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

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Paul Arons
LAW OFFICES OF PAUL ARONS
685 Spring Street, Suite 104
Friday Harbor, WA 98250
(360) 378-6496

Beth E. Terrell
Blythe Chandler
TERRELL MARSHALL LAW
GROUP PLLC
936 North 34th Street, Suite 300
Seattle, WA 98103
(206) 816-6603

Deepak Gupta
Matthew W.H. Wessler
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Michael F. Ram
ROBINS KAPLAN LLP
2440 W El Camino Real #100
Mountain View, CA 94040
(650) 784-4040

Attorneys for Plaintiffs-Appellees

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INTRODUCTION

Narisha Bonakdar received a letter from her local prosecutor threatening her with criminal prosecution and jail unless she paid hundreds of dollars in fees. She was understandably frightened. But what she didn't know was that she faced no real risk of prosecution. The letter actually came from Victim Services, Inc. (VSI)—a for-profit company that rents out the prosecutor's seal to aid its private collection efforts. Without disclosing its identity, VSI's letters falsely represent that the prosecutor has accused the recipient of violating California's criminal bad-check law. The ABA has condemned this practice as "abusive" because it falsely "gives the impression that the machinery of the criminal justice system has been mobilized against the debtor." ABA Formal Ethics Op. 469 (2014), ER 885.

VSI now claims that *because* Ms. Bonakdar gave into its false threats—and as a consequence of fine print on the third page of its letter—she has traded away her right to challenge VSI's practices in court and must instead be forced into arbitration. There is one basic problem with that tactic: "Arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). To run roughshod over that bedrock rule, as VSI urges, would raise serious constitutional problems in this context. It would allow a wide range of for-profit entities wielding state power—from private-probation companies to private prisons—to withdraw themselves from the public scrutiny of the courts.

This Court, however, need not resolve those weighty constitutional issues today. Instead, it should follow the "cardinal principle of judicial restraint"—"if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. DEA*, 362 F. 3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The Court can (and therefore should) decide this appeal on the premise that the Federal Arbitration Act applies and that arbitration may not be compelled under the FAA where no contract exists. Such "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). VSI's brief—devoted to defending the proposition that the FAA applies—is therefore largely beside the point.

Under the FAA, courts "apply ordinary state-law principles that govern the formation of contracts." *First Options v. Kaplan*, 514 U.S. 938, 944 (1995). Those principles make "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). And where, as here, a party is "deceived as to the [agreement's] basic character," "mutual assent is lacking." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 415, 425 (1996). VSI's efforts to disguise its identity are also fatal because it must be "possible to identify" the contracting parties. Cal. Civ. Code § 1558; *see Lee v. Intelius Inc.*, 737 F.3d 1254, 1260 (9th Cir. 2013). Based on these black-letter contract rules, the denial of VSI's motion to compel arbitration should be affirmed.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1367. On July 27, 2016, the district court issued an order denying VSI's motion to compel arbitration, from which VSI appealed on August 24, 2016. This Court has jurisdiction under 9 U.S.C. § 16(a)(1).

STATEMENT OF THE ISSUES

1. Contract formation. Under the Federal Arbitration Act, "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). "When deciding whether the parties agreed to arbitrate a certain matter," courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under those principles, the question presented is whether a valid contract was formed where:

(a) Ms. Bonakdar's "consent" was obtained by threat of criminal prosecution;

