

No. 16-16495 (consolidated with No. 16-16549)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KEVIN BREAZEALE, KAREN SOLBERG, KEVIN HIEP VU,
NANCY MORIN, AND NARISHA BONAKDAR,
Plaintiffs-Appellees,

v.

VICTIM SERVICES INC., d/b/a CorrectiveSolutions,
NATIONAL CORRECTIVE GROUP, d/b/a
CorrectiveSolutions, and MATS JONSSON
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:14-cv-05266-VC

**BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Amicus affirms that no counsel for a party authored the brief in whole or in part and that no person other than amicus, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

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INTEREST OF AMICUS

The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, non-partisan organization of more than 1 million members dedicated to defending the civil liberties guaranteed by the Constitution. The Racial Justice Program (“RJP”) at the national offices of the American Civil Liberties Union is dedicated to combating the structural drivers of racism and inequality and works to end discrimination in the criminal justice system, education, housing, police profiling, and lending. RJP litigates cases aimed at protecting the rights of the poor in the criminal justice system, including *Kennedy v. Biloxi*, No. 1:15-cv-348-HSO-JCG (S.D. Miss) (filed Oct. 21, 2015) and *Thompson v. DeKalb County*, No. 1:15-cv-00280-TWT (N.D. Ga.) (filed Jan. 29, 2015).

SUMMARY OF ARGUMENT

This appeal raises serious concerns regarding the lawfulness of compelled arbitration for claims of abuse against a private company administering a bad check diversion program. Defendant Victim Services, Inc. (“VSI”) seeks to set a novel and far-reaching precedent by demanding arbitration of claims related to a pretrial diversion program that individuals enter under the coercive threat of criminal prosecution. Amicus agrees with the arguments of Plaintiffs-Appellees

that no contract was formed here and that enforcing arbitration under such circumstances would violate basic principles of voluntary assent to contract.

Amicus writes separately to provide the Court with information about the broader context of privatization of the criminal justice system. For-profit companies have become deeply enmeshed in administering a broad range of functions of the criminal justice system, but individuals who “accept” the terms of a company’s bad check diversion program, pretrial release monitoring, or probationary supervision have little practical choice or meaningful negotiating power. A ruling in this case that Ms. Bonakdar could be compelled to arbitrate her claims would have widespread implications for the rights of defendants and potential defendants in these inherently coercive contexts. If VSI’s position were adopted, comparable arbitration requirements would propagate throughout the criminal justice system, presenting a host of procedural and substantive concerns, while disrupting the ability of individuals to safeguard their fundamental civil rights.

The District Court was correct to reject VSI’s position. Amicus urges the Court to evaluate the propriety of requiring arbitration in this case with particular care in light of potentially sweeping consequences for the many individuals entangled in the privatized criminal law enforcement system.

ARGUMENT

I. Private, For-Profit Companies Increasingly Administer Core Components of the Criminal Justice System.

The circumstances giving rise to the claims in this case are far from isolated. Over the past thirty-five years, state and local governments have increasingly delegated crucial government functions related to criminal justice and law enforcement to private companies.¹ Other corporations currently operate bad check diversion programs nearly identical to the arrangement between the El Dorado County District Attorney's office and VSI that is the subject of this case.² Such companies have been found liable for or settled allegations of abusive practices similar to those presented by this case. *See Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1087 (E.D. Cal. 2008); *Gradisher v. Check Enforcement Unit, Inc.*, 210 F. Supp. 2d 907, 916–17 (W.D. Mich. 2002); *see also Liles v. Am. Corrective Counseling Servs., Inc.*, No. 400CV10497, 2003 WL 22466222, at *1 (S.D. Iowa Oct. 1, 2003) (referencing class action settlement). But the privatization of criminal law enforcement extends well beyond diversion programs like these.

¹ See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266.

² See *Cavnar v. Bounceback, Inc.*, No. 2:14-cv-0235, 2015 WL 4429095 (E.D. Wa.); *see also* “Local prosecutor contracts with high-pressure debt collector, possibly skirting state law,” Q13Fox.com (July 31, 2014), <http://q13fox.com/2014/07/31/shady-collection-company-agency-teams-up-with-prosecutors-office-harasses-struggling-mother-for-cash/> (last accessed Apr. 26, 2017).

Private corporations are now involved at virtually every stage of the criminal justice system. In addition to pretrial diversion, private companies operate a wide range of programs including for-profit bail bonds, private policing, pretrial release, electronic monitoring, private probation programs, private detention facilities, prison services, post-sentence reentry programs, and halfway houses. Some jurisdictions have effectively relinquished control of broad swaths of their criminal justice systems to private entities.

