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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KEVIN BREAZEALE, KARIN SOLBERG, KEVIN HIEP VU, NANCY MORIN, and NARISHA BONAKDAR, on their own behalf and on behalf of others similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No. 3:14-cv-05266-VC

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS OPPOSITION TO DEFENDANT VICTIM SERVICES, INC.'S MOTION TO COMPEL ARBITRATION AND STAY ACTION

The Honorable Vince Chhabria

CLASS ACTION

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INTRODUCTION

This brief addresses the question posed by the Court's request for additional briefing: "[W]hen the State uses a private company to assist in the operation of the criminal justice system, is it ever appropriate for disputes that arise between the private company and citizens who have been pulled into the criminal justice system to be resolved through arbitration?"

The answer is no. "Arbitration," the Supreme Court has repeatedly held, "is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). VSI's forced-arbitration scheme—in which it misrepresents itself as the district attorney and threatens individuals with criminal prosecution and imprisonment to obtain their unknowing assent to arbitration with an unidentified corporation—is nothing *but* coercion. Compelling arbitration here would open the door to a world where a range of for-profit entities in the criminal-justice system, from private probation companies to private prisons, could withdraw even constitutional claims from the scrutiny of public courts. Nor would it stop there. What would prevent governments at all levels from forcing citizens to give up access to courts?

Such a radical restructuring of the relationship between the individual and the state raises serious and novel constitutional problems, explored in this brief, that have yet to be addressed by courts or scholars. VSI is a state actor, threatening prosecution using the district attorney's seal, and compelling arbitration would deprive Ms. Bonakdar of interests protected by the Due Process Clause. At the very least, Ms. Bonakdar may not be deprived of these interests absent knowing, voluntary, and intelligent consent—the standard courts regularly apply when facing constitutional waivers. To nonetheless enforce arbitration here would constitute an unconstitutional application of the Federal Arbitration Act.

This Court should not lightly wade into these uncharted waters. Instead, it should be guided by the longstanding principle that courts do "not pass upon a constitutional question . .

. if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). That is true here. Under the FAA, "*the court must decide whether a contract exists* before it decides whether to stay an action and order arbitration." *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741–42 (7th Cir. 2010) (emphasis added). And blackletter contract law leads to only one conclusion: No contract was formed between Ms. Bonakdar and VSI. In its reply, VSI did not contest the bulk of our contract-formation arguments or deny that, under California law, "[i]t is clear that consent to arbitrate obtained by threat of prosecution is invalid." *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 127 (1993).

Instead, VSI's reply brief argued that, under *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006), only an arbitrator can consider these arguments. But VSI's reading of *Buckeye* rests on an elementary misunderstanding of the law of arbitration. In fact, *Buckeye* reserved for courts the question whether an arbitration agreement was "ever concluded," *id.* at 444 n.1, and the Supreme Court has since made clear that it is "well settled that where the dispute at issue concerns contract formation," it is "for courts to decide," *Granite Rock v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010). This Court's ruling should rest on these "well settled" grounds. A contrary ruling would contravene Ninth Circuit precedent (and the precedent of every other circuit to confront the question): "challenges to the existence of a contract as a whole ***must be determined by the court*** prior to ordering arbitration." *Sanford v. MemberWorks*, 483 F.3d 956, 962 (9th Cir. 2007) (emphasis added).

But no matter the ground upon which it rules, this Court should not endorse VSI's effort to transform arbitration—a *consensual* mode of *private* dispute resolution—into a coerced method for avoiding public judicial scrutiny of abuses carried out in the name of the state.

ISSUES PRESENTED

This brief addresses the questions raised in the Court's request for briefing:

1. When the State uses a private company to assist in the operation of the criminal justice system, is it ever appropriate for disputes that arise between the private company and citizens who have been pulled into the criminal justice system to be resolved through arbitration? (Part I, pages 3–6)

2. Would an agreement to arbitrate disputes of this type violate the United States Constitution? (Parts II and III, pages 6–18)

3. Would an agreement to arbitrate disputes of this type violate the California Constitution? (Part IV, pages 18–19)

4. Would an agreement to arbitrate disputes of this type be substantively unconscionable under California law? (Part V, pages 19–20)

ARGUMENT

I. Enforcing the arbitration provision here would have serious practical consequences and troubling constitutional implications.

