 12-14-14 ($5 remitted to general fund of municipality, and, if adopted by municipality by ordinance, additional $10 per case may be imposed and sent to general fund); *id.* § 12-19-310(b)(2) ($10 in docket fee costs to be retained by municipality per case for "operation of the municipal court"); *id.* § 11-47-7.1 (municipality can vote to assess additional court costs and fees, up to amount charged by county district court for a similar case, which can be used exclusively for purchase, construction, and maintenance of court and jail facilities). All of the costs listed in this paragraph are included in the "court costs" assessed as a matter of course in the Clanton Municipal Court on each conviction, and often even on cases that are dismissed.

convicted of DUIs or other alcohol or drug related offenses "shall be ordered by the court to pay an alcohol and drug abuse court referral officer assessment fee"); § 12-23-13 (alcohol or drug-related offender referred for assessment and placed on probation "shall pay a monitoring fee to the court referral officer"); § 12-23-15 ("each offender" in court referral program shall pay fee to the Indigent Offender Alcohol and Drug Treatment Trust Fund); § 13A-12-284 (requiring defendant to "agree[] to pay for all or some portion of the costs associated with" rehabilitation program, with the ability to reduce the penalty imposed by the amount paid for treatment upon successful completion); § 15-18-180 ("user fees may be assessed to help defray the cost of" a community punishment and correction plan).

The Alabama legislature therefore clearly understands how to "expressly provide[] by law" when fees can be assessed against a defendant. *See Melton*, 1 So. 2d at 921. Yet, notably absent from any of these explicit statutory authorizations to charge fines and costs is any mention of additional fees authorized when a person is placed on municipal court probation.[7] There is a

[7] Nor can the probation fees in the JCS-Clanton Contract be considered part of the "fine," although this justification has been used in the court debt collection context. For example, the Alabama Supreme Court approved of fees charged by a private company hired to collect outstanding municipal court fines. *See Wilkins v. Dan Haggerty & Associates, Inc.*, 672 So. 2d 507, 509–10 (Ala. 1995). It reasoned that judges could impose these fees as an additional "fine" for scheduled offenses (offenses where fine amount is not variable and is set by a schedule) if the person failed to appear at their initial appearance, prior to sentencing. *Id.* at 510 (citing Ala. R. Jud. Adm. 19(C)(2)). The only restrictions on imposing such fines are the jurisdictional limitations contained in Ala. Code § 11-45-9 ($500 for traffic cases and other municipal ordinance violations, $1,000 for some misdemeanors, and $5,000 for DUIs).

This analysis is inapplicable to the fees mandated by the JCS-Clanton Contract. First, the contract states that such fees are imposed as a monthly "probation fee" and as a "probationer set-up fee," not as a fine. *See* Ex. C to JCS-Clanton Contract. Second, these fees are not imposed at sentencing, but after a person states that he cannot pay the fines and costs that the sentence has already imposed. *See* Reynolds Decl. ¶ 3; Ware Decl. ¶¶ 3, 4, 7; Williams Decl. ¶ 2. There is no statutory provision allowing judges to increase the fines after sentencing. In fact, the *Wilkins* court expressly declined to consider whether the fee to the collection company would be legal if applied to persons who had already been sentenced, since plaintiffs presented no evidence that this was happening in practice in the municipal court. *See Wilkins*, 672 So. 2d at 510–11.

statute that authorizes probation in municipal court, but it does not make any reference to charging a fee or cost to the probationer. *See* Ala. Code § 12-14-13. The closest it comes to suggesting a probation fee could be assessed is a generalized statement that a municipal court may place *conditions* on the probationer. The statute provides:

> The court shall determine and may, at any time, modify the conditions of probation and may require the probationer to comply with the following or any other conditions:
>
> (1) To avoid injurious or vicious habits;
> (2) To avoid persons or places of disreputable or harmful character;
> (3) To report to the probation officer or other person designated by the judge;
> (4) To permit the officer to visit him at his home or elsewhere;
> (5) To work faithfully at suitable employment as far as possible;
> (6) To remain within a specified area;
> (7) To pay the fine and costs imposed or such portions thereof as the judge may determine and in such installments as the judge may direct;
> (8) To make reparation or restitution to any aggrieved party for the damage or loss caused by his offense in an amount to be determined by the court; and
> (9) To attend defensive driving schools, alcohol countermeasure programs or courses where available and support his dependents to the best of his ability.

