**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF LOUISIANA**

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| HAKEEM MEADE and MARSHALL SOOKRAM, on behalf of themselves and all others similarly situated,<br>Plaintiffs,<br><br>v.<br><br>PAUL A. BONIN, Judge of the Orleans Parish Criminal District Court, and<br>ETOH MONITORING, LLC, a Louisiana Limited Liability Company,<br>Defendants. | No. 2:20-cv-1455<br><br>Section J<br>Division 3<br><br>District Judge Carl J. Barbier<br>Magistrate Judge Dana M. Douglas |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO ETOH MONITORING, LLC'S MOTION TO DISMISS [DKT. 12] THE FIRST AMENDED COMPLAINT [DKT. 7]**

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## INTRODUCTION

Plaintiffs Hakeem Meade and Marshall Sookram oppose Defendant ETOH Monitoring, LLC's ("ETOH") motion and supporting memorandum ("ETOH Mem.", Dkt. 12-1) to dismiss Plaintiffs' First Amended Complaint (Dkt. 7).

ETOH has moved to dismiss under Rule 12(b)(6) on the sole ground that it is not a state actor or acting under color of state law with respect to the conduct that Plaintiffs allege violates due process in this case—namely, Defendant Judge Bonin's practice of conditioning pretrial liberty determinations on criminal defendants' ability to pay ETOH, a private ankle monitoring company with which the judge has significant personal, professional, and political ties.[1]

ETOH argues that it is not subject to Plaintiffs' Section 1983 claims because, "as a private company, [it] did not act under the color of law, did not commit any unlawful act, and did not participate in any agreement or conspiracy with [Judge Bonin] to commit any illegal act or to deprive the plaintiffs of their constitutional rights." ETOH Mem. at 11.

The Court should deny ETOH's motion. A private entity is subject to Section 1983 claims for violating the Due Process Clause of the Fourteenth Amendment if the well-pleaded allegations against it show either (1) that the private entity performs a "public function" in the context of the conduct Plaintiffs allege is unconstitutional or (2) that the private entity's conduct demonstrates

[1] On July 24, 2020, a news outlet reported that Defendant Judge Bonin will not seek reelection to the Orleans Parish Criminal District Court this November, meaning his term will end on December 31, 2020. *See* J. Simerman, *New Orleans Judge Paul Bonin to step down, wrapping up 23 years on bench*, NOLA.com (July 24, 2020), https://www.nola.com/news/courts/article_4b94ca7e-cdbd-11ea-8bc7-cbc6883ec7d2.html. Considering this development, and because Plaintiffs sought only prospective declaratory relief against Judge Bonin, Pls.' First Am. Compl. ¶¶ 122–129, Plaintiffs have requested that this Court dismiss their claims against Judge Bonin without prejudice as set forth in their response to Judge Bonin's motions to dismiss, filed today. *See* Dkt. 23. Plaintiffs continue their suit for declaratory and injunctive relief against Defendant ETOH; and all criminal defendants who have come before Judge Bonin since January 1, 2017 or will come before him until he leaves the bench may become members of the putative class. Pls.' First Am. Compl. ¶ 107.

"joint action" with a state actor with respect to the constitutional violations alleged. Here, ETOH's conduct satisfies both tests. ETOH performs a quintessentially public function (ankle monitoring of the state's criminal defendants) that is at the heart of Plaintiffs' allegations of constitutional harm, and the company coordinates closely with a state actor (Judge Bonin) in performing that function and in conditioning criminal defendants' pretrial liberty on their ability to pay ETOH's ankle monitoring fees.

**BACKGROUND**

Judge Bonin is a Louisiana state court judge on the Orleans Parish Criminal District Court. ETOH is a private ankle monitoring company operating in Judge Bonin's court. Its founders and managers are two frequent contributors (through their eponymous law offices, in the form of donations and an outstanding loan) to Judge Bonin's judicial election campaigns, and one of them is also Judge Bonin's former longtime law partner. Pls.' First Am. Compl. ¶¶ 8, 9, 67, 73–75.