Permitting a for-profit, private entity to coerce people into arbitration under threats of criminal prosecution and imprisonment raises serious constitutional and practical concerns that extend beyond the bad-check-diversion context. In fact, VSI itself has embedded this same arbitration provision in its notice regarding different California "pre-charge" diversion programs. *See* Ex. 3 (Chandler Decl.). And enforcing the arbitration provision will give the green light to other private actors who operate in the criminal-justice sector to invoke the State's coercive power to force individuals—often incredibly vulnerable individuals—into arbitration. This is all the more disturbing given that "[t]he private role in criminal justice has grown considerably over the past three decades." Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. Chi. Legal F. 265, 266 (2010); *see also* Ric Simmons, *Private Criminal Justice*, 42 Wake Forest L. Rev. 911, 911 (2007) ("Private criminal law . . . has grown into an immense industry operating completely outside of the

public criminal justice system."). Indeed, the Department of Justice recently took the unusual step of issuing guidance urging courts to "safeguard against unconstitutional practices by . . . private contractors" to "ensure . . . compl[iance] with due process" and specifically rejecting the "use of arrest warrants as a means of debt collection."[1]

Sanctioning mandatory arbitration here, for example, could chart a path forward for private-probation corporations to force probationers into arbitration.[2] Such companies, Human Right Watch has reported, are delegated "a great deal of responsibility, discretion and coercive power" with "little meaningful government oversight." *Id.* And, commentators have observed, they often engage "in predatory behavior," using "the law as [a] sort of lever on a juicer into which poor people are fed and squeezed to produce an endless stream of fees."[3] These practices have recently come under fire in numerous federal lawsuits alleging that private-probation companies regularly violate probationers' rights. *See, e.g.*, *Luse v. Sentinel Offender Servs., LLC*, No. 2:16-cv-00030 (N.D. Ga.) (filed Feb. 17, 2016); *Rodriguez v. Providence Comm. Connections, Inc.*, No. 3:15-cv-01048 (M.D. Tenn.) (filed Oct. 1, 2015); *Thompson v. DeKalb Cnty., Ga.*, No. 1:15-cv-00280 (N.D. Ga.) (filed Jan. 29, 2015).

But what if these companies, like VSI, had inserted a provision requiring probationers to arbitrate any dispute? Under VSI's logic, they would have given up any right to challenge the for-profit companies' illegal or unconstitutional practices in court—even, for example,

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[1] Civil Rights Division and Office for Access to Justice, Dep't of Justice, letter to state and local courts 2, 6 (Mar. 14, 2016), http://1.usa.gov/1M2cT7J (attached as Exhibit 1).

[2] Over 1,000 courts in a number of states contract with private-probation companies, ordering hundreds of thousands of offenders to probation overseen by for-profit companies that charge their fees directly to the probationers. *See generally* Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry* (2014), http://bit.ly/1T8GdJ6.

[3] Andrew Cohen, *The Private Probation Problem Is Worse Than Anyone Thought*, The Atlantic (Feb. 5, 2014), http://theatln.tc/1cY2ois; *Private probation: A juicy secret*, The Economist (Apr. 22, 2014), http://econ.st/1uAjOco.

egregious fee structures that force poor people to remain in jail simply because of indigency. This is not a mere hypothetical; recent litigation in Georgia (brought by *amicus* Southern Center for Human Rights) has shown that private-probation companies are *already* hiding arbitration provisions in the fine print of documents detailing various "rules and instructions" to probationers. *See* Dkt. 11-4, *Luse v. Sentinel Offender Services, LLC*, No. 2:16-cv-00030 (N.D. Ga.) (attached as Exhibit 2).