Ala. Code § 12-14-13(d). This generalized language, including the statement that the court may impose "any other conditions," does not provide the "express" authority that is required to charge additional fees. *See Melton*, 1 So. 2d at 921. Nor does any other statute provide authority for a fee being an appropriate "condition" of municipal court probation. *Contra* Ala. Code § 15-22-2(a)(1) (authorizing fee for probation through circuit and district courts). This omission, both within Section 12-14-13 specifically and the Alabama Code more generally, is dispositive of the issue, for without that express authorization, the fee cannot be assessed. *Cf. Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Nevertheless, the Alabama Attorney General opined to the contrary in 1997, stating that Section 12-14-13 *does* authorize the assessment of a supervision fee on probationers as a condition of probation. The Opinion noted that a supervisory fee could not be assessed as a cost, but reasoned:

> The municipal probation statute . . . gives the judge broad authority to place conditions on probation. Ala. Code § 12-14-13 (1995). The statute not only provides a listing of conditions that the judge may require the probationer to comply with, but also gives the judge the authority to require the probationer to comply with "any other conditions." *Id.* Therefore, it is the opinion of this Office that a municipal judge can assess a supervision fee upon each probationer as a condition of probation.

Op. Ala. Att'y Gen. 98-00043, 1997 WL 35271245, at *2 (Nov. 24, 1997).[8]

This Attorney General Opinion is not deserving of any weight in this Court, for two critical reasons. First, it has no binding effect on this Court or state courts, and is instead merely considered as potentially persuasive authority; in other words, it should be treated like any other legal brief and should be followed only if this Court agrees with "the soundness of its reasoning and the correctness of its conclusion." *Ala. Dep't of Pub. Safety v. Barbour*, 5 So. 3d 601, 609–10 (Ala. Civ. App. 2008). If not, then it should be disregarded.

Second, the Opinion is demonstrably *not* well-reasoned and does not reach a correct conclusion. The Opinion fails to acknowledge or in any way address the cardinal rule that fees "can only be taxed when expressly provided by law." *Melton*, 1 So. 2d at 921; *Norwood*, 26 So. 2d at 582. The Opinion fails to cite to any statutory language that "expressly provide[s]" for the assessment of a probation fee in municipal court. Indeed, the reasoning of the Opinion is so vague that it would allow a municipal court to assess *unlimited* fees or other costs to any person

[8] The Attorney General also noted that the municipal court statute grants municipalities "power to provide probation services." Op. Ala. Att'y Gen. 98-00043, 1997 WL 35271245, at *1. Yet the relevant statutory provision, Ala. Code § 12-14-2, does not sanction assessing an additional fee for this probation, and thus provides no more support than does § 12-14-13.

sentenced to probation, subject only to their ability to pay. Op. Ala. Att'y Gen. 98-00043, 1997 WL 35271245, at *2. This is not permissible under and directly conflicts with Alabama law.

Without such explicit statutory authorization, no additional fees associated with probation may be mandated by the municipality and imposed in municipal court, as the JCS-Clanton Contract compels. Thus, Plaintiffs are substantially likely to prevail on their claim that the contract is void and illegal because it violates public policy. *Perdue*, 127 So. 3d at 358.

II. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY UNLESS A PRELIMINARY INJUNCTION ISSUES.

Plaintiff Mr. Williams and the putative class he seeks to represent are suffering, and will suffer in the future, irreparable injury. The injury flows both from their personal and the public interest of not being subjected to monopolies that avoid competitive bidding; their inability to pay for basic life necessities like food, housing, and power because of the incessant obligation to pay illegal monies to JCS; and the corresponding obligation to face onerous reporting requirements for longer periods of time because the money being illegally siphoned to JCS is invariably delaying the ability of the class members to pay off their municipal court debts and to end their pay-only probation period. These are immediate and irreparable injuries that justify a preliminary injunction.

First, Plaintiff Williams and the putative Class Members are suffering irreparable harm because JCS and the City of Clanton have violated their constitutional right to be free from an exclusive franchise that was not competitively bid, forcing them to comply with the terms agreed to in this illegal contract. Such contracts create monopolies, which are "obnoxious to the law" and "violative of fundamental constitutional rights." *Kennedy v. City of Prichard*, 484 So. 2d 432, 434 (Ala. 1986) (quoting *Crabtree v. City of Birmingham*, 299 So. 2d 282, 289 (Ala. 1974); *Dickinson v. Cunningham*, 37 So. 345, 349 (Ala. 1903)). The Alabama Constitution compels

competitive bidding to protect against the "derogation of or encroachment on public rights" that occurs when an exclusive franchise is granted, *Rogers v. City of Mobile*, 169 So. 2d 282, 300 (Ala. 1964), and to ensure that "the convenience and benefit of the public" is not impaired. *Kennedy*, 484 So. 2d at 434 (citations omitted). *See also Birmingham & P.M. St. Ry. Co. v. Birmingham St. Ry. Co.*, 79 Ala. 465, 473 (1885) (constitutional right is of "great public importance").