Ankle monitoring of criminal defendants is a quintessentially governmental function. Indeed, for years, the City of New Orleans contracted with the Orleans Parish Sheriff's Office to conduct ankle monitoring of defendants in the Orleans Parish Criminal District Court.[2] That agreement ended, and since 2016, two private companies (one of which is ETOH) and the Gretna Police Department's "government-funded" Home Incarceration Program have conducted ankle monitoring for the Orleans Parish Criminal District Court. Pls.' First Am. Compl. ¶ 12; Court

[2] *See* Office of Inspector General, City of New Orleans, *Evaluation of the City's Electronic Monitoring Program Administered by the Orleans Parish Sheriff's Office* at 2 (Apr. 2, 2014), http://nolaoig.gov/index.php?option=com_mtree&task=att_download&link_id=31&cf_id=37; Cooperative Endeavor Agreement Between the City of New Orleans and Orleans Parish Sheriff's Office (Oct. 15, 2010), https://assets.documentcloud.org/documents/1153514/orleans-parish-sheriffs-office-contract-with.pdf. These documents are not referenced in Plaintiffs' First Amended Complaint, but they are public documents subject to judicial notice. Fed. R. Evid. 201(b); *see Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 519 (5th Cir. 2015); *McZeal v. MidSouth Nat'l Bank, NA*, Civ. Action No. 2:15-cv-02315, 2017 WL 1332730, at *5 (W.D. La. Jan. 13, 2017).

Watch NOLA, *Orleans Criminal District Court, Magistrate Court & Municipal Court: 2018 Review* at 18 & n.84, https://www.courtwatchnola.org/wp-content/uploads/2018-Annual-Report.pdf. When Judge Bonin and other judges on the court delegate this governmental function to ETOH, the company charges defendants high fees for their own court-imposed surveillance. Pls.' First Am. Compl. ¶¶ 10–15.

Judge Bonin has ordered or steered many people, including Plaintiffs Hakeem Meade and Marshall Sookram, to pay ankle monitoring fees to ETOH—including under threat of jailing, like Plaintiff Meade, and as a condition of their release from custody, like Plaintiff Sookram. Pls.' First Am. Compl. ¶¶ 9, 23, 29, 38, 48, 57, 83–102. As part of that practice, ETOH sends Judge Bonin monthly Payment Status Reports. Pls.' First Am. Compl. ¶ 87. These Reports have the sole apparent function of keeping Judge Bonin apprised of criminal defendants' ability to pay ETOH's ankle monitoring fees; they keep track of everyone's payments and they highlight people who "need[] attention" from Judge Bonin. They are, in short, requests from ETOH for Judge Bonin to send judicial debt collection reminders for ETOH. Pls.' First Am. Compl. ¶¶ 88–90.

Plaintiffs filed this class action lawsuit alleging due process violations based on (1) Judge Bonin's failure to disclose to the defendants he orders or steers to ETOH that he has various ties with the company's managers, (2) Judge Bonin's failure to disclose the availability of alternative ankle monitoring providers to those defendants, (3) Judge Bonin's and ETOH's practice of making liberty determinations based on criminal defendants' ability to pay ETOH's fees, and (4) ETOH's practice of using Judge Bonin's judicial power and position to serve as the company's de facto debt collector. Pls.' First Am. Compl. ¶¶ 122–142.

ETOH has moved to dismiss, arguing only that because it is a private company and because it is not alleged to have engaged in an illegal conspiracy, its conduct does not satisfy the Fourteenth

Amendment's "state actor" requirement or Section 1983's "under color of state law" requirement. For the reasons explained in more factual and legal detail below, ETOH's arguments misconstrue the governing legal standards and are meritless.

**STANDARD OF REVIEW**

"When considering a Rule 12(b)(6) motion, [the Court must] liberally construe the complaint in favor of the plaintiff and accept all well-pleaded factual allegations as true." *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011). The Court "must draw all reasonable inferences in favor of the plaintiff." *Glotfelty v. Hart*, Civ. Action No. 11-2849, 2012 WL 1204736, at *4 (E.D. La. Apr. 11, 2012) (Barbier, J.) (citing *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232–33 (5th Cir. 2009)). And the motion must be denied if the facts alleged "plausibly" satisfy the relevant legal standard. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

**ARGUMENT**

ETOH is subject to constitutional scrutiny under Section 1983 because its conduct satisfies any one of several well-established tests. Specifically, ETOH's conduct satisfies two independently sufficient tests: (1) the "public function" test (which asks whether ETOH performs a function—specifically, ankle monitoring of state criminal defendants—that is traditionally the exclusive province of the state) and (2) the "joint action" test (which asks whether ETOH acts together with or has obtained significant aid from a state actor—specifically, Judge Bonin).

