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I. Introduction

Defendant ABK charges criminal defendants (supervisees) in Vanderburgh County exorbitant fees for testing and monitoring — without any inquiry into ability to pay. ABK’s fees are so high that supervisees struggle to pay for their basic necessities such as housing, food, and transportation. When supervisees inevitably cannot pay, ABK will call the police and file revocation reports with the county courts, confident that the county will enforce ABK’s profits by jailing those who cannot pay.

As putative class representatives, Plaintiffs William Huggins and Hobert Keith Miller seek a class-wide preliminary injunction to stop ABK from treating them and putative class members as a revenue stream. Specifically, Plaintiffs move for a preliminary injunction against Defendant ABK on Counts One through Five of their Complaint, requesting that ABK be enjoined from charging supervisees any and all fees associated with pretrial or post-trial supervision.

In support of this motion, in addition to ABK and county records, Plaintiffs present declarations of thirteen persons, including themselves, who have been charged and/or continue to be charged ABK fees.

II. Statement of Facts

ABK (A) irreparably harms Plaintiffs and putative class members with fees that are (B) so exorbitant as to make a later damages award insufficient, all (C) for the financial benefit of all Defendants, without findings of guilt or considering ability to pay, and under threats of incarceration to force compliance.

A. ABK Irreparably Harms Plaintiffs and Putative Class Members, Forcing Them to Pay Exorbitant Fees on Penalty of Incarceration

ABK administers all pretrial drug and alcohol testing as well as electronic monitoring for Vanderburgh County criminal courts. Ex. 1, ABK Interrogatory Responses (ROG 1); Ex. 2, ABK

RFP Responses (RFP 3); Ex. 3, Kiely Interrogatory Responses (ROG 3). For sentenced defendants, ABK is in charge of house arrest (known as electronic home detention), as well as drug and alcohol testing. *Id.* ABK charges fees to all supervisees, whether pretrial or as part of their sentence, as a condition of their supervision and thus as a condition of their freedom. Ex. 1, ABK Interrogatory Responses (ROG 1). ABK causes irreparable harm, as illustrated by the experiences of (i) Plaintiff Huggins, (ii) Plaintiff Miller, (iii) putative class-member Cathy Murray, and (iv) putative class-member Warren G. Hawkins, Jr.

i. Plaintiff Huggins

Plaintiff Huggins has been charged ABK fees as part of both pretrial and post-trial supervision. ECF 2-3, Huggins Decl. ¶¶ 2, 28. While on pretrial supervision from April 2021 to February 2022, ABK required Plaintiff Huggins to pay \$30 per drug test once per week. *Id.* at ¶ 3. ABK also supervised Plaintiff Huggins after sentencing, through electronic home detention starting in February 2022. ABK required Plaintiff Huggins to pay a \$300 set up fee for electronic home detention, plus an ongoing \$112 weekly fee plus \$35 per drug test (one to two times per week), resulting in an average monthly bill of \$600 in ABK fees. *Id.* at ¶¶ 4, 6.

ABK knows that Plaintiffs Huggins is unemployed and therefore cannot afford ABK's fees. *See, e.g.*, ECF 2-9 (March 29, 2022 Petition to Revoke for Plaintiff Huggins) and ECF 2-13 (May 17, 2022 Petition to Revoke for Plaintiff Huggins). Mr. Huggins has had to rely on family, including his own children, to keep up with ABK's fees. *Id.* at ¶¶ 11, 21, 23–24. Just in the three months or so that Plaintiff Huggins was on electronic home detention under ABK, Plaintiff Huggins paid approximately \$2,000 in ABK fees. Huggins Decl. at ¶ 22.

When Plaintiff Huggins has not been able to pay, ABK has filed petitions to revoke (PTRs) to end Plaintiff Huggins' community placement. *See, e.g.*, ECF 2-9 (March 29, 2022 Petition to Revoke for Plaintiff Huggins), ECF 2-10 (March 29, 2022 ABK Violation Report for Plaintiff

Huggins), ECF 2-13 (May 17, 2022 Petition to Revoke for Plaintiff Huggins), and ECF 41-1 at pp. 54–55 (Oct. 24, 2022 Petition to Revoke for Plaintiff Huggins).

After ABK PTR'd Plaintiff Huggins multiple times in the span of a few months due to his inability to afford ABK fees, Plaintiff Huggins was temporarily removed from electronic home detention and switched to probation (DAPS), under which he must do random drug tests with ABK once per week. Huggins Decl. at ¶¶ 25–26. Plaintiff Huggins' time on ABK supervision was supposed to end August 2, 2022, but because ABK PTR'd Plaintiff Huggins because he cannot afford ABK fees, he remains on probation to this day, without a current end date to how long he will continue to have to pay ABK. *See* Huggins Decl. at ¶¶ 26–29; ECF 2-10, March 29, 2022 ABK Violation Report for Plaintiff Huggins; Ex. 4, Emails Between ABK Employee Kim Whelan and Vanderburgh County Staff Regarding Plaintiff Huggins.

Plaintiff Huggins has suffered irreparable harm; he has had to pay fees he cannot afford and has had his supervision extended as a result of the PTRs ABK filed due to Plaintiff Huggins' inability to afford ABK's fees.

ii. Plaintiff Miller

Plaintiff Miller has been on pretrial supervision since June 2022. ECF 2-7, Miller Decl. ¶ 2. Even though Plaintiff Miller was not charged with an alcohol-related offense, he is required to take in-person breathalyzer tests every day, six days a week, at his own expense. *Id.* at ¶¶ 3, 5. ABK charges Plaintiff Miller \$7 per day in cash for the breathalyzers, resulting in approximately \$168 in ABK fees per month. *Id.* at ¶ 10. Plaintiff Miller has paid nearly a thousand dollars in ABK fees in about six months of ABK pretrial supervision. Ex. 2, ABK RFP Responses (RFP 2) (noting Plaintiff Miller has done 138 breathalyzer tests as of Dec. 7, 2022).

ABK will not allow Plaintiff Miller to test without first paying. *Id.* at ¶ 9. Probation staff informed him that not paying means a warrant would be issued for his arrest. *Id.* at ¶ 6. Plaintiff

Miller remains on pretrial supervision, without having been found guilty of the crime for which he is accused and for which supervision was ordered. *Id.* at ¶ 15. Plaintiff Miller is irreparably harmed by having to pay ABK fees under threat of incarceration despite his legal innocence as a pretrial supervisee.

iii. Putative Class Member Cathy Murray

Putative class member Cathy Murray is on ABK home detention. Ex. 5, Declaration of Cathy Murray ¶ 2. She works at a fast-food restaurant making \$12/hour. *Id.* at ¶ 17. Her take-home pay is around \$1,000 month. *Id.* ABK charges Ms. Murray around \$600 to \$700 per month in fees, thus approximately 60 to 70% of her income goes to pay ABK. *Id.*

Given how exorbitant ABK fees are, Ms. Murray cannot afford her basic expenses while on ABK supervision, such as food. *Id.* at ¶¶ 21–22. Ms. Murray has to rely on a subsidized housing program to afford housing. *Id.* at ¶ 19. Ms. Murray is a mother of five and cannot provide for her children given her limited income and the burden of ABK fees. *Id.* at ¶ 21.

Despite Ms. Murray's poverty, ABK has not adjusted Ms. Murray's fees. When Ms. Murray has shared with ABK staff that she cannot afford ABK fees, ABK staff responded that she should budget, rely on churches for furniture, and go to locations such as the Salvation Army for meals. *Id.* at ¶ 22. ABK's fees irreparably harm Ms. Murray as they are so high that they prevent Ms. Murray from affording her basic expenses.

iv. Putative Class Member Warren G. Hawkins, Jr.

In the two years or so that putative class member Warren G. Hawkins, Jr. has been on ABK home detention, he has had to pay approximately \$15,000 in ABK fees, and still has years of ABK supervision ahead of him. Ex. 6, Declaration of Warren G. Hawkins, Jr. ¶ 2.

ABK charged Mr. Hawkins a \$300 set up fee and charges him \$115 every week. *Id.* at ¶ 4. ABK also charges Mr. Hawkins \$30 per drug test and \$5 per breathalyzer test. *Id.* at ¶¶ 6, 9. In an average month, Mr. Hawkins has to pay ABK around \$600 to \$750 in fees. *Id.* at ¶ 14.

Mr. Hawkins cannot afford these fees, and has had to rely on his partner, family, and friends to pay ABK. *Id.* at ¶ 16. The financial burden of ABK fees has been so significant that Mr. Hawkins has been unable to keep up with child support payments. *Id.* at ¶ 21.