(b) VSI misrepresented the very nature of the purported agreement; and

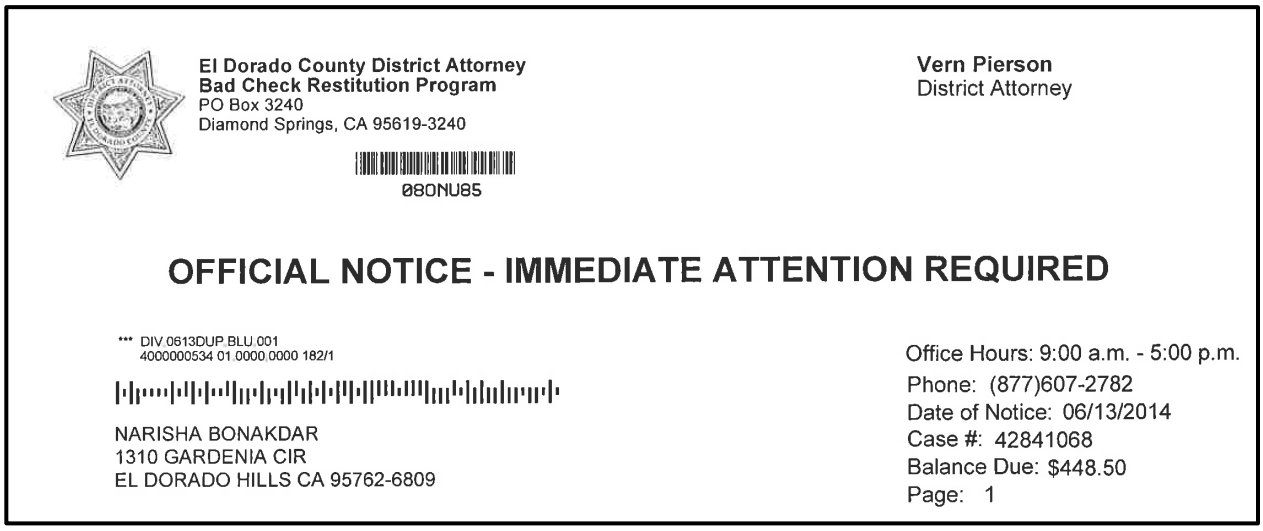
(c) VSI intentionally concealed its identity.

2. Constitutionality. Assuming that arbitration may otherwise be compelled against Ms. Bonakdar consistent with the Federal Arbitration Act and state-law contract-formation principles, would it nevertheless be unconstitutional to do so under either the Due Process Clause or the Commerce Clause?

STATEMENT OF THE CASE

A. VSI sends threatening debt-collection letters to thousands of California consumers, including Narisha Bonakdar.

In June 2014, Narisha Bonakdar received a letter informing her that she had been "accused" of a crime, punishable by "up to one . . . year in the county jail," because the check she wrote for her monthly bus pass—which she believed had been paid in full—had been rejected for insufficient funds. ER 413, 420. Signed by her local District Attorney, Vern Pierson, the notice appeared on the following letterhead:



El Dorado County District Attorney
Bad Check Restitution Program
PO Box 3240
Diamond Springs, CA 95619-3240

080NU85

Vern Pierson
District Attorney

OFFICIAL NOTICE - IMMEDIATE ATTENTION REQUIRED

*** DIV.0613DUP.BLU.001
4000000534 01.0000.0000 182/1

NARISHA BONAKDAR
1310 GARDENIA CIR
EL DORADO HILLS CA 95762-6809

Office Hours: 9:00 a.m. - 5:00 p.m.
Phone: (877)607-2782
Date of Notice: 06/13/2014
Case #: 42841068
Balance Due: $448.50
Page: 1

ER 413. The letter explained that she could avoid charges by completing the "El Dorado County District Attorney Bad Check Restitution Program." *Id.* This would require Ms. Bonakdar, "a single mother [who] lives month to month," to attend a financial accountability class, pay restitution of the $200 check, and pay $248.50 in

program fees—far more than the $65 in fees allowed by California law. ER 416, 420; Cal. Penal Code § 1001.65.

Ms. Bonakdar was "upset and intimidated" by the letter, and called the El Dorado County District Attorney's Office to ask whether she "was being charged with a crime." ER 420. A receptionist told her that it "sounded like [she] was," but refused to transfer her to anyone in the office who could provide more information. *Id.* Instead, Ms. Bonakdar was told to call the number on the notice. *Id.* When she did so, she was informed that she would not be charged with a crime if she "paid the fees and attended the class." *Id.* Ms. Bonakdar, who works full-time as a legislative manager in the California Department of Conservation, worried that she would lose her job, pension, and daughter if she were sent to jail. ER 421. So she decided to participate in the program—"even though [she] did not think [she] had done anything criminal." ER 421; *see* ER 665. Between July and December of 2014, Ms. Bonakdar made six payments of $74.75 and attended a financial education class. ER 657–58; *see* ER 667–76. By December, she had "successfully completed" the program. ER 658.

What Ms. Bonakdar did not know was that she had never been accused of a crime by the El Dorado County District Attorney's Office, and was never at risk of being prosecuted under California's criminal check-fraud statute. Though written on District Attorney letterhead and bearing the signature of District Attorney Vern

Pierson, the notice was in fact sent by Victim Services, Inc. (VSI)—a for-profit company that rents out the local prosecutor's seal to aid its private debt-collection efforts. Using letterhead from district attorneys across the state, VSI and its predecessors have sent these notices to nearly 200,000 California consumers, ER 436, deceptively informing them that, unless they pay steep fees, they would be prosecuted for writing a bad check.