First, ETOH's conduct clearly satisfies the "public function" test. Plaintiffs' allegations of unconstitutionality revolve around Judge Bonin's ankle monitoring orders. Ankle monitoring is the electronic supervision of a defendant involved in the government's criminal justice system and is used to, among other things, determine whether a defendant is abiding by a court-imposed curfew or is staying within court-imposed geographical confines. Pls.' First Am. Compl. ¶ 10. There is no private need or right to conduct this surveillance of criminal defendants. It is a

quintessentially governmental function—performed by ETOH—and it is at the heart of Plaintiffs' claims of unconstitutional conduct. Therefore, ETOH is a proper defendant under the well-established "public function" test for private entities acting under color of state law.

Also, ETOH's conduct clearly satisfies the "joint action" test. Plaintiffs' allegations demonstrate that ETOH is not a passive conduit for or observer of the conduct that Plaintiffs allege is unconstitutional. To the contrary, ETOH is a willing, active, and conspicuous participant in and beneficiary of Judge Bonin's efforts to ensure that criminal defendants pay ETOH's fees upon threat of pretrial jailing. ETOH's role in this unconstitutional enterprise satisfies the Fifth Circuit's "joint action" test for private entities acting under color of state law.

## I. ETOH's conduct is fairly attributable to the state—and therefore subject to constitutional scrutiny under Section 1983—if its conduct satisfies the "public function" test or the "joint action" test.

ETOH is a private, for-profit company. It conducts pretrial supervision of criminal defendants pursuant to ankle monitoring orders by Judge Bonin, a Louisiana state judge. Pls.' First Am. Compl. ¶¶ 8–14. As such, ETOH is liable under Section 1983 for constitutional violations if it is acting "under color of state law." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 (1982); *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003).

"Where, as here, deprivations of rights under the Fourteenth Amendment are alleged," Section 1983's "under color of state law" requirement and the Fourteenth Amendment's "state action" requirement "converge." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 n.8 (1999) (citing *Lugar*, 457 U.S. at 935 n.18).

A private entity's conduct can satisfy the state action requirement under any one of several tests. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). The Fifth Circuit and other courts summarize the established tests under three headings: (1) the "public

function" test; (2) the "nexus" or "joint action" test; and (3) the "state compulsion" test. *See, e.g.*, *Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549–50 (5th Cir. 2005).

If ETOH's conduct satisfies one of these tests, its motion to dismiss must be denied. *Cherry Knoll, LLC v. Jones*, 922 F.3d 309, 319 (5th Cir. 2019) ("It is enough that [the private entity] is a willful participant in joint action with the [s]tate or its agents.") (quoting *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980)); *see also Rosborough*, 350 F.3d at 460–61 (assessing adequacy of pleading color of state law based solely on public function test); *Ayo v. Dunn*, Civ. Action No. 17-526-SDD-EWD, 2018 WL 4355199, at *2 (M.D. La. Sept. 12, 2018) (same); *Doe v. United States*, 831 F.3d 309, 314–15 (5th Cir. 2016) (assessing adequacy of pleading color of state law based solely on nexus or joint action test); *Ballard v. Wall*, 413 F.3d 510, 518–19 (5th Cir. 2005) (same); *Richard v. Hoechst Celanese Chem. Grp., Inc.*, 355 F.3d 345, 352–53 (5th Cir. 2003) (same); *Jones v. Cty. of Suffolk*, 164 F. Supp. 3d 388, 397 (E.D.N.Y. 2016) (finding defendant "a state actor under either the 'joint action' or 'public function' test").[3]

The color of state law determination is a "necessarily fact-bound inquiry." *Lugar*, 457 U.S. at 939. But ultimately, the question is simply (1) whether the deprivation of rights at issue is "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed . . . by a person for whom the [s]tate is responsible" (i.e. Judge Bonin) and (2) whether ETOH's conduct is "fairly attributable to the [s]tate" as a result of its joint actions with Judge Bonin. *Id.* at 937.

[3] As these cases illustrate, the Supreme Court's warning against treating "any set of circumstances [as] absolutely sufficient" for finding state action does not mean that satisfying one test is not sufficient. The Court was simply noting that even if a test is satisfied, "there may be some countervailing reason against attributing activity to the government." *Brentwood Acad.*, 531 U.S. at 295–96. There are no countervailing reasons to overlook ETOH's governmental actions.