- **Commercial bail bonds**: For-profit companies provide bond services to individuals who cannot otherwise afford bail amounts set by the court, charging a percentage of the bail amount in fees to the defendant. The United States is the only developed country that permits this practice, which directly disadvantages the poor.³ The multi-billion dollar commercial bail industry is rife with corruption and has lobbied to halt reform and ensure that bail amounts are kept high in order to maintain profits.⁴

³ See Adam Liptak, “Illegal Globally, Bail for Profit Remains in U.S.,” *New York Times* (Jan. 29, 2008), <http://www.nytimes.com/2008/01/29/us/29bail.html> (last accessed Apr. 26, 2017) (“Other countries almost universally reject and condemn [commercial bail bonding], in which defendants who are presumed innocent but cannot make bail on their own pay an outsider a nonrefundable fee for their freedom.”).

⁴ See “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice,” *Justice Policy Institute* (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf (last accessed Apr. 26, 2017), at 26–37.

- **Private pretrial supervision and electronic monitoring**: In the United States, 100,000 individuals are monitored daily, and an increasing number of private companies have begun to offer “tagging services” in the form of electronic ankle monitors and other surveillance.⁵
- **Private probation**: Numerous jurisdictions have outsourced probation supervision to private companies. These companies charge fees to probationers as a condition of their supervision and often focus on extracting court debts from defendants—many of whom have no ability to pay.⁶ A 2014 report by Human Rights Watch noted that these private companies were operating, in effect, as “an extremely muscular form of debt collection masquerading as probation supervision, with all costs billed to the debtor.”⁷
- **Private prisons and detention facilities and services**: The rise of private prisons in the United States has been extensively documented.⁸ For-profit prison corporations operate outside the traditional purview of public oversight and accountability. Such companies are incentivized to cut

⁵ Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, 123 YALE L.J. 1344, 1365 n. 94, 1379 n. 165 (2014).

⁶ American Civil Liberties Union, “In For a Penny: The Rise of America’s New Debtors’ Prisons,” (Oct. 2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf (last accessed Apr. 26, 2017), at 59–63.

⁷ Human Rights Watch, “Profiting from Probation: America’s ‘Offender-Funded’ Probation Industry,” (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf (last accessed Apr. 26, 2017), at 3.

⁸ See Fairfax, *supra* note 1 at 271–72.

medical staffing and deny care in order to maximize shareholder return and have maintained a particularly poor track record of detainee abuse and neglect.⁹ In addition, both public and private prisons contract with private companies for prison telephone and medical services.

- **Privatized reentry programs**: For-profit private prison corporations have recently expanded from detention into private reentry programs.¹⁰ These companies have rebranded themselves to take advantage of an increase in the number of jurisdictions seeking to reduce prison populations. They now operate residential reentry centers, charging ex-offenders fees to stay in intermediate sanction facilities and halfway houses.

Given the extensive involvement of for-profit companies in the criminal justice system, compelled arbitration raises significant concerns. Enforcing VSI's arbitration clause would likely result in copycat provisions proliferating throughout the privatized criminal justice system. Individuals could be required to agree to arbitration as a condition of supervised release, a suspended sentence, or access to

⁹ See Office of the Inspector General, U.S. Dep't of Justice, "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons," (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf#page=2> (last accessed Apr. 26, 2017), at ii–iii; see also Memorandum from Sally Yates, Deputy Attorney General, U.S. Dep't of Justice to the Acting Director of the Federal Bureau of Prisons (Aug. 18, 2016) <https://www.justice.gov/archives/opa/file/886311/download> (last accessed Apr. 26, 2017).

¹⁰ See American Friends Service Committee, "Community Cages: Profitizing community corrections and alternatives to incarceration," (Aug. 2016), <https://afscarizona.files.wordpress.com/2016/08/communitycages.pdf> (last accessed Apr. 26, 2017).

medical care or services in prisons and detention facilities. Such agreements would leave individuals even more vulnerable to documented patterns of abuse by private companies.

II. The Potential for Abuse by Private Companies is High Because Companies Profit From Charging Fees to Offenders.

Private companies that carry out criminal law enforcement functions often rely on an “offender-funded” business model where costs are borne by criminal defendants.¹¹ The private company recoups its operating expenses by charging fees to offenders themselves—and the company depends on this sole source of revenue for its profits. *Id.* Cash-strapped states and municipalities have embraced privatization largely because it guarantees that the jurisdiction will not need to expend taxpayer dollars on privatized aspects of criminal justice. *Id.* But of course such costs are not eliminated—rather, they are shifted onto the shoulders of the poor who have already become entangled in the criminal justice system.¹² Many individuals who cannot pay the fees assessed for the “privilege” of privatized probation or pretrial supervision are often trapped in years-long cycles of indebtedness from which they cannot escape.¹³

¹¹ Human Rights Watch, *supra* note 7 at 15.

¹² Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1487–88 (Nov. 2016).