B. California law strictly limits diversion programs to cases in which district attorneys suspect an intent to defraud.

Under California law, writing a check that is bounced for insufficient funds is not, by itself, a crime. The check writer must have written it "willfully, with intent to defraud," "knowing at the time" that the account had insufficient funds to pay the amount in full. Cal. Penal Code § 476a(a). This "intent to defraud" is considered "the gist of the offense," *People v. North*, 131 Cal. App. 3d 112, 117 (1982), for which "no presumption of law will suffice," *People v. Becker*, 137 Cal. App. 349, 352 (1934). More generally, courts have long warned that the use of state bad-check laws "should be closely scrutinized," because without a fraudulent-intent element these laws become "no more than a device to force payment of debt." *People v. Vinnola*, 494 P.2d 826, 828, 831 (Colo. 1972). That is, they "lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them." *Tolbert v. State*, 321 So. 2d 227, 232 (Ala. 1975). Establishing fraudulent

intent is particularly important because, in California, "the use of criminal prosecution" simply "as a means of collecting a debt is against public policy." *Shasta Water Co. v. Croke*, 128 Cal. App. 2d 760, 764 (1954).

California's Bad Check Diversion Act, Cal. Penal Code §§ 1001.60–67, thus strictly limits pretrial diversion programs to cases in which "there is probable cause to believe there has been a violation of Section 476a"—i.e., that there was an intent to defraud. *Id.* Before referring a case to a diversion program, district attorneys are required to consider five discrete factors, including the amount of the bad check, the check-writer's criminal history, and the "strength of the evidence, if any, of intent to defraud the victim." *Id.* § 1001.62. To defray operating costs, programs are allowed to charge only a $50 administrative fee, in addition to the bank charges actually incurred by the merchant, which are capped at $15. *Id.* § 1001.65.

C. VSI rents the District Attorney's letterhead to administer El Dorado County's bad-check diversion program, without any prosecutorial involvement or case-by-case determination.

California law allows district attorneys to contract out these pretrial diversion programs to "private entit[ies]" like VSI, so as long as the district attorneys retain prosecutorial discretion and establish probable cause before referring cases to the programs. *Id.* § 1001.60. VSI and its predecessors have administered El Dorado County's program under this provision. ER 594–95. For each consumer who completes the program, the District Attorney's Office receives $20 from the

administrative fee; VSI pockets the rest of the fees. ER 856–57. Although the contract between VSI and the District Attorney purports to comply with statutory requirements for prosecutorial oversight, *see* ER 850, the record shows that they are entirely disregarded in practice.

The District Attorney's Office has conceded that it does not conduct the full review for probable cause required by California law. The office has delegated the responsibility to refer cases to the VSI program to a non-lawyer: Nancy Anderson, the District Attorney's executive assistant. ER 455. And both Ms. Anderson and the current District Attorney, Vern Pierson, have testified that Ms. Anderson reviews only limited information, such as the check writer's name, the reason the check bounced, and the amount of the check—far less than the five-factor analysis required under California law, *see* Cal. Penal Code § 1001.62. ER455–57. Cases are pulled for further inspection only rarely: if the check bounced on a closed account, or if Ms. Anderson recognizes the name of a repeat-offender. ER 457, 466. For District Attorney Pierson, this "checklist" system is a form of necessary "triage." ER 490. But the "intake criteria" falls short of what is required for prosecution under California law. *See* ER 491–96; Cal. Penal Code § 1001.62. The District Attorney's Office referred Ms. Bonakdar to the program after only a cursory review of the bad-check crime report the El Dorado County Transit Authority submitted on her case. *See* ER 355, ER 454–57.

And many cases enter VSI's program without even this limited prosecutorial oversight. The District Attorney's Office has conceded that, because large retailers can directly "file electronically" with VSI, a large portion of VSI's caseload bypasses the discretion of the prosecutor altogether. ER 458; *see also* ER 466. The District Attorney assumes that VSI applies the intake criteria to checks submitted to diversion, but makes no efforts to ensure that is true. *See* ER 497–98. In other words, most checks submitted to the diversion program are not preceded by a probable-cause determination by a local district attorney, in blatant disregard of state law. *See* Cal. Penal Code § 1001.60.