For the reasons explained below, because ETOH (1) conducts ankle monitoring of criminal defendants appearing before Judge Bonin (2) in close coordination with Judge Bonin (including soliciting and receiving Judge Bonin's aid to collect its ankle monitoring debts), ETOH's conduct with respect to the actions challenged in this case satisfies both the "public function" test and the "joint action" test.

## II. ETOH's conduct satisfies the "public function" test—and is therefore subject to constitutional scrutiny under Section 1983—because ankle monitoring is a form of supervision that is the exclusive province of the state.

"Under the Supreme Court's 'public function' test, a private entity acts under color of state law 'when that entity performs a function which is traditionally the exclusive province of the state.'" *Rosborough*, 350 F.3d at 460 (quoting *Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989)). In other words, "when private individuals or groups are endowed by the [s]tate with powers or functions governmental in nature, they become agencies or instrumentalities of the [s]tate and subject to its constitutional limitations." *Id.* (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

Supervision of criminal defendants—including by ankle monitoring—is a quintessential governmental function. Indeed, many cities, state courts, and other governmental agencies operate their own ankle monitoring services—including, in the past, the Orleans Parish Criminal District Court, pursuant to an agreement between the City of New Orleans and the Orleans Parish Sheriff's Office. *See supra* at 2 & n.2. But now, when judges on the court order defendants to ankle monitoring, outside providers—including ETOH—do the monitoring and supervision. Pls.' First Am. Compl. ¶ 12. Such monitoring and supervision make ETOH an instrumentality of the state and satisfy the well-established "public function" test.

The Fifth Circuit has held that "confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function." *Rosborough*, 350 F.3d. at 461. Similarly, the "maintenance of a prison system is something 'traditionally reserved to the state.'"

*Stephens v. Correctional Serv. Corp.*, 428 F. Supp. 2d 580, 584 (E.D. Tex. 2006) (citing *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991)).

Relying on these established principles, the Middle District of Louisiana recently held that a private, for-profit ankle monitoring provider "was acting under color of state law and, thus, amenable to suit under 42 U.S.C. § 1983" because "pretrial detention and supervision are traditionally state functions." *Ayo*, 2018 WL 4355199, at *2. Similarly, the Eastern District of New York recently held that a private company was subject to suit under Section 1983 because the "[c]ounty delegated to [the company] the inherently public function of monitoring registered sex offenders." *Jones*, 164 F. Supp. 3d at 396–97. In both courts' view, the private companies' performance of the delegated public function of electronic monitoring and surveillance was sufficient to end the "color of state law" inquiry in the plaintiffs' favor.

This Court should hold the same. ETOH conducts ankle monitoring of pretrial defendants. Pls.' First Am. Compl. ¶ 12. Ankle monitoring is a form of custodial supervision of the actions of a criminal defendant, Pls.' First Am. Compl. ¶ 10, as recognized in *Ayo* and *Jones*. When Judge Bonin orders pretrial ankle monitoring, ETOH places a GPS device on the defendant's ankle, and it records the defendant's location to ensure compliance with judicially imposed restrictions on the defendant's liberty. These restrictions include curfew and geographical confines. Pls.' First Am. Compl. ¶¶ 10, 13. And the defendants must pay ETOH for this monitoring. Pls.' First Am. Compl. ¶ 14. ETOH has no right or reason to subject people to these non-consensual deprivations of liberty and property except pursuant to an order of the state court. Indeed, if ETOH took these actions without the color of state law, it would likely be committing a criminal act. *See, e.g.*, La. Rev. Stat. § 14:35 (simple battery); La. Rev. Stat. § 14:46 (false imprisonment); La. Rev. Stat. § 14:323 (non-consensual use of tracking devices).

In other words, as in *Ayo*, ETOH's authority to conduct this governmental function exists solely because of the "arrangement between [ETOH] and Judge [Bonin]" and ETOH's status as an "approved vendor for pre-trial supervision." 2018 WL 4355199, at *2; *see* Pls.' First Am. Compl. ¶¶ 23, 28–32, 57, 83 (describing Judge Bonin's practices—including with respect to the named Plaintiffs—of steering defendants to ETOH and emailing defense attorneys instructions for their clients to sign up for ankle monitoring, with ETOH managers included on the emails).