When Mr. Hawkins expressed his inability to afford such fees to ABK staff, ABK's response was that he had to find a way to pay for it. *Id.* at ¶ 4. ABK knows that Mr. Hawkins is unemployed, has child support obligations, and cannot afford ABK fees, but filed a PTR anyway because Mr. Hawkins cannot afford ABK fees. *See Ex. 7, Dec. 1, 2020 ABK Violation Report for Warren G. Hawkins Jr.* As a result of ABK's PTR, Mr. Hawkins had to appear in court, where Judge Kiely admonished him that not paying ABK would result in him ending up back in court and in jail. *Hawkins Decl.* ¶¶ 7–8. ABK has irreparably harmed Mr. Hawkins in charging him massive fees he cannot afford that have even affected his ability to pay child support and filing a PTR to revoke Mr. Hawkins' community placement.

B. ABK Charges Fees So Exorbitant that Supervisees Struggle to Afford Even Basic Necessities, Making a Damages Award Years From Now Insufficient

ABK charges a plethora of fees, including a variety of late fees. ABK also demands specific forms of payment depending on the service. ABK's current fees include, but are not limited to:

- \$300 set up fee for home detention in cash (*Huggins Decl.* ¶¶ 5–6, 8; *Ex. 8, Declaration of Chardae Smith* ¶ 4; *Murray Decl.* ¶¶ 7–8; *Hawkins Decl.* ¶ 4);
- \$112 to 115 weekly fee for home detention if payment made via automatic, weekly bank account withdrawal (*Huggins Decl.* ¶ 6; *Murray Decl.* ¶ 11; *Smith Decl.* ¶ 7;

Ex. 9, Declaration of JayVontae Schwartz ¶ 10; Hawkins Decl. ¶¶ 4–5; Ex. 10, Declaration of James Stevens ¶ 9; Ex. 11, Declaration of Artius Brown ¶ 6);

- \$147 to \$150 weekly fee for home detention if payment made in cash (Huggins Decl. ¶ 8; Schwartz Decl. ¶ 20; Ex. 12, Declaration of Kar'Monta Miles ¶ 3);
- At least \$35 penalty fee for late home detention payments (Smith Decl. ¶ 12; Schwartz Decl. ¶¶ 10, 20; Brown Decl. ¶ 9);
- \$750 penalty fee for damage to ankle monitor (Miles Decl. ¶ 8);
- \$25 penalty fee for damage to ankle monitor charger (Miles Decl. ¶ 8);
- \$100 set up fee for drug/alcohol testing, Ex. 13, ABK Substance Abuse Testing Procedure;
- \$15 to 45 per drug test in cash (Huggins Decl. ¶ 6; Miller Decl. ¶ 5; Ex. 14, Declaration of April Hicks ¶ 10; Murray Decl. ¶ 11; Smith Decl. ¶¶ 7–9, 11, 16; Schwartz Decl. ¶ 10; Ex. 15, Declaration of Richard Garrett ¶¶ 4, 14–15; Hawkins Decl. ¶ 6; Stevens Decl. ¶ 9; Miles Decl. ¶ 3; Brown Decl. ¶ 6; Ex. 16, ABK Drug Testing Instructions (“If you hear your group # report to ABK during the time listed on your ID card with \$32.00 cash for the test”)), though each test only costs ABK \$2.90 to purchase, Ex. 2, ABK RFP Responses (RFP 3);
- \$30 to \$50 retesting fee for drug tests in cash (Huggins Decl. ¶ 15; Miller Decl. ¶ 5; Hicks Decl. ¶¶ 15, 20; Smith Decl. ¶ 27; Hawkins Decl. ¶ 19; Stevens Decl. ¶ 16; Ex. 16, ABK Drug Testing Instructions (“Lab confirmation will be conducted at your expense”));
- \$5 to 15 per day for in-person alcohol testing in cash (Miller Decl. ¶ 5; Hicks Decl. ¶ 17; Hawkins Decl. ¶ 9; Ex. 17, Declaration of Tia Bailey ¶ 5);

- \$20–25 penalty fee to replace ABK ID card given to those subject to drug/alcohol testing (Huggins Decl. ¶ 20); Ex. 13, ABK Substance Abuse Testing Procedure;
- \$300 to \$400 set up fee for a portable breathalyzer device (Hicks Decl. ¶¶ 7–8);
- \$84 weekly fee for portable breathalyzer device (Bailey Decl. ¶ 8); and
- \$45 late payment penalty fee for portable breathalyzer device (Hicks Decl. ¶ 9).

ABK has full discretion over how much it charges and can change the fee amounts without notice. *See* Smith Decl. ¶¶ 7–8; Garrett Decl. ¶ 14; Ex. 1, ABK Interrogatory Responses (ROG 1). ABK also has discretion to decide how *often* supervisees test and for how *long*. *See* Huggins Decl. ¶ 7 (ABK employee “Kim also told me that she was not bound by the same laws as a regular probation officer and that she could drug test me every day if she wanted”); ECF 2-12 Sanctions List for ABK Offender Accountability Program (detailing sanctions ABK imposes, including increased frequency of drug testing and length of time on drug testing). With such discretion, ABK gets to decide how much profit it makes, untethered to the cost of these services and without consideration of supervisees’ legal innocence and/or ability to pay.

Supervisees routinely have to pay hundreds of dollars in fees to ABK every month. *See, e.g.,* Huggins Decl. ¶ 6 (approximately \$600 per month); Hawkins Decl. ¶ 14 (approximately \$600 to \$750 per month); Schwartz Decl. ¶ 11 (approximately \$600 to \$700 per month); Smith Decl. ¶ 16 (approximately \$600 to \$1,000 per month); Murray Decl. ¶ 12 (approximately \$600 to \$700 per month); Hicks Decl. ¶ 16 (approximately \$350 to \$400 per month); Stevens Decl. ¶ 10 (approximately \$600 per month); Miles Decl. ¶ 10 (approximately \$600 to \$730 per month); Bailey Decl. ¶ 9, 11 (over \$330 per month); Brown Decl. ¶ (approximately \$600 to \$800 per month).

Over the course of ABK supervision, which can last for years, ABK fees add up to *thousands* and even *tens of thousands* of dollars. Hawkins Decl. ¶ 2 (approximately \$15,000 so

far); Garrett Decl. ¶ 2 (approximately \$2,500 so far); Schwartz ¶ 2 (approximately \$20,000); Smith Decl. ¶ 23 (approximately \$6,000); Murray Decl. ¶ 2 (estimated \$20,000 over course of supervision); Hicks Decl. ¶ 2 (approximately \$13,000); Huggins Decl. ¶¶ 3, 22 (approximately \$3,000 so far); Stevens Decl. ¶¶ 2, 17 (approximately \$20,000 so far); Bailey Decl. ¶ 2 (approximately \$5,000 so far); Brown Decl. ¶¶ 2, 8 (more than \$5,000).

ABK fees are so exorbitant that they can add up to crushing percentages of supervisees' income. *See, e.g.*, Smith Decl. ¶ 18 (ABK fees accounting for approximately half of income); Brown Decl. ¶¶ 8, 12 (same); Murray Decl. ¶ 17 (approximately 60 to 70% of income); Miles Decl. ¶ 12 (60 to 100% of income). ABK charges fees even when supervisees are unemployed. Hicks Decl. ¶ 23 (unemployed at various points of ABK supervision); Smith Decl. ¶ 18 (same); Stevens Decl. ¶¶ 12–15 (same); Ex. 18, Declaration of Melina O'Brian ¶ 11 (same); Bailey Decl. ¶ 14 (same); Brown Decl. ¶ 11 (same); Hawkins Decl. ¶¶ 17–18 (unemployed).

ABK fees are so exorbitant that they can cost about as much as rent. *See, e.g.*, Schwartz Decl. ¶¶ 11, 15 (average monthly ABK fees between \$600 and \$700, exceeding monthly rent of \$550 per month); Smith Decl. ¶ 19 (average monthly ABK fees between \$600 and \$1,000 and rent of \$650); Huggins Decl. ¶¶ 6, 23–24 (average monthly ABK fees of about \$600 and rent of \$675).¹

ABK fees are so exorbitant that supervisees scramble to borrow and fundraise money. Some supervisees borrow money from friends and family to keep up and stay out of jail. Huggins Decl. ¶ 21; Hawkins Decl. ¶ 16; Schwartz Decl. ¶ 14; Smith Decl. ¶ 25; Garrett Decl. ¶ 19; Stevens Decl. ¶¶ 6, 12, 15; Brown Decl. ¶ 21; Miles Decl. ¶ 13 (“I remember telling a family member once

¹ The average rental price for a 1-bedroom apartment in Vanderburgh County is approximately \$690/month. *Indiana Fair Market Rent for 2021*, Rent Data, <https://www.rentdata.org/states/indiana/2021> (last visited Dec. 20, 2022) (listing \$670 as the average rental price for 1-bedroom apartments in 2021); *Homes For Rent in Vanderburgh County, IN*, Rental Source, <https://www.rentalsource.com/vanderburgh-county-in/> (last visited Dec. 20, 2022) (listing \$709 as the average rental price for 1-bedroom apartments in Dec. 2022).

that I needed to borrow money or I was going to jail”). Supervisees have had to sell personal possessions and even sell plasma to stay afloat. Garrett Decl. ¶ 19; Stevens Decl. ¶ 15. They have fundraised with their churches to cover ABK fees. Stevens Decl. ¶ 15.