VSI has, without any prosecutorial involvement or judgment, sent thousands of form letters warning consumers that they have been accused of a crime, and encouraging them to participate in an expensive diversion program in order to avoid the possibility of "further action," including jail time. But the record demonstrates that these are false threats. The District Attorney only prosecutes "a small fraction" of bad-check cases. ER 502. And District Attorney Pierson further concedes that the office "would be unlikely [to] ever file" charges in "many cases that [they] refer to the check program." ER 496. A "decision" on "whether or not someone is going to be prosecuted" is not even made, according to Ms. Anderson, "until after Corrective Solutions has exhausted its attempts to . . . collect." ER 476.

More broadly, the District Attorney has testified that, in his view, these "are not criminal cases and they should not be in the . . . criminal justice system." ER 487.

The numbers underscore how rarely the threat of prosecution is realized. As of November 23, 2015, out of the 2,431 people who had been sent form notices in El Dorado County, VSI had sent just 33 back to the El Dorado County District Attorney's Office to be charged. ER 446–48. The fraction of cases that actually results in prosecution is even smaller. Over a four-and-a-half year period between January 1, 2011 and August 31, 2015, just 6 of the nearly 2,000 individuals—or 0.3%—who received VSI's notices but failed to complete the diversion program were ever charged with a crime. ER 514.

But Ms. Bonakdar knew none of this when she received a letter from her local district attorney, informing her that she had been "accused" of a crime. "[I]t seemed clear" that, if she decided not to participate in the restitution program and pay $248.50 in fees, she was "risking prosecution." ER 420. At a hearing on the motion to dismiss, Judge Chhabria agreed that there was one "unmistakable take-away from this letter": "I'd better participate in this program or I'm going to [be] charged with a crime." Dist. Ct. Dkt. 62 at 15. This dynamic has led the ABA, in a formal ethics opinion, to condemn practices like VSI's: By giving the "false impression" that "the prosecutor or associates in the prosecutor's office have reviewed the facts and found that a crime has been committed and criminal

prosecution is warranted," these debt collectors "misuse the criminal justice system by deploying the apparent authority of a prosecutor to intimidate an individual." ABA Formal Ethics Op. 469, ER 883.

D. VSI buries a forced arbitration clause in the form letters it sends to consumers like Ms. Bonakdar.

When Narisha Bonakdar received the first communication from VSI, she believed it to be an "Official Notice" sent directly by the District Attorney's Office—not a contract for a debt-collection program run by a private company. But on the third page of its form letter, VSI included a "Terms of Service" document that, it now argues, creates a binding contract between the company and any consumer that participates in the diversion program. The agreement explained that, "by paying the fees charged for the Program, participant is bound by the terms and conditions of the Program, as set forth in this agreement." ER 413. Nowhere in the intake letter or terms document does VSI ever identify itself. For consumers, the only indication that this is a contract with a private company is a small notice that "a private entity under contract with the El Dorado County District Attorney" administers the program. *Id.*

But in this document, VSI inserted a clause that purports to force all of a participant's claims—against either the district attorney or the private company—

out of court and into private arbitration. ER 415.[1] The contract explains that, in VSI's view, merely by sending money to VSI, participants and the "Administrator agree to resolve any and all claims and disputes relating in any way to the Program ('Claims'), except for Claims concerning the validity, scope or enforceability of this Arbitration Agreement, through BINDING INDIVIDUAL ARBITRATION before the American Arbitration Association." ER 415. The "Administrator" is never identified. Consumers are also required to waive their ability to file claims on a class-wide basis. *Id.* VSI has used this arbitration agreement in the form letters it sends to consumers since 2011, and similar agreements before that. ER 440–42. According to VSI's records, no consumer has ever arbitrated a claim against the company. ER 436–38. Though the agreement gives consumers the opportunity to opt out of the arbitration clause, this right appears to have rarely been invoked. VSI admits that it "does not keep data regarding the number of persons who have opted out of arbitration." ER 440.