ETOH's supervisory status over criminal defendants is "caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed . . . by a person for whom the [s]tate is responsible" (i.e. Judge Bonin). *Lugar*, 457 U.S. at 937. This is "determinative" of the fact that ETOH is "subject to limitations imposed by the [Fourteenth] Amendment" in its performance of the public function of ankle monitoring. *Rosborough*, 350 F.3d at 461 (citing *Skelton*, 963 F.2d at 102).

In short, ETOH's right to conduct ankle monitoring is not just "fairly," but entirely, "attributable to the [s]tate," via Judge Bonin and other state judges. *Lugar*, 457 U.S. at 937.

## III. ETOH's conduct satisfies the "joint action" test—and is therefore subject to constitutional scrutiny under Section 1983—because ETOH acts together with and has obtained significant aid from Judge Bonin.

To satisfy the "joint action" test, Plaintiffs need only show that ETOH and Judge Bonin act in concert with respect to the conduct that Plaintiffs allege violates due process. The color of state law inquiry does not require pleading the standards for a civil conspiracy claim, as ETOH incorrectly argues.

Plaintiffs have alleged more than enough to show that ETOH and Judge Bonin act in concert—with respect to the named Plaintiffs, with respect to several individual putative class members, and with respect to the putative class as a whole.

**1. To demonstrate that ETOH acts under color of state law, Plaintiffs need only show that ETOH and Judge Bonin have acted in concert—not that they have entered into an unlawful agreement to commit an illegal act.**

A private entity acts under color of state law when it is "involved in a conspiracy *or* participates in joint activity with state actors." *Ballard*, 413 F.3d at 518 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150–52 (1970)) (emphasis added). Courts take a "two-part approach" to the joint action inquiry. *Lugar*, 457 U.S. at 930. In circumstances very similar to this case, the Fifth Circuit explained: (1) "the first factor under *Lugar* is satisfied because [the plaintiff] proffers allegations that 'a person for whom the state is responsible' caused the constitutional deprivation," and (2) "[u]nder the second *Lugar* prong, a private party can be deemed a state actor if [it] is a 'joint participant' with a state official in the offending enterprise." *Ballard*, 413 F.3d at 519 (quoting *Lugar*, 457 U.S. at 937, 931).

In *Ballard*, the plaintiff alleged that private attorneys acted jointly with a Louisiana state judge to "keep[] him in jail until he paid his debt" to the private attorneys." *Id.* at 512. He "essentially contend[ed] that the [private attorneys and the judge] operated a debtor's prison in violation of his constitutional rights." *Id.*

The Fifth Circuit held that "various assertions in the complaint" satisfied the first *Lugar* factor, including: the judge "instructed [the plaintiff] that he would have to pay $10,000 [to the private attorneys] to keep from going to jail; the judge's secretary told the plaintiff's wife that the bond "had to be paid directly to" the private attorneys; and the plaintiff "was only released from jail after his wife paid the $10,000." *Id.* at 519.

To satisfy the second *Lugar* factor, the Fifth Circuit held that the plaintiff was "required to demonstrate that the attorneys and the judge knowingly participated in the alleged conspiracy, in [that] instance, the operation of the debtor's prison." *Id.* The Court held that the complaint sufficiently alleged knowing participation because the attorneys' office and the judge's chambers

were communicating with each other and with the plaintiff about the fact that his release from incarceration was contingent on paying the private attorneys. *Id.*

ETOH does not engage with this governing law at all. Instead, it explores whether Plaintiffs' allegations are sufficient to establish a claim for civil conspiracy—a claim that Plaintiffs have not brought. ETOH misunderstands the state action inquiry when it argues that Plaintiffs must "allege specific facts showing that an unlawful agreement [between] Bonin and ETOH to commit an illegal act existed." ETOH Mem. at 9. That is the standard "[t]o succeed on a [Section] 1983 claim for civil conspiracy." *Gopalam v. Smith*, Civ. Action No. 12-542-JJB, 2014 WL 518199, at *3 (M.D. La. Feb. 6, 2014) (citing *Hey v. Irving*, 161 F.3d 7, 7 (5th Cir. 1998)), *aff'd*, 575 F. Appx. 442 (Mem). That standard is irrelevant here for two independent reasons: (1) Plaintiffs have not brought a civil conspiracy claim; and (2) the standard to succeed on a civil conspiracy claim—or any other Section 1983 claim—is distinct from the standard for the threshold issue of whether a private entity is acting under color of state law such that it is amenable to a Section 1983 lawsuit at all (and ETOH has only argued the threshold issue here).