ABK supervisees sometimes have to go without basic necessities such as food and housing to keep up with ABK fees. Bailey Decl. ¶ 16 (evicted from apartment because fell so behind on rent while trying to keep up with ABK fees); Smith Decl. ¶ 19 (moved in with family because could not afford rent while paying ABK); Stevens Decl. ¶ 15 (same); O’Brian Decl. ¶ 12 (same); Miles Decl. ¶ 14 (same); Brown Decl. ¶ 17–19 (same); Schwartz Decl. ¶¶ 15, 17 (cut back on food and ate mostly at work because could not afford to and pay ABK; lived with friend because could not afford own apartment).

ABK fees also interfere with parents’ ability to support their children. Schwartz Decl. ¶ 18 (“Because of ABK home detention, I also didn’t have money to support my kids as much as would have been best for them. I hated having to say no to their requests for things because I had to pay ABK about \$600 to \$700 every month instead”); Murray Decl. ¶ 21 (“I don’t have the money to support [my children], even for things like birthdays, because so much of my income is going to ABK”); Hawkins Decl. ¶ 21 (“I haven’t been able to pay child support since being on ABK supervision, except for the COVID stimulus checks, which went to paying child support”); Brown Decl. ¶ 25 (“I couldn’t support myself, much less support my children . . . while I was on ABK”).

ABK is aware that some supervisees struggle with poverty, yet ABK does not adjust its fees, instead advising supervisees to take measures such as going to the Salvation Army for meals (Murray Decl. ¶ 22) and to stop taking care of their children and getting their hair done (Smith Decl. ¶ 21). ABK even asks supervisees to provide “emergency” contact information so that ABK can contact the people listed in the event the supervisee cannot pay. Bailey Decl. ¶ 8.

C. ABK Imposes Exorbitant Fees to the Financial Benefit of All Defendants, Without Findings of Guilt or Considering Ability to Pay, and on Penalty of Incarceration

ABK charges fees (i) to financially benefit all Defendants, (ii) without any finding of guilt, (iii) without considering ability to pay for pretrial as well as sentenced supervisees, and (iv) on penalty of incarceration.

i. ABK Imposes, Collects, and Distributes Fees, Creating a Conflict of Interest That Violates Due Process (Count One)

ABK has full discretion over how much to charge in fees. ABK has full discretion over the frequency of such conditions such as drug testing, which directly translates into more profit for ABK because each test means more profit for ABK. *See* Huggins Decl. ¶ 7 (ABK employee “Kim also told me that she was not bound by the same laws as a regular probation officer and that she could drug test me every day if she wanted”). ABK also has the cooperation of county police and courts to arrest and incarcerate those who does not pay ABK whatever dollar amount it demands, *see* Section II.C.iii.a, *infra*.

Since ABK pays Vanderburgh County based on the number of drug and alcohol tests it administers, Ex. 2, ABK RFP Responses (RFP 2), each test also means more profit for Defendants Vanderburgh County and Kiely. Each ABK payment is labeled as a “referral” or “admin fee” and is used to pay for probation department salaries — a department that Defendant Kiely heads. *See* Ex. 3, Kiely Interrogatory Responses (ROG 1); Ex. 19, Vanderburgh County Auditor’s Office Reports on ABK Payments to Vanderburgh County’s Supplemental Adult Probation Circuit Court Fund (showing over \$77,000 paid by ABK to Vanderburgh County in 2022 as of September 2022, \$94,520 paid by ABK to Vanderburgh County in 2021, and \$89,043 paid by ABK to Vanderburgh County in 2020); Ex. 20, Emails and Invoices Reflecting ABK Payments to Vanderburgh County (showing \$101,612 paid by ABK to Vanderburgh County in 2022 as of December 2022 and

\$48,335 paid by ABK to Vanderburgh County in June through Nov. 2021). The amounts that ABK pays the county are significant. For example, at the end of 2021, the Supplemental Adult Probation Circuit Court Fund had a balance of \$771,157.93. That means that ABK's payments accounted for approximately 12% of the fund.² In 2020, the fund had a balance of \$662,939, thus ABK's payments accounted for more than 13% of the fund.³

ii. ABK Charges Fees for Pretrial Supervision in Violation of Due Process (Counts Two and Three)

ABK charges fees to pretrial supervisees, (a) regardless of how much bail supervisees have already had to pay and regardless of their legal innocence, (b) offering no opportunity to contest its fees, and (c) without crediting or reimbursing fees depending on case outcomes.

a. ABK Imposes Fees on Top of Bail and Without Findings of Guilt

Although pretrial arrestees are by definition legally innocent, they are forced to shoulder the costs of ABK supervision. Pretrial supervisees must pay bail separately from, and on top of, ABK fees. *See, e.g.*, Miller Decl. ¶¶ 3, 5 (about \$500 bail in addition to ABK fees); O'Brian Decl. ¶ 3 (about \$4,000 bail in addition to ABK fees).

b. ABK Pretrial Fees Are Indefinite and Cannot be Challenged

ABK pretrial fees remain ongoing until Defendants say otherwise. *See, e.g.*, Miller Decl. ¶¶ 2, 7, 15 (no end date to pretrial fees); Ex. 16, ABK Drug Testing Instructions ("Call ABK Daily (Mon-Sun) until your P.O. or the judge tells you to stop"). Pretrial supervision can last a very long time, even over a year. *See, e.g.*, O'Brian Decl. ¶¶ 2, 16.

² Gateway Indiana, *Vanderburgh County, Indiana Cash & Investments Combined Statement – 2021*, https://gateway.ifionline.org/report_builder/Default3a.aspx?rptType=af&rpt=cash_inv_combined&rptName=Cash%20and%20Investments (last visited Dec. 20, 2022).

³ Gateway Indiana, *Vanderburgh County, Indiana Cash & Investments Combined Statement – 2020*, https://gateway.ifionline.org/report_builder/Default3a.aspx?rptType=af&rpt=cash_inv_combined&rptName=Cash%20and%20Investments (last visited Dec. 20, 2022).

Despite the indefinite and sometimes lengthy nature of ABK's pretrial fees, there is no meaningful opportunity to be heard on the fees. Normally, supervisees (whether pretrial or post-sentence) only learn the true cost of ABK fees once they have met with ABK or probation staff. Smith Decl. ¶¶ 3–4; Hawkins Decl. ¶¶ 3–4; Schwartz Decl. ¶¶ 6, 10; Miller Decl. ¶¶ 3, 5; Murray Decl. ¶¶ 7–11; Stevens Decl. ¶ 8. As discussed more fully *infra*, Section II.C.iii, ABK does not conduct any kind of review of its fees over the course of supervision nor reduce or waive its fees.

c. ABK Does Not Credit ABK Fees Towards Sentences nor Offer Reimbursements in the Event of Dismissals and Acquittals

In the event that a supervisee goes from ABK pretrial supervision to supervision as part of their sentence, supervisees are not given credit for any fees previously paid. Huggins Decl. ¶ 4. If a supervisee's case is dismissed or if a supervisee is found not guilty, ABK provides no reimbursement of ABK fees. Miller Decl. ¶ 7. If a supervisee pays to have a drug test retested and the test turns out to be negative, the supervisee is not reimbursed either. Stevens Decl. ¶ 16.

iii. ABK Charges Fees Without Considering Ability to Pay and Punishes Those Unable to Pay in Violation of Equal Protection and Due Process (Counts Four and Five)

Even though supervisees must pay for ABK supervision, rarely do Vanderburgh County judges ask if supervisees can afford it, and probation staff and ABK staff never do. Huggins Decl. ¶¶ 4, 7; Hicks Decl. ¶ 6; Murray Decl. ¶ 11; Garrett Decl. ¶ 3; Miller ¶ 11; Stevens Decl. ¶ 5; Miles Decl. ¶ 4; Bailey Decl. ¶ 3–4, 10, 12; Brown Decl. ¶ 7. ABK acknowledges that it does not determine ability to pay. Ex. 1, ABK Interrogatory Responses (ROG 1).