Or take the private-prison context as another example. A significant proportion of American prisoners are currently incarcerated in private facilities, whose negative conditions have been well documented.[4] Various studies have detailed private prisons' "overuse and abuse of solitary confinement," and the "higher incidence of assaults on prisoners by guards at private prisons than in state and federal prisons." Mary Turck, *Private Prisons, Public Shame*, Al Jazeera America (June 9, 2015), http://bit.ly/1JG0eF2; *see also* Order, *DePriest v. Walnut Grove Correctional Auth.*, No. 3:10-cv-00663 (S.D. Miss. March 26, 2012) (finding that a for-profit prison had "allowed a cesspool of unconstitutional and inhuman acts and conditions to germinate, the sum of which places the offenders at substantial ongoing risk"). Thus, prisoners regularly seek recourse in the courts when private prisons fail to comply with their constitutional and statutory obligations. And, as a general matter, that prisoners are in private rather than public prisons has no bearing on whether they can access the courts.[5]

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[4] *See* Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 Fla. St. U. L. Rev. 149, 149–50 (2010) (noting that "approximately 11.5% of federal inmates" are housed in private facilities); *see generally* ACLU, *Banking on Bondage: Private Prisons and Mass Incarceration* (Nov. 2011), http://bit.ly/1SLTUxO.

[5] State prisoners can sue private prisons under § 1983 or state tort law, for example. And, although they cannot bring *Bivens* actions, *see Minneci v. Pollard*, 132 S. Ct. 617 (2012), federal prisoners in private facilities still can litigate "parallel tort remed[ies]" and file "suits in federal court for injunctive relief," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72–74 (2001).

Endorsing VSI's position in this case, however, would allow private prisons to end this litigation at its inception simply by requiring prisoners to arbitrate disputes—either as a condition of their incarceration or as a prerequisite to access prison services (e.g., law library, educational and vocational programs, etc.). There is no more obvious example of a private entity using the state's coercive power to force individuals to waive their right to bring claims in court. But approving arbitration here could lead precisely to that outcome, for no limiting principle restricts VSI's arguments to bad-check-diversion programs.

Nor will the effects be confined to private entities operating within the criminal-justice system. Granting VSI's motion could set a precedent for arbitration *whenever* the state interacts with citizens—public schools could require that students sign an arbitration agreement as a condition of enrollment, for example, or agencies administering public benefits could require recipients to arbitrate all disputes concerning those benefits. These are settings in which, as far as we are aware, arbitration has never been imposed, presumably because it was thought to be impermissible—both under ordinary contract law and under the Constitution.

II. Under the constitutional-avoidance doctrine, this Court should resolve this case under the FAA and ordinary principles of state contract law.

Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen*, 559 U.S. at 681, the reverberations that would flow from compelling arbitration under these circumstances alone suggest that doing so would be unconstitutional. And, as we explain in Part III, although the proper doctrinal framework is unclear given the lack of case law, forcing individuals to arbitrate by way of the state's coercive power violates procedural due process.

But the Court need not reach those constitutional questions; it can resolve this case by invoking a "well-established principle governing the prudent exercise of this Court's jurisdiction": the constitutional-avoidance doctrine. *Bond v. United States*, 134 S. Ct. 2077, 2087

(2014) (internal quotation marks omitted). Under that doctrine, courts "avoid considering constitutionality if an issue may be resolved on narrower grounds." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003). And especially where a case involves state-law issues, the Supreme Court has cautioned, it is "much better to decide it with regard to the question of a local nature . . . , rather than to unnecessarily decide the various constitutional questions appearing in the record." *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909).

A. As the Supreme Court and every circuit have held, the FAA requires that courts determine whether a contract exists under state law before compelling arbitration.

This Court should heed those cautions and rule on the non-constitutional grounds clearly presented by this case. Under the Federal Arbitration Act, federal courts must enforce agreements to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Among those "grounds" are state-law questions concerning whether a contract was formed. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . [courts] should apply ordinary state-law principles that govern the formation of contracts."). And because "ordinary state-law principles that govern the formation of contracts" compel a finding that no "valid arbitration agreement exists" here, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014), there is no need for the Court to wade into the murky and unsettled constitutional questions that the arbitration provision otherwise implicates.

In its reply, VSI largely argued that the Court should refer our contract-formation arguments to the arbitrator. But, as the Supreme Court indicated in *Buckeye* and confirmed in *Granite Rock*, it is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide"—*not* for the arbitrator. *Granite Rock*, 561 U.S. at 296; *see Buckeye*, 546 U.S. at 444 n.1. "Because an arbitrator's authority depends on the consent of

the parties," Chief Justice Roberts recently explained, "the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented." *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1221 (2014) (Roberts, C.J., dissenting). Accordingly, "questions going to consent . . . are for courts to decide." *Id.* at 1222.