The Fifth Circuit's holding and analysis in *Ballard* are illustrative and controlling. There, to satisfy the so-called "conspiracy" prong of the *Lugar* test, the Fifth Circuit did not require any allegations that the private attorneys and the judge had an explicit agreement to violate the law or the Constitution (i.e. allegations satisfying the standards for a civil conspiracy claim, as argued by ETOH).[4] Rather, the Fifth Circuit held that the plaintiff "satisfied the requirements articulated by

[4] The Fifth Circuit also did not hold that being in the same room is an element of joint action. ETOH argues that because its personnel were not present when Judge Bonin ordered defendants to ankle monitoring and steered them to ETOH, there could be no joint action by ETOH and Judge Bonin. ETOH Mem. at 3, 8. However, as discussed below, Judge Bonin acted essentially as a debt collector for ETOH—at ETOH's request—so regardless of their physical location, there was substantial communication and coordination between them.

*Lugar* sufficiently to survive a motion to dismiss brought pursuant to Rule 12(b)(6) [by] the attorneys" because the allegations demonstrated, "at a minimum, that [the judge] provided 'significant aid' to the attorneys in their effort to collect the money [the plaintiff] owed." *Ballard*, 413 F.3d at 519 (quoting *Lugar*, 457 U.S. at 937).

In short, if the allegations describing the relationship between ETOH and Judge Bonin show joint action with respect to the conduct that Plaintiffs allege is unconstitutional, then ETOH must answer to Plaintiffs' Section 1983 claims—even if there is no allegation showing that ETOH and Judge Bonin entered into an explicit illegal agreement.

**2. ETOH's and Judge Bonin's pattern of behavior—including with respect to the named Plaintiffs—demonstrates joint action.**

In *Ballard*, a one-off situation was sufficient to show that the private attorneys and the judge acted jointly and that the judge provided "significant aid" to the private attorneys in collecting their debts. *Ballard*, 413 F.3d at 519. Here, Plaintiffs have shown a pattern of such behavior—with respect to themselves and others.

With respect to both of the named Plaintiffs and all the other members of the putative class, the first *Lugar* factor is satisfied because Plaintiffs allege that the constitutional deprivations at issue here were in concert with "a person for whom the [s]tate is responsible," i.e. Judge Bonin. *Id.* (quoting *Lugar*, 457 U.S. at 937).

The allegations below demonstrate that ETOH is a "joint participant" in the "offending enterprise" and therefore satisfy the second *Lugar* factor as well. *Id.* (quoting *Lugar*, 457 U.S. at 931). ETOH's "willful participa[tion] in joint action with" Judge Bonin is "enough" to show that it is "acting 'under color of law' for purposes of [Section] 1983 actions." *Cherry Knoll, LLC*, 922 F.3d at 319 (quotation marks and citations omitted).

**a. Joint action with respect to named Plaintiff Hakeem Meade**

When Judge Bonin ordered Plaintiff Hakeem Meade to ankle monitoring for no apparent reason, he "told Hakeem to go to ETOH for these services." Pls.' First Am. Compl. ¶¶ 23, 26. Pursuant to Judge Bonin's order, "Hakeem was required to submit to ETOH's custody without delay." Pls.' First Am. Compl. ¶ 28. Paying ETOH's fees was a condition of Judge Bonin's order, and nonpayment could result in Hakeem's pretrial jailing. *Compare* Pls.' First Am. Compl. ¶ 29; *with Ballard*, 413 F.3d at 519 (the judge instructed the plaintiff that he would have to pay the private attorneys "to keep from going to jail").

When Hakeem "submitted to ETOH's custody" pursuant to Judge Bonin's order, an ETOH employee "told Hakeem that the company would be sending detailed reports to Judge Bonin—not only regarding his compliance with the geographic and curfew restrictions, but also his payment (or nonpayment) of ETOH's daily fees." Pls.' First Am. Compl. ¶ 30. And ETOH did exactly that: in its monthly Payment Status Reports to Judge Bonin, ETOH highlighted Hakeem as a "client [who] need[s] attention" (solely for falling behind on payments). Pls.' First Am. Compl. ¶ 88.