In addition to not considering ability to pay, ABK does not offer fee reductions or waivers (nor does any Defendant, for that matter). When supervisees express their inability to afford ABK fees, ABK's response is to keep the fees as they are and to reiterate to supervisees that not paying means going to jail. Huggins Decl. ¶ 11; Miller Decl. ¶ 6; Schwartz Decl. ¶ 23 ("The first time I

was late in paying home detention fees, ABK employee Kim called me and asked, ‘Where’s my money?’ I was scared of going back to jail and it made me feel like my entire life was in her hands.”); Brown Decl. ¶ 24 (describing how on “one occasion [when] I missed a payment . . . Kim called me and asked, “Where’s my money?”); Hicks Decl. ¶ 24 (“I told Kim of ABK . . . that I couldn’t afford the fees. The response I got was essentially . . . if I couldn’t pay, then I would have to go back to jail because not paying was a violation of my conditions.”); Stevens Decl. ¶ 14 (ABK employee “Kim said . . . ‘don’t think I won’t PTR your ass and send you back to prison, if you don’t have the money by 4 o’clock’ today”). ABK’s standard contracts confirm the absence of a forum to challenge the fees, nor the existence of fee reductions or waivers for those unable to afford the fees. *See* ECF 2-4, Sample ABK Contract (“[Y]ou agree to pay all ABK Tracking charges incurred in full”). ABK claims that it offers fee reductions “if asked,” but admits that it does not determine ability to pay, nor show evidence of any consistent policy on how to adjust fees based on ability to pay. *See* Ex. 1, ABK Interrogatory Responses (ROG 1).

Sometimes, ABK even insults supervisees for asking for help. Huggins Decl. ¶ 11 (“The first time I didn’t have the money for my drug test . . . [ABK employee] Kim said that ‘not having money was not an excuse.’ She . . . call[ed] me ‘lazy’ and t[old] me to ‘stop living off of’ my wife.”); Smith Decl. ¶ 21 (ABK employee “Kim said to me that if I stopped taking care of my kids and getting my hair done, I wouldn’t be behind on my fees.”).

When supervisees ask for help, ABK also blurs professional and personal lines between staff and supervisees by encouraging supervisees to become involved in the family businesses of ABK employees. *See* Brown Decl. ¶¶ 11–16 (describing how he and other ABK supervisees worked for ABK employee Kim’s stepfather’s business while on ABK supervision); Smith Decl.

¶ 20 (describing how ABK employee Kim suggested Ms. Smith give up her soon-to-be-born daughter to ABK employee Kim's sister's adoption agency).

The consequences for not paying ABK whatever fees it demands when it demands them are severe. ABK (a) refuses to test those who cannot pay, setting them up for jail time; (b) files PTRs to have supervisees jailed and revoked from ABK supervision; and (c) threatens jail time.

a. ABK Refuses to Test Those Who Cannot Pay in Full, Setting Supervisees Up for Arrest Due to Inability to Pay

ABK refuses to test supervisees who cannot pay the full amount of a drug/alcohol test in cash prior to testing. Huggins Decl. ¶ 9 (“ABK does not allow me to drug test if I don’t have the money. . . . On one occasion, ABK officers refused to let me drug test because I was \$5 short.”); Hawkins Decl. ¶ 12; Miller Decl. ¶ 9; Schwartz Decl. ¶ 25; Stevens Decl. ¶ 11; Miles Decl. ¶ 6 (“Kim said that if I came in to drug test and I didn’t have the money to test, it would be considered an automatic fail”); O’Brian Decl. ¶ 6; Brown Decl. ¶ 22; ECF 41-1 at p. 54, Oct. 24, 2022 Petition to Revoke for Plaintiff Huggins (“[T]he defendant had no test fee at ABK Tracking, thus was not tested”); Ex. 13, ABK Substance Abuse Testing Procedure (“Make sure you never arrive to the ABK Tracking office for your random drug test without the exact funds for the test”).

If the supervisee cannot pay, ABK will sometimes have the person arrested while the person is still at ABK’s office. Garrett Decl. ¶ 9 (“ABK staff say that not having money to pay for your test is the same as a failure (same as a positive test), and ABK will call the police right then and there to arrest you at ABK’s office”); Murray Decl. ¶ 15 (“When someone shows up to drug test and they don’t have the money, ABK makes them sit in a secluded area in the back and wait for the police to show up and arrest them.”); Smith Decl. ¶ 25 (“There were times I would call before my drug tests and explain that I didn’t have the money. The response I got from ABK staff was that if I didn’t have the money, I would go to jail. . . . There were times when I was at the

ABK office, and I saw other people go to jail because they couldn't pay for their drug tests ABK staff would have people sit in the back, in another waiting area, and wait for the police to take them to jail.”); Brown Decl. ¶ 22 (“ABK would make supervisees wait in the back area of their office for the police to come and arrest them when they didn't have the money for their test.”); O'Brian Decl. ¶ 13 (“While at ABK, I've seen other people taken to jail over unpaid fees or positive drug tests. The officers come into the ABK building and arrest people”). From January 1, 2020 through November 28, 2022, ABK called Vanderburgh County Central Dispatch 643 times — the equivalent of more than one call every other day over an approximately three-year period. Ex. 21, Declaration of Natasha Baker ¶ 4. Of those 643 calls, 589 calls (or approximately 92%) were for “order[s] to hold PTR,” referring to ABK's requests to arrest. *Id.* Of those 643 calls, 379 calls (or approximately 59%) ended in an arrest. *Id.*

b. ABK Files PTRs to Have Supervisees Jailed and Removed from ABK Supervision for Those Who Cannot Pay

ABK staff tell supervisees that if they do not pay their fees, ABK will “PTR” them, which stands for “petition to revoke.” Murray Decl. ¶ 14; Miles Decl. ¶ 5 (ABK employee Kim said “I would get PTR'd if I didn't pay”); Stevens Decl. ¶ 14 (ABK employee “Kim said . . . ‘don't think I won't PTR your ass and send you back to prison, if you don't have the money by 4 o'clock' today”).

What ABK then does is file a violation report with the court, probation department, and/or prosecutor. *See, e.g.*, Huggins Decl. ¶ 12 (“Because I couldn't pay for my drug test, Officer Kim filed a Petition to Revoke (PTR) with the court to send me back to jail.”); Hicks Decl. ¶ 14 (“On another occasion, ABK PTR'd me claiming I had unpaid fees.”); ECF 2-8, ABK Violation Report for David Carney (asking for sentence to be revoked in part due to unpaid fees); Ex. 1, ABK Interrogatory Responses (ROG 1) (acknowledging that when a supervisee is “unable to afford”

electronic home detention fees, ABK “notifies the courts”). The relevant probation officer or prosecutor will then file a PTR with the court, copying ABK’s language verbatim. For example:

- *Compare* ECF 2-10, March 29, 2022 ABK Violation Report for Plaintiff Huggins with ECF 2-9, March 29, 2022 Petition to Revoke for Plaintiff Huggins (using identical language to request revocation of Plaintiff Huggins’ bond due to inability to afford ABK drug testing fees);
- *Compare* ECF 41-1 at p. 50, May 17, 2022 ABK Violation Report for Plaintiffs Huggins with ECF 41-1 at p. 48, May 17, 2022 Petition to Revoke for Plaintiff Huggins (using identical language to request revocation of Plaintiffs’ Huggins sentence due to inability to afford ABK drug testing fees);
- *Compare* Ex. 7, Dec. 1, 2020 ABK Violation Report for Warren G. Hawkins Jr. with Ex. 22, Dec. 2, 2020 Petition to Revoke for Warren G. Hawkins Jr. (using identical language to request revocation of Mr. Hawkins’ sentence due to inability to afford ABK electronic home detention fees); and
- *Compare* Ex. 23, Sept. 22, 2020 ABK Violation Report for Justin Young with ECF 2-5, Sample Petition to Revoke from Prosecutor Douglas Brown Prosecutor Douglas (both documents stating, “ABK Tracking as [*sic*] that Mr. Young be removed from EHD [electronic home detention] while in court today since he can not afford it”)

Had supervisees been able to afford ABK’s fees, ABK would not have filed these violation reports.

c. ABK Threatens to Jail Those Who Cannot Afford ABK’s Fees

Along with threats of PTRs, ABK routinely threatens supervisees with incarceration to induce payment of fees. *See* Huggins Decl. ¶ 12 (“Officer Kim told me that if I didn’t have the money to pay my ABK fees, I would go back to jail.”); Miller Decl. ¶ 6 (probation “[s]taff said that if you don’t pay, it’s considered a failure to appear and a bench warrant would be issued for your arrest, which means jail”); Murray Decl. ¶ 14 (“[ABK Officer] Kim said if you don’t pay, you can be PTR’d and go back to jail, and then it’s up to the judge what to do from there.”); Smith Decl. ¶ 25 (ABK staff said that “if I didn’t have the money, I would go to jail”); Garrett Decl. ¶¶ 9, 16 (“ABK staff say that not having money to pay for your test is the same as a failure (same as a positive test), and ABK will call the police right then and there to arrest you at ABK’s office. . . .

