

RECORD NO. 19-13368-A

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In The  
**United States Court of Appeals**  
For The Eleventh Circuit

**CATHERINE REGINA HARPER and  
SHANNON JONES, on behalf of themselves and those  
similarly situated, and JENNIFER ESSIG,**

*Plaintiffs – Appellants,*

v.

**PROFESSIONAL PROBATION SERVICES INC.,**

*Defendant – Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA**

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**BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE  
IN SUPPORT OF PLAINTIFFS-APPELLANTS  
AND IN SUPPORT OF REVERSAL**

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## **Certificate of Interested Persons and Corporate Disclosure Statement**

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, Amicus certifies that the certificate of interested persons filed by Appellants is complete, and adds the following interested persons and entity:

1. Institute for Justice, a 501(c)(3) nonprofit corporation (Amicus Curiae)
2. House, Joshua (Counsel for Amicus)
3. Hottot, Wesley (Counsel for Amicus)

Amicus further certifies that the Institute for Justice has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Dated: October 30, 2019

/s/ Joshua House  
*Counsel for Amicus Curiae*

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\* Chief Authorities are designated by an asterisk.

*\*Harper v. Prof. Probation Servs.,*

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*Horne v. Dep't of Agric.,*

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*Kaley v. United States,*

134 S. Ct. 1090 (2014).....1

*Kelo v. City of New London,*

545 U.S. 469 (2005).....1

*Koontz v. St. Johns River Water Mgmt. Dist.,*

570 U.S. 595 (2013).....1

*Leonard v. Texas,*

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*\*Marshall v. Jerrico, Inc.,*

446 U.S. 238 (1980).....*passim*

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*Sourovelis v. City of Philadelphia,*

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*Timbs v. Indiana*,  
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*United States v. Melrose E. Subdivision*,  
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*Whitner v. City of Pagedale*,  
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*Wollschlaeger v. Governor of Fla.*,  
 848 F.3d 1293 (11th Cir. 2017) .....1

**Other Authorities**

2d Am. Compl., *Harper v. Prof. Probation Servs.*, No. 2:17-cv-01791-ACA,  
 Doc. 56 (N.D. Ala. Apr. 23, 2018) .....22, 23

2d Am. Compl. *Morales v. City of Indio*, No. RIC1803060  
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 Criminal Justice System that Disproportionately Impact the Poor* (Dec.  
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Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (2016), available at <https://tinyurl.com/y9e7f5b2> .....12, 16

Dick M. Carpenter II, et al., *The Price of Taxation by Citation: Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees* Institute for Justice (2019), available at <https://tinyurl.com/y6y7ywx6>.....10, 11

Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. Rev. 2 (2018).....7

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Consent Decree, *Whitner v. City of Pagedale*, No. 4:15-CV-1655-RWS, Doc. 116 (E.D. Mo. May 21, 2018), available at <https://tinyurl.com/yyd9vcf4> .....22

Editorial, *Limit Cities’ Reliance on Revenue from Traffic Fines*, Denver Post (April 24, 2016), available at <https://tinyurl.com/yxvaybjd>.....11

Maura Ewing, *Want to Clear Your Record? It will Cost You \$450*, The Marshall Project (May 31, 2016), available at <https://tinyurl.com/yyb32qcu>.....8

Police Executive Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County* (2015), available at <https://tinyurl.com/osqzlh8>.....15

Adam Geller, *Poor Offenders Pay High Price When Probation Turns on Profit*, AP News (Mar. 12, 2016), <https://tinyurl.com/yyvkvywh> .....5

Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, Urban Affairs Rev., 2018 (2016), available at <https://tinyurl.com/y28xy4hl>.....15

Kate Carlton Greer, *Over the Years, Court Fines, Fees Have Replaced General Revenue Funds*, KGOU (Feb. 9, 2015), available at <https://tinyurl.com/yxv9yndk> .....11

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Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (2016).....4, 5, 8

Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Sociology 1753 (2010)..... 3-4

Brian D. Kelly, *Fighting Crime or Raising Revenue?* Institute for Justice (2019), available at <https://tinyurl.com/y5n5vvkz>.....15

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Karen D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Criminology 471 (2018)..... 11-12

Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create* 6, Harvard Kennedy Sch. & Nat’l Inst. of Justice New Thinking in Community Corrections (2017), available at <https://tinyurl.com/y5l6gqbw> .....8

Minute Order Den. Def.’s Dem., *Morales v. City of Indio*, No. RIC1803060 (Cal. Super. Ct. (Riverside County) Jan. 23, 2019), available at <https://tinyurl.com/y3a3cr5p>.....19

