

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

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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. s

named Plaintiffs are entitled to summary judgment on their individual Fourteenth

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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;

Gasden Municipal Court Dep. (Ex. 10), ECF 231-10 at 1:1–1:10; Tw -24.3

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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 40:3–13.² 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. 2) ECF-

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; W IR 91 -9 2 D W 1

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

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

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.* ¶¶

a receipt stating “NON-PAYMENT.” McCombs Dep., ECF 231-31 at 177:11–178:14; *e.g.*

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 -

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).

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 201:5–191 (ep)-40 Tc 2.06 0 Td(5)Tj0.502 0 Tj0.2.002 Tc (2)-4.2 (0)]TJ6Td[(at)-2.9w35p339

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

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 0:12–0:40.⁵ 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.

at 147:13–148:6. The judge then ordered Harper “5 days to serve” in jail for missed appointments. 9-

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;⁶ *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 Je]HTd[0.003 Tw 2.3.

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, EJ1

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.

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).⁸

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

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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)⁹ (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.

⁹ 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

1. PPS imposed two binding

Essig Sentence of Probation

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

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

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.”),¹⁰ *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

¹⁰ 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).

need not show that PPS “had an interest in opposition to [its] proper one” as the probation authority; “it is rather that [PPS] had

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

whether it was PPS or the judge who imposed a payment schedule for all Class members, it is undisputed that PPS later

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

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 schedule hearings on BDC (1/28/2017) at

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

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

DATED: September 22, 2022. Respectfully Submitted,

CERTIFICATE OF SERVICE