Accordingly, on at least one occasion, Judge Bonin reminded Hakeem that he still owed money to ETOH and that his "failure to pay ETOH could violate his bond conditions" and result in his pretrial jailing. *Compare* Pls.' First Am. Compl. ¶ 38; *with Ballard*, 413 F.3d at 519; *see also Smith v. Brookshire Bros., Inc.*, 519 F.2d 93, 94 (5th Cir. 1975) (state action based on private entity's and government entity's "customary plan" of detaining people at the private entity's behest without cause).

ETOH enforced Judge Bonin's orders. Pls.' First Am. Compl. ¶ 31. Judge Bonin "explicitly condition[ed] Hakeem's freedom from pretrial jailing on his ability to pay ETOH." Pls.' First Am. Compl. ¶ 38. And Hakeem paid ETOH on the "[u]nderstanding that his freedom was contingent on" it. Pls.' First Am. Compl. ¶ 39.

All of these joint and intertwined actions demonstrate that ETOH actively and willingly "participates in joint activity with [a] state actor[]," and that, "at a minimum, [Judge Bonin] provided 'significant aid' to [ETOH] in [its] effort to collect the money [Hakeem] owed." *Ballard*, 413 F.3d at 518–19 (citations omitted). According to the Fifth Circuit, that satisfies the state action requirements of Section 1983 and the Fourteenth Amendment. *Id.* at 520.

**b. Joint action with respect to named Plaintiff Marshall Sookram**

When Judge Bonin ordered Plaintiff Marshall Sookram to ankle monitoring, he "asked for Marshall's public defender's email address, which was consistent with Judge Bonin's practice of emailing attorneys the instructions for their clients to sign up for ankle monitoring with ETOH." Pls.' First Am. Compl. ¶ 48. Marshall wound up with another company, but eventually switched to ETOH—with his lawyer confirming that Judge Bonin had given him ETOH's phone number. Pls.' First Am. Compl. ¶¶ 49, 51.

Marshall paid ETOH to the best of his abilities, Pls.' First Am. Compl. ¶ 55, and ETOH included Marshall in its monthly Payment Status Reports to Judge Bonin—including his latest payments and his outstanding fees. Pls.' First Am. Compl. ¶ 87.

As part of its regular communication and coordination with Judge Bonin, after Marshall had been paying ETOH's monitoring fees for seven months, the company emailed Judge Bonin and his staff "to confirm that Mr. Sookram is allowed to be released from the GPS monitor." Pls.' First Am. Compl. ¶ 56. That same day, Judge Bonin's administrative assistant responded: "Mr. Sookram will be able to have the monitor removed once his balance is paid in full." Pls.' First Am. Compl. ¶ 57. ETOH told Marshall that Judge Bonin had conditioned his release from ankle monitoring on paying all ETOH's fees. *Compare* Pls.' First Am. Compl. ¶ 58; *with Ballard*, 413 F.3d at 519.

He paid ETOH at least $500 (with the help of family) and was "immediately freed form ankle monitoring." Pls.' First Am. Compl. ¶ 58. ETOH then informed Judge Bonin that "Mr. Sookram has paid his balance in full" and "has no further obligation to make payments to our company." *Compare* Pls.' First Am. Compl. ¶ 59; *with Ballard*, 413 F.3d at 519. Of course, that was after Judge Bonin had—upon the threat of Marshall's pretrial jailing, continued custody, and further mounting of fees—"provided 'significant aid' to [ETOH] in [its] effort to collect the money [Marshall] owed." *Ballard*, 413 F.3d at 518–19 (citation omitted). This was all thanks to ETOH's and Judge Bonin's constant lines of communication and coordination.

**c. Joint action with respect to other individual putative class members**

In addition to their own experiences, the named Plaintiffs have identified several other instances of ETOH "knowingly participat[ing]" in the "offending enterprise" of Judge Bonin failing to disclose his ties to ETOH and conditioning pretrial defendants' freedom on their ability to pay ETOH. *Id.* at 519. The four examples below are illustrative.

ETOH relied on Judge Bonin's judicial power to collect its fees, with messages such as: "We ask that [the defendant] be reminded of his continuing obligation to make payments to our company." Pls.' First Am. Compl. ¶¶ 90–91.