Bart J. Wilson & Michael Preciado, *Bad Apples or Bad Laws: Testing the Incentives of Civil Forfeiture* 3, Institute for Justice (2014), available at <https://tinyurl.com/y35wcd6e> .....16

Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, Mother Jones (Sept. 12, 2014), available at <https://tinyurl.com/y5tvwu6g> .....9

Proposed Revised Consent Decree on Plaintiff’s Fifth and Sixth Claims  
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J. M. Miller & L. H. Selva, *Drug Enforcement’s Double-Edged Sword: An  
Assessment of Asset Forfeiture Programs*, 11 *Justice Quarterly* 313  
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Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent  
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<https://tinyurl.com/y8lru8k9> .....7

Andria Simmons, *Atlanta’s Ticket Traps: Slow Down Or Pay Up*,  
*Atlanta Journal-Constitution* (Oct. 18, 2014), available at  
<https://tinyurl.com/y5p8js2u>.....9

Patrick Sisson, *How the Municipal Court Money Machine Burdens  
City Residents*, *Curbed* (May 24, 2018), available at  
<https://tinyurl.com/y26l9q2j> ..... 8-9

Mac Taylor, *Improving California’s Criminal Fine and Fee System*, Cal. Legislative Analyst’s Office Rep. No. 3322 (Jan. 5, 2016) .....7

Better Together, *Public Safety – Municipal Courts* (Oct. 2014), available at <https://tinyurl.com/y39pzo6x>.....10

Michael Preciado & Bart J. Wilson, *The Welfare Effects of Civil Forfeiture*, 4 Rev. Behavioral Econ. 153 (2017), available at <https://tinyurl.com/yy4ft9gb> .....16

## Identity and Interest of Amicus Curiae<sup>1</sup>

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy property. Property rights are jeopardized, however, where fines, fees, and forfeitures can be used to deprive individuals of their personal and real property. That is why IJ has litigated landmark property rights cases, including some at the U.S. Supreme Court. *See, e.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Kelo v. City of New London*, 545 U.S. 469 (2005). And it regularly files *amicus curiae* briefs in cases addressing property rights or other constitutional liberties. *See, e.g., Nelson v. Colorado*, 137 S. Ct. 1249 (2017); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Kaley v. United States*, 134 S. Ct. 1090 (2014); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Bennis v. Michigan*, 516 U.S. 442 (1996); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017).

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<sup>1</sup> All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than Amicus or its counsel—contributed money that was intended to fund preparing or submitting this brief.

### **Statement of the Issues**

The question presented is whether the district court erred by granting Professional Probation Services' Motion to Dismiss, and whether private probation officers acting in a prosecutorial capacity owe probationers a duty of neutrality.

### **Summary of the Argument**

Amicus wishes to make the Court aware of two things:

First, the use of fines, fees, and forfeitures to generate revenue—including the probation fees at issue in this case—is a growing trend. But reliance on these tools creates a perverse incentive for prosecutors not to protect the public and do justice, but to serve their own interests. This practice continues to grow as municipalities shift the costs of criminal justice systems from the taxpayer and onto individual defendants. It has proven especially problematic where, as here, the people seeking the fine, fee, or forfeiture stand to benefit financially.

Second, this brief makes the Court aware of several recent legal challenges to the practice of relying on fines, fees, and forfeitures to fund municipal operations. The financial incentive in these cases is directly analogous to the plaintiffs-appellants' claims in this case. And several courts have expressly held that prosecutors cannot, consistent with due process, have a financial incentive to charge or convict defendants.

## Argument

Local governments are distorting prosecutors' priorities by relying on revenue from fines, fees, and forfeitures. In several cases, courts have brought municipalities to task for allowing municipal prosecutors to operate with this unconstitutional financial incentive.

### **I. Using Fines, Fees, and Forfeitures to Fund Municipal Government is an Increasingly Common Practice and Incentivizes Municipalities to Prioritize Revenue over Justice.**

Plaintiffs-appellants alleged that Professional Probation Services (PPS) charged a monthly supervision fee to probationers, and then prosecuted alleged violations of probation terms in court, often seeking to extend the probation term. *Harper v. Prof. Probation Servs.*, No. 2:17-cv-01791-ACA, 2019 WL 3555068, at \*2–3 (N.D. Ala. Aug. 5, 2019). Because drawing out a person's probation allowed PPS to continue collecting monthly fees, the plaintiffs-appellants alleged that PPS had a financial conflict of interest that “incentivized [it] to maximize corporate profit in deciding probation conditions.” *Id.* at \*5.

PPS's financial incentive to prosecute probation violations is part of a troubling—and unconstitutional—national trend.