The District Attorney who signed the letter—and who was thus the only party Ms. Bonakdar would be able to identify in the contract—has admitted that he did not "remember . . . signing off on" an arbitration agreement in VSI's form letter. ER 485, 491. The District Attorney's Office was required under its contract

[1] The terms also state that, by participating in the program, consumers agree that "the fees charged for the Program are reasonable and appropriate," *id.*, even though they exceed what is allowed under state law, *see* Cal. Penal Code § 1001.65.

with VSI to provide oversight for all communications sent out on its behalf. ER 850. Yet, while District Attorney Pierson "presum[ed]" that the company had included an arbitration provision in its solicitation letters, he did not "remember specifically reviewing" this language. ER 485.

When Ms. Bonakdar received the letter, she "did not notice or read the arbitration provision," until well after she completed VSI's program. ER 421. Her "attention was focused on the threats of prosecution and the money being demanded to avoid the risk of going to jail." *Id.* She has testified that she "would never have expected that a notice from the prosecutor would waive my rights to go to court against an unidentified private company." ER 421.

E. This litigation

In December 2014, a group of victims of VSI's scheme across California filed this class action, alleging that VSI's practices violate the federal Fair Debt Collection Practices Act and state law.[2] *See* ER 730–902. The plaintiffs, including Ms. Bonakdar, allege that (1) VSI's use of official letterhead to falsely represent that the letters are from prosecutors violates 15 U.S.C. §§ 1692e(3), (9), and (14); (2) the form letters' false threats that the failure to pay will result in arrest or imprisonment

[2] Ms. Bonakdar was added as a plaintiff in the first amended complaint, filed on February 6, 2015. ER 909.

violate 15 U.S.C. §§ 1692e(4)–(5); and (3) the fees charged are not authorized by state law, in violation of 15 U.S.C. §§ 1692e(2)(A) and 1692f(1).

VSI's initial efforts in the district court to escape liability failed. The defendants filed a motion to dismiss, contending that VSI should be excluded from the definition of a "debt collector," and therefore free from the constraints of the FDCPA. *See* Dist. Ct. Dkt. 26. Separately, VSI asked the court to strike the plaintiffs' state-law claims, claiming that the lawsuit is "an improper 'strategic lawsuit against public participation' (a 'SLAPP suit')"—intended to "punish Defendants for exercising" their constitutional rights. *See* Dist. Ct. Dkt. 28 at 2. The district court easily disposed of these motions; it concluded that the "complaint plausibly alleges that the defendants violated the FDCPA in a number of ways," and that the state-law claims fall into the "public interest" exception to California's statute concerning SLAPP lawsuits. Dist. Ct. Dkt. 63 at 1, 2. The defendants filed an interlocutory appeal on its anti-SLAPP motion, and asked the court to stay proceedings in the district court while that appeal—which is currently pending before this panel—continued. Dist. Ct. Dkt. 65. The court denied the request to delay proceedings. Dist. Ct. Dkt. 83.

1. VSI moves to compel arbitration of Ms. Bonakdar's claims.

In a further bid to escape liability, while its anti-SLAPP appeal was pending before this Court, VSI moved to force Ms. Bonakdar's claim into individual

arbitration and stay the entire action. ER 628–722. In support of this motion, VSI relied on the "Agreement to Arbitrate" it buried on the third page of the form letter sent to Ms. Bonakdar on the District Attorney's letterhead, as described above.

In the district court, VSI argued that, merely by sending payment to the bad-check diversion program and enrolling in the class, Ms. Bonakdar had "assented to the terms of the Arbitration Agreement." ER 640. In VSI's view, Ms. Bonakdar had entered into a binding contract with VSI, even though the company was never identified as a party in the contract containing the arbitration agreement. To support this view, VSI pointed to the supposed "benefits" Ms. Bonakdar received from the contract—a promise that she "will not be prosecuted for the alleged bad check crime." ER 644. But this was a benefit (and a hollow one, given the nonexistent risk of being charged) that only the District Attorney's Office could provide. Still, VSI argued that this exchange of "benefits" meant that Ms. Bonakdar had entered a contract with the unidentified private debt-collector secretly behind the form letter. The company thus asked the court to compel arbitration, prevent any affected class claims from moving forward, and stay the entire action while Ms. Bonakdar's individual claims were arbitrated. ER 647.

