No. 21-30620

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HAKEEM MEADE, on behalf of himself and all others similarly situated; MARSHALL SOOKRAM,

Plaintiffs-Appellants,

v.

PAUL A. BONIN, Judge of the Orleans Parish Criminal District Court; ETOH MONITORING, L.L.C.,

Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Louisiana,
No. 2:20-cv-1455, Hon. Carl Barbier, District Judge, presiding.

APPELLANTS' OPENING BRIEF

MOST & ASSOCIATES
William Brock Most
201 St. Charles Avenue
Suite 114 #101
New Orleans, LA 70170
(504) 509-5023

INSTITUTE FOR JUSTICE
William R. Maurer
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300

Jaba Tsitsuashvili
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Counsel for Plaintiffs-Appellants

Certificate of Interested Persons

Appellants certify that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. Plaintiffs-Appellants

   Hakeem Meade; Marshall Sookram

2. Defendants-Appellees

   ETOH Monitoring, L.L.C.; Paul A. Bonin

3. Counsel for Plaintiffs-Appellants

   William R. Maurer; Jaba Tsitsuashvili; Institute for Justice; William Brock Most; Most & Associates

4. Counsel for Defendants-Appellees

   Leonard Louis Levenson; Christian Wayne Helmke; Donna R. Barrios; Leonard L. Levenson & Associates; Clare Roubio; Dane S. Ciolino; Louisiana Legal Ethics LLC

Dated: December 23, 2021 /s/ William R. Maurer
Counsel for Plaintiffs-Appellants

Statement Regarding Oral Argument

Plaintiffs-Appellants Hakeem Meade and Marshall Sookram respectfully request oral argument. This case presents novel and important issues of due process in the administration of state criminal court systems, including court-ordered deprivations of liberty and property for the benefit of a for-profit company.

Oral argument will aid this Court's consideration of these issues because the Court may have questions about the scope of Plaintiffs-Appellants' claims and of Defendant-Appellee's arguments for dismissal. The Court may also have questions about the application of its recent due process pronouncements in *Cain v. White*, 937 F.3d 446 (5th Cir. 2019), and *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019), to the facts of this case.

Table of Contents

Table of Authorities

Page(s)

Cases

Rules

Statement of Jurisdiction

This is a civil rights case brought under 42 U.S.C. § 1983 and the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

The district court granted Defendant-Appellee ETOH Monitoring, LLC's motion for judgment on the pleadings and entered a memorandum order and final judgment of dismissal on September 10, 2021. ROA.955-963. Plaintiffs-Appellants Hakeem Meade and Marshall Sookram filed a timely notice of appeal on October 5, 2021. ROA.964.

This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues Presented

1. Whether it violates due process for a criminal court judge to design and implement an ankle monitoring system in a manner that financially benefits a for-profit company with which he has significant but undisclosed personal, financial, professional, and political ties, or whether, as the district court held, there can be no systemic due process violation if only one judge engages in that improper conduct?

2. If Plaintiffs-Appellants here have adequately alleged a system of potentially interested decision-making, whether they have pleaded

sufficient facts to survive a motion for judgment on the pleadings?

Statement of the Case

This case concerns the operation of a courtroom in the Orleans Parish Criminal District Court in New Orleans, Louisiana. The court at issue was presided over by then-Judge Paul A. Bonin ("Judge Bonin"). ETOH Monitoring, LLC ("ETOH") is an ankle monitoring company that operated in Judge Bonin's courtroom. Judge Bonin and ETOH had significant, but undisclosed, personal, financial, professional, and political ties that resulted in the appearance, and reality, of interested decision-making regarding criminal defendants' liberty and property.

Plaintiffs-Appellants Hakeem Meade and Marshall Sookram ("Appellants") are two of dozens of defendants who Judge Bonin ordered to ankle monitoring. Judge Bonin ordered or steered them to contract with and pay ETOH for that court-ordered, defendant-funded surveillance. He conditioned their liberty from jailing or continued monitoring on their ability to pay ETOH's fees (up to $300 a month). This was all without disclosing the availability of alternative ankle monitoring providers or, crucially, the significant ties between Judge Bonin and ETOH's principals, including, among other things, an unpaid loan to

Judge Bonin's judicial election campaign. Appellants brought this case on behalf of a putative class, alleging that the ties between Judge Bonin and ETOH, in conjunction with their conduct, gave rise to the appearance and the reality of interested decision-making in the operation of the court's ankle monitoring system.[1]

I. Factual History

A. Judge Bonin ordered defendants in his court to ankle monitoring services, and ETOH contracted with defendants to provide that surveillance.

In 2016, Judge Bonin, then a sitting judge on Louisiana's court of appeals, ran for and won a trial-level seat on the Orleans Parish Criminal District Court. ROA.69. He served on the Criminal District Court from January 2017 until he stepped down in December 2020. ROA.69, 311.

As part of his duties as a Criminal District Court judge, Judge Bonin regularly ordered defendants to be supervised via ankle monitoring. ROA.65, 68, 72-77. Ankle monitoring is a means of court

[1] In addition to ETOH, Appellants also sued Judge Bonin for prospective declaratory relief. ROA.60. In July 2020, Judge Bonin announced he would not seek reelection that November. Because Appellants only sought prospective relief from Judge Bonin, they voluntarily dismissed their claim against him, and he is no longer a party to this case. ROA.220, 233.

control and oversight of a criminal defendant. ROA.63. The appropriate considerations in determining the need for monitoring are whether the defendant poses a risk of flight or a threat to public safety. ROA.65.

When a judge orders a defendant to wear an ankle monitor, the ankle monitoring provider places a GPS tracking device on the defendant's ankle, and the device records the defendant's location. ROA.63. The provider uses this information to monitor, record, and report the defendant's compliance with court-ordered curfew and geographic constraints. ROA.63.