#### **A. Municipalities Have Come to Financially Depend on Fines, Fees, and Forfeitures.**

Fines and fees have long been utilized as punishment in both Europe and America. Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social*

*Inequality in the Contemporary United States*, 115 Am. J. Sociology 1753, 1758 (2010). Although the use of monetary sanctions in the U.S. waned around World War II, *id.*, the postwar rise in crime, and the concurrent rise in the cost of administering the criminal justice system, created a need to use penalties and fees to supplement state and local budgets, *see* Council of Economic Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), <https://tinyurl.com/ya94ey8p>.

Today, it has become widespread practice to shift the cost of enforcement from taxpayers to defendants by imposing fines, fees, and forfeitures on offenders. In other words, municipalities have turned to these powerful law enforcement tools to boost revenues while offsetting economic decline and a shrinking tax base.

**1. Governments Are Charging “User Fees” in Criminal Proceedings to Generate Revenue.**

To shift the cost of criminal justice from taxpayers to defendants, state and local governments are creating novel financial penalties for defendants. All 50 states mandate that fines be levied upon conviction. Alexis Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 26–27 (2016). Criminal fines, however, are just the beginning. In addition to traditional fines, state and local governments have added so-called “user fees”—such as court costs, the cost of public defense, filing fees, jury costs, charges for witnesses, warrants, criminal laboratory costs, charges related to the collection, recording, and storage of DNA,

court security fees, special court costs, and even, in North Carolina, a “cost of justice fee.” *Id.* at 27, 42. Georgia levies fees to pay for “a state police motorcycle unit, a brain and spinal injury trust fund, and a police supplemental retirement fund.” Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country Are Dangerously Dependent on Punitive Fines and Fees*, *Governing Magazine* (Sept. 2019), <https://tinyurl.com/y5ybbqb4>.

Adding another layer of “offender-funded” justice, 44 states also charge probationers for the cost of supervision. Eli Hager, *Debtors’ Prisons, Then and Now: FAQ*, *The Marshall Project* (Feb. 24, 2015), <https://tinyurl.com/q99mvab>. Municipalities often place misdemeanor offenders on probation when they cannot afford to pay the applicable fine, frequently for offenses as minor as traffic violations. *Id.* This practice has created a market for private probation companies, which aim to earn a profit while “forc[ing] the offenders themselves to foot the bill for parole, reentry, drug rehab, electronic monitoring, and other services (some of which are not even assigned by a judge).” *Id.* These companies usually charge supervision fees of \$40 to \$45 per month, and most also collect court-imposed fines and court costs. Adam Geller, *Poor Offenders Pay High Price When Probation Turns on Profit*, *AP News* (Mar. 12, 2016), <https://tinyurl.com/yyvkvywh>. In some cases, probationers also pay for the cost of orientation, counseling, and even participation in litter pick-up programs. *Id.* Failure to pay these fees results in jail

time, even if the probationer has already served his or her sentence for the original misdemeanor. *See Hager, supra.*

Fees like these are increasingly common. For example, in Massachusetts, a defendant is subject to an almost never-ending list of charges:

He'll incur a fee for court-appointed counsel (even if he's indigent), a fine (if he's guilty of the underlying crime), a victim/witness assessment (even if the crime is victimless), a monthly supervision fee (if he's put on probation), a daily monitoring fee (if he has to wear a GPS device), court costs (because courts are expensive to run), a default fee (if he defaults on a court date), and so on.

Mass. Senate Comm. on Post Audit and Oversight, *Fine Time Massachusetts: Judges, Poor People, and Debtors' Prison in the 21st Century*, S. 2504, at 10 (Nov. 7, 2016), <https://tinyurl.com/y43hhttp>.

In California, a defendant must pay \$490 to the state for a traffic infraction. The fine is \$100, but the defendant must pay an additional \$390 in charges for such things as a "criminal surcharge," a court construction fund, and a fee for emergency medical services. Lawyers' Comm. for Civil Rights of the San Francisco Bay Area et al., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California* 10 (2015), <https://tinyurl.com/y4rd8qfo>. If the defendant fails to pay, the state will suspend the person's driver's license, depriving him or her of the ability to get to work and earn money to pay the original fines and fees, leading to never-ending financial penalties. *Id.* at 11. In fact, fines and fees fund large portions of California's government, from the State Optometry Fund to the Underground

Storage Tank Cleanup Fund. Mac Taylor, *Improving California's Criminal Fine and Fee System*, Cal. Legislative Analyst's Office Rep. No. 3322, at 9 (Jan. 5, 2016).