When a pretrial defendant stopped paying ETOH's fees, ETOH began pressuring his girlfriend for payment, including with threats to have the defendant jailed by Judge Bonin if she did not pay. Pls.' First Am. Compl. ¶ 93.

ETOH updated Judge Bonin regarding one defendant's efforts "to catch up on his balance." This email had no apparent purpose except keeping Judge Bonin apprised of the defendant's financial obligations to ETOH. Pls.' First Am. Compl. ¶ 96.

ETOH emailed Judge Bonin when a defendant that the company was expecting did not show up, prompting Judge Bonin to threaten the defendant's immediate arrest, until his attorney

informed Judge Bonin that he was using a different monitoring company. Pls.' First Am. Compl. ¶ 102; *cf. Glotfelty v. Karas*, 512 F. Appx. 409, 416 (5th Cir. 2013) (distinguishing the case from *Ballard* because, unlike in *Ballard*, there was no allegation that the "judge had not ordered the plaintiff jailed until after [the judge] initiated a telephone conversation with one of the [private] attorneys" who was acting in concert with the judge).

**d. Joint action with respect to all putative class members**

Finally, ETOH participates in Judge Bonin's "offending enterprise," *Ballard*, 413 F.3d at 519, of conditioning defendants' pretrial liberty on their ability to pay ETOH, Pls.' First Am. Compl. ¶¶ 81–85, 89, on a general and class-wide basis by sending Judge Bonin monthly Payment Status Reports—which have no apparent purpose except to keep Judge Bonin apprised of who is and who is not keeping up with their ETOH payments, Pls.' First Am. Compl. ¶¶ 87–88, so that Judge Bonin can use his judicial power to ensure that defendants pay ETOH, Pls.' First Am. Compl. ¶ 89.

This is precisely the scenario the Supreme Court and the Fifth Circuit have explained satisfies the "joint action" test: Plaintiffs have demonstrated that Judge Bonin provides significant aid to ETOH's debt collection efforts, and that this aid is pursuant to ETOH's active participation, guidance, and information. *See Lugar*, 457 U.S. at 937; *Ballard*, 413 F.3d at 518–20.

* * *

The only issue that ETOH has raised in its motion to dismiss is whether it is subject to constitutional scrutiny at all—with no argument as to the viability or plausibility of the actual due process violations that Plaintiffs allege. Therefore, a finding that ETOH either performs a public function or acts jointly with a state actor ends the inquiry, and ETOH's motion should be denied. *See Jones*, 164 F. Supp. 3d at 397 (analyzing separately whether the monitoring company was

subject to constitutional scrutiny and whether the plaintiff had sufficiently pleaded a constitutional violation); *Lugar*, 457 U.S. at 942 (similar).[5]

**CONCLUSION**

When the government delegates a public function to a private entity, that function does not become private. ETOH's conduct satisfies the Supreme Court's and the Fifth Circuit's well-established "public function" and "joint action" tests for determining whether a private entity acts under color of state law. For each of these independently sufficient reasons, ETOH's motion to dismiss should be denied.

[5] ETOH says, without citation to authority or development of an argument, that Plaintiffs' "allegations regarding the prior campaign contributions of the law firms of the principals of ETOH are insufficient to state a claim against ETOH under Section 1983." ETOH Mem. at 10–11.

To the extent ETOH contends that this throw-away line attacks the viability or plausibility of Plaintiffs' due process claims, this "undeveloped" assertion is "waived," and the Court should not consider it. *Wilson v. City of Mission*, Civ. Action No. 7:18-cv-00399, 2020 WL 2079359, at *10 (S.D. Tex. Apr. 29, 2020) ("Federal courts are not merely a repository into which [a litigant] may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate. This [c]ourt is entitled to have issues clearly defined; arguments asserted without citation to authority or left undeveloped are waived.") (internal quotation marks and citations omitted); *Mays v. Chevron Pipe Line Co.*, No. 19-30535, -- F.3d --, 2020 WL 4432025, at *7 n.17 (5th Cir. Aug. 3, 2020) (court "need not consider" argument with "no attempt to explain" it) (collecting cases).

In any event, nowhere in the First Amended Complaint do Plaintiffs allege that the campaign contributions themselves violated due process—or even that the contributions are what make ETOH a state actor—so ETOH's argument is also incomprehensible and meritless.

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Respectfully Submitted,

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