The ankle monitoring provider may be either (i) a government entity, (ii) a private company with which the government contracts, or (iii) a private company with which the defendant contracts. The Orleans Parish Criminal District Court uses a combination of the first and third options: Defendants whom the court orders to be supervised by ankle monitoring must contract with one of two private companies (one of those being ETOH) or with the Gretna Police Department's ankle monitoring program. ROA.63, 193-194.

While ankle monitoring permits a defendant to live at home and attend school or work, it is nonetheless a form of government custody and

control that seriously interferes with a person's liberty and property. ROA.63-64. In addition to the restrictions on where a defendant may be and how long they may be there, ankle monitoring services cost money. For instance, nationally, use of an ankle monitor typically costs the defendant $10 a day, with an installation fee of $50 to $100 or more. ROA.63. For indigent defendants, paying for ankle monitoring for any length of time can cause severe financial hardships. ROA.63.

Court-imposed, defendant-paid fees are ETOH's sole source of revenue; the company does not receive government funding or subsidy. ROA.63-64. In the Orleans Parish Criminal District Court, if a defendant contracted with ETOH, the company charged the defendant or their loved ones daily fees for their court-imposed surveillance, up to over $300 a month. ROA.64. Appellants were each employed during their monitoring, yet these fees were still a "significant financial burden and deprivation of [their] property." ROA.66, 68.

As explained in the following discussion, ETOH's imposition and collection of ankle monitoring fees was a function not only of Judge Bonin's initial ordering and steering of defendants to the company (part B), but also his subsequent threats, at ETOH's behest, of jailing or

continued monitoring simply for failure or inability to pay the company (part C)—with which he had significant and undisclosed personal, financial, professional, and political ties (part D).

B. Judge Bonin ordered and steered defendants in his court to contract with and pay ETOH, which he called his "special service."

As noted above, ETOH was one of three ankle monitoring providers available in the Orleans Parish Criminal District Court. ROA.63. However, Judge Bonin regularly ordered, steered, and permitted criminal defendants to contract with and pay ETOH specifically, without mention of the other available providers. ROA.65, 68, 71-77.

For example, "Judge Bonin . . . ordered [Appellant Meade] to ankle monitoring at [Meade's] expense" and "told [Meade] to go to ETOH for these services." ROA.65. Similarly, Appellant Sookram initially used the other private ankle monitoring company, but later switched to "another company that [Judge Bonin] had given [Sookram's attorney] the phone number of"—the latter company being ETOH. ROA.68.

Consistent with Appellants' experiences, a judicial watchdog report found that Judge Bonin's regular practices included: "recommending defendants use ETOH"; emailing defense attorneys "on how the

defendant could sign up for ankle monitoring services" while including ETOH's managers on the emails; and requiring his staff to "provide the defendant or the defendant's family members with the contact information for ETOH." ROA.72-73.

Echoing those findings, Appellants' operative complaint identifies at least eleven instances, in addition to their own, of Judge Bonin ordering or steering defendants to ETOH. ROA.73-77. In short, ETOH was, in Judge Bonin's words, his "special service." ROA.75.

C. Judge Bonin conditioned criminal defendants' liberty on their ability to pay ETOH, and, at the company's behest, he acted as its de facto debt collector.

Not only did Judge Bonin order and steer defendants to ETOH; he also conditioned their liberty on paying ETOH's fees, both at the time of his initial ankle monitoring orders and—at ETOH's behest—while the company provided ankle monitoring services. ROA.71-77. In other words, defendants' right to liberty depended on their paying debts to a private company, without regard to the defendants' financial capability, risk of flight, or threat to public safety.

For example, with respect to Appellant Sookram, Judge Bonin's chambers informed Sookram and ETOH that "Mr. Sookram will be able

to have the monitor removed once his balance is paid in full." ROA.69.

Similarly, for Appellant Meade, "[p]aying ETOH's fees was a condition of Judge Bonin's order, and nonpayment could result in [Meade's] pretrial jailing." ROA.65. "When Judge Bonin ordered [Meade] to ankle monitoring by ETOH, [Meade] does not recall the judge stating that he was a flight risk or that he posed a threat to public safety." ROA.65. And "[d]uring at least one subsequent pretrial hearing, Judge Bonin reminded [Meade] that he still owed money to ETOH and that [his] failure to pay ETOH could violate his bond conditions. [Meade] understood this as Judge Bonin explicitly conditioning [his] freedom from pretrial jailing on his ability to pay ETOH." ROA.66-67.

Appellants' experiences were shared by others. Their operative complaint identifies at least six instances, in addition to their own, where Judge Bonin conditioned liberty on the ability to pay ETOH and acted as the company's de facto debt collector by threatening jailing or ongoing monitoring for failure or inability to pay. ROA.73-77.

A judicial watchdog report summarized these practices: On "several occasions, Judge Bonin refused to release the defendants from jail until the family had arranged for ETOH to set up ankle monitoring"; he

regularly refused to release defendants from ankle monitoring "solely because the defendants had not paid ETOH all the remaining fees"; and he "threatened to put defendants back in jail and set bond for their failure to pay their remaining debts." ROA.72.

ETOH was not a passive recipient of Judge Bonin's efforts on the company's behalf. It was an active participant in the debt-collection operation: ETOH regularly told Judge Bonin, ex parte, which defendants were behind on payments and how much they owed, and it asked Judge Bonin to "remind[] [defendants] of [their] continuing obligation to make payments to our company." ROA.73-74. To further facilitate and systematize Judge Bonin's debt collection reminders, ETOH sent him a monthly Payment Status Report. ROA.73. These reports, also ex parte, detailed each defendant's payment history and status and asked the judge to "Please note that the highlighted clients need attention"—solely for being behind on payments, as happened with Appellant Meade. ROA.73.