In Alabama, where this case arose, a survey found that “a system of layered fees,” including “unregulated supervision fees” paid to for-profit entities like PPS, has “a dramatic impact on an individual’s ability to pay routine court costs and successfully exit the criminal justice system.” Foster Cook, *The Burden of Criminal Justice Debt in Alabama* 18, Univ. Ala. Treatment Alternatives for Safer Communities (2014), <https://tinyurl.com/y4pnst7y>. As one might suspect, these fees hit poor Alabamans the hardest: “Under current policies, the poorer the defendant the longer they are in the system and the more they pay.” *Id.*

The use of fines, fees, and forfeitures continues to grow because it is less politically advantageous to raise taxes than it is to impose costs on those in the criminal justice system: “[M]any lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases in ticketing in projected budgets.” Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 *UCLA L. Rev.* 2, 22 (2018) (footnotes omitted). Since 2010, 48 states have moved to increase civil and criminal financial penalties. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014) (describing results of yearlong investigation), <https://tinyurl.com/y8lru8k9>. To address 2010

budget shortfalls, Arizona, Louisiana, Ohio, and Texas instituted new fees and raised existing fees. Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create* 6, Harvard Kennedy Sch. & Nat'l Inst. of Justice New Thinking in Community Corrections (2017), <https://tinyurl.com/y5l6gqbw>. In 2012, the Tennessee Legislature established a \$450 criminal-record-expungement fee for the specific purpose of raising revenue for the state general fund. Maura Ewing, *Want to Clear Your Record? It will Cost You \$450*, The Marshall Project (May 31, 2016), <https://tinyurl.com/yyb32qcu>. In 1991, 25 percent of inmates had legal financial obligations imposed. Harris, *A Pound of Flesh*, *supra*, at 23. By 2004, the number of inmates with such obligations had risen to 66 percent—an increase from one-quarter to two-thirds in the span of just 13 years. *Id.* The number is undoubtedly even higher today.

## **2. Fines, Fees, and Forfeitures Generate a Substantial Portion of Municipal Revenues.**

Local governments across the nation are becoming dependent on fines, fees, and forfeitures to maintain revenues. Within this Circuit, the city of Doraville, Georgia uses tickets for small-time offenses, such as having a cracked driveway or improperly stacked wood, to account for a quarter of its yearly budget. *See* Christian Britschgi, *Atlanta Suburb Brags About Fines for Chipped Paint and Incorrectly Stacked Wood*, Reason (May 24, 2018), <https://tinyurl.com/yy4gfakj>; Patrick Sisson, *How the Municipal Court Money Machine Burdens City Residents*, Curbed (May

24, 2018), <https://tinyurl.com/y26l9q2j>. Doraville boasted that “[a]veraging 15,000 cases and bringing in over \$3 million annually, the court system contributes heavily to the city’s bottom line.” Britschgi, *surpa*. A small city with a population of just around 10,000, Doraville reportedly writes over 40 tickets per day. Andria Simmons, *Atlanta’s Ticket Traps: Slow Down Or Pay Up*, Atlanta Journal-Constitution (Oct. 18, 2014), <https://tinyurl.com/y5p8js2u>

Ferguson, Missouri, is perhaps the most notorious example of a municipality prosecuting individuals in order to generate revenue. The objective of the town’s police and municipal court (according to a U.S. Department of Justice report) was not justice; it was generating revenue. Any violation of Ferguson’s byzantine code would result in a plethora of fines, fees, and surcharges. *See* U.S. Dep’t of Justice Civil Rights Div., *Investigation of the Ferguson Police Department* 7 (March 4, 2015), <https://tinyurl.com/jpk4bjb>; *see also* Julia Lurie & Katie Rose Quandt, *How Many Ways Can the City of Ferguson Slap You with Court Fees? We Counted*, Mother Jones (Sept. 12, 2014), <https://tinyurl.com/y5tvwu6g> (documenting how rolling through a stop sign in Ferguson could easily result in incarceration and impoverishment). The city’s quest to maximize revenue led it to criminalize harmless situations and engage in biased policing. The municipal court even made it a policy to quickly convict and obtain fines from defendants, who were often financially incapable of satisfying the city’s demands.

Ferguson, it turns out, was no outlier. In St. Louis County, municipalities routinely used their prosecutors and municipal courts as revenue generators. The cities of Calverton Park, Bella Villa, Vinita Terrace, and Pine Lawn all derived around half (or more) of their general revenue from fines and fees. Better Together, *Public Safety – Municipal Courts* 8 (Oct. 2014), <https://tinyurl.com/y39pzo6x>. When the state of Missouri capped the amount of money that municipalities could retain from traffic fees, municipalities turned to ticketing people for things like having a barbeque in their front yard or basketball hoops in the street. Jennifer S. Mann, *Municipalities Ticket for Trees and Toys, as Traffic Revenue Declines*, St. Louis Post-Dispatch (May 24, 2015), <https://tinyurl.com/y5svvrk7>.