That is also the Ninth Circuit's rule: "challenges to the existence of a contract as a whole must be determined by the court prior to ordering arbitration." *Sanford*, 483 F.3d at 962. Every circuit to have considered the question agrees. *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012) ("[A]s the arbitrator has no authority of any kind . . . absent an agreement to arbitrate, the question of whether such an agreement exists and is effective is necessarily for the court and not the arbitrator."); *SBRMCOA, LLC v. Bayside Resort*, 707 F.3d 267, 271 (3d Cir. 2013) ("[C]hallenges to the formation of a contract are 'generally for courts to decide.'"); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (If the "very existence of a contract containing the relevant arbitration agreement is called into question, the federal courts have authority and responsibility to decide the matter."); *Janiga*, 615 F.3d at 741–42 ("[T]he court must decide whether a contract exists before it decides whether to stay an action and order arbitration."); *Solymar Invs. v. Banco Santander*, 672 F.3d 981, 989 (11th Cir. 2012) ("[I]ssues concerning contract formation are . . . reserved for the courts to decide.").

Under this settled consensus, then, this Court can—and indeed must—decide whether any agreement was formed here. In doing so, this Court should follow the lead of the courts in *Regan v. Stored Value Cards, Inc.*, 85 F. Supp. 3d 1357, 1360–61 (N.D. Ga.), *aff'd* 608 F. App'x 895 (11th Cir. 2015). Confronted with an attempt to force arbitration on a prisoner who was handed a prepaid card agreement by a jail upon his release, both courts recognized that "any formation challenge to the contract containing the arbitration clause" was for the court. *Id.* at 1359, 1362–64 (citing *Granite Rock*). The courts thus resolved the case by deciding whether the

prisoner had meaningfully consented under ordinary principles of state contract law.

B. Because Ms. Bonakdar did not meaningfully consent to the arbitration agreement, no contract exists.

1. VSI does not deny that any consent was obtained by duress. Deciding this case on non-constitutional grounds is all the more appropriate because VSI has tacitly conceded the primary contract-formation argument pressed by Ms. Bonakdar: duress. VSI does not contest that, in California, duress goes directly to whether a party has properly consented to an agreement. *See* Opp. 8 (citing Cal. Civ. Code § 1567; *Tiffany & Co. v. Spreckels*, 202 Cal. 778, 784 (1927)). Nor does VSI dispute that California courts have long held as blackletter law that obtaining a party's assent by threats of prosecution and imprisonment is "destructive of [the] free consent" required to form a contract. Opp. 9–10 (discussing *Shasta Water Co. v. Croke*, 128 Cal. App. 2d 760, 764 (1954); *Bayscene*, 15 Cal. App. 4th at 127–29).

Instead, VSI argued (at 1–4) only that Ms. Bonakdar's duress arguments fail because (a) they "challenge[] the BDCP contract as a whole," and (b) duress renders a contract "voidable," not void. Both of these arguments, however, are premised on basic misunderstandings of the Supreme Court's FAA jurisprudence.

a. Whether the contract was a product of duress is a question for courts. VSI's first argument, as discussed above, directly contravenes the Supreme Court's decisions in *Granite Rock* and *Buckeye*, not to mention the uniform holdings of the federal circuits. Although challenges to the *validity* of a contract as a whole may be for the arbitrator, challenges to the *formation* of a contract are only for the court to decide. *See Granite Rock*, 561 U.S. at 296.

b. The Supreme Court specifically disavowed the void/voidable distinction. VSI also argues (at 2) that "an allegation that render[s] a contract voidable"—like duress—"is arbitrable." But the Supreme Court specifically rejected this argument in *Buckeye*, explaining that nothing "turn[s]

on whether the challenge at issue would render the contract voidable or void." 546 U.S. at 446, 448. As courts have recognized after *Buckeye*, "the question of whether or not the arbitration clause is severable does not depend on whether the challenge at issue would render the contract as a whole voidable or void." *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 377 (1st Cir. 2011); *see also Moran v. Svete*, 366 F. App'x 624, 631 (6th Cir. 2010) ("[T]he Supreme Court specifically disavowed the void/voidable distinction in *Buckeye*"). VSI otherwise offers no meaningful response to the merits of our duress arguments. Thus, once VSI's misguided FAA arguments are set aside, this Court can easily conclude that no contract exists between VSI and Ms. Bonakdar.