The appearance and reality that ETOH's collection of fees was this judicially imposed ankle monitoring system's core operating principle is

perhaps best encapsulated by a May 2018 exchange in court:

> [W]hile sentencing a defendant for multiple charges, Judge Bonin "waive[d] any fines and court costs." Later, upon being reminded that the defendant had previously been ordered to ankle monitoring, Judge Bonin inquired, "what service is he with?" Upon learning that it was ETOH, Judge Bonin inquired of the defendant, "How much money do you owe them right now?" Judge Bonin then explained to the defendant, "when you get financially current then they can release you." Judge Bonin concluded, "I'm going to release him subject to satisfying his obligation."

ROA.74. *See also* ROA.76 (Judge Bonin: "I will consider reducing [the defendant's] bond if necessary to expedite the process of treatment"; but no such consideration was made regarding reducing the defendant's payments to ETOH.).

D. Neither Judge Bonin nor ETOH disclosed to defendants Judge Bonin's personal, financial, professional, and political ties to ETOH, nor did they disclose available alternatives to ETOH.

While steering criminal defendants and their families to ETOH and threatening jailtime or continued monitoring for failure to pay, Judge Bonin did not disclose to those defendants or families the availability of alternative ankle monitoring providers. ROA.71. And neither Judge Bonin nor ETOH disclosed the personal, financial, professional, and

political ties between Judge Bonin and ETOH. ROA.71.

These ties were extensive, long-standing, and meaningful.

For instance, before Judge Bonin's political and judicial career, his legal partner for fourteen years was Leonard L. Levenson, a Louisiana attorney. ROA.70, 311. Levenson and Christian W. Helmke, also a Louisiana attorney, founded ETOH in 2006, and they manage it to this day. ROA.70, 312.

In 2007, when Judge Bonin was an elected New Orleans Traffic Court judge and ETOH was a newly founded, one-year-old company, Judge Bonin was the first judge who "agreed to introduce . . . a pilot [ankle monitoring] program along with ETOH Monitoring" in his court. ROA.898.[2]

From 2005 (the year before ETOH's founding) to 2016 (the year of Judge Bonin's election to the Criminal District Court), ETOH managers

[2] Appellants obtained the quoted document in discovery, and it is not referenced in their operative complaint (which must form the basis for deciding this appeal from a judgment on the pleadings). However, the quoted document is a public document subject to judicial notice by this Court because it is an official publication of the New Orleans Traffic Court and there is no reason to doubt its accuracy. Fed. R. Evid. 201(b); *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

Levenson and Helmke (via their eponymous law offices) made seven donations (totaling $8,650) and one loan (of $1,000, still outstanding) to Judge Bonin's three judicial election campaigns. ROA.70.

These undisclosed personal, financial, professional, and political ties between Judge Bonin and ETOH were not only significant, but also unusual: Judge Bonin did not have any such ties to the Parish's other available ankle monitoring providers, and Levenson and Helmke did not contribute nearly as much or as often (and, on information and belief, made no loans) to other judges on the Orleans Parish Criminal District Court—none of whom were Levenson's former law partner and none of whom had given Levenson's fledgling company a foothold in the New Orleans judicial system. ROA.71.

II. Procedural History

A. Appellants brought due process claims on behalf of a putative class.

Appellants Meade and Sookram brought this case on behalf of a putative class of "[e]very individual . . . ordered, steered, or permitted by Judge Bonin to contract for or otherwise receive or pay for ankle monitoring services by ETOH." ROA.77. Appellants alleged that Judge Bonin's and ETOH's ankle monitoring system violated due process

because the undisclosed ties between the judge and the company, coupled with the judge's steering of defendants to ETOH and his conditioning of their liberty on the ability to pay ETOH, gave rise to the appearance and the reality of a system operating based on personally and financially interested judicial decision-making. ROA.80-83. Appellants alleged:

> Judge Bonin's and ETOH's practice of requiring criminal defendants to pay ankle monitoring fees to ETOH—a company in which the judge has personal, financial, professional, and political interests—and their practice of tying custody determinations to the payment of those fees to ETOH are unconstitutional because, in the absence of adequate disclosures, they demonstrate judicial bias and conflicts of interest, or the appearance of judicial bias and conflicts of interest, in violation of due process.

ROA.81-82.

Appellants voluntarily dismissed Judge Bonin from the case when he announced that he was not seeking reelection. ROA.220, 233. Appellants' due process claim against ETOH remains, and it is the subject of this appeal. In addition to seeking declaratory relief and an injunction prohibiting ETOH from engaging in any such practices in the future, Appellants' requests for relief include canceling the putative class's outstanding ETOH fees and disgorging the putative class's paid

ETOH fees. ROA.81-84.

B. The district court correctly held that ETOH is a state actor and subject to Appellants' due process claim.

ETOH initially moved to dismiss Appellants' due process claim under Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), arguing that the company is not a state actor and therefore not subject to 42 U.S.C. § 1983 or the Fourteenth Amendment. ROA.154-159. The district court denied ETOH's motion, holding that "ETOH is a state actor when it provides ankle monitoring services to criminal defendants because monitoring pretrial defendants is a 'fundamentally governmental function' that is 'traditionally reserved to the state.'" ROA.284-293 (quoting *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (per curiam)). That issue is not before this Court: ETOH has not cross-appealed on that issue and has therefore waived any argument contrary to the district court's holding. *Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 211 (5th Cir. 2014).