This invidious practice is spreading. A recent study of three Georgia cities found that, when tax revenues shrunk during the great recession, municipalities “likely turned to fines and fees as a readily available revenue source.” Dick M. Carpenter II, et al., *The Price of Taxation by Citation: Case Studies of Three Georgia Cities That Rely Heavily on Fines and Fees* 18, Institute for Justice (2019), <https://tinyurl.com/y6y7ywx6>. Across America, tickets, fines, and forfeitures account for more than 10 percent of general fund revenue in nearly 600 jurisdictions. Maciag, *supra*. In at least 284 of those, fines make up more than 20 percent of the municipal budget. *Id.* The governments most dependent on financial penalties tend to be found in rural, high poverty areas: In jurisdictions where fines and fees

constituted over 20 percent of general fund revenue, the median household income was less than \$40,000. *Id.*

In Colorado, five towns receive more than 30 percent of their revenue from traffic tickets and fines, with one town receiving 93 percent of its revenue from traffic tickets alone. Editorial, *Limit Cities' Reliance on Revenue from Traffic Fines*, Denver Post (April 24, 2016), <https://tinyurl.com/yxvaybjd>. In Oklahoma, a county district judge observed, “we fund probably 90 percent or more of the operation of the courts actually out of the money that the court collects.” Kate Carlton Greer, *Over the Years, Court Fines, Fees Have Replaced General Revenue Funds*, KGOU (Feb. 9, 2015), <https://tinyurl.com/yxv9yndk>. In Louisiana, criminal justice agencies in New Orleans collected “\$1.7 million in bail and bond fees and \$2.8 million in conviction fines and fees” in 2015. Mathilde Laisne et al., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans* 22, Vera Institute of Justice (2017), <https://tinyurl.com/yynonqrp>. This “[r]evenue from fees helps to fund the municipal and district courts, the district attorney, public defender, and sheriff’s office, and other agencies.” *Id.* at 12. And in Nevada, the state supreme court “recently went broke because revenue from traffic tickets plummeted.” Karen

D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Criminology 471, 477 (2018).

Civil forfeiture is also being used as a tool for revenue generation. Civil forfeiture allows law enforcement to seize property “merely on a showing of probable cause to believe that the property was implicated in certain offenses.” *United States v. Melrose E. Subdivision*, 357 F.3d 493, 501 (5th Cir. 2004) (holding recent amendment to Civil Asset Forfeiture Reform Act did not raise standard of proof). As a result, in 2012, agencies in 26 states and the District of Columbia took in more than \$254 million through forfeiture under state laws alone. Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice 11 (2016), <https://tinyurl.com/y9e7f5b2>. This amount is growing: The total amount seized in forfeitures “across 14 states more than doubled from 2002 to 2013.” *Id.* at 5.

As these many accounts show, state and local governments now view law enforcement as just another way to generate revenue. And when those governments cannot easily obtain revenue through other means, they become dependent on fines, fees, and forfeitures to make ends meet.

**B. Reliance on Fines, Fees, and Forfeitures Creates Perverse Profit Incentives for Prosecutors.**

Increasing dependence on the criminal justice system to produce revenue creates perverse incentives for local officials, especially prosecutors—pushing them to prioritize revenue over justice and public safety. This is precisely what the Department of Justice uncovered in its Ferguson investigation. After noting that “[t]he City budgets for sizeable increases in municipal fines and fees each year [and] exhorts police and court staff to deliver those revenue increases,” the DOJ found that Ferguson’s “municipal court does not act as a neutral arbiter of the law . . . . Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests.” U.S. Dep’t of Justice Civil Rights Div., *supra*, at 2–3.

The pressure to generate “royal revenue” is a well-recognized by-product of any system of fines. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989). Unlike other forms of punishment—which cost the government money— “fines are a source of revenue.” *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (op. of Scalia, J.). So “[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence.” *Id.* Because “the State stands to benefit” from levying fines, *id.*, there is a singular risk that governments

and other state actors will exercise their punitive powers with an eye toward revenue, rather than justice, *see Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

The business model of for-profit probation companies is predicated on this financial incentive. Because they keep the fees that they charge probationers, and often collect the associated court-imposed fines and court costs, probation companies have a perverse incentive to extend the period of supervision. Geller, *supra*. As a result, probation officers often fail to consider whether people can afford to pay the fees, lengthening probation and snaring poor offenders in “a cycle of debt and punishment.” *Id.* Some companies even reward probation officers for collecting fees. In one case, a private probation company in Georgia offered \$500 bonuses and a \$1,000 prize in a “March Madness” contest “for workers who met or exceeded collection goals.” *Id.*