2. This Court must decide fraud in the execution. Responding to our fraud-in-the-execution argument, VSI merely repeats its misunderstanding of federal arbitration law. Citing *Buckeye*, it argued in its reply (at 4) that "[i]t is up to the arbitrator, rather than a court, to decide whether a contract that contains an arbitration agreement is an enforceable contract." But, as discussed above, the FAA requires the court—and only the court—to decide the question whether a contract exists. And, under California law, fraud in the execution goes directly to a party's assent to a contract—meaning that a contract made under such circumstances was never formed. *See Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1200 (2003) (explaining that fraud in the execution concerns "whether any contract had ever existed"). Post-*Buckeye*, both state and federal courts in California have recognized that fraud in the execution is a formation issue for the court. *See Rodriguez v. Sim*, 2008 WL 5130445, at *2 (N.D. Cal. 2008); *Duffens v. Valenti*, 161 Cal. App. 4th 434, 448 (2008).

VSI also argued (at 5–6) that Ms. Bonakdar's argument instead sounds in fraudulent inducement, relying on the principle that, under California law, failure to read a document does not establish fraud in the execution. But that simply sidesteps Ms. Bonakdar's argument:

that the fraud here—VSI's misrepresenting of itself as the district attorney and using the threat of criminal prosecution to obtain consent to arbitration with an unidentified private entity—was "so fundamental" that Ms. Bonakdar was "deceived as to the basic character of" the notice "and had no reasonable opportunity to learn the truth." Opp. 11. Thus, her "apparent assent" to the arbitration clause must be "negated," and this Court should conclude that no contract was ever formed. *Id.*

3. VSI failed to identify itself in the contract. And VSI has similarly failed to establish another critical element required to form a contract in California: that "it should be possible to identify" the contracting parties. Cal. Civ. Code § 1558. Indeed, VSI did not dispute that this argument is for the Court to decide. Its reply nevertheless claimed (at 6–7) that recipients could identify VSI by information they gained later, or by requesting information from the District Attorney's office. But the first argument misstates the law, while the second argument misstates the facts. The California cases that VSI cites involve agreements in which a party either *knew* the other parties but the contract mistakenly identified them, or else contracted with an identified agent on behalf of an undisclosed party. Here, by contrast, VSI concedes that its notices never disclose its exact identity; rather, they refer to VSI only as an unnamed "Administrator" and are designed to lead recipients to believe that they were from the local prosecutor. As for the assertion that Ms. Bonakdar failed to ascertain VSI's identity by calling and requesting that information, the plaintiff's allegations and the record (aside from the VSI CEO's own declaration) indicate that VSI's employees misrepresented their identities even when directly asked over the phone.

* * *

In sum, there are at least three straightforward contract-formation grounds upon which this Court could deny VSI's motion to compel arbitration. Under the FAA, it is this

Court's "authority and responsibility to decide" whether a contract exists before ordering arbitration. *Banc One*, 367 F.3d at 429. And the constitutional-avoidance doctrine counsels that this Court should rule on those narrower statutory grounds, rather than pass on the broad, unsettled constitutional questions it would otherwise confront.

III. Compelling arbitration in the absence of meaningful consent here—in contravention of binding precedent—would violate procedural due process and thus render the FAA unconstitutional as applied.

For all the reasons given above, this Court should avoid resolving the constitutional issues presented by this case and hold instead that no arbitration agreement was formed for purposes of the FAA. *See Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 564–65 (9th Cir. 2014) (declining to enforce arbitration provision under FAA § 2 because "no valid agreement to arbitrate exist[ed]" under "well-settled principles of contract law"); *Garcia v. U.S. Bancorp*, 579 F. App'x 581, 582 (9th Cir. 2014) ("[B]ecause the absence of mutual assent meant no contract was formed, the arbitration clause in the purported agreement was of no force or effect.").