In response, Ms. Bonakdar argued that she had never entered into a valid agreement with VSI, and thus had never consented to arbitrate her claims relating

to the bad-check diversion program. She began with classic contract-formation defenses. She explained that a number of features of VSI's form letter made free and meaningful consent—the foundation of any valid contract—impossible. First, the implicit threat of prosecution constituted coercion. ER 394–95 (citing *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 127 (1993)). Second, the letterhead and signature block, which identified the District Attorney and not VSI, "deceived [her] as to the basic character" of the agreement. ER 397. In particular, Ms. Bonakdar had no way of identifying the other party to the contract; the only reference to VSI was a short notice that an unnamed "third-party administrator" ran the program. ER 398. More broadly, Ms. Bonakdar argued that the agreement, if valid, would be unconscionable. From Ms. Bonakdar's perspective, the alternative to entering the agreement appeared to be prosecution, so she had no real choice but to participate in the program. And, as the clearly weaker party, she had no bargaining power in determining the contents of the contract. ER 399–400. Finally, Ms. Bonakdar described how allowing a private entity to use the prosecutor's seal and then enforce an arbitration agreement would raise grave constitutional concerns: A ruling for VSI would open up the possibility that forced arbitration could be introduced in a variety of criminal-justice contexts, such as plea bargains. ER 400–01.

2. After holding a hearing and requesting supplemental briefing, the district court denies VSI's bid to force Ms. Bonakdar into arbitration.

The district court held a hearing on VSI's motion on March 10, 2016. ER 19–50. Two weeks later, Judge Chhabria issued an order requesting further briefing on the questions "whether the arbitration provision itself is unlawful," and if it is "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." ER 51. The court asked the parties to address whether the agreement would be unconscionable under California law, and whether it would violate either the California or federal constitutions. *Id.* After both sides filed supplemental briefs, *see* ER 209–58, ER 131–58, in July 2016 the court again asked for further guidance on two foundational questions: (1) Does the Federal Arbitration Act apply to the letter VSI sent to Ms. Bonakdar; and, (2) Should the court analyze the motion to compel arbitration under California law? ER 17.

Two weeks later, the district court denied VSI's motion to compel arbitration. ER 1–16. Judge Chhabria outlined the two-step inquiry that he undertook to reach this conclusion. First, the court posited that the contract was a non-prosecution agreement between the District Attorney and Ms. Bonakdar, ER 5, and should not be considered "a contract evidencing a transaction involving commerce," ER 8. The court thus reasoned that the FAA does not apply to the

contract at all. ER 1. Second, Judge Chhabria analyzed the contract under California law to determine if "arbitration should be compelled nonetheless." ER 10. The court concluded that doing so would be "contrary to California public policy," ER 11, which "requires that the conduct of" private agents that the "government uses . . . in the exercise of its law enforcement power . . . be subject to judicial review." ER 14. Accordingly, the court denied the motion to compel Ms. Bonakdar to arbitration. ER 16. On August 24, 2016, the defendants timely filed their notice of appeal of the district court's order. ER 925.

SUMMARY OF ARGUMENT

I. A. Compelling arbitration here—where it is the product of false threats of criminal prosecution by an unidentified private corporation—would raise profound and novel constitutional questions, with sweeping practical implications. But this Court need not reach those weighty questions now. Instead, it can—and therefore should—resolve this appeal by invoking settled principles of constitutional avoidance and grounding its decision in black-letter principles of contract law.

B. Under the Federal Arbitration Act, courts must first determine whether a contract exists under ordinary state contract law. This is so because the FAA commands courts to compel arbitration "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 in the first place.

It is therefore "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).

C. For three independent reasons, no valid contract was formed here. *First*, Ms. Bonakdar's "consent" was obtained by the coercive threat of criminal prosecution. California law is clear: consent to arbitrate obtained by threat of prosecution is invalid—period. *Second*, VSI misrepresented the very nature of the purported agreement. Under black-letter California contract law, where the promisor is deceived as to the nature of his act, and actually does not know what he is signing, mutual assent is lacking. *Third*, VSI failed to identify itself in the arbitration clause. Under California law, "it is essential . . . not only that the [contract] parties should exist, but that it should be *possible to identify* them." Cal. Civ. Code § 1558 (emphasis added).

II. For the reasons given above, this Court should affirm the district court's denial of VSI's motion to compel arbitration on a non-constitutional ground: because no arbitration agreement was formed in the first place. A contrary holding would not only exceed the bounds of the Court's authority under the FAA but would also apply that statute unconstitutionally. Such a holding would contravene procedural due-process principles and set a precedent that extends beyond the bad-check-diversion context, to private-probation and private-prison companies. In

addition, although we concede that there are reasons to doubt its interstate-commerce analysis, the district court correctly recognized the need for judicial caution before extending the FAA to a troubling scenario that Congress could not have contemplated—a purported arbitration agreement with an unidentified private corporation, secured through false threats of criminal prosecution.