Civil forfeitures have also infamously perverted government incentives. “[B]ecause the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture.” *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (citation omitted). As Justice Thomas recently noted, “[t]his system . . . has led to egregious and well-chronicled abuses” and “frequently target[s] the poor and other groups least able to defend their interests in forfeiture proceedings.” *Id.*

This is not theoretical. Empirical research shows that using prosecutions to raise revenue leads to fewer violent and property crimes being solved. *See* Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, *Urban Affairs Rev.*, 2018, at 1, 17 (2016), <https://tinyurl.com/y28xy4hl>. That is because law enforcement officers, in response to political pressure, devote resources not to solving crime but to generating revenue. *See id.* Specifically, a one-percent increase in a municipality’s fines, fees, and forfeitures revenue “is associated with a statistically and substantively significant 3.7 percentage point decrease in the violent crime clearance rate.” *Id.* at 4. Even law enforcement groups have lamented that “[a]n inappropriate and misguided mission has been thrust upon the police in many communities: the need to generate large sums of revenue for their city governments.” Police Executive Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County* 7 (2015), <https://tinyurl.com/osqzlh8>.

Reliance on forfeiture revenues can likewise impact prosecutorial priorities. *See* Brian D. Kelly, *Fighting Crime or Raising Revenue?* 15, Institute for Justice (2019), <https://tinyurl.com/y5n5vvkz> (finding that a statistically significant link between a municipality’s fiscal stress and increases in forfeiture activity “suggest[s] police do make greater recourse to forfeiture when local budgets are tight”). Multiple studies have confirmed the perverse incentive that this financial stake creates in law

enforcement. In a study in the Review of Behavioral Economics, the authors found that “the temptation for law enforcement personnel to benefit themselves at the expense of the public is indeed strong and clearly evident in our data.” Michael Preciado & Bart J. Wilson, *The Welfare Effects of Civil Forfeiture*, 4 Rev. Behavioral Econ. 153, 175 (2017), <https://tinyurl.com/yy4ft9gb>. In the same vein, studies have shown that “[a]llowing law enforcement agencies to reap financial benefits from forfeitures encourages the pursuit of property over the impartial administration of justice.” Carpenter II et al., *Policing for Profit*, *supra*, at 11 (citing J. M. Miller & L. H. Selva, *Drug Enforcement’s Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 Justice Quarterly 313 (1994)).

Financial incentives do not influence only those unscrupulous individuals who misuse positions of power. Instead, these incentives lead to systemic distortions of priorities: revenue over public safety, fees over justice. The problem “is not one of ‘bad apples’ but bad rules that encourage bad behavior—it is not the players, but the game.” Bart J. Wilson & Michael Preciado, *Bad Apples or Bad Laws: Testing the Incentives of Civil Forfeiture* 3, Institute for Justice (2014), <https://tinyurl.com/y35wcd6e>.

## **II. Courts Have Found Financially Biased Prosecution Unconstitutional, and the Same Analysis Applies to Probation Officers Acting as Privatized Prosecutors.**

Because financial incentives warp officials' priorities, courts are seeing more challenges to financial conflicts of interest. In two recent cases, the Fifth Circuit held that judges who have "a direct and personal interest in the fiscal health of the public institution that benefits" from fines and fees have an unconstitutional conflict of interest. *Caliste v. Cantrell*, 937 F.3d 525, 532 (5th Cir. 2019); *see also Cain v. White*, 937 F.3d 446, 454 (5th Cir. 2019). Although prosecutors are not subject to the same standards of neutrality as judges, "prosecutorial discretion do[es] not immunize from judicial scrutiny cases in which the enforcement decisions . . . were motivated by improper factors or were otherwise contrary to law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980).

### **A. Financially Motivated Prosecution Violates Due Process.**

Courts have held that direct financial incentives to prosecute defendants violate due process by creating an unconstitutional conflict of interest. In the cases described below, all of which (unlike this case) survived motions to dismiss, courts have found that plaintiffs adequately alleged a due process violation where prosecutors had a financial incentive to prosecute.