If, however, the Court nonetheless enforces this arbitration agreement, it would not only exceed the bounds of its authority under the FAA, but also apply that statute unconstitutionally—contravening central principles of procedural due process. We acknowledge at the outset the absence of case law or even scholarship discussing the question whether state actors operating in the criminal-justice system may constitutionally compel individuals into arbitration. But this absence does not mean that forcing arbitration under those circumstances is constitutionally permissible. Quite the contrary: it reflects the widespread consensus that arbitration under these circumstances would be unthinkable, and fundamentally in conflict with the constitutional protections that shield individuals from the coercive power of the state. Thus, if the Court rules on constitutional grounds, it should affirm that settled consensus and hold that VSI's arbitration scheme violates procedural due process.

1. VSI is a state actor. Initially, there is no question that VSI is a state actor for purposes of constitutional liability. *See West v. Atkins*, 487 US 42, 52–54 (1988); *Lee v. Katz*, 276 F.3d 550, 554–55 (9th Cir. 2002). A private entity's activity "may be state action when it results from the State's exercise of coercive power . . . or when a private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).[6] In borrowing the state's seal to extract fees under threat of criminal prosecution, VSI surely meets those tests. *Cf. Ouzts v. Md. Nat. Ins. Co.*, 505 F.2d 547, 558 (9th Cir. 1974) ("[A] finding of state action [was] compelled" because "California has vested in defendants [bailbondsmen] . . . the coercive power of the state.").

2. Interests protected by the Due Process Clause are at stake. Nor should there be any doubt that VSI has deprived Ms. Bonakdar of interests protected by due process.

First, VSI has deprived Ms. Bonakdar of the fees she paid to participate in the diversion program—fees that are far in excess of those permitted under state law. "There is no question that [her] interest in the funds . . . is a protected property interest." *Quick v. Jones*, 754 F.2d 1521, 1523 (9th Cir. 1985). And the taking of funds raises due process concerns all the more when done in the debt-collection context, where "[t]he leverage of the creditor . . . is enormous." *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341 (1969).

Second, at least where a state actor like VSI exerts government coercion to obtain consent, the use of arbitration implicates interests in individuals' *constitutional* rights to access to the courts, to a jury trial, and to an Article III tribunal—rights that have been entirely negated

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[6] Despite VSI's claim, the Ninth Circuit has not held that private entities like VSI are not state actors; *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008), held only that they do not have state immunity. If anything, the court there *confirmed* that private entities enlisted by the state could be liable for constitutional violations. *Id.* at 1081 n.16 ("Although we hold that private entities cannot be arms of the state, we emphatically do not hold that they cannot act under color of state law for the purposes of 42 U.S.C. § 1983 and similar statutes.").

by VSI's forced-arbitration scheme. *See* U.S Const., art. vii; *Christopher v. Harbury*, 536 U.S 403, 415 n.12 (2002) (grounding the right of court access in various constitutional provisions); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (describing Article III guarantee "as a personal right"); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (holding that "the federal litigant has a personal right . . . to demand Article III adjudication of a civil suit"); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041–43 (9th Cir. 2013) (noting that rights protected by the Bill of Rights may constitute "constitutionally protected liberty interests" for purposes of procedural due process). In fact, the Supreme Court has expressly framed such rights in terms of procedural due process, describing the "relationship" between its "cases involving the right of access to courts" and "the right to procedural due process at issue" as "analogous." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5 (1982). Moreover, to the extent that arbitration hinders Ms. Bonakdar's ability to vindicate her statutory rights, VSI's forced-arbitration scheme also deprives her of her statutory claims under the FDCPA. *See id.* at 428–29 (holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" "protect[ing] civil litigants who seek recourse in the courts").

To be sure, many commentators have argued that forced arbitration even between *private* parties is unconstitutional for the same reasons.[7] Neither Ms. Bonakdar nor this Court

[7] *See generally, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015); Roger Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 Am. U. L. Rev. 201 (2012); Jean Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669 (2001); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949 (2000); Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1 (1997); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81 (1992).

need go that far here because—whatever the scope of those rights may be in the private-arbitration context—this case presents profoundly different circumstances: a for-profit entity using the coercive power of the state to force vulnerable individuals into arbitration. In other words, whether or not entirely private arbitration implicates constitutional concerns has little significance to the questions raised here.

