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.

ETOH MONITORING, L.L.C.,

Defendant-Appellee.

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' REPLY BRIEF

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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

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Dated: March 30, 2022

/s/ Jaba Tsitsuashvili
Counsel for Plaintiffs-Appellants

Statement Regarding Oral Argument

Defendant-Appellee ETOH Monitoring, LLC ("ETOH") argues that oral argument is unnecessary because "this case raises no novel or complex legal issues." ETOH Brief at ii. Plaintiffs-Appellants Hakeem Meade and Marshall Sookram ("Appellants") disagree. Appellants, ETOH, and the district court have presented different arguments and rationales regarding which Supreme Court and Fifth Circuit precedents govern this case and disagree about which facts this Court should consider. For that reason, and for the reasons stated in Appellants' Opening Brief, this Court should hear oral argument to ensure thorough consideration of the application of precedent to the facts of this case.

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Introduction

Contrary to ETOH's arguments, this case is not about whether Judge Bonin should have recused himself from any case. Nor is it about the number of judges that make possibly tainted decisions or how many individuals those decisions adversely affect. Rather, at issue here is whether the following facts implicate the Fourteenth Amendment's guarantee of the appearance of judicial neutrality:

Judge Bonin introduced a private, for-profit company (ETOH) into the operations of the New Orleans judicial system. ETOH conducts electronic surveillance of pretrial criminal defendants, charging them daily fees. Over the course of three judicial elections, ETOH's two principals—one of whom was Judge Bonin's law partner for fourteen years—made donations and an unpaid loan totaling nearly $10,000 to Judge Bonin's election campaigns. Once on the bench, with his campaign still carrying that unpaid loan, Judge Bonin regularly steered criminal defendants to ETOH, which he called his "special service," without disclosing to those defendants or their attorneys his ties to the company or the availability of alternative surveillance providers. Judge Bonin regularly conditioned defendants' liberty from pretrial jailing on their

ability to pay ETOH, in two ways: first, as a condition of initial release from jail; second, based on ETOH's persistent ex parte prodding, as a condition of remaining on surveillance instead of in jail.

Those facts, taken together, amount to a system in which a judge's decisions might, in every case, financially benefit a private company with which the judge has extensive undisclosed personal, financial, professional, and political ties. This case asks whether that system violates the Constitution's guarantee of both the appearance and actuality of judicial neutrality. ETOH says no, and that this system is "normal." Appellants disagree on both fronts. But even if that system was normal, the Fourteenth Amendment and this Court's precedent say it is unconstitutional.

Summary of the Argument

This Court should reverse and remand the district court's dismissal of Appellants' due process claim for the following reasons. *First*, ETOH's arguments are wrong on the facts and the law. *Second*, ETOH relies on a due process analysis inapplicable to this case, one which applies only to requests for recusal in one-off situations, where a judge's relationship with a particular party or issue in a particular lawsuit gives rise to the

appearance or possible temptation of interested decision-making in that particular lawsuit. Here, however, every defendant—regardless of their identity, alleged crime, or any other factor—who walked into Judge Bonin's court faced the possibility of Judge Bonin steering or pressing them to contract with and pay a non-party with which the judge had extensive ties. *Third*, ETOH's arguments against the correct legal standard—the one applicable to institutional or systemic incentive claims like Appellants'—misunderstands that standard and what a plaintiff must allege to meet it. *Finally*, even under ETOH's inapposite one-off recusal standard, Appellants' allegations should survive dismissal.

Argument

I. ETOH's Statement of the Issue Presented misstates the legal and factual issues before this Court.

ETOH's Statement of the Issue Presented misstates the issues before this Court, both legal and factual. On an accurate and complete description of the law and the facts, however, it becomes clear that under the totality of circumstances, Appellants have plausibly alleged a due process claim. Appellants thus highlight the following errors in ETOH's

brief, first legal, then factual.