Moreover, the irreparable harm calculus must consider the harm that this contract is inflicting on the public. *See Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623, 625 (5th Cir. 1985); *see also Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) ("A preliminary injunction both protects this interest in participating in a legal bidding process and ensures that the contract awarded will be a legal one. It makes little sense to us to not consider this fact in the irreparable harm calculus."). The public interest is strongly against monopolies, which is why this constitutional right is of "great public importance." *Birmingham & P.M. St. Ry. Co.*, 79 Ala. at 473. Thus, both because Plaintiff Mr. Williams and the putative class are being personally subjected to an exclusive franchise that was not bid, and because this harm is against the public generally, the irreparable harm element is established.

Second, the Plaintiff class is, and will be, irreparably harmed by the requirement to pay a $10 set-up fee and a monthly $40 probation fee to JCS, in contradiction of Alabama law. Monetary injuries are not typically deemed "irreparable" since they can usually "be undone through monetary remedies." *See Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983). Yet, courts have long recognized that having to make (or failing to receive) small payments *can* lead to irreparable injury when it involves persons living on the economic margins of society. *See*

Miss. Power & Light Co., 760 F.2d at 625 ("A refund of overcharges sometime in the future could never adequately compensate families living at or close to the poverty line for hardships they would endure as a result of overcharges they would have to pay at present and during the course of litigation."); *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1292 (M.D. Fla. 2011) (finding irreparable harm to persons deprived of public benefits) (citing *Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982) ("We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes" without the statutorily conferred level of welfare benefits.), *aff'd sub nom. Lebron v. Sec'y, Fla. Dep't of Children & Families*, 710 F.3d 1202 (11th Cir. 2013)). *See also Beno v. Shalala*, 30 F.3d 1057, 1064 (9th Cir. 1994) (collecting cases, and concluding that reductions in public benefits impose irreparable harm on recipient families); *Reynolds v. Guiliani*, 35 F. Supp. 2d 331, 339 (S.D.N.Y. 1999) ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury." (citation omitted)).

The same is true here. Plaintiff Mr. Williams and the putative class he seeks to represent are all being forced onto pay-only probation with JCS for only one reason: their inability to pay their costs and fines immediately in the Clanton Municipal Court. *See* Reynolds Decl. ¶ 3; Ware Decl. ¶¶ 3, 4, 7; Williams Decl. ¶ 2. It is clearly not in any class member's rational economic interest to be placed on JCS, for the typical $40-per-month charge embedded in an average $140 payment constitutes a *monthly* interest rate of 40%. Those who are being forced to pay this fee are being forced to go without other daily necessities, including rent, food, and electricity. *See* Reynolds Decl. ¶ 8 (skipped meals and groceries, power cut off, didn't pay other bills); Ware Decl. ¶ 10 (skipped meals, stopped paying other bills, took out high-interest loan to pay off JCS); Williams Decl. ¶ 4 (no phone, moved back in with family). It is no answer to say that the Class

may at some future time be reimbursed, for that will do nothing to remedy the "hardships they [are] endur[ing]" in the interim. *Miss. Power & Light Co.*, 760 F.2d at 625.

Furthermore, this $10 set-up charge and $40 per month payment is being taken directly from the limited funds Plaintiffs are paying towards their court-owed debt, which requires them to be on this pay-only probation for a longer period of time.[9] This continued probationary period causes additional irreparable harm to the putative class, as members are required to report frequently to the JCS office (often weekly when unable to make full payments), forcing individuals to take time away from their jobs or job searching. *See* Reynolds Decl. ¶ 7 (told to report within week when did not pay enough); Ware Decl. ¶ 9 (time away from work; told to report within a week when failed to pay enough); Williams Decl. ¶ 5 (time away from jobs and searching for jobs). Individuals whose driver's licenses are suspended, such as Mr. Williams, must find friends and family who can take approximately an hour of time to drive and wait in the office, and must provide them with gas money. *See* Williams Decl. ¶ 5; Reynolds Decl. ¶ 10. These particular injuries cannot be fully remedied through a claim of damages. And these injuries are further preventing class members from "being able to escape the never-ending and seemingly unbreakable cycle of poverty." *See Gresham v. Windrush Partners*, 730 F.2d 1417, 1424 (11th Cir. 1984).