3. If the arbitration provision is enforced, Ms. Bonakdar will be denied process to which she is due. Once a protected interest has been shown, the analysis shifts to the level of process due, under the inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "The *Mathews* test balances three factors: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used, and the value of additional safeguards; and (3) the government's interest." *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015).

On the one hand, the private interests affected here, as described above, are weighty. The Supreme Court has held that in the debt-collection context, "[w]here the taking of one's property is so obvious, it needs no extended argument to conclude that" such a taking "absent notice and a prior hearing . . . violates the fundamental principles of due process." *Sniadach*, 395 U.S. at 342. All the more so when the collection is being conducted by a private entity using the state's coercive power, given that a "basic" purpose of procedural due process is to guard against the "danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

On the other side of the scale, the government has little, if any, interest in depriving Ms. Bonakdar of either her property or her ability to vindicate her statutory rights in a judicial forum. And the government's interest may actually cut in the opposite direction; as the Department of Justice recently explained, "[a]dditional due process concerns arise when" criminal-justice functions are conducted by entities—like VSI—that "have a direct pecuniary

interest in the management or outcome of a case." DOJ Letter, *supra* n.1; *see also Tumey v. Ohio*, 273 U.S. 510 (1927); *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 844 (9th Cir. 1997) (explaining that, under *Tumey* and its progeny, "due process is violated if a decisionmaker has a 'direct, personal, substantial pecuniary interest' in the proceedings," or "would have 'so strong a motive' to rule in a way that would aid the institution" it represents).

To be sure, weighing the "the value of additional procedural safeguards" against the risk of error and "the fiscal and administrative burdens" here is a difficult task, given the lack of precedent and the "flexible" nature of due-process analysis. *Vasquez*, 734 F.3d at 1044–45. Yet, at least "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Of course, no such hearing was afforded here before VSI extracted its fees by threatening prosecution, nor is there any reason to believe that this one of the "limited cases" where "post-deprivation process can suffice." *Shinault*, 782 F.3d at 1058 (holding that "a state must provide a hearing prior to freezing" prisoners' funds).

Additionally, whether the Constitution requires a pre- or post-deprivation hearing under these circumstances, VSI's forced-arbitration scheme certainly denies Ms. Bonakdar the "use of established adjudicatory procedures" to which she would otherwise be entitled in bringing her FDCPA claims; that is, it would be "the equivalent of denying [her] an opportunity to be heard upon [her] claimed right[s]." *Logan*, 455 U.S. at 429–30. Arbitration, as Justice Kagan explained, can be a "mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting). And preventing people like Ms. Bonakdar from seeking recourse in the courts through aggregate litigation may "have the effect of depriving [them] of their claims" under federal law. *AT&T Mobility LLC v. Concepcion*,

563 U.S. 333, 365 (2011) (Breyer, J., dissenting). Granted, the Supreme Court found these concerns insufficient to invalidate arbitration clauses with class waivers in the *private-arbitration* context. But these concerns rise to another level when a *state* actor coerces individuals into vindicating their statutory rights solely through binding, individual arbitration.

In any event, whatever precise level of process may be due to Ms. Bonakdar, at the very least the question whether she consented to arbitration—waiving her rights to additional process—should be evaluated under a "knowing, voluntary, and intelligent" standard. In fact, the Supreme Court has indicated that such a standard applies to contractual waivers of procedural due process rights in entirely *private* commercial transactions. *See D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972). And that standard is consistent with the standard courts regularly employ to determine waiver of statutory and constitutional rights in other contexts in which individuals are confronted with the coercive power of the state. *See Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011); Perlstadt, *supra*, at 248 ("[C]ircuit courts addressing the issue have generally adopted the [position] that waiver of civil constitutional rights . . . requires knowing and voluntary consent."). For example, consent to dismissal-release agreements—under which prosecutors agree to dismiss criminal charges in exchange for a release from liability of claims under 42 U.S.C. § 1983—must be evaluated under a voluntary-and-knowing standard. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). And, even then, a court may decline to enforce a valid waiver if "its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993) (citing *Rumery*, 480 U.S. at 392).