C. The district court erroneously dismissed Appellants' due process claim.

Nine months after the district court denied ETOH's motion to dismiss, with voluminous discovery already exchanged and class

certification briefing looming, ETOH moved for judgment on the pleadings under Fed. R. Civ. P. 12(c) ("Rule 12(c)").

ETOH argued that Appellants' due process claim failed under past Supreme Court cases finding the risk or appearance of unconstitutionally interested judicial decision-making, but ETOH did not address this Court's recent pronouncements on the issue. ROA.458-469. Appellants argued that under the totality-of-circumstances test governing such claims, they had adequately alleged both the appearance and the reality of interested decision-making, and that this case presents an institutional or systemic due process claim—given that Judge Bonin and ETOH stood to benefit not because ETOH was a party before him in any particular case (indeed, the company was not a party to any case), but because the company was a non-party institution that could benefit from his decisions in every case (and often did, for four years). ROA.480-505.

The district court granted ETOH's motion and dismissed the case. The court held that no institutional due process claim can exist if the "allegations depend on the specific relationship between" a decision-making judge and a for-profit company that stands to benefit from his decisions as a non-party. ROA.960. Instead, the district court assessed

and dismissed Appellants' claim under the line of cases that "address one-off situations when the financial incentive is unique to the facts of the case" based on the identity of a party to the case, *Caliste v. Cantrell*, 937 F.3d 525, 530 (5th Cir. 2019). ROA.961-962 (dismissing Appellants' claim under *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)).

The district court did not address Appellants' argument that their allegations demonstrated not just the appearance but also the *reality* of interested decision-making, given Judge Bonin's conditioning of liberty (at ETOH's behest) on defendants' ability to pay ETOH. *See* ROA.65-67, 69, 72-77, 81-82 (allegations), 486, 503 (argument).

The district court did not rule on Appellants' motion for class certification. *See* ROA.584 (motion), 586 (memorandum in support).

Standard of Review

This Court reviews de novo the district court's judgment on the pleadings and applies the same standard as to a Rule 12(b)(6) motion to dismiss. *Aldridge v. Miss. Dep't of Corr.*, 990 F.3d 868, 873 (5th Cir. 2021). The Court accepts the complaint's allegations as true, and "the central issue is whether, in the light most favorable to [Plaintiffs], the complaint states a valid claim for relief." *Id.* (cleaned up). The complaint need only

plead "enough facts to state a claim to relief that is plausible on its face." *Id.* (citation omitted). "The issue is not whether [Plaintiffs] will ultimately prevail, but whether [they are] entitled to offer evidence to support [their] claim." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (cleaned up).

Summary of the Argument

The district court erroneously held that a plaintiff does not allege a plausible due process claim if a single judge designs and implements (without oversight) an ankle monitoring system for the benefit of a for-profit company with which the judge has personal, financial, professional, and political ties. Instead, the district court held that the due process question depended on whether one aspect of those ties—the amount of election contributions—was the determining factor in placing the judge on the bench.

That was error on multiple fronts, and this Court should reverse. An institutional or systemic due process allegation does not, as the district court held, challenge whether an entire court system (or, put more precisely, more than one judge) stands to benefit from interested decision-making. Nor does such a claim require that the system be

imposed or implemented by the institution that stands to benefit. Rather, the defining feature of an institutional or systemic challenge is that the system operates in a manner that risks a possible temptation of interested decision-making (1) in every case before a decision-maker, regardless of the identity of a specific party, (2) because the decision-maker has an interest in or relationship with, pecuniary or otherwise, a non-party that stands to benefit from his or her decisions.

Appellants' allegations, in their totality, meet those standards (and any other possible temptation standard), especially at the pleading stage. The facts alleged show that, for four years, Judge Bonin, with ETOH's participation and urging, appeared to and did make judicial decisions about ankle monitoring—such as the necessity of that liberty deprivation in the first instance, as well as the duration of that monitoring—for the institutional benefit of ETOH, a for-profit company funded entirely by defendant-paid fees, and with which Judge Bonin had personal, financial, professional, and political ties. Appellants' allegations show that not only was there the risk or appearance of interested decision-making, but also the reality of it, because Judge Bonin—at ETOH's behest—explicitly

conditioned Appellants' and others' liberty on their ability to pay ETOH.

Argument

In a century-long line of cases, the Supreme Court and this Court have recognized that it violates due process if a court system or procedure offers a "possible temptation" for a judge to benefit him- or herself or to benefit an institution in which he or she has a pecuniary or other interest. *See Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Brown v. Vance*, 637 F.2d 272 (5th Cir. Jan. 1981); *Cain v. White*, 937 F.3d 446 (5th Cir. 2019); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019).

When such a system is at issue, the risk or appearance of interested decision-making is not based on a judge's ties to a party in any particular case, but rather the judge's ties to a non-party institution that stands to benefit from every case that comes before the judge. Therefore, the defining feature of a due process "challenge to . . . incentives that a court's structure creates in every case," *Caliste*, 937 F.3d at 530, is not whether the system at issue is imposed by an external institution, nor whether it operates in more than one courtroom, as the district court in this case erroneously held. The defining feature is simply whether a non-party

institution with ties to the decision-making judge stands to benefit from that judge's orders. And in assessing these considerations, this Court reviews the totality of circumstances, *Cain*, 937 F.3d at 454, in which "concerns of judicial administration [do not] necessarily require a high evidentiary barrier," *Brown*, 637 F.2d at 284.