First, contrary to ETOH's representation, the legal question is not whether the facts of this case present a "serious risk of actual bias." *See* ETOH Brief at 1. That standard is not the law. Far from it. Under blackletter law, the question is simply whether the facts present the "appearance" or "possible temptation" of interested decision-making—pecuniary or nonpecuniary, direct or indirect, and under the totality of circumstances, not any individual aspect of the relationships or system at issue. Appellants' Opening Brief at 21–24; *Caliste v. Cantrell*, 937 F.3d 525, 530 (5th Cir. 2019) (recognizing viability of due process claims based on "indirect[]" or "nonmonetary benefits"); *Cain v. White*, 937 F.3d 446, 454 (5th Cir. 2019) (a court must assess a due process claim under the "the totality of [the] situation"); *infra* section III.

Second, ETOH misstates the factual bases of Appellants' claim. Appellants' allegation of a due process violation does not, as ETOH suggests, rest only the fact that ETOH's principals (through their eponymous law firms) made frequent donations and an unpaid loan totaling nearly $10,000 to Judge Bonin's judicial election campaigns. *See* ETOH Brief at 1. The actual bases of Appellants' claim include these

additional salient facts:

(1) one of those ETOH principals making the donations was Judge Bonin's law partner for fourteen years;

(2) Judge Bonin gave his former law partner's fledgling company (ETOH) its foothold in the New Orleans judicial system the year after it was founded, a foothold that ETOH occupies to this day; and

(3) ETOH has profited from that foothold for more than a decade, thanks largely to Judge Bonin, who, unlike other judges, (i) regularly steered or ordered defendants and their families to contract with ETOH, (ii) regularly conditioned defendants' liberty on their or their families' ability to pay ETOH, and (iii) called ETOH his "special service," all without disclosing to any defendant his myriad ties to the company. Appellants' Opening Brief at 10–12; ROA.69-73, 75.

Those extensive personal, financial, professional, and political ties are enough to satisfy the possible temptation standard under any line of cases. *See infra* section IV. But ETOH also omits Appellants' allegations regarding the *actuality* of Judge Bonin's interested decision-making, through (1) his explicit funneling of contracts to ETOH, by steering defendants and their families directly to the company, and (2) his

regularly acting as ETOH's debt collector upon threat of defendants' jailing, at the company's persistent ex parte behest. Appellants' Opening Brief at 3–12; ROA.64-69, 71-77.

It is worth saying up front: It is not, as ETOH posits, a "normal function of the criminal justice system," ETOH Brief at 4 n.3, for judges to condition liberty from pretrial jailing on defendants' ability to fulfill their part in private contracts. It is not "normal" for a judge to threaten to deprive individuals of their freedom based on the ex parte urging of one party to those contracts. And it is certainly not "normal" for a judge to use his or her power over defendants' liberty to pressure them and their families to pay a company with which the judge has extensive personal, financial, professional, and political ties. *See 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). If any of that is normal, then there is something seriously wrong with the American justice system. To the contrary, what ETOH deems normal judicial behavior is precisely the conduct demonstrating that Judge Bonin's and ETOH's "[p]ossible

temptation bloomed into questionable behavior," and that their system demonstrated not just the appearance or possible temptation of interested decision-making (which is all that Appellants need to allege), but also the actuality of it. *Brown v. Vance*, 637 F.2d 272, 286 (5th Cir. Jan. 1981); Appellants' Opening Brief at 35–40; *infra* section IV.[1]

In short, an accurate and complete description of the legal and factual landscape of this case demonstrates that, under the totality of circumstances, Appellants have plausibly stated a due process claim.

II. This case is not about Judge Bonin's disqualification from lawsuits involving particular litigants or issues, but rather his potential for interested decision-making in every case that came before him, for the benefit of a non-party institution with which he had extensive ties.