In *Harjo v. City of Albuquerque*, the district court found "a due process violation" where "prosecutors' judgment will be distorted, because . . . the more

revenues the prosecutor raises, the more money the forfeiture program can spend.” 326 F. Supp. 3d 1145, 1195 (D.N.M 2018) (citing *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972)). When Arlene Harjo’s vehicle was seized for civil forfeiture after her son had taken it, without her permission, to visit his girlfriend, she filed suit against the City of Albuquerque. *Id.* at 1162–65. She alleged that the city’s prosecutors had an unconstitutional financial incentive to use civil forfeiture. *Id.* at 1162–65. Relying on the principle that the Due Process Clause “imposes ‘limits on the partisanship of administrative prosecutors,’” the district court found in Harjo’s favor. *Id.* at 1185 (quoting *Marshall*, 446 U.S. at 249). Because “the forfeiture program has the control to spend all it takes in,” *id.* at 1197, there was “a realistic possibility that the [prosecutor’s] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts,” *id.* at 1193 (alteration in original) (citing *Marshall*, 446 U.S. at 250). The court thus concluded that the city’s forfeiture prosecutors had “an unconstitutional institutional incentive to prosecute forfeiture cases, because . . . the forfeiture program can spend, without meaningful oversight, all of the excess funds it raises.” *Id.* at 1193.

In this Circuit, a recent lawsuit challenging the financial incentive of Doraville, Georgia to prosecute and convict people in order to generate city revenue withstood a motion to dismiss. *See Brucker v. City of Doraville*, 391 F. Supp. 3d 1207 (N.D. Ga. 2019). The city prosecuted and fined people for municipal ordinance

violations, issuing thousands of tickets per year for minor offenses such as having a cracked driveway or improperly stacked wood. *See id.* at 1215. The fines and fees that the city collected by haling its residents and visitors into court for minor code violations constituted between 17 and 30 percent of its annual revenue. *Id.* at 1209. That “institutional reliance on revenue from fines and fees,” the plaintiffs alleged, created an unconstitutional incentive to prosecute people. *Id.* at 1209–10. The court agreed. *Id.* at 1217. Like judges, the court reasoned, prosecutors are also “‘public officials’ who ‘must serve the public interest.’” *Id.* If a prosecutor has “‘a personal interest, financial or otherwise’” in obtaining fines, fees, or forfeitures, their “enforcement decisions may ‘raise serious constitutional questions.’” *Id.* (quoting *Marshall*, 446 U.S. at 249–50). The court concluded that “[t]he extent of this profit incentive and its potential to distort these officials’ judgment is a factual issue that the Court cannot resolve on a motion to dismiss.” *Id.* (citing *Marshall*, 446 U.S. at 241).

In California, a state-court class action challenging the City of Indio’s practice of outsourcing code-violation prosecutions to a private law firm also survived a demurrer—the state equivalent of a motion to dismiss. *See* Minute Order Den. Def.’s Dem., *Morales v. City of Indio*, No. RIC1803060 (Cal. Super. Ct. (Riverside County) Jan. 23, 2019), available at <https://tinyurl.com/y3a3cr5p>. According to the complaint, the private law firm, which had complete control over prosecutions,

pursued criminal convictions in minor code-enforcement cases. *See* 2d Am. Compl. ¶¶ 156–84, *Morales v. City of Indio*, No. RIC1803060 (Cal. Super. Ct. (Riverside County) Feb. 13, 2018), available at <https://tinyurl.com/y3a3cr5p>. After a defendant pleaded guilty and paid criminal fines, the firm could then recoup 100 percent of its attorneys’ fees in a later proceeding against the defendant. *Id.* The plaintiffs argued that this practice created an unconstitutional financial incentive to prosecute, and the parties eventually agreed to a settlement. *See* Mem. Supp. Prelim. Approval of Class Action Settlement, *Morales v. City of Indio*, No. RIC1803060, \*12 (Cal. Super. Ct. Jan. 24, 2019), <https://tinyurl.com/y6aud92v>. As part of the settlement, the City agreed to end the practice of seeking cost recovery in criminal cases, to return all the attorneys’ fees that the law firm had collected from the plaintiffs and class members, and to improve the oversight of any private attorneys acting as city prosecutors. *Id.*

Homeowners in Philadelphia filed a similar federal class action against the city’s civil forfeiture program in 2015, alleging that prosecutors, along with other city officials, “use[d] form legal documents and endless proceedings to generate millions of dollars in revenue.” *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694, 698 (E.D. Pa. 2015) (internal quotation marks omitted). The court denied the city’s motion to dismiss, holding that the plaintiffs had adequately pleaded a due process violation because they alleged that “the [Philadelphia] D.A.’s Office allocates forfeiture proceeds for both institutional and personal benefit and further

alleg[ed] a profit-sharing agreement with the Philadelphia police department.” *Id.* at 709. The parties have since agreed to a consent decree on that claim, which enjoins the city and the D.A.’s office from using revenue from any “civil[] or criminal forfeiture to fund either (i) the District Attorney’s Office or the Philadelphia Police Department, or (ii) any other law enforcement purpose.” Proposed Revised Consent Decree on Plaintiff’s Fifth and Sixth Claims for Relief, *Sourovelis v. City of Philadelphia*, No. 2:14-cv-04687, Doc. 271-2 (E.D. Pa. April 12, 2018), <https://tinyurl.com/y2v9tx7n>.