Thus, whether considered individually to the putative Class or in terms of the harm to the public itself, the harm resulting from the void and illegal JCS-Clanton Contract "demonstrate[s]

[9] *See* Ex. B, ¶ 15, to JCS-Clanton Contract ("JCS may recommend to the Court early probation release if a probationer has fulfilled all Court ordered requirements and paid all fines. Any remaining fees will not be assessed against the probationer if the Court grants early release.") (attached as Ex. C to Brooke Decl.). In practice, JCS requests termination of probation whenever all court-owed debt and accrued JCS fees are paid in full. Reynolds Decl. at ¶ 12; Ware Decl. at ¶¶ 6, 11.

that irreparable injury is likely in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

III. THE THREATENED INJURY TO PLAINTIFFS AND THE CLASS OUTWEIGHS ANY POTENTIAL HARM THE RESTRAINING ORDER MIGHT CAUSE TO DEFENDANTS.

The threat of injury the putative Class considerably outweighs any threat of harm to Defendants. Without immediate injunctive relief, Plaintiff Mr. Williams and the putative Class face irreparable harm, including being subjected to an unconstitutional exclusive franchise, being required to pay money that is illegal under Alabama law and is inhibiting their ability to pay for basic necessities, and being subjected to onerous reporting requirements over an extended period of time.

The only harm that may befall Defendant JCS is loss of the income that they currently derive under a void contract. As courts have held, profiting from illegal behavior is "not a cognizable 'hardship' that this Court should consider." *See Dell Inc. v. BelgiumDomains, LLC*, No. 07-22674-CIV., 2007 WL 6862342, at *13 (S.D. Fla. Nov. 21, 2007); *Beavers*, 645 So. 2d at 1377 (injunctive relief appropriate to prevent defendants' "profit from making an unconstitutional contract"); *see also EyePartner, Inc. v. Kor Media Grp. LLC*, No. 4:13-10072-CIV, 2013 WL 3733434, at *5 (S.D. Fla. July 15, 2013) ("[I]t is well-established in the copyright context that a company cannot build a business on infringements and then argue that enforcing the law will cripple that business.") (internal quotations and citations omitted), *appeal dismissed* (Aug. 12, 2014).

Similarly, Defendant City of Clanton may contend that an injunction of the contract may inhibit its ability to collect fines and costs from municipal court defendants. That contention is unlikely to prove valid—Plaintiffs are not challenging the actual sentences imposed on municipal

court defendants—but in any event does not outweigh the strong public interest against monopolies, which are "obnoxious to the law" and "violative of fundamental constitutional rights." *Kennedy*, 484 So. 2d at 434 (citations omitted). Nor can it justify violating Alabama law regarding assessing fees for persons placed on municipal probation.

IV. AN INJUNCTION WOULD NOT DISSERVE THE PUBLIC INTEREST.

The last factor in the Court's analysis—whether the requested injunction would be adverse to the public interest—also weighs strongly in favor of Plaintiffs. An injunction certainly would not disserve the public interest, but rather would "protect[] those rights to which [the public] too is entitled." *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000).

The contract was presented initially to the City Council in 2009 as a service to the public, which would prevent jailing of defendants in municipal court and allow defendants instead to pay fines over an extended period of time. Clanton Advertiser, *Clanton to offer probation for some offenses* (Feb. 9, 2009) (attached as Ex. G to Brooke Decl.). However, this "benefit" cannot justify the contract, for it would be clearly unconstitutional to jail all individuals who are now sent to probation because they cannot pay the fines and costs assessed. *See Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."); *see also Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (to "deprive a probationer of his conditional freedom simply because, through no fault of his own he cannot pay a fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment").

The public interest is served by stopping violations of public laws and by voiding contracts that violate the Alabama Constitution. Thus, this factor favors the issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the balance of equities tips sharply in favor of issuing a preliminary injunction against enforcement of the JCS-Clanton Contract that compels Plaintiff Mr. Williams and the putative class to be subjected to an unconstitutional exclusive franchise, high fees that hinder their ability to provide for their basic necessities, and onerous reporting conditions over an extended period of time.

Dated: March 30, 2015

Respectfully submitted,

/s/ Sara Zampierin
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CERTIFICATE OF SERVICE

The foregoing document has not been formally served. It will be served pursuant to Rule 4 of the Federal Rules of Civil Procedure, and when that has occurred Plaintiffs' Counsel will file an affidavit of service with the Court.

Dated: March 30, 2015 /s/ Sara Zampierin