No conjugation (or synonym) of the word "recuse" or the word "disqualify" appears in Appellants' complaint—because Appellants' complaint, which they filed while Judge Bonin was still on the bench, did not seek Judge Bonin's recusal or disqualification from any cases, or

[1] Contrary to ETOH's rhetoric, Appellants are not asking the district court or this Court to declare Judge Bonin or ETOH "wicked" or "evil." *See* ETOH Brief at 3 n.3. Appellants are asking this Court to hold that the conduct alleged states a due process claim under well-settled constitutional principles regarding the appearance, possible temptation, and actuality of interested judicial decision-making.

argue that he should have recused or disqualified himself in the past. ROA.83-84 (Request for Relief). Nevertheless, ETOH insists that this is a recusal case, trying to bring it within the ambit of *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), and *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). *See* ETOH Brief at 10–12. This Court should reject that effort; this case is about a judicial decision-making system, not a one-off lawsuit.

In *Aetna Life Insurance Co.* and *Caperton*, unlike here, it made sense for the complainants to seek a state judge's one-off recusal from hearing a particular lawsuit, because the basis for interested decision-making was the relationship between that judge (1) and a particular party or issue (2) in a particular lawsuit before him. 475 U.S. at 817–19; 556 U.S. at 873–75. That sort of one-off judge–party or judge–issue conflict is not the basis of Appellants' complaint. As ETOH itself recognizes: "ETOH Monitoring and its principals were never active participants in the criminal proceedings resulting in electronic

monitoring for criminal defendants." ETOH Brief at 13 n.4.[2]

Accordingly, because ETOH was not a party to any of the cases before Judge Bonin, the basis for interested decision-making here was not Judge Bonin's relationship with a particular party or issue in a particular lawsuit before him. That makes this case quite different from *Aetna Life Insurance Co.* or *Caperton*.

Unlike cases involving a decision by a judge with some personal or financial interest in the specific litigant or issue before him, the source of the conflict of interest here was Judge Bonin's relationship with a non-party institution that could financially benefit from his ankle monitoring decisions in every criminal case he heard, regardless of the identity of the accused or what issues their cases raised. Recusal would make no sense in these circumstances, in which the conflict is endemic to the judge's court regardless of litigant or issue.

That is why, unlike in *Aetna Life Insurance Co.* or *Caperton*, Appellants' proposal for curing the conflict here was not recusal, but

[2] To be clear, even though ETOH was not an active participant in Judge Bonin's decisions to impose ankle monitoring, ETOH was very much an active participant in Judge Bonin's persistent efforts to recover money owed to the company. Appellants' Opening Brief at 9; ROA.73-74.

judicial disclosures (by Judge Bonin) and elimination of the non-party institution's (ETOH's) influence on the judge's decisions. ROA.83-84 (Request for Relief). That elimination of influence is precisely the sort of relief this Court recognized in *Caliste*, which is an institutional or systemic incentive case, not a recusal case. *See* 937 F.3d at 533 ("it may well turn out that the only way to eliminate the unconstitutional temptation is to sever the direct link between the money the criminal court generates and the Judicial Expense Fund that supports [that court's] operations").

In short, Appellants did not seek Judge Bonin's recusal in any particular criminal proceedings. Instead, like the *Caliste* plaintiffs, Appellants sought to eliminate the ever-present incentive or temptation for a judge (there, Judge Cantrell; here, Judge Bonin) to funnel money to a non-party institution with which he had ties (there, the Judicial Expense Fund; here, ETOH). So, while it is true that Appellants' "legal theory is built exclusively on the unique" and extensive relationships "between former Judge Bonin and the principals of ETOH," ETOH Brief at 14, that does not bring this case within the line of cases regarding one-off recusals. This case instead falls in the category of institutional or

systemic cases assessing the constitutionality of court systems or procedures that may affect every party appearing before a given judge. Appellants' Opening Brief at 30–35; *infra* sections III, IV.

III. ETOH's arguments against the application of this Court's institutional or systemic line of cases (*Cain*, *Caliste*, and *Brown*) are based on four fundamental errors of law.

In arguing against the application of this Court's institutional or systemic line of due process precedent (*Cain*, *Caliste*, and *Brown*), ETOH makes four legal errors, which the district court implicitly or explicitly endorsed. Individually and collectively, those errors require reversal because they make clear that the district court applied the wrong line of precedent to this case.