When I told my probation officer I couldn't afford the fees, he advised me to 'Figure it out or [I would] go to jail'); Hicks Decl. ¶¶ 6, 11 ("Kim said that I had to come up with the money or I would go to jail. . . . ABK had a sign on their window that explained that you would go to jail if you didn't have the money for your drug test"); Brown Decl. ¶ 22 ("ABK staff told me I would go to jail if I didn't have the money" for drug/alcohol testing); Stevens Decl. ¶ 14 (ABK employee "Kim said . . . 'don't think I won't PTR your ass and send you back to prison, if you don't have the money by 4 o'clock' today"); Bailey Decl. ¶ 6 ("ABK staff told me that if I didn't have the money, it was a violation and I was either going to jail or going to have to see my probation officer); Miles Decl. ¶ 5 (ABK employee Kim said "a PTR meant that either I would have to go to court or that the police would pick me up directly from ABK and take me to jail"). In one instance, supervisee Hicks was held in a back room due to allegedly being behind on her fees; ABK staff told her they had "the ability to take [her] to jail right then and there." Hicks Decl. ¶ 14. Ms. Hicks avoided jail only after ABK staff let her leave to go to the bank to show proof of payment. *Id.*

ABK's standard contract echoes this threat of jail time, warning that "pay[ing] all ABK Tracking charges incurred in full" is a condition of ABK supervision and that "failure to comply with the rules and regulations . . . could result in filing a PTR or your arrest and subsequent detainment." ECF 2-4 at p. 2, Sample ABK Contract.

ABK knows, or should know, that its threats can materialize into actual jailings, underscoring the harmful nature of ABK's threats. On ABK's allegation that supervisee Smith was behind on her fees, without first having a court hearing, Ms. Smith was arrested and jailed. Smith Decl. ¶¶ 28–30. Many declarants have seen others be arrested at ABK for non-payment of fees. Murray Decl. ¶ 15 ("When someone shows up to drug test and they don't have the money, ABK makes them sit in a secluded area in the back and wait for the police to show up and arrest them.");

Smith Decl. ¶ 25 (“There were times when I was at the ABK office, and I saw other people go to jail because they couldn’t pay for their drug tests ABK staff would have people sit in the back, in another waiting area, and wait for the police to take them to jail.”); Hawkins Decl. ¶ 13 (“If you don’t pay for your test, ABK says it’s a failure . . . and ABK will call the police right then and there to come arrest people at ABK’s office. ABK makes people sit in a certain section of their office while they wait for the police to come.”).⁴ Police will even show up at supervisee’s place of employment to arrest them based on ABK’s allegations. *See, e.g.*, Miles Decl. ¶ 19 (describing police showing up at his workplace and telling him “ABK had PTR’d me and they were there to arrest me” due to missing a drug test because he could not leave work). The police are also highly responsive to ABK’s calls to Central Dispatch, with 643 police runs to ABK in an approximately three-year period, with 92% of them in response to a PTR hold request. Ex. 21, Baker Decl. ¶ 4.

ABK’s push to limit sentencing options for those who cannot afford ABK’s fees is another example of how ABK is aware, or should be aware, that its threats of jail can be realized. For example, ABK (along with county prosecutors parroting ABK’s requests), will petition to remove supervisees from electronic home detention who cannot afford it. *See, e.g.*, ECF 2-5, Sample Petition to Revoke from Prosecutor Douglas Brown (“ABK Tracking as[ked] that Mr. Young be removed from EHD [electronic home detention] while in court today since he cannot afford it. . . . the State of Indiana would respectfully request that the Defendant’s bond . . . be revoked”). Electronic home detention is an alternative to a carceral sentence. Thus a supervisee who is denied electronic home detention as a sentence (because he cannot afford it) will be sent to prison *because of his poverty*.

⁴ ABK will also have supervisees arrested on site for other violations. Declarant O’Brian was taken to jail directly from ABK’s office over a false positive drug test. O’Brian Decl. ¶ 14.

The risk of incarceration is so real that supervisees will do whatever they can to keep up with fees. They borrow money from friends and family. Huggins Decl. ¶ 21; Hawkins Decl. ¶ 16; Schwartz Decl. ¶ 14; Smith Decl. ¶ 25; Garrett Decl. ¶ 19; Stevens Decl. ¶ 14; Miles Decl. ¶ 13; O’Brian Decl. ¶ 5; Brown Decl. ¶ 21. They sell their cars, giving up their mode of transportation to avoid jail. Stevens Decl. ¶¶ 14–15. They sell plasma. Garrett Decl. ¶ 19. They go without food. Schwartz Decl. ¶ 17; Murray Decl. ¶ 22. They move in with family or friends, unable to afford their own place. Schwartz Decl. ¶ 15; Smith Decl. ¶ 19; Miles Decl. ¶ 14; Brown Decl. ¶ 17. They rely on government assistance programs. Murray Decl. ¶ 19. They stop paying child support. Hawkins Decl. ¶ 21.

III. This Court Should Preliminarily Enjoin ABK from Charging Fees to Plaintiffs and the Putative Class

Plaintiffs’ motion for a preliminary injunction should be granted because: (A) Plaintiffs and the putative class will continue to suffer irreparable harm without an injunction; (B) traditional legal remedies are inadequate to remedy the harm; (C) Plaintiffs are likely to succeed against ABK on the merits of Counts One, Two, Three, Four, and Five of Plaintiffs’ Complaint because ABK violates due process and equal protection; and (D) the balance of harms weighs heavily in favor of a preliminary injunction because all parties, as well as the public, share an interest in supervision mechanisms that conform to the Constitution, and Vanderburgh County judges will still be able to impose supervision conditions where appropriate. *See Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 24 F.4th 640, 644 (7th Cir. 2022) (reviewing factors for a preliminary injunction).

A. ABK Inflicts Irreparable Harm

Constitutional violations are in and of themselves a form of irreparable harm, and Plaintiffs have alleged several such violations as to due process and equal protection. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (“When an alleged deprivation of a constitutional right

is involved, most courts hold that no further showing of irreparable injury is necessary”); *see also* *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm”); *Baskin v. Bogan*, 983 F.Supp.2d 1021, 1028 (S.D. Ind. 2014) (“[A] constitutional violation . . . is indeed irreparable harm for purposes of preliminary injunctive relief.”); *Planned Parenthood of Ind. and Ky., Inc. v. Comm’r*, 194 F.Supp.3d. 818, 835 (S.D. Ind. 2016) (finding “presumption of irreparable harm also applies to equal protection violations”).

Among the constitutional violations at issue here is incarceration in violation of due process. “Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also* *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); *Sample v. Diecks*, 885 F.2d 1099, 1109 (3d Cir. 1989) (“Next to bodily security, freedom of choice and movement has the highest place in the spectrum of values recognized by our Constitution” in discussing irreparable harm caused by incarceration past inmate’s release date).

The irreparable harm of unconstitutional jailing is exacerbated by the dangers that go hand-in-hand with incarceration. Each jailing inflicts indignities, including intrusive body searches, the ever-present risk of violence, and “crowded, unsanitary, and dangerous living conditions.” *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 333 (2012) (acknowledging standard jail conditions). The Vanderburgh County jail in particular is dealing

with ongoing problems of inadequate mental health services⁵ and overcrowding,⁶ which exacerbate the already-horrible conditions typical of jails. Pretrial detention has unique harms; in addition to the harms of job loss, disruption to family life, and idleness due to an absence of programming inherent to incarceration, pretrial detention also makes it exceedingly difficult for a defendant to prepare his defense. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972).

ABK's fees are also so exorbitant that ABK irreparably harms supervisees' livelihoods. Supervisees have to go without basic necessities, forego care for their children, lose their housing, sell plasma and personal possessions, and go into debt to keep up with ABK's fees. *See* Section II.B, *supra*. The amount of time that supervisees are subject to supervision can also be extended if they cannot afford ABK's fees, *see supra* Section II.A.i, II.B; supervisees such as Plaintiff Huggins have no way of getting back that extra supervision time.

Without intervention from this Court, Plaintiffs and putative class members will continue to be charged exorbitant fees that wreak irreparable havoc on their lives. As long as ABK is allowed to charge fees, supervisees' livelihoods and liberty will remain under threat simply because they cannot afford ABK's exorbitant fees. A preliminary injunction is required to end this irreparable harm.