Residents of Pagedale, Missouri challenged a similar due process violation. They filed a class action alleging that the city had a financial incentive to prosecute defendants in order to generate revenue. *See Whitner v. City of Pagedale*, No. 4:15-CV-1655-RWS, 2016 WL 915303, at \*1 (E.D. Mo. Mar. 10, 2016); *see also* Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. Times, Nov. 4, 2015, at A15, <https://tinyurl.com/y5fz98jb>. The residents alleged that the city’s revenue goals motivated it to prosecute absurd code violations, including “failing to install screens on every door and window opening to the outside, hang drapes or blinds that match and ‘are neatly hung, in a presentable appearance,’ repair driveway cracks or chipped paint on a home’s exterior, or paint foundations and wood fences.” *Whitner*, 2016 WL 915303, at \*1. After the court denied the city’s motion to dismiss, the parties agreed to a consent decree in which

Pagedale agreed to reform its municipal code and ticketing practices, and to submit regular reports regarding its finances. *See* Consent Decree, *Whitner v. City of Pagedale*, No. 4:15-CV-1655-RWS, Doc. 116 (E.D. Mo. May 21, 2018), <https://tinyurl.com/yyd9vcf4>.

**B. A Financial Incentive to Prosecute Probation Violations Likewise Violates Due Process.**

The due process analysis in the cases above also applies to private probation companies, like PPS, acting “in a prosecutorial or plaintiff-like capacity.” *Marshall*, 446 U.S. at 248. In addition to supervising probationers, PPS employees regularly acted as prosecutors. *See Harper v. Prof. Probation Servs.*, No. 2:17-cv-01791-ACA, 2019 WL 3555068, \*1–4 (N.D. Ala. Aug. 5, 2019). Like prosecutors, PPS retained complete discretion to refuse to prosecute those who could not pay, and to determine whether those individuals could perform community service in lieu of payment. *See* 2d Am. Compl., *Harper v. Prof. Probation Servs.*, No. 2:17-cv-01791-ACA, Doc. 56, ¶¶ 70–71, 86 (N.D. Ala. Apr. 23, 2018). Probation officers frequently haled probationers into municipal court to enforce alleged probation violations. *Id.* at 2. If the individuals could not afford to pay the fines that PPS charged, PPS set more frequent “review” hearings in municipal court. *See id.* ¶ 4. During these review hearings, PPS employees brought probationers’ noncompliance (usually missed payments or appointments) to the attention of the municipal court. *Harper*, 2019 WL

3555068, \*2. Relying on PPS's report, the municipal court would then revoke the alleged offender's probation. *Id.*

PPS haled all three plaintiffs into municipal court to enforce the terms of their probation. In Gina Harper's case, her probation officer reported to the municipal court that she had missed payment appointments and had failed to comply with the terms of her probation. *Id.* at 3. Then, "[b]ased on the probation officer's representations that Ms. Harper was non-compliant, the Municipal Court ordered her to jail for five days." *Id.* Her co-plaintiff, Shannon Jones, also alleged that she spent five days in jail because PPS informed the municipal court that she had made a negative comment about the review hearings. *See Am. Compl., Harper v. Prof. Probation Servs., supra* at ¶ 208. Plaintiff Jennifer Essig likewise received 24 hours in jail after a hearing in which a PPS employee reported to the municipal court that she had missed probation appointments. *Harper*, 2019 WL 3555068, \*4.

Though it recognized these facts, the district court mistakenly concluded that probation officers performing prosecutorial functions do not owe a duty of neutrality to probationers. This was misguided. In fact, prosecutors do owe a duty to avoid injecting "a personal interest, financial or otherwise, into the enforcement process." *Marshall*, 446 U.S. at 249. PPS had a direct financial incentive to prosecute, which infected all its exercises of prosecutorial discretion. A perverse financial incentive

to prosecute probation violations does, therefore, “raise serious constitutional questions.” *Id.* at 250.

### **Conclusion**

The order of dismissal below should be reversed and this case remanded.

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Respectfully submitted,

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### **Certificate of Compliance**

The undersigned certifies that the foregoing Brief of *Amicus Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,356 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this Brief of Appellee 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 Version 2016 in 14 point Times New Roman font.

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### **Certificate of Filing and Service**

I hereby certify that on this 30th day of October, 2019, I caused this Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiff–Appellants and in Support of Reversal to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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