¹³ Human Rights Watch, *supra* note 7 at 22. Human Rights Watch calculated that for some probationers, it would be financially preferable to take out a loan with an APR of 50% rather than pay the monthly fee required by private probation companies. *Id.* at 29.

The offender-funded model creates a direct conflict of interest between the private company administering the program and the offender subject to imprisonment or potential prosecution. The company's profits depend upon charging and recouping as much money in fees as possible from individuals who face the threat of criminal prosecution or have been charged or convicted. Because profit is the goal, there is a clear disincentive for the company to waive or reduce the costs of participating in the program, improve its services, or advise an individual of any rights she may have. To the contrary, companies frequently offer financial bonuses to staff based on their ability to reach specific monetary targets for fees collected from offenders.¹⁴

The facts in this case vividly illustrate the potential for abuse resulting from this conflict. In VSI's letter to Ms. Bonakdar, the company represented itself as the El Dorado District Attorney's Office in order to pressure her to join its diversion program and pay the associated fee. VSI declined to advise Ms. Bonakdar that she had not been formally accused of any crime, nor did it provide her with any information about her right to trial, her right to counsel, her right to a probable cause determination, the elements of the alleged offense, or the State's burden of proof for criminal prosecution. If recipients of the letter had correct information about their rights and the nature of the accusation, it would reduce the

¹⁴ Human Rights Watch, *supra* note 7 at 42–43.

likelihood that they would pay to participate in the bad check diversion program, resulting in lost revenue for the company. An offender-funded model encourages companies to hide the ball and rely on the public's ignorance or uncertainty to reap greater profits, even at the expense of an individual's legal rights. Enforcing arbitration under these circumstances would only encourage deceptive and coercive practices.

Other documented abuses by private companies operating in the criminal justice sphere highlight the inappropriateness of binding arbitration in this context.

Debtors' Prisons: Many private probation companies engage in abusive collection practices and revoke probation even when an individual has no ability to pay the company's fees. Jail and the threat of jail are frequently deployed as tools to extract payments from probationers or from their family members.¹⁵ Such practices violate the Fourteenth Amendment and the Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 668 (1983) holding that "it is fundamentally unfair to revoke probation" when a probationer is too poor to pay. Multiple lawsuits have been filed, including by amicus, challenging these pervasive

¹⁵ Human Rights Watch, *supra* note 7 at 46–52; *see also* American Civil Liberties Union, *supra* note 6 at 61 ("Since private probation companies do not bear the costs of incarceration or overburdened courts, . . . there is nothing discouraging them from referring large numbers of defaulting probationers to the courts and, potentially, jail.").

violations of probationers' rights.¹⁶ But it is often difficult to identify the full extent of abuses because "in many courts the only people tracking important baseline data about a probation company's dealings with probationers are the company's own employees."¹⁷ Permitting private companies to bind probationers into arbitration would make it much more difficult to identify and address abuses.

Illegal Fees: Private companies also overcharge for services like drug testing, alcohol monitoring, and electronic ankle bracelets.¹⁸ Because probation companies can easily increase revenue by imposing additional monitoring and testing, there is little incentive to efficiently allocate or reduce the cost of such services. In *Luse v. Sentinel Offender Servs., LLC*, the Southern Center for Human Rights has charged Sentinel Offender Services with unlawfully requiring probationers to undergo, and pay for, drug tests even though they were never ordered by any court.¹⁹ Importantly, Sentinel has *already* inserted an arbitration

¹⁶ See, e.g., *Luse et al. v. Sentinel Offender Servs., LLC*, No. 2:16-cv-00030 (N.D. Ga.) (filed Feb. 17, 2016); *Rodriguez v. Providence Cmty Connections, Inc.*, 155 F. Supp. 3d 758 (M.D. Tenn. 2015); *Edwards et al. v. Red Hills Cmty Probation, et al.*, No. 15-cv-00067 (M.D. Ga.) (filed Apr. 10, 2015); *Reynolds v. Judicial Correction Services, Inc.*, No. 2:15-cv-00161-MHT-CSC (M.D. Ala.) (filed Mar. 12, 2015); *Thompson v. DeKalb Cty., Ga.*, No. 1:15-cv-00280 (N.D. Ga.) (filed Jan. 29, 2015); *Ray v. Judicial Correction Servs., Inc.*, No. 2:12-CV-02819-RDP, 2013 WL 5428395 (N.D. Ala. Sept. 26, 2013).

¹⁷ Human Rights Watch, *supra* note 7 at 57.

¹⁸ *Id.* at 33–37; see also Alicia Bannon, Mitali Nagrecha and Rebekah Diller, Brennan Center for Justice, "Criminal Justice Debt: A Barrier to Reentry," (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (last accessed Apr. 26, 2017) at 7–10.