B. Traditional Methods Do Not Offer an Adequate Remedy for the Irreparable Harm that ABK Causes

ABK causes irreparable harm to Plaintiffs' and putative class members' livelihoods, and there is no adequate remedy at law for such harm. Damages remedies can be inadequate in a few scenarios, and one of those scenarios is when "the plaintiff is so poor that he would be harmed in

⁵ Sarah Loesch, *On mental health in jails, Vanderburgh sheriff candidates have very different views*, Evansville Courier & Press (Oct. 7, 2022), <https://www.courierpress.com/story/news/politics/elections/2022/10/07/vanderburgh-sheriff-hopefuls-are-split-on-mental-health-in-jails/69525412007/>.

⁶ Sidney Spencer, *Vanderburgh County Jail continues to battle with inmate overcrowding*, 44 News (Oct. 13, 2022), https://www.wevv.com/news/vanderburgh-county-jail-continues-to-battle-with-inmate-overcrowding/article_63e5690a-4b7c-11ed-9909-3bf7d6aa2d69.html.

the interim by the loss of” the money at issue. *Hamlyn v. Rock Island Cnty. Metro. Mass Transit Dist.*, 960 F.Supp. 160, 162 (C.D. Ill. 1997). The monetary damages that Plaintiffs seek from ABK are an inadequate remedy for those whose livelihoods have been threatened because of how exorbitant ABK fees are.

The present case presents a similar situation to that in *Lee v. Christian Coal. of Am., Inc.*, 160 F.Supp.2d 14 (D.D.C. 2001). There, the court found that an employer’s discharging of employees (in response to their filing a discrimination complaint) constituted irreparable harm and issued a preliminary injunction because the employees were “subsistence employees, who need their meager wages to support their families.” *Id.* at 32. Were the employees to lose their jobs, they “may have great difficulty finding other work to avoid insolvency, eviction, and even to obtain food.” *Id.* The employees provided declarations talking about how reducing their hours or losing their jobs would cause them to fall behind on their bills, be unable to provide for their children, and might require them to use government assistance programs to survive. *Id.* at 32–33. As detailed above in Section II.B, *supra*, ABK fees are so oppressive that they can constitute substantial portions of supervisees’ income and interfere with their ability to pay for necessities. “The inability to pay utility bills or to feed one’s children or the risk of being evicted from one’s home, amounts to irreparable injury that money damages cannot remedy.” *Lee*, 160 F.Supp.2d at 32. Waiting years to be compensated is not an adequate remedy when supervisees cannot afford basics such as housing and food *now*.

What is more, ABK supervision makes it more difficult to hold down the very jobs supervisees need to be able to afford ABK fees, along with their other financial obligations. *See* Garrett Decl. ¶ 11–12 (jailed for missing random ABK drug test because supervisee was at work and would have risked losing job to go to ABK); Hicks Decl. ¶ 23 (describing how frequency of

random ABK drug testing made it difficult to maintain employment); Miles Decl. ¶ 19 (jailed for missing random ABK drug test because he could not leave work); Miles Decl. ¶ 17 (describing ABK’s threats to “PTR [him] and send the police to come arrest” him if ankle monitor ever died despite inability to charge monitor while at work).

Unlawful incarceration — another form of irreparable harm that Defendant ABK causes — also has no adequate remedy at law. *See Stone v. Jeffreys*, No. 21 C 5616, 2022 WL 4596379, at *3 (N.D. Ill. Aug. 30, 2022); *Cobb v. Green*, 574 F.Supp. 256, 262 (W.D. Mich. 1983) (“There is no adequate remedy at law for a deprivation of one’s physical liberty”); *see also Flower Cab Co. v. Petite*, 685 F.2d 192, 195 (7th Cir. 1982) (noting that in prison conditions cases, “the quantification of injury is difficult and damages are therefore not an adequate remedy”).

Plaintiffs’ and putative class members’ liberty and livelihoods are at stake, and these vital interests have no adequate remedy at law. Therefore, a preliminary injunction is necessary.

C. Plaintiffs Are Likely to Succeed on the Merits Because ABK Creates Conflicts of Interests, Exacts Punishment Without Guilt, and Criminalizes Poverty in Violation of Plaintiffs’ Due Process and Equal Protection Rights

Plaintiffs are likely to prevail on the merits because ABK violates their constitutional rights. ABK unconstitutionally deprives Plaintiffs and the putative class of their property and freedom because, among other reasons, ABK (i) creates a financial conflict of interest that deprives Plaintiffs and the putative class of due process (Count One); (ii) exacts punishment without guilt in violation of due process (Counts 2 and 3); and (iii) criminalizes poverty in violation of equal protection (Count 4) and due process (Count 5).

i. ABK Imposes, Collects, and Distributes Fees, Creating a Conflict of Interest That Deprives Plaintiffs and the Putative Class of Due Process (Count One)

ABK imposes, collects, and distributes fees in such a way that all Defendants are incentivized to keep supervisees on as many conditions for as long as possible, generating more

profit along the way. Due process prohibits neutral judicial officers and law enforcement actors from having a “direct, personal, and substantial pecuniary interest” in the cases they prosecute and supervise, *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927), yet all Defendants have a financial stake in ABK’s fees, rendering it impossible for them to make neutral decisions about conditions (which supervisees must pay ABK for), the frequency of conditions, the fee amounts, and the consequences for nonpayment.

ABK has a conflict of interest because ABK gets to set its own fees while also having influence over the conditions and length of supervision that correspond with those fees, thereby being incentivized to maximize conditions so as to maximize its profits. ABK has full discretion over how much to charge in fees. *See* Section II.B, *supra*. According to Defendant Vanderburgh County, ABK also has discretion to decide how much of the fees it collects are sent to the County and Judge Kiely. *See* ECF 40 at p. 12. ABK also has full discretion over the frequency of conditions such as drug testing, which directly translates into more profit for ABK because each test means more profit for ABK. *See* ECF 2-3, Huggins Decl. ¶ 7 (ABK employee “Kim also told me that she was not bound by the same laws as a regular probation officer and that she could drug test me every day if she wanted”); ECF 2-12 Sanctions List for ABK Offender Accountability Program (detailing sanctions ABK imposes, including increased frequency of drug testing and length of time on drug testing). ABK also has the cooperation of county law enforcement and courts to arrest and incarcerate those who does not pay ABK whatever dollar amount it demands. *See, e.g.*, Ex. 21, Baker Decl. ¶ 4 (discussing Central Dispatch run report showing 589 police runs to ABK from Jan. 1, 2020 to Nov. 28, 2022 for “Order to Hold PTR” and 379 arrests over same time period).

ABK also has say over how long someone is on ABK supervision and what kind of sentences criminal defendants can serve. *See* ECF 2-12 Sanctions List for ABK Offender

Accountability Program (detailing sanctions ABK imposes, including increased frequency of drug testing and length of time on drug testing). Plaintiff Huggins, for example, was supposed to end the electronic home detention portion of his sentence in August 2022, yet he continues to serve his sentence to this day because ABK sought to remove Plaintiff Huggins due to his inability to pay; had Plaintiff Huggins been able to afford ABK's fees, he would have been done with (at least that portion of) his sentence months ago. *See* Section II.A.i, *supra*. Because ABK's "income, in the form of . . . fees, depend[s] directly on how long each probationer remain[s] on the hook," ABK cannot "determine [supervision] matters impartially." *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1243–44 (11th Cir. 2020).

Because ABK pays Defendant Vanderburgh County for every drug and alcohol test it administers, and that money is used to fund the probation department, which Defendant Kiely oversees, Defendants Vanderburgh County and Kiely are incentivized to have more people on ABK supervision for longer. ABK pays Vanderburgh County \$1 per alcohol test it administers and \$5 for each drug test it administers, creating an incentive to test supervisees as much as possible so as to generate as much profit as possible. Ex. 2, ABK RFP Responses (RFP 2). That money is paid into the probation department fund. Ex. 19, Reports from Vanderburgh County Auditor's Office. Defendant Kiely is the head of the probation department. Ex. 3, Defendant Kiely Interrogatory Responses (ROG 1). The amounts that ABK pays to the probation fund make up a significant portion of the fund. Ex. 19, Reports from Vanderburgh County Auditor's Office. Even if ABK fees do not fund Defendant Kiely's salary, the "principle of disqualification applies even if the pecuniary interest is only an indirect outgrowth of a public official's desire to protect official funds." *Meyer v. Niles Township*, 477 F. Supp. 357, 263 (N.D. Ill. 1979).