ETOH's first error is its argument that Appellants' claim does not challenge a court system or procedure. Second, ETOH seeks to impose elements on Appellants' claim that find no support in the law. Third, to avoid the obvious implications of its status as a non-party that could benefit from every case that came before Judge Bonin, ETOH mislabels itself a "participant in the litigation" before Judge Bonin. Finally, ETOH misconstrues Appellants' claim and speculates that the claim risks imposing an "untenable burden on Louisiana lawyers," when neither

Appellants' claim nor their proposed remedies would do any such thing.

A. As in *Cain*, *Caliste*, and *Brown*, Appellants' claims are "leveled at the system" in which Judge Bonin imposed ankle monitoring and payment orders.

ETOH argues that this case is unlike *Cain*, *Caliste*, and *Brown* because there is, in ETOH's and the district court's view, (1) no "*structure*, *system*, or *institutional* framework giving rise to any conflict of interest," *see* ETOH Brief at 25 (emphases in original), and (2) no challenge by Appellants to "a defect in the *court structure* or *procedure*," ETOH Brief at 36 (emphases in original). ETOH and, respectfully, the district court are wrong.

As in *Cain*, *Caliste*, and *Brown*, Appellants' claims are indeed "levelled at the system," *Brown*, 637 F.2d at 284, for two simple reasons: (1) Any ankle monitoring system or procedure in the Orleans Parish Criminal District Court is designed, implemented, and managed by each individual judge in his or her individual court. Therefore, the ankle monitoring system or procedure that each judge designs, implements, and manages in his or her court is the relevant system or procedure for assessing compliance with due process and other constitutional requirements. (2) Every defendant in Judge Bonin's court, regardless of

identity or alleged crime, faced the possibility of Judge Bonin ordering or pressuring them or their families to contract with ETOH. Appellants' Opening Brief at 30–35.

The first reason Appellants' claim challenges the system in which Judge Bonin imposed ankle monitoring and payment orders is that the "legislative framework" governing the Orleans Parish Criminal District Court created the "vulnerability" to interested decision-making that Appellants are challenging. *Brown*, 637 F.2d at 284. The Louisiana Legislature, the Louisiana Supreme Court, the Orleans Parish, and the Orleans Parish Criminal District Court have established a legislative and judicial framework that permits due process violations like those that occurred here, through their failure to enact barriers in the form of (1) legislation regarding the operation of ankle monitoring systems or procedures, (2) a Parish Criminal District Court-wide ankle monitoring system or procedure, or (3) a government-funded ankle monitoring system or procedure.

Given the absence of those broader ankle monitoring systems or procedures, any ankle monitoring system or procedure in the Parish Criminal District Court is designed, implemented, and managed by each

individual judge in his or her individual court. Therefore, the ankle monitoring system or procedure that each judge designs, implements, and manages in his or her court is the relevant system or procedure for assessing compliance with due process and other constitutional requirements. And Appellants are challenging the particular system that Judge Bonin designed, implemented, and managed—for four years, at his sole discretion, without legislative, judicial, or administrative oversight, and under which he assessed every defendant in his court.[3]

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[3] ETOH argues that this Court should affirm the district court's dismissal because "[o]nly 48 out of the over 1600 criminal defendants who appeared before Judge Bonin" contracted with or paid fees to ETOH. *See* ETOH Brief at 33 n.12. The Court should ignore (and indeed strike) this argument for three reasons:

First, those numbers are not in the record before this Court, which, on the Rule 12(c) motion at issue here, includes only Appellants' complaint and ETOH's answer. Appellants' complaint alleges that "at least 52 [people] [not 48] have been ordered, steered, or otherwise permitted by Judge Bonin to contract for or otherwise receive ankle monitoring services with ETOH at their own expense." ROA.77. The 1600 denominator, meanwhile, appears nowhere in the record, and ETOH does not identify a source for it, so it is not subject to judicial notice.

Second, ETOH's denominator is the wrong one. The question is how many of the defendants whom Judge Bonin ordered, steered, or permitted to contract with ETOH were unaware of the ties between Judge Bonin and ETOH. Appellants allege (and there is no reason to doubt) that the answer to that question is 100 percent. *E.g.*, ROA.71, 79.