¹⁹ Complaint, *Luse et al. v. Sentinel Offender Servs., LLC*, ECF No. 1, No. 2:16-cv-00030 (N.D. Ga.) (filed Feb. 17, 2016).

clause into the fine print of the form agreements it requires probationers to sign. While the arbitration provision has not precluded federal judicial review in that case, there can be little doubt that such provisions would be invoked in comparable cases should arbitration be permitted here.

Municipal Debt Collection Services: Many municipalities contract with private debt collection companies. The Federal Trade Commission (“FTC”) recently charged American Municipal Services, which collects debt on behalf of more than 500 municipalities in eight states, with using misleading and threatening communications to coerce payments for utility bills, medical services, and other city fines or services.²⁰ Like VSI, American Municipal Services was accused of sending letters using letterhead reading “Warrant Enforcement Division” or “Municipal Enforcement Division” that deceived consumers into believing the letter was coming from a government agency. Letters with the heading “FINAL NOTICE PRIOR TO ARREST” falsely claimed that the consumer was subject to imminent arrest for nonpayment, warning, “IF YOU DO NOT RESPOND NOW, EVERY EFFORT WILL BE MADE TO HAVE YOU ARRESTED.”²¹ According to the FTC, American Municipal Services’ collectors falsely threatened consumers

²⁰ Complaint, *Federal Trade Commission v. Am. Mun. Servs. Corp. et al.*, ECF No. 1, No. 4:17-cv-00168 (E.D. Tx.) (filed Mar. 7, 2017).

²¹ *Id.* at 6–7.

that they could be handcuffed, jailed, or have their vehicles impounded unless they would pay.²²

Private Detention and Prison Services: Private prisons are less accountable than government facilities and are often notorious for providing substandard care and services to inmates. Serious abuses at private facilities have been documented concerning the provision of healthcare,²³ sexual abuse,²⁴ forced labor,²⁵ surveillance of attorney-client communications,²⁶ and excessive telephone fees.²⁷

VSI's theory would permit privatized prisons to bind inmates into arbitration

²² Federal Trade Commission, "FTC Settlement Halts Allegedly Abusive Practices by Company Collecting Debts for More Than 500 Municipalities," (Mar. 24, 2017), https://www.ftc.gov/news-events/press-releases/2017/03/ftc-settlement-halts-allegedly-abusive-practices-company?utm_source=govdelivery (last accessed Apr. 26, 2017).

²³ Elliott C. McLaughlin, "Texas prisoner's death casts spotlight on privatized health care," *CNN* (Nov. 1, 2016), <http://www.cnn.com/2016/10/27/us/michael-sabbie-death-private-prison-health-care/> (last accessed Apr. 26, 2017) ("When [inmate healthcare is] privatized, it's so barebones, it's so cutthroat, there's much less understanding on a human level that people might need care.").

²⁴ Casey Tolan, "Inmate sues private prison company alleging he was sexually harassed by a prison nurse," *Fusion* (June 8, 2016), <http://fusion.net/inmate-sues-private-prison-company-alleging-he-was-sexu-1793857362> (last accessed Apr. 26, 2017).

²⁵ See *Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (inmates at a for-profit immigration detention facility alleging they were forced to perform labor without compensation under threat of solitary confinement).

²⁶ See Justin Glawe, "U.S. Attorney's Office Under Investigation After 700 Lawyers Were Spied On in Prison," *Daily Beast* (Mar. 27, 2017), <http://www.thedailybeast.com/articles/2017/03/27/700-attorneys-spied-on-in-one-prison-investigator-finds.html> (last accessed Apr. 26, 2017); Jordan Smith and Micah Lee, "Not So Secure: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege," *The Intercept* (Nov. 11, 2015), <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/> (last accessed Apr. 26, 2017).

²⁷ Timothy Williams, "The High Cost of Calling the Imprisoned," *New York Times* (Mar. 30, 2015), https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html?_r=0 (last accessed Apr. 26, 2017).

clauses as a condition of accessing services despite the obvious coercive authority of the prison over its inmates.

Given the high risk of abuse by private actors, requiring a person subject to the threat of prosecution or imprisonment to arbitrate claims of abuse would be particularly dangerous. Keeping information about misconduct confined to private arbitration would permit illegal behavior to continue unchecked, without the exposure and accountability that accompanies public adjudication.

CONCLUSION

For these reasons, the Court should affirm the District Court's denial of VSI's motion to compel arbitration.

April 26, 2017

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 26, 2017.

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Dated: April 26, 2017

s/ R. Orion Danjuma

R. Orion Danjuma

Counsel for Amicus Curiae

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Signature of Attorney or
Unrepresented Litigant

s/ R. Orion Danjuma

Date

04/26/2017

("s/" plus typed name is acceptable for electronically-filed documents)