IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

Karen McNeil, et al., Plaintiffs, v. Community Probation Services, LLC, et al., Defendants.	Case No. 1:18-cv-33 District Judge William L. Campbell, Jr. Magistrate Judge Jeffery S. Frensley JURY DEMAND

PSI Defendants' Brief on the Issue of Standing to Participate in the Preliminary Injunction Hearing

Pursuant the Court's November 21, 2018 order [Doc. No. 178], Defendants Progressive Sentencing, Inc., PSI-Probation II, LLC, PSI-Probation, L.L.C., Tennessee Correctional Services, LLC, Timothy Cook, Markeyta Bledsoe, and Harriet Thompson (collectively, the "PSI Defendants" or "these Defendants") submit the following brief:

I. Standing is a jurisdictional issue that does not govern whether named party defendants can participate in evidentiary hearings

Standing is a legal doctrine developed to ensure that the federal courts do not exceed the "judicial Power" the United States Constitution grants them in Article III, section 1. The doctrine prevents the federal courts from infringing on legislative and executive power by limiting the exercise of judicial power to the cases and controversies described in Article III, section 2. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016), *as revised* (May 24, 2016). Standing is a threshold issue affecting subject matter jurisdiction, almost always raised to challenge a plaintiff's right to assert a claim—not to prohibit the participation of specific defendants from specific hearings. Generally, "*[t]he party invoking federal jurisdiction* bears the burden of establishing [standing]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Both cases cited by the plaintiffs,[1] *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) and *Diamond v. Charles*, 476 U.S. 54 (1986), address the standing of a defendant to appeal an adverse decision from

[1] The plaintiffs assert in their Omnibus Reply in Support of Plaintiffs' Motion for Preliminary Injunction [Doc. No. 134] that they "do not believe that CPS and PSI Defendants have standing to contest the Motion for Preliminary Injunction because they lack a legally protected interest relevant to Count 15." *Id.* at 1, n. 2.

a case in which they participated as an intervening defendant, a situation where the defendant is invoking the federal jurisdiction of the appellate court.

The PSI Defendants are unable to locate any legal authority addressing whether standing is a legal doctrine that should prohibit only specific named party-defendants from participating in a specific evidentiary hearing where the the plaintiffs suing them are going to give testimony and present evidence. As such, the PSI Defendants assert that they have the right to defend themselves by participating in every proceeding in this case.

II. The PSI Defendants nonetheless have standing under traditional analysis

Nonetheless, if the Court considers the PSI Defendants' standing to participate in the upcoming evidentiary hearing through standard legal analysis, it is clear that the PSI Defendants do have standing to participate. The United States Supreme Court has summarized the elements of standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756, 104 S.Ct., at 3327; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore*, *supra*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare *561 Rights Organization*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43, 96 S.Ct., at 1924, 1926.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)

The only two fact witnesses who are probationers in Giles County that the plaintiffs will call at the hearing are PSI supervised probationers, who were supervised by named party-defendants Markeyta Bledsoe and Harriet Thompson.

The PSI Defendants have the fundamental legal right to cross examine these witnesses *as necessary*. The United States Supreme Court has explained that the right of confrontation (generally applicable in criminal proceedings under the Sixth Amendment), is also applicable in appropriate civil cases:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g., ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93—94, 33 S.Ct. 185, 187—188, 57 L.Ed. 431 (1913); *Willner v.*

Committee on Character & Fitness, 373 U.S. 96, 103—104, 83 S.Ct. 1175, 1180—1181, 10 L.Ed.2d 224 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496—497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:

> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. ***While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.*** We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'

Goldberg v. Kelly, 397 U.S. 254, 269–70 (1970) (citations omitted) (emphasis added).

In their witness list, the plaintiffs described the "scope" of the probationers' expected testimony as "the experience of being detained due to inability to pay money bail required for release after arrest on a VOP warrant," Doc. No. 171, p. 2. In a later email from plaintiffs' counsel, they greatly broadened their expected testimony as being "limited to *the facts surrounding the warrants issued* in 2018 that resulted in their detention." Exhibit 1, 11/17/2018 email from plaintiffs' counsel. The truth of the matter is—as all attorneys and judges know—there is absolutely no way to predict what a witness might say in response to questioning on the stand. In any event, "the facts surrounding the warrants issued in 2018" clearly include the conduct and statements of the named PSI Defendants who executed affidavits that resulted in the issuance of an arrest warrant for each of these witnesses. Prohibiting the PSI Defendants from participating in the hearing where these witnesses will testify will invade their legally protected interest to cross examine them. The right to participate and question these witnesses is a concrete, particularized right that is being actually threatened by the plaintiffs' assertion that the PSI Defendants not be permitted to participate in the hearing.

Beyond the fundamental right to defend against legal claims, the PSI Defendants will also be harmed if the Court issues the sought after injunctive relief. If the Court issues the injunctive order sought by the plaintiffs, then the authority of the PSI Defendants would be greatly diminished. If the court grants the injunction, and afterwards defendant Markeyta Bledsoe propounds an affidavit to the Court regarding a

probationer's violation of a condition of probation, and the Court issues an arrest warrant with a money bond, and it is not enforced by the Sheriff, then the PSI Defendants authority would be diminished, as would their ability to fulfill their contractual obligations to the County.

Standing also requires a causal connection between "the injury" and the conduct complained of. Here, the conduct complained of is the defendants right to defend themselves, and if it is taken away, they will be injured directly by being rendered powerless to cross examine witnesses who have given testimony adverse to their positions in the case.

Thirdly, to have standing, a litigant must show that it is likely that the injury will be redressed by a favorable decision. Here a favorable decision would be in the form of an order saying the defendants can participate in the hearing. If this relief is granted, it will completely and immediately redress the depravation of their fundamental legal right to cross examine witnesses.

It is also important to note that the PSI Defendants do not have the ability to cross examine any witnesses beyond the scope of the direct examination under Rule 611 of the Federal Rules of Evidence, unless the Court specifically allows it. *See* Fed. R. Evid. 611 (b). So, participation by these defendants in the hearing should not result in prolonged cross examination on issues not before the Court, unless they are brought up by the plaintiffs during direct examination.

The PSI Defendants also incorporate by reference all arguments for standing made in the briefs filed by the County and the CPS defendants.

III. Conclusion

Based on the above authorities and argument, the PSI Defendants respectfully request that they be permitted to participate in the hearing.

Respectfully Submitted,

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