Appellants have adequately pleaded an institutional or systemic due process claim because they have alleged facts showing that Judge Bonin designed and implemented (without oversight) a system and procedure of ankle monitoring that gave rise to the possible temptation and appearance of interested decision-making for the benefit of an institution (ETOH) with which the judge had significant and undisclosed personal, financial, professional, and political ties. Specifically, Judge Bonin regularly ordered or steered defendants to contract with and pay ETOH (a for-profit company with no revenue source other than defendant-paid fees), without disclosing his ties to the company or the availability of alternative ankle monitoring providers. And, at ETOH's behest, Judge Bonin conditioned release from monitoring on defendants' ability to pay ETOH's fees. That is an unconstitutional judicial system operating for the benefit of an institution with ties to the decision-making

judge. Not only have Appellants alleged the possible temptation or appearance of interested decision-making, but also the reality of it; for either reason, their due process claim should proceed.

I. This case is governed by the "possible temptation" standard of interested judicial decision-making as applied to judicial systems or procedures.

It violates due process if a court system or "procedure would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true." *Cain*, 937 F.3d at 452 (cleaned up; citations omitted). If that system or procedure (1) operates in every case that comes before a judge, without regard to the identity of the parties, and (2) may benefit an institution with which the judge has sufficient ties, then the system gives rise to an institutional due process claim.

The sufficiency of the ties between the decision-making judge and the benefiting institution is assessed under the totality of circumstances, without "necessarily requir[ing] a high evidentiary barrier," *Brown*, 637 F.2d at 284, and the ties may be pecuniary or nonpecuniary, direct or indirect. *Caliste*, 937 F.3d at 530; *Cain*, 937 F.3d at 454.

A. The Supreme Court and this Court have articulated a "possible temptation" standard for due process challenges to court systems or procedures.

From the Supreme Court's holdings in *Tumey* and *Ward*, to this Court's decisions in *Brown*, *Cain*, and *Caliste*, to *Harper v. Professional Probation Services, Inc.*, 976 F.3d 1236 (11th Cir. 2020), and beyond, American courts have recognized due process violations when individuals appear before tribunals that may be partial or interested. As *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), phrased it, due process imposes a "requirement of neutrality in adjudicative proceedings." Plaintiffs alleging a due process violation may prevail if they demonstrate that a court's system or "procedure would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true." *Cain*, 937 F.3d at 452 (cleaned up; citations omitted). As this Court did in *Brown v. Vance*, Appellants will refer to this as the "possible temptation" standard. 637 F.2d at 279.

Under the possible temptation standard, this Court focuses "on the strength of the temptation rather than an actual showing of []partiality." *Caliste*, 937 F.3d at 529. Indeed, "under the principles laid out in [a string of Supreme Court cases], *actual* influence [is] not necessary." *Cain*, 937

F.3d at 453 (emphasis in original) (collecting cases). Rather, the guiding principle is the "appearance of justice." *Id.* (citation omitted). "[T]he mere threat of []partiality" in the administration of a court "violate[s] due process." *Caliste*, 937 F.3d at 530.[3]

In *Cain* and *Caliste*, this Court summarized the considerations for reviewing courts applying the possible temptation standard to due process claims:

(1) Plaintiffs need not allege that the circumstances actually influenced judicial decision-making. The incentive, possible temptation, risk, or appearance of interested decision-making is sufficient. *Caliste*, 937 F.3d at 529–30; *Cain*, 937 F.3d at 453.

(2) In applying the possible temptation standard, reviewing courts distinguish between (i) due process claims regarding a judge's relationship to a particular litigant or subject matter, and (ii) due process claims regarding an institutional, systemic, or procedural arrangement that could affect every litigant. *Caliste*, 937 F.3d at 530. In the latter,

[3] This does not mean, of course, that when a judge demonstrably engages in interested decision-making, the court does not violate due process. Rather, a lack of cases in which there is evidence of such actual partiality (which, as explained below, Appellants have alleged here) is sufficiently rare as to not have generated much case law.

institutional or systemic category (in which this case falls), the pecuniary interest of a third-party institution with which the judge has ties or the nonpecuniary interest of the judge is sufficient to allege a due process violation. *Id.*; *Cain*, 937 F.3d at 454. As explained below, the defining feature of the institutional or systemic category is whether a challenged system or procedure benefits an institution other than the judge (and the judge has an interest—pecuniary or nonpecuniary, direct or indirect—in that institution's benefit).

(3) The totality of circumstances—not any isolated aspect of the challenged system or procedure—determines whether the facts suggest an incentive, possible temptation, risk, or appearance of interested decision-making. *Cain*, 937 F.3d at 454.

B. This Court recognizes the application of the "possible temptation" standard to judicial systems or procedures (the institutional or systemic category) and one-off situations (the *Caperton* or party-specific category).

This Court recognizes that "[t]he cases applying the *Tumey* [possible temptation] standard can be sorted into two groups." *Caliste*, 937 F.3d at 530. Cases in the first group "address one-off situations when the financial incentive is unique to the facts of the case," such as *Aetna*

Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), or *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). *Caliste*, 937 F.3d at 530. Other cases of this sort, discussed below, include *In re Murchison*, 349 U.S. 133 (1955); *Johnson v. Mississippi*, 403 U.S. 212 (1971); and *Williams v. Pennsylvania*, 579 U.S. 1 (2016).

The "one-off situation" line of cases has two defining features, neither of which is present in this case:

First, in one-off cases, the due process problem is not institutional, systemic, or based on a "procedure," *Tumey*, 273 U.S. at 532, that the decision-making court might apply in every case, regardless of the parties before it. Instead, in one-off cases, the due process problem is based on the relationship between the decision-making judge and a particular party or litigant in a particular case. Second, in one-off cases, the due process problem is not based on a system's or procedure's benefit to an institution that is not a party appearing before the decision-making judge; rather, again, it is based on the benefit to a particular party appearing before the decision-making judge in a particular case, based on the relationship between the judge and the party. *See Williams*, 579 U.S. at 4 (due process required recusal where judge had participated in

petitioner's prosecution); *Caperton*, 556 U.S. at 873–74 (judge potentially biased in favor of litigant who spent heavily in favor of his election); *Aetna Life Ins. Co.*, 475 U.S. at 817 (judge predisposed to rule against insurance companies like the one before him based on his adversarial dealings with such companies); *Johnson*, 403 U.S. at 215 (judge who issued a contempt order had been a defendant in a case brought by the individual held in contempt); *Murchison*, 349 U.S. at 136 (judge who conducted one-man grand jury proceedings could not preside over cases of individuals arising from those proceedings).