ABK operates under the assumption that county police and courts will enforce its financial interest by incarcerating those who do not pay. Plaintiffs and the putative class have a “constitutional right to have [their conditions] decided by . . . unbiased, disinterested” officials. *Meyer*, 477 F.Supp. at 362. ABK denies Plaintiffs and the putative class of this right as a result of the conflicts it creates, and thus this Court should order a Preliminary Injunction as to Count One.

ii. By Charging Pretrial Supervisees Fees, ABK Exacts Punishment Without Guilt and Deprives Pretrial Supervisees of Their Property Without Due Process (Counts Two and Three)

ABK charges pretrial fees in violation of due process. Pretrial supervisees have a property interest in money paid towards pretrial ABK fees, which often amount to hundreds of dollars per month. *See supra*, Sections II.A, II.B. Due process requires that pretrial arrestees have a meaningful opportunity to challenge these deprivations, by a state actor,⁷ of their property. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). “Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.” *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). ABK’s imposing and collecting of pretrial fees does not withstand the test.

ABK’s pretrial fees affect Plaintiff Miller’s and pretrial putative class members’ property interests. Pretrial arrestees have “an obvious interest” in such property. *Nelson*, 137 S. Ct. at 1255. A state actor may not, consistent with due process, “presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.” *Id.* at 1256. For example, bail payments

⁷ ABK is a state actor for purposes of this case because it acts under color of law in providing traditional government services. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 n. 1 (7th Cir. 2004) (private entity is liable under *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) for constitutional violations it engages in while “acting under color of state law as a contractor performing the public function of running” pretrial and probation conditions); *see also Shields v. Ill. Dept. of Corr.*, 746 F.3d 782 (7th Cir. 2014) (noting every circuit court that has addressed the issue has extended the *Monell* standard to private corporations acting under color of state law). ABK is therefore “treated the same as a municipality for purposes of Section 1983” liability. *Woodward*, 368 F.3d at 927 n. 1; *see also Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 766 n.6 (7th Cir. 2002) (“For purposes of § 1983, we have treated a private corporation acting under color of state law as though it were a municipal entity.”).

imposed prior to trial must meet stringent due process requirements, given that in “our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *See U.S. v. Salerno*, 481 U.S. 739, 755 (1987); *see also Fry v. State*, 990 N.E.2d 429, 434 (Ind. 2013) (“The right to freedom by bail pending trial is an adjunct to that revered Anglo–Saxon aphorism which holds an accused to be innocent until his guilt is proven beyond a reasonable doubt. Unless that right is preserved, the presumption of innocence, secured only after centuries of struggle, will lose its meaning.”) (cleaned up). Pretrial fees are subject to the same constitutional protections as bail because they are also a condition of pretrial freedom.

The risk of “erroneous deprivation” of pretrial supervisees’ property interests is great because ABK charges fees without any procedural protections. Because the goal of due process is to minimize the risk of erroneous deprivations, the amount and quality of process due varies with the level of deprivation. *See, e.g., Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (the “quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error”); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process depends on the “weight” and “nature of the . . . interest” at issue and is “flexible and calls for such procedural protections as the particular situation demands”). When the deprivation rises to the level of incarceration or fines via criminal sentence, due process requires the right to a criminal trial. *See, e.g., Duncan v. State of La.*, 391 U.S. 145, 149 (1968) (incorporating Sixth Amendment right to trial by jury against the states via the 14th Amendment and holding that right to jury trial applies to Louisiana misdemeanor law that provided for prison time and a fine). When the deprivation is pretrial, such as via pretrial detention, bail, or pretrial fees, due process does not need to be as robust as a full criminal trial, but it must still be robust. *See Salerno*, 481 U.S. at 751–52, 755; *Nelson*, 137 S. Ct. at 1256 (state actor may not, consistent

with due process, “presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.”); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777–91 (9th Cir. 2014) (discussion of process due in pre-trial context).

ABK’s pretrial fees do not meet *Salerno*’s constitutional standard. First, ABK charges fees to pretrial arrestees, who have not been convicted and are thus legally innocent, *see* Section II.C.ii, *supra*, undermining the presumption of innocence central to the American (and Hoosier) system of justice. *See Salerno*, 481 U.S. at 755; *Fry*, 990 N.E.2d at 434. Second, pretrial arrestees have no option to challenge the fees, including no option to be heard on ability to pay. *See* Section II.C.ii, *supra*. Third, ABK imposes fees indefinitely. Unlike bail which, once posted, is satisfied, ABK pretrial fees remain ongoing until Defendants say otherwise. *See, e.g.*, ECF 2-7, Miller Decl. ¶¶ 2, 7, 15 (no end date to pretrial fees); Ex. 16, ABK Drug Testing Instructions (“Call ABK Daily (Mon-Sun) until your P.O. or the judge tells you to stop”). Pretrial supervision can last a very long time, even over a year. *See, e.g.*, O’Brian Decl. ¶¶ 2, 16. This indeterminacy burdens arrestees’ exercise of other constitutional rights, including the right to trial, because going to trial (rather than taking a plea) prolongs the pretrial phase, increasing the total amount of pretrial fees paid to ABK. Fourth, pretrial arrestees are neither credited for fees if they are later found guilty and a fine is imposed, nor are arrestees refunded fees when charges are dismissed or an acquittal is obtained. *See* ECF 2-3, Huggins Decl. ¶ 4 (no credit towards sentence for pretrial fees paid); ECF 2-7, Miller Decl. ¶ 7 (probation officer noted that fees are not refunded if case is dismissed). Pretrial arrestees supervised by ABK lack any meaningful opportunity to challenge this deprivation of their property, therefore the risk that they will be erroneously deprived of their property is great.

Finally, there is no government interest at stake because ABK has no right to pretrial fees. ABK imposes pretrial fees on legally innocent individuals in violation of their constitutional rights.

ABK has “no interest in withholding . . . money to which [it] . . . has zero claim of right.” *Nelson*, 137 S. Ct. at 1257. ABK has no legitimate claim to pretrial fees charged to supervisees and thus there is no government interest to consider in evaluating the due process required as applies to ABK pretrial fees.

Each *Mathews* factor weighs in Plaintiffs’ favor. Whether treated as punishment or bail, ABK’s pretrial fees deprive supervisees of their property without due process, and therefore this Court should issue a preliminary injunction on Counts Two and Three of the Complaint.

iii. ABK’s Failure to Consider Ability to Pay Violates Due Process and Equal Protection Because It Criminalizes Poverty (Counts Four and Five)

ABK charges fees for both pretrial and sentenced supervisees without considering ability to pay. *See* Section II.C.iii, *supra*. By doing so, ABK pushes already-indigent supervisees deeper into poverty and creates debtors’ prisons. ABK knows that some supervisees cannot afford ABK’s unconscionable fees, *see* Sections II.B, II.C.iii, *supra*, yet this knowledge does not translate into fee reductions or waivers, nor eliminate the punishment that comes with nonpayment. *See id.*

Because ABK does not adjust its fees for indigent supervisees like Plaintiff Huggins, the punishment ABK inflicts on indigent supervisees is unconstitutional. Without an exception for indigence, penalties for nonpayment are unconstitutional. *See Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *Tate*, 401 U.S. at 398; *Mayer v. Chicago*, 404 U.S. 189, 197–98 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970). To determine whether such an unconstitutional penalty exists in the context of “the treatment of indigents in our criminal justice system . . . due process and equal protection principles converge.” *Bearden*, 461 U.S. at 664–65. Courts must conduct “a careful inquiry into such factors as” (1) “the nature of the individual interest affected,” (2) “the extent to which it is affected,” (3) “the rationality of the connection between legislative means and purpose,” and (4) “the existence of alternative means for effectuating the purpose” to determine

whether the treatment is constitutional. *Id.* at 666–67. All *Bearden* factors favor a finding that ABK’s penalizing of indigent supervisees who cannot pay ABK is constitutionally impermissible.

Heightened scrutiny is the applicable standard to assess ABK’s fees under a *Bearden* framework because the liberty interest of indigent persons is at stake. The due process clause “provides heightened protection against government interference with certain fundamental rights and liberty interests” such as freedom from detention. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997); *see also Salerno*, 481 U.S. at 748 (only “compelling” government interests can justify pre-trial detention); *Williams*, 399 U.S. at 241–42 (the “passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process”). Thus, ABK’s fees must be analyzed through a heightened scrutiny lens.

ABK fees greatly impact Plaintiffs’ and the putative class’ property and liberty interests. First, the interests in the fee amounts as well as freedom from incarceration are significant. Second, ABK significantly and adversely affects those interests. ABK charges exorbitant fees, routinely amounting to hundreds of dollars per month. *See supra* Sections II.A, II.B. ABK fees regularly amount to a significant percentage of supervisees’ income. *See, e.g.*, Smith Decl. ¶ 18 (ABK fees equivalent to approximately half of income); Brown Decl. ¶¶ 8, 12 (same); Murray Decl. ¶ 17 (approximately 60 to 70% of income); Miles Decl. ¶ 12 (almost entire income). Supervisees struggle to afford even basic expenses while having to pay ABK. *See supra* Section II.B. ABK fees massively infringe on supervisees’ property interests and livelihoods.