So too here. Where a state actor invokes "the full 'machinery of the state'" to get an individual to waive his or her rights under the law, courts must ensure that the individual voluntarily and knowingly decided to do so—particularly given that "the use of such powers

for *private advantage* is inherently unfair." Joan Meier, *The "Right" to A Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 108 (1992) (emphasis added). Although VSI might contend that employing such a standard will threaten arbitration more generally, this Court should recognize that the circumstances presented by this case are markedly different from the ordinary arbitration dispute. As Judge Posner once explained, "[p]rivate arbitration . . . really is private; and since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint." *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

But where, like here, arbitration is imposed by a state actor—using the coercive power of the criminal-justice system, no less—the denial of "safeguards that are encompassed by the term 'due process of law'" gives rise to "constitutional complaint." *Id.*; *cf. Regan*, 85 F. Supp. 3d at 1364 (finding a prisoner had not consented to arbitration while "being discharged from jail, *i.e.* from a condition of absence of liberty of choice"). To nonetheless permit arbitration would unconstitutionally apply the FAA in conflict with basic due-process principles.

IV. The arbitration agreement here also violates the California Constitution.

The Court's order requesting briefing also asked whether "an agreement to arbitrate disputes of this type [would] violate the California Constitution." It would. California's Constitution protects individuals' rights to procedural due process and in fact "place[s] a *higher* significance on the dignitary interest inherent in providing proper procedure" than the federal constitution. *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1190 n.15 (9th Cir. 2015), *as amended* (Jan. 29, 2016) (emphasis added). And California's "due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant

need not establish a property or liberty interest as a prerequisite to invoking due process protection." *Ryan v. California Interscholastic Fed'n-San Diego Section*, 94 Cal. App. 4th 1048, 1069 (2001). Accordingly, if compelling arbitration here would violate the Fourteenth Amendment, it also violates California's Constitution given that the latter "is much more inclusive and protects a broader range of interests," such as "an individual's due process liberty interest to be free from arbitrary adjudicative procedures." *Id.*

And permitting arbitration implicates California's guaranty against "imprison[ment] in a civil action for debt." Cal. Const. Art. 1, § 10; *see Bradley v. Super. Ct.*, 48 Cal. 2d 509, 519 (1957) ("[E]very doubt should be resolved in favor of the liberty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt"). In California, "[t]he law does not contemplate the use of criminal process as a means of collecting a debt." *People v. Beggs*, 178 Cal. 79, 84 (1918). But VSI's scheme does exactly that.[8]

V. The arbitration agreement is substantively unconscionable.

Finally the Court asked for briefing on whether arbitration agreements like this one would "be substantively unconscionable under California law." As explained in our opposition (at 13–14), the arbitration clause here is substantively and procedurally unconscionable. Substantive unconscionability "addresses the fairness of the term in dispute," "focus[ing] [on] whether the term is one-sided and will have an overly harsh effect on the disadvantaged party." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010). That is the case here. The arbitration clause is "unfairly one-sided" because, functionally, "it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of

[8] Although the FAA preempts state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," it does not preempt "generally applicable . . . defenses," like those here. *Concepcion*, 563 U.S. at 339.

claims that are more likely to be brought by the stronger party." *Fitz v. NCR Corp.*, 118 Cal App. 4th 702, 724 (2004); *see also Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1228 (N.D. Cal. 2015) (applying *Fitz* and concluding clause was substantively unconscionable).

Under the arbitration clause, a check-writer must arbitrate *all* disputes with VSI; however, if the check-writer fails to comply with the diversion program's terms, VSI can refer the case to prosecution. Put differently, there is essentially no claim that VSI would be required to bring in arbitration. *Cf. Carmona v. Lincoln Millennium Car Wash*, 226 Cal. App. 4th 74, 86 (2014) (concluding that an arbitration agreement that gave the employer "the choice of either court or arbitration" while "employees would never be in [such] a position" was "substantively unconscionable"). Thus, the agreement lacks "mutuality"—"the 'paramount' consideration when assessing substantive unconscionability." *Pokorny*, 601 F.3d at 997.

CONCLUSION

For the reasons provided above and in the previously filed opposition, this Court should deny VSI's motion to compel arbitration.

Dated: April 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deepak Gupta, hereby certify that on April 20, 2016, I electronically filed the foregoing supplemental brief with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the following:

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