By contrast, the second "line of cases" applying the possible temptation standard "address[es] incentives that a court's structure creates in every case," without regard to the identities of the parties appearing before the decision-making judge, such as *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *Caliste*, 937 F.3d at 530.

This Court's decisions in *Cain*, *Caliste*, and *Brown* are in this institutional, systemic, or procedural category. For the reasons explained below, so is this case. The defining features of the due process problem in

this category are:

First, the due process problem is not based on the identity of any party appearing before the decision-making court, because the problem is not based on the relationship between the judge and a party, but rather on the relationship between the judge and a benefiting non-party institution in which the judge has an interest—pecuniary or nonpecuniary, direct or indirect. *Caliste*, 937 F.3d at 530; *Cain*, 937 F.3d at 454; *Ward*, 409 U.S. at 60 (decision-making judge need not "share[] directly" in the fees he imposes to violate due process); *Berryhill*, 411 U.S. at 579 ("the financial stake need not be as direct or positive as it appeared to be in *Tumey*").

Second, because the problem pervades every case that comes before the decision-making court, "concerns of judicial administration [do not] necessarily require a high evidentiary barrier." *Brown*, 637 F.2d at 284. Therefore, for example, *Caperton*'s focus on the amount of a party's political contributions in one election to the decision-making judge's campaign, and whether those contributions were election-determinative, is not the deciding criteria; political contributions may be one part of the totality of circumstances that determine whether the system or

procedure utilized in every case that comes before the decision-making judge gives rise to an incentive, possible temptation, risk, or appearance of interested decision-making. *Cain*, 937 F.3d at 454.

In addition to *Cain* and *Caliste*, in which this Court recently held that fee systems in which judges benefited indirectly from their decisions violated due process under the totality of the circumstances, four other cases help illustrate what constitutes an institutional, systemic, or procedural defect in the operation of a court:

In *Tumey* and *Ward*, the Supreme Court held that it violated due process for the decision-making judges' financial impositions on defendants to "help the financial needs of the village" (i.e., the institution that stood to benefit from the judges' financial impositions). *Tumey*, 273 U.S. at 535; *Ward*, 409 U.S. at 60.

In *Gibson v. Berryhill*, the Supreme Court held that a board composed of optometrists could not decide whether other optometrists could be in business, not because the members of the board had any reason to be biased against any particular applicant that came before them, but because the members had an indirect interest in limiting the

number of optometrists generally. 411 U.S. at 578–79.

And in *Brown v. Vance*, this Court held that a system in which decision-making judges' salaries depended on the number of cases they heard violated due process even though there was no indication that they would harbor bias against any particular party that came before them. 637 F.2d at 282.

II. The district court incorrectly assessed Appellants' claim under the *Caperton* party-specific line of "possible temptation" cases, and Appellants have adequately pleaded an institutional, systemic, or procedural claim under the *Tumey*, *Ward*, *Berryhill*, *Cain*, *Caliste*, and *Brown* line.

Appellants have alleged an institutional due process claim because their challenge is leveled at the system of ankle monitoring operated by Judge Bonin and ETOH, which affected every criminal defendant that appeared in that court for four years. Appellants' claim is that a possible temptation, appearance, and reality of interested decision-making arose (1) without regard to the parties that came before Judge Bonin, and (2) for the benefit of an institution (ETOH) with which Judge Bonin had ties. Under the totality of circumstances, Appellants' factual allegations adequately suggest the possible temptation, appearance, and reality of interested decision-making because Judge Bonin regularly ordered or

steered defendants to contract with and pay ETOH, a company with which he had significant and undisclosed personal, financial, professional, and political ties, and because, at ETOH's behest, he explicitly conditioned defendants' liberty on the ability to pay ETOH's fees.

A. This case fits in the institutional or systemic line of "possible temptation" cases.

A straightforward application of the case law discussed above puts this case in the second category of due process cases discussed in *Caliste* and requires reversal of the district court's novel application of the possible temptation standard. Appellants' claim, like the claims in *Tumey*, *Ward*, *Berryhill*, *Cain*, *Caliste*, and *Brown* is "levelled at the system." *Brown*, 637 F.2d at 284. That is because Appellants' claim does not have the defining features of the *Caperton* line of "one-off" cases, and it does have the defining features of the institutional, systemic, or procedural cases. The claim is not about the effect on any particular defendant that came before the court, but every defendant over the course of four years.

Unlike the *Caperton* line of cases discussed above, Appellants' claim does not depend on Judge Bonin's or ETOH's relationship with any

criminal defendant that interacted with Judge Bonin or with ETOH. Neither Judge Bonin nor ETOH had an incentive to impose fees to the benefit or detriment of Appellants or any other specific party that came before the decision-making court. Appellants alleged no personal connection to Judge Bonin, either positive or negative. They had not appeared before him in the past or contributed money to his or his competitors' election campaigns. Nor had Judge Bonin charged, indicted, or prosecuted them. In short, although the ankle monitoring system at issue in this case was presided over by one man for the benefit of one company, this was a systemic interest affecting all defendants in Judge Bonin's court. It was, therefore, not a "one-off" situation.