Moreover, the liberty interest in freedom is among the strongest constitutional interests. *See Salerno*, 481 U.S. at 751 (describing the pre-trial liberty interest as “fundamental”); *see also Lee v. City of L.A.*, 250 F.3d 668, 683 (9th Cir. 2001) (“The Supreme Court has recognized that an individual has a liberty interest in being free from incarceration absent a criminal conviction”);

Sample, 885 F.2d at 1109 (“Next to bodily security, freedom of choice and movement has the highest place in the spectrum of values recognized by our Constitution”).

As to the third *Bearden* factor, ABK’s fees do not rationally promote plausible legislative purposes. The scheme clearly contravenes one legislative purpose central to Indiana law: pretrial freedom. *See* Ind. Const. art. 1, § 17 (establishing pretrial freedom as the default in cases other than murder and treason); Ind. Code § 35-33-8-3.3 (requiring consideration of ability to pay for pretrial arrestees and denying incarceration as a consequence for nonpayment); *see also Fry v. State*, 990 N.E.2d 429, 434 (Ind. 2013). Even Indiana’s Pretrial Services Rules (a guide created by trial court judges to standardize pretrial policies and procedures throughout the state) requires that a person’s ability to pay be assessed before imposing pretrial fees, that pretrial fees be part of a written policy, and that incarceration cannot be a consequence for nonpayment.⁸ ABK’s fees fail on all of these fronts. ABK does not consider ability to pay, ABK’s pretrial fees are not part of a written policy but determined at ABK’s discretion, and incarceration is a consequence of nonpayment. *See* Sections II.B, II.C.iii. The lack of an indigence exception to ABK fees cannot be justified on the basis of the legislative interest in promoting pretrial freedom and the presumption of innocence because ABK fees undermine that interest.

As for those paying ABK fees as part of their sentence, there is still an absence of a legislative purpose that justifies exacerbating and criminalizing poverty. Were ABK to argue that charging ABK fees is somehow necessary as a cost-saving measure, the Supreme Court has already laid that argument to rest:

Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State’s revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment,

⁸ A copy of the Pretrial Services Rules is available at Judicial Conference of Indiana, *Pretrial Services Rules*, Indiana Office of Court Services (Jan. 1, 2020), <https://www.in.gov/courts/iocs/files/iocs-pretrial-services-rules.pdf> (*see* Section 13: Pretrial Services Fees and Fiscal Matters).

rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

Tate v. Short, 401 U.S. 395, 399 (1971). The Supreme Court reiterated this analysis over a decade later in *Bearden*, when the state tried to argue that incarceration of indigent persons was necessary to promote payment of restitution:

Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.

Bearden, 461 U.S. at 670–71. ABK cannot justify their fees as a necessary cost-saving measure when they are extracting money from those who do not have the funds and are actually creating more expense via the cost of incarceration, lost wages due to incarceration, etc.

Were ABK to argue that the fees somehow promote public safety, the Supreme Court has already addressed that as well:

[T]he State asserts that its interest in rehabilitating the probationer and protecting society requires it to remove him from the temptation of committing other crimes. This is no more than a naked assertion that a probationer's poverty by itself indicates he may commit crimes in the future and thus that society needs for him to be incapacitated. . . . Given the significant interest of the individual in remaining on probation . . . the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty.

Bearden, 461 U.S. at 671. Plaintiffs are not arguing that *conditions* such as drug testing cannot be imposed where appropriate, thus addressing any legitimate public safety concern that may be at issue. Rather, Plaintiffs argue that the *cost* of those conditions cannot be applied in the manner as currently devised. Indeed, ABK undermines public safety by refusing to drug test those who cannot afford its fees. *See* Section II.C.iii.a, *supra*. If testing is important for public safety, *not* testing someone simply because they cannot afford the test is irrational.

Fourth and finally, many alternatives exist to both protect the constitutional rights of supervisees and satisfy any legitimate interests ABK has. *See, e.g., Bearden*, 461 U.S. at 671–72 (discussing alternatives); *Tate*, 401 U.S. at 399–400 (same). Federal criminal courts use alternative procedures, including evaluating ability to pay for sentenced-related monetary penalties.⁹ Other vendors besides ABK exist. *See, e.g., Ex. 24, Total Court Services Contract with Posey County, Indiana*.¹⁰ If supervision is necessary in certain cases, ABK must find a way to fund it that is constitutional and does not shift the financial burden onto individual supervisees.

At “all stages of [criminal] proceedings the Due Process Clause and Equal Protection Clauses protect [indigent] persons like petitioners from invidious discriminations.” *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Without an exception for indigence, penalties for nonpayment exact “invidious discrimination” and are therefore unconstitutional. *Id.*; *see also Bearden*, 461 U.S. at 672–73; *Tate*, 401 U.S. at 398; *Mayer v. Chicago*, 404 U.S. 189, 197–98 (1971); *Williams*, 399 U.S. at 242. All *Bearden* factors counsel in favor of a preliminary injunction as to Counts Four and Five of the Complaint.

D. The Parties’ and the Public Interest Weigh Heavily in Favor of a Preliminary Injunction

The harm that Plaintiffs will suffer without an injunction is irreparable. *See* Section II.A, II.B, III.A, *supra*. In contrast, an injunction will not harm ABK. As discussed above, *see* Section III.C.iii, *supra*, ABK’s interests are not advanced by an unconstitutional scheme, and ABK does “not have a valid interest in upholding and applying a [policy] that violates the[] constitutional guarantees” of due process and equal protection. *Baskin v. Bogan*, 983 F.Supp.2d 1021, 1029 (S.D.

⁹ *See, e.g.,* Administrative Office of the United States Courts Probation and Pretrial Services Office, *Overview of Probation and Supervised Release Conditions* 54–55 (Nov. 2016), [overview_of_probation_and_supervised_release_conditions_0.pdf](#) (uscourts.gov).

¹⁰ Plaintiffs do not concede that this sample contract is constitutionally sound; it is included merely to show that other vendors beyond ABK provide similar services.

Ind. 2014). ABK has “no interest in withholding . . . money to which [ABK] . . . has zero claim of right.” *Nelson*, 137 S. Ct. at 1257. Collectively, Defendants can come up with alternatives to cover the cost of necessary conditions, but without violating the constitutional rights of supervisees.

What is more, all parties have an interest in promoting public safety, and ABK fees actively undermine that interest by destabilizing supervisees’ lives. ABK’s high fee demands, made on threat of incarceration, endanger employment, housing, mental health, and familial ties, among other known indicators of stability.¹¹ *See* Smith Decl. ¶ 19 (undermined housing stability); Hawkins Decl. ¶ 21 (undermines ability to pay child support); Schwartz Decl. ¶ 18 (undermined ability to provide for family and pay for food and housing); Garrett Decl. ¶¶ 6, 11–12 (ABK’s schedule prioritized over work schedule); Murray Decl. ¶¶ 18–19 (has to rely on public assistance to afford housing); Brown Decl. ¶¶ 16–19, 25 (undermined ability to provide for family and created housing and transportation instability). It does not serve anyone’s interest to push already vulnerable people into poverty or to criminalize their indigence; conditioning freedom on the ability to pay ABK’s exorbitant fees undermines everyone’s interest in promoting stability.

A preliminary injunction will also serve the public interest because ABK’s conduct violates the constitutional rights of Plaintiffs and putative class members. Preventing constitutional violations is “always in the public interest.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest”); *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th

¹¹ *See, e.g.,* Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. St. L. Rev. 1, 12–13 (2014) (Unemployment and homelessness are “significant causes of recidivism; people who are employed and have stable housing are significantly less likely to be re-arrested.”).

Cir. 2012) (“[T]he public is served by the preservation of constitutional rights”); *Giovani Carandola v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (same).

What is more, “justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts.” *Mayer*, 404 U.S. at 197. ABK creates a deeply negative experience for the public and therefore undermines justice. Criminal debt in particular “significantly harm[s] the efforts of formerly incarcerated people to rehabilitate and reintegrate, thus compromising key principles of fairness in the administration of justice . . . and engendering deep distrust of the criminal justice system[.]”¹² ABK undermines the public interest in the fair administration of justice.

ABK undermines the interests of all parties and of the public. The balance of interests, therefore, weighs heavily in favor of a preliminary injunction.

IV. Conclusion

For these reasons, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction.

Respectfully submitted,

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¹² Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, U.S. Dep’t of Justice National Institute of Justice 2 (Jan. 2017), <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

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Certificate of Service

I hereby certify that on December 20, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered counsel.

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