The second reason Appellants' claim is leveled at the system in which Judge Bonin imposed ankle monitoring and payment orders is that every defendant—regardless of their identity, alleged crime, or any other factor—walking into Judge Bonin's court faced the possibility of being ordered to ankle monitoring and pressured to contract with and pay a non-party institution (ETOH) of which the decision-making judge (Judge Bonin) had an interest, pecuniary or nonpecuniary, direct or indirect, in maintaining the financial health. That is all that the institutional or systemic line of cases requires; it does not require that the system at issue be imposed by the institution that benefits from it (as happened to be the case in *Tumey*), nor does it require that the system reach beyond one courtroom (as happened to be the case in *Cain*). *See Caliste*, 937 F.3d at

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Third, even taking ETOH's numbers at face value, they mean nothing. The legal question is whether the system at issue fosters a possible temptation for self-dealing. A judge and private company who succumbed (or appear to have succumbed) to that temptation cannot absolve themselves of their constitutional violations by arguing that they could have, but did not, commit more. (To a person pickpocketed in a crowd, it is cold comfort to point out all the other people whose wallets remain untouched.) If anything, the percentage of defendants and their family members who were adversely affected by Judge Bonin's and ETOH's system may be relevant in assessing the strength of the temptation at summary judgment or trial, but that merits question is premature at this Rule 12(c) stage.

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

For these reasons, and the additional reasons in Appellants' Opening Brief, "the situation here falls within the ambit of *Ward*." *Cain*, 937 F.3d at 454. Appellants' claim does indeed, in ETOH's words, challenge a "structure, system, or institutional framework giving rise to [Judge Bonin's and ETOH's] conflict of interest" in the operation of the ankle monitoring system in Judge Bonin's court.

B. ETOH seeks to impose elements on Appellants' claim that find no support in the law.

ETOH incorrectly argues that (1) a judge's direct pecuniary interest and (2) his dual role of imposing fees and managing them are both necessary for an institutional or systemic incentive claim. *See* ETOH Brief at 26–34. In fact, neither condition is necessary.

No direct pecuniary interest need be present. "The fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). That is because the Supreme Court is "concerned with more than the traditional common-law prohibition on direct pecuniary interest"; it looks instead to "a more general concept of interests that tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878.

Therefore, as this Court made clear, the ties between the judge and the benefiting institution may be pecuniary or nonpecuniary, direct or indirect. *Caliste*, 937 F.3d at 530; *Cain*, 937 F.3d at 454.

There is also no dual-role requirement. This Court's decision in *Caliste* was not because Judge Cantrell was one of the judges who managed the fees he imposed. Instead, this Court's reasoning turned on the fact that Judge Cantrell had a professional interest in keeping the Judicial Expense Fund well-stocked, regardless of who managed it. *Caliste*, 937 F.3d at 530.[4] So too here: Judge Bonin had professional (as well as personal, financial, and political) interests in keeping ETOH funded so that he could keep using his "special service" to run the ankle monitoring system that he unilaterally designed, implemented, and managed in his court. Appellants' Opening Brief at 33–35; ROA.75.

[4] If, contrary to Appellants' view, this Court finds it is an open question whether a dual role is an element of an institutional or systemic incentive claim, this Court should take this opportunity to directly answer in the negative. Any such categorical requirement would be irreconcilable with this Court's and the Supreme Court's totality-of-circumstances inquiry, which makes clear that the facts of past cases do not confine the bounds of the analysis. *Cain*, 937 F.3d at 454; *Caperton*, 556 U.S. at 877 (recognizing that the due process inquiry accounts for "new problems [that] emerge[]").

C. ETOH was a non-party that could benefit financially from Judge Bonin's decisions in every case, regardless of party or issue.