And, as in past institutional, systemic, or procedural cases, the possible temptation facing the judge was for the benefit of a non-party institution (ETOH) with which the judge had significant ties. That makes this case just like *Cain* and *Caliste*. In both of those cases, the institution that stood to benefit was a fund that did not put money directly in the decision-making judges' pockets, but of which the decision-making judges had an interest, pecuniary or otherwise, in maintaining the financial

health. *Caliste*, 937 F.3d at 530; *Cain*, 937 F.3d at 454.

So too here. The problem Appellants allege with the operation of Judge Bonin's court is that it involved an ankle monitoring system and procedure that benefited ETOH, a non-party institution that stood to benefit from each of Judge Bonin's ankle monitoring-related decisions, regardless of the party before Judge Bonin in any particular case.

The error the district court made was grafting onto the institutional or systemic line of cases a requirement that finds no support in the case law. The district court held that no institutional, systemic, or procedural possible temptation claim can exist if the "allegations depend on the specific relationship between" a decision-making judge and a for-profit company that stands to benefit from his decisions as a non-party. ROA.960. The district court reasoned that this was because Judge Bonin's ankle monitoring system and procedure was not imposed by any external institution and was confined only to Judge Bonin's court. ROA.960-961.

That conclusion misunderstands the nature of the institutional or systemic inquiry. The inquiry is not whether the conduct is *imposed by* the institution that benefits from the conduct, nor whether the conduct

pervades the entire court system. Rather, the question is simply whether the conduct systematically *benefits* an institution of which the decision-making judge has an interest, pecuniary or otherwise, in maintaining the financial health. *Caliste*, 937 F.3d at 530; *Cain*, 937 F.3d at 454.

Judge Bonin's ankle monitoring system—designed and implemented solely at his discretion, without any oversight—benefited an institution (ETOH) of which he had an interest, pecuniary or otherwise, in maintaining the financial health, given the judge's and the company's significant personal, financial, professional, and political ties. That connection touched every ankle monitoring decision in that courtroom for four years. For all these reasons, "the situation here falls within the ambit of *Ward*." *Cain*, 937 F.3d at 454.

By holding that no institutional due process claim can exist if a problematic system arises in the courtroom of a particular judge, the district court created a novel rule that neither this Court nor any other has adopted. To the contrary, this Court held in *Caliste* that "the challenge to *Judge Cantrell's* dual role fits into the line of cases addressing incentives that a court's structure creates in every case." 937 F.3d at 530 (emphasis added) (citing *Tumey*, 273 U.S. 510; *Dugan*, 277

U.S. 61; and *Ward*, 409 U.S. 57). In other words, a due process claim raises an institutional or systemic issue if the possible temptation applies to every case that comes before a given judge. The district court's holding that every judge in a particular courthouse must be infected with the same possible temptation in order to give rise to an institutional, systemic, or procedural defect finds no support in this Court's precedent.

Moreover, the Parish Criminal District Court's "legislative framework" permitted this "vulnerability" to interested decision-making to occur. *Brown*, 637 F.2d at 284. As ETOH extensively argued below, ROA.465-469, there was no positive requirement in Louisiana law, Parish ordinances, or court rules that prevented Judge Bonin's and ETOH's conflict of interest from occurring or that mitigated its effects. Put another way, the legislative framework permitted (and still permits) any judge in the Parish to operate his or her court to benefit a private company. The fact that Judge Bonin and ETOH were the only ones identified in this lawsuit who took advantage of this systemic vulnerability does not absolve ETOH from liability.

If anything, it makes the due process violation worse. To say, as the district court did, that because the misconduct occurred only in Judge

Bonin's court—a system at his sole design and discretion, without any oversight—should subject his system to *less* due process scrutiny not only lacks any support in the case law, but it is also illogical and threatens to cut off constitutional review in the situations where it is needed most.

Finally, if the district court were correct, Appellants would have stated a viable due process claim if one or more other judges on the Parish Criminal District Court also had ties to ETOH, even though everything else—the steering of defendants to ETOH, Judge Bonin's acting as debt collector for ETOH, and the conditioning of defendants' freedom on their payment of ETOH's fees—remained the same. Or, put another way, Appellants' due process claims would only become viable if someone else also experienced them in another courtroom. That cannot be the law.

B. Appellants' factual allegations suggest the possible temptation, appearance, and reality of interested decision-making in Judge Bonin's and ETOH's ankle monitoring system.

Because this case arises under the institutional or systemic line of possible temptation cases for all the reasons discussed above, the "concerns of judicial administration" that this case presents should not "require a high evidentiary barrier"—especially to survive dismissal at

this early stage. *Brown*, 637 F.2d at 284.

Here, Appellants have not only adequately alleged the existence of a possible temptation of interested decision-making—they have adequately alleged the reality of it. Specifically, against the backdrop of Judge Bonin's and ETOH's extensive ties, Judge Bonin's conditioning of criminal defendants' liberty on their ability to pay ETOH—at the company's behest—plausibly suggests the risk, appearance, and reality that ETOH's financial interests influenced judicial determinations of liberty and property. The company regularly communicated with Judge Bonin, ex parte, for the sole purpose of keeping him apprised of which defendants needed prodding or threatening to pay ETOH's fees. This kind of manipulation of the machineries of justice for the gain of one party to a private contract "pushes beyond what due process allows." *Caliste*, 937 F.3d at 532. At the very least, here, as in *Brown*, "[p]ossible temptation bloomed into questionable behavior." *Brown*, 637 F.2d at 286.