STANDARD OF REVIEW

This Court "review[s] the denial of a motion to compel arbitration de novo." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014). "Underlying factual findings are reviewed for clear error," while "the interpretation and meaning of contract provisions are reviewed de novo." *Id.*

ARGUMENT

I. BECAUSE NO VALID CONTRACT WAS FORMED, VSI HAS NO RIGHT TO COMPEL ARBITRATION HERE.

A. This Court should avoid difficult constitutional issues by grounding its decision in the Federal Arbitration Act and ordinary principles of contract law.

Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010), neither the Federal Arbitration Act nor state contract law provide any sound basis for compelling arbitration where, as here, it is the product of threats of criminal prosecution. Compelling arbitration where it is induced by a private actor wielding the state's

coercive power would raise profound constitutional questions, implicating the Due Process Clause and the scope of Congress's power.

But this Court need not reach those constitutional questions; it can resolve this appeal 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). This Court should heed those cautions and rule on the non-constitutional grounds clearly presented by this case.

B. Under the FAA, courts must first determine whether a contract exists under ordinary state contract law.

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*, 763 F.3d at 1175, there is no need for the Court to wade into the murky and unsettled constitutional questions that the arbitration provision otherwise implicates.

Below, VSI largely argued that any contract-formation arguments must be referred 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 v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010); *see Buckeye Check Cashing v. Cardegna,* 546 U.S. 440, 444 n.1 (2006). "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.

This Court applies the same rule: "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). It is "well settled that where the

dispute at issue concerns contract formation," it is "for courts to decide." *Granite Rock*, 561 U.S. at 296. 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 v. Questar Capital Corp.*, 615 F.3d 735, 741–42 (7th Cir. 2010) ("[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, courts should—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. 2015), *aff'd* 608 F. App'x 895 (11th Cir. 2015). Confronted with an attempt to force arbitration on a prisoner who received a prepaid-payment-card

agreement from 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.

C. No valid contract was formed here.

Following that approach here demonstrates that no enforceable contract was ever formed. In its brief, VSI makes no effort to establish that it met the threshold requirement that an arbitration agreement must exist. And, although it simply asserted below that Ms. Bonakdar "assented to the terms of the Arbitration Agreement by her failure to opt out, her payment to the BCDP, and her enrollment and completion of the BCDP course," ER 640, it sidestepped the fact that Ms. Bonakdar's apparent assent was obtained through threats of prosecution and misrepresentations. Application of "ordinary state-law principles that govern the formation of contracts," including California's doctrines of fraud and duress, makes clear that no "valid arbitration agreement exists." *Nguyen*, 763 F.3d at 1175. In other words, no agreement between Ms. Bonakdar and VSI was "ever concluded." *Buckeye*, 546 U.S. at 444 n.1.

1. Ms. Bonakdar's "consent" was unlawfully obtained by the coercive threat of criminal prosecution.

Consent is one of the four elements "essential to the existence of a contract" under California law. Cal. Civ. Code § 1550. To be valid, the parties' consent "must be . . . [f]ree." *Id.* § 1565. But "[a]n apparent consent is not real or free when obtained" through "duress" or "menace." *Id.* § 1567; *see also Tiffany & Co. v. Spreckels*, 202 Cal. 778, 784 (1927).

Here, Ms. Bonakdar did not freely consent to be bound when she paid collection fees to VSI. To the contrary, VSI pressured her to participate by threatening criminal prosecution and "up to one (1) year in county jail" if she did not do so. ER 413. Such coercion, under California law, destroys the consent necessary to form a contract. *See* 2 Cal. Affirmative Def. § 33:1 (2d ed.) ("Free consent is defeated when one party enters into the contract under duress.").

California law "is clear that consent to arbitrate obtained by threat of prosecution is invalid." *Bayscene*, 15 Cal. App. 4th at 127. That rule is simply an application of the general principle that "an agreement obtained through threat of criminal prosecution is void," because "such threats, like all threats of injury to the character of the party, constitute menace destructive of free consent." *Shasta Water*, 128 Cal. App. 2d at 764; *see also* 1 Witkin, Summary 10th (2005) Contracts, § 312, p. 337. Nor is this principle unique to California; to the contrary, it is an ancient principle of common law that improper threats of imprisonment vitiate a party's

free consent to a contract. *See* 28 Williston on Contracts § 71:1 (4th ed.); Restatement (Second) of Contracts § 176(1)(b). In a late-nineteenth-century decision discussing the concept of duress "at common law, as understood in the parent country," the Supreme Court explained:

> [C]onsent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent.