To distinguish this case from *Cain*, *Caliste*, and *Brown*, and bring it within the ambit of *Aetna Life Insurance Co.* and *Caperton*, ETOH mislabels itself a "participant in the litigation" that came before Judge Bonin. *See* ETOH Brief at 22–24. Of course, the company has already admitted that "ETOH Monitoring and its principals were never active participants in the criminal proceedings resulting in electronic monitoring for criminal defendants." ETOH Brief at 13 n.4.[5]

This fact answers the question of what role ETOH played in Judge Bonin's cases: ETOH was a non-party institution with extensive ties to Judge Bonin, of which Judge Bonin had interests, pecuniary or otherwise, direct or indirect, in maintaining the financial health. That role (a benefiting non-party) makes this case like *Cain* and *Caliste*: In all three cases, non-party institutions in which the judges had interests

[5] This Court should note that ETOH's "participation" in Judge Bonin's cases came not as a party, but largely via ex parte communications urging Judge Bonin to use his judicial power to force people to pay ETOH upon threat of jailing. Appellants' Opening Brief at 9; ROA.73-74. In other words, ETOH, a state actor, benefitted from its status as a "participant" in Judge Bonin's cases when the judge coerced defendants to pay ETOH to avoid jail.

(there, the Judicial Expense Fund; here, ETOH) reaped the direct financial benefits of the judges' decisions. And in all three cases, the possible temptation of interested decision-making was present in every case that came before the judges, regardless of party identity. Appellants' Opening Brief at 31–33.

D. Appellants' claim would not "impose a new and untenable burden" on anyone.

ETOH's fourth substantial legal error is its argument that Appellants' "arguments would impose a new and untenable burden on Louisiana lawyers." *See* ETOH Brief at 26 n.9. Not so. Appellants' claim and arguments would only require that when a private company or entity operates institutionally in a judge's court (rather than as a party appearing before the judge) and stands to gain from the judge's orders or decisions, the judge should either disclose his ties to the company or, at the very least, not steer or direct defendants to contract with or pay the company, especially upon threat of jailing. That is not an "untenable burden" on anyone. It is a constitutionally required minimum operating principle. And this Court made clear in *Caliste* that questions as to the precise contours of an ultimate remedy are no reason to reject viable due process claims even at the final judgment stage, let alone the Rule 12(c)

stage of this case. *See* 937 F.3d at 532–33.

IV. Appellants have adequately pleaded a claim under any line of interested decision-making cases: actual; institutional or systemic; and one-off or recusal.

Regardless which line of cases this Court assesses Appellants' claim under, it should reverse the district court's dismissal order and remand the claim for further proceedings. Contrary to ETOH's arguments, Appellants' allegations meet (1) the actual interest standard, (2) the institutional or systemic incentive standard, and (3) the one-off or recusal standard.

A. Judge Bonin's and ETOH's conduct demonstrates that they "actually succumbed" to the temptation for interested judicial decision-making.

Appellants have pleaded facts demonstrating the reality and actuality of interested decision-making. Judge Bonin regularly and explicitly conditioned liberty determinations on defendants' ability to pay ETOH, the company with which he had extensive undisclosed ties, and he did so in response to the company's persistent ex parte requests for the judge to function as its debt collector. ROA.65-67, 72-77, 81-82. That violates due process standing alone because "[p]ossible temptation bloomed into questionable behavior." *Brown*, 637 F.2d at 286; *see also In*

re Murchison, 349 U.S. 133, 136 (1955) (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*, 413 F.3d at 519 (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). Unfortunately, the district court did not address Appellants' allegations and arguments that Judge Bonin engaged in actual interested decision-making. This Court should reverse and remand for that reason alone.

B. Judge Bonin's and ETOH's conduct raises grave "concerns of judicial administration."

Appellants' allegations should easily survive dismissal under the institutional or systemic incentive standard. This Court has made clear that in assessing the totality of circumstances in institutional or systemic incentive claims, "concerns of judicial administration [do not] necessarily require a high evidentiary barrier." *Brown*, 637 F.2d at 284; *see also Cain*, 937 F.3d at 454. In other words, when the issue is systemic (as opposed to one-off), even an indirect or nonpecuniary interest, or seemingly unexceptional ties between the judge and the benefiting non-party, may

implicate the appearance or possible temptation standard.