Moreover, these risks (and realities) are especially pronounced here because this is not a case where the system at issue was comprised solely of entities ostensibly devoted only to the goal of seeing that justice is done. Instead, here, the court system operated for the benefit of an entity

with a direct financial stake in the proceedings—indeed, one that exists solely to make a profit, and which has no source of revenue other than defendant-paid fees. In such circumstances, the specter of financial interests influencing decision-making looms particularly large. *See Harper v. Prof. Prob. Servs., Inc.*, 976 F.3d 1236, 1243 (11th Cir. 2020); *McNeil v. Cmty. Prob. Servs., LLC*, 2021 WL 366776, at *24 (M.D. Tenn. Feb. 3, 2021).

Regarding the appearance of interested decision-making, the aggregate personal, financial, professional, and political ties between Judge Bonin and ETOH suggest that (1) ETOH stood to gain directly and monetarily, while (2) Judge Bonin stood to gain the "nonmonetary benefits" associated with ETOH's collection of ankle monitoring fees. *Caliste*, 937 F.3d at 530. Those ties include Judge Bonin's political campaign's unpaid debt to ETOH's principal (who was also his former law partner); the repeated political donations to the judge by both of ETOH's principals; and the regular communications between ETOH and Judge Bonin regarding defendants' payment statuses.

Reading the allegations in Appellants' complaint in the light most favorable to Appellants—as required under Rule 12(c)—it is plausible

that in Judge Bonin's courtroom, custody determinations could appear to be (and were) based on (1) the longstanding personal, financial, professional, and political ties between Judge Bonin and ETOH, and (2) the financial interests of a for-profit company. That is enough for Appellants to have stated a claim for relief under the possible temptation standard's totality-of-circumstances inquiry. *Cain*, 937 F.3d at 454.

The district court, however, came to the opposite conclusion by considering only the amount of political contributions and loans made by ETOH's principals to Judge Bonin's judicial campaigns. ROA.961-962 (citing *Caperton*, 556 U.S. at 886). But Appellants do not claim that ETOH's political and financial support of Judge Bonin was the only factor giving rise to a due process problem. Rather, ETOH's principals' contributions were one component of the totality of circumstances that gave rise to the appearance, risk, and reality of interested decision-making, not the sole source of it. Even if the district court was correct to assess Appellants' claim under the *Caperton* line of non-systemic cases, this Court should reverse because even in those cases, "[c]ircumstances and relationships must be considered." *Caperton*, 556 U.S. at 880 (quoting *Murchison*, 349 U.S. at 136). The district court's consideration

of only the campaign-contributions aspect of Appellants' allegations failed to heed that requirement. *See Aetna Life Ins. Co.*, 475 U.S. 813 (finding due process violation in non-systemic case that did not concern campaign contributions, but rather the judge's background circumstances that might give rise to a possible temptation).

Consideration of all of Appellants' allegations is crucial to determine whether the "totality of this situation, not any individual piece," suggests an incentive, possible temptation, risk, or appearance of judicial decision-making influenced by the financial interests of ETOH. *Cain*, 937 F.3d at 454. Reading all of Appellants' allegations together regarding Judge Bonin's and ETOH's ties and their behavior, this situation is sufficient to proceed under either the *Tumey*, *Ward*, *Berryhill*, *Cain*, *Caliste*, and *Brown* line of cases or the *Caperton* and *Aetna Life Ins. Co.* line of cases because "when everything involved in this case is put together, the 'temptation' is too great." *Cain*, 937 F.3d at 454.

For all those reasons, Appellants' allegations regarding the appearance of interested decision-making are more than enough to reverse the district court. But if nothing else, Appellants' allegations of *actually* interested decision-making compel reversal and require this

case to proceed. *See Murchison*, 349 U.S. at 136 (due process "of course requires an absence of actual bias"); *Cain*, 937 F.3d at 454 n.7 (suggesting the obvious proposition that it violates due process if a judge "actually succumbed to that 'temptation'"); *Ballard v. Wall*, 413 F.3d 510, 519 (5th Cir. 2005) (allowing a due process claim to proceed against private creditors who benefited from a judge's explicit conditioning of liberty and property determinations on paying private debts to those private creditors).

Finally, at the very least, Appellants should have an opportunity to amend their complaint to address any deficiencies in their pleading of an institutional claim, a *Caperton* claim, or an actually interested decision-making claim. Leave to amend should be "freely give[n] . . . when justice so requires"—i.e., in the absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the other side, or futility. Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962). All these factors are lacking here, including futility: Even if Appellants have not pleaded a "possible temptation" claim (which they have), their factual allegations give rise to a claim of actually interested decision-making—which is a theory Appellants put forth in the district

court, but which the district failed to address. *See* ROA.65-67, 69, 72-77, 81-82 (allegations), 486, 503 (argument).

Conclusion

This Court should reverse the district court's order granting ETOH's motion for judgment on the pleadings and remand this case to the district court for further proceedings. Appellants have adequately alleged a due process claim under multiple legal theories. At the very least, they should have an opportunity to amend their complaint to address deficiencies with any one of their proffered legal theories.

Dated: December 23, 2021

Respectfully submitted,

/s/ William R. Maurer
William R. Maurer
(WA Bar No. 25451)
Institute for Justice
600 University Street, Suite 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

William Brock Most
(LA Bar No. 36914)
Most & Associates
201 St. Charles Ave.
Ste. 114, # 101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

Jaba Tsitsuashvili
(DC Bar No. 1601246)
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
jtsitsuashvili@ij.org

Counsel for Plaintiffs-Appellants

Certificate of Service

The foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on December 23, 2021, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

Dated: December 23, 2021 /s/ William R. Maurer
Counsel for Plaintiffs-Appellants

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

Dated: December 23, 2021 /s/ William R. Maurer
Counsel for Plaintiffs-Appellants