That makes sense: When a possible temptation arises in every case that comes before a judge, there is a risk that the harms will be diffuse among many defendants or litigants, while the problematic gains will be concentrated for the judge and the non-party institution that stands to benefit from his decisions. Therefore, as the *Brown* Court recognized, the ties between the judge and that non-party institution need not be exceptional or obviously influential to cross the line from acceptable to unconstitutional.

Appellants' allegations exemplify those concerns, and this Court should make clear that the extensive ties between Judge Bonin and ETOH (to say nothing of the ways they acted on those ties) cross the modest evidentiary threshold required for institutional or systemic incentive claims, particularly at this early stage of the case. *See* Appellants' Opening Brief at 3–12 (recounting Appellants' factual allegations of Judge Bonin's and ETOH's relationships and their conduct), 35–41 (explaining that Appellants have adequately pleaded all the elements of an institutional or systemic incentive claim).

C. Judge Bonin's and ETOH's conduct was "exceptional" in its appearance, temptation, and actuality of interested judicial decision-making.

Appellants' claim should go forward even under *Caperton*'s "exceptional case" standard for a one-off recusal claim based on a judge's relationship with a particular party or issue in a particular lawsuit, which ETOH incorrectly pushes here. *See* ETOH Brief at 19. If the Court assesses Appellants' claim under this standard, it is important to note that *Caperton*'s four "factors" are not dispositive considerations, despite ETOH's and the district court's incorrect view to that effect. *See* ETOH Brief at 15–22; ROA.961-962. Conflict of interest cases are, by their nature, highly fact dependent, and courts must assess the facts for the appearance or possible temptation of interested decision-making based on the totality of potentially novel circumstances. As explained by amici, the Supreme Court does not require close factual overlap with prior cases because "the type or degree of interest sufficient to compromise due process 'cannot be defined with precision'"; "both pecuniary and nonpecuniary interests can taint a judge's participation in a proceeding"; and "to ferret out when due process is at risk, all '[c]ircumstances and relationships must be considered.'" Brief of Amici Curiae The Cato

Institute et al. at 5 (quoting Supreme Court precedents). With that careful and holistic inquiry in mind: If a judge's consistent determinations of liberty and his regular threats to jail pretrial defendants for their inability to pay a private company with which he has extensive personal, financial, professional, and political ties—all at that company's persistent behest—do not rise to the level of an exceptional case under the totality of circumstances, it is hard to imagine what will.

V. Appellants should have leave to amend, if necessary.

Appellants' complaint meets the standards required to survival dismissal, particularly at this stage. Indeed, Appellants' claim tracks well-settled due process principles and precedent, and it survives even under *Caperton*'s "exceptional case" standard. *Supra* section IV.

Even if this Court holds that elements of Appellants' claim need shoring up to meet one or more of the standards discussed above, however, Appellants should have leave to amend under Rule 15(a)(2)'s liberal amendment standard. Appellants' Opening Brief at 40–41.

ETOH argues against amendment because Appellants already amended their complaint once and because Appellants have "consistently argued that the *Caperton* standard" is inapplicable to this case. *See*

ETOH Brief at 37. Neither point precludes leave to amend.

Appellants' one amendment preceded any briefing; it simply added an additional named plaintiff and provided additional examples showing the appearance, temptation, and actuality of interested decision-making in Judge Bonin's ankle monitoring system. *See* ROA.4, 60-85.

Appellants' arguments against the *Caperton* standard should not preclude amendment, if this Court holds both that the *Caperton* standard applies *and* that Appellants' allegations must more closely track *Caperton*'s facts. *But see supra* section IV (explaining that Appellants' allegations are adequate even under *Caperton*'s exceptional case standard). As explained at length by amicus, this Court's amendment rules warrant leave to amend, if necessary, considering Section 1983's promise to zealously safeguard constitutional rights. Brief of Amicus Curiae The Roderick & Solange MacArthur Justice Center at 10–25.

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: March 30, 2022

Respectfully submitted,

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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 March 30, 2022, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

Dated: March 30, 2022 /s/ Jaba Tsitsuashvili
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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 5149 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: March 30, 2022

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