Baker v. Morton, 79 U.S. 150, 157–58 (1870). This "moral compulsion," the Court continued, is similarly present where "a party enters into a contract . . . for fear of imprisonment." *Id.* at 158. Ms. Bonakdar did just that; she paid fees to participate in the diversion program "to avoid the risk[s] of going to jail" and losing her job, pension, and child. ER 421. Here, as in *Bayscene*, "it is uncontroverted that the Agreement to Arbitrate was obtained under threat of criminal prosecution and that [Ms. Bonakdar] would not have signed the agreement absent such threat." 15 Cal. App. 4th at 128. Thus, just as in *Bayscene*, "[VSI's] threats constituted menace destructive of [the] free consent" required to form a contract under California law. *Id.* at 129.

It is irrelevant whether VSI really believed what it was threatening. Where "a threat [of prosecution] is made," even "the fact that the one who makes it honestly believes that the recipient is guilty is not material," because "[t]he threat

involves a misuse, for personal gain, of power given for other legitimate ends." Restatement (Second) of Contracts § 176. Here, however, VSI's threats are all the more "unlawful," because it "kn[ew] the falsity of [its] claim." *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123, 128 (1966). As described above, the District Attorney's Office in most instances fails to conduct the required review of checks and to determine probable cause for a bad-check violation. *See* ER 454–57, 491–98, 735, 737, 749. VSI not only coerced Ms. Bonakdar into paying it fees but knowingly coerced her on the basis of false pretenses.

Apart from physical violence, threatening an individual with the coercive power of the state is one of the strongest forms of duress. As the ABA recently observed in an ethics opinion, the kind of threats used by VSI in this case "abusive[ly] . . . give[] the impression that the machinery of the criminal justice system has been mobilized against the debtor, and that unless the debtor pays the debt, the debtor faces criminal prosecution and possible incarceration." ABA Formal Ethics Op. 469, ER 885. Because VSI's coercion destroyed Ms. Bonakdar's free consent, no contract was ever formed.

In truth, VSI never contested below that, in California, duress goes directly to whether a party has properly consented to an agreement. *See* ER 394 (citing Cal. Civ. Code § 1567; *Tiffany & Co. v. Spreckels*, 202 Cal. 778, 784 (1927)). Instead, it argued 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.

First, the question whether the contract was a product of duress is a question for courts. VSI's 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.

Second, the Supreme Court has disavowed the void/voidable distinction. VSI argued before the District Court (at ER 327) 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 has offered no meaningful response to the merits of our duress arguments.

2. Because VSI misrepresented the very nature of the purported agreement, no contract was formed.

VSI's threats to prosecute Ms. Bonakdar were not only coercive but fundamentally deceptive. This, too, requires a finding that no valid agreement was formed. Under California law, where "the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void." *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 415 (1996); 1 Witkin, Summary 10th (2005) Contracts, § 299. This type of deception, known as "fraud in the inception or execution," undermines the very formation of a contract; it goes to "whether any contract had *ever* existed." *Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1200 (2003) (emphasis added).

The form letter that VSI sent to Ms. Bonakdar—like all its letters in California—was rife with fraudulent misrepresentations. VSI conveyed the false impression that the letter was sent directly from El Dorado County prosecutors, going so far as to include the signature block of Vern Pierson, the current District Attorney. *See* ER 413. VSI also represented that Ms. Bonakdar was "accused of violating California Penal Code 476a," implying both that a prosecutor had reviewed her case and found probable cause of a violation and that Ms. Bonakdar

would in fact be prosecuted if she did not pay the requested fees. *Id.* Yet neither representation was true. Unbeknownst to her, the notice was actually from a private, for-profit debt-collection company that pretends to be the local prosecutor and that uses false threats of criminal prosecution to extract fees from consumers—consumers that the actual prosecutors have not even accused of a crime. And, to the extent VSI even mentioned "a private entity," it falsely suggested that its role is limited to "print[ing] and mail[ing]" notices on behalf of the District Attorney, hiding from Ms. Bonakdar the fact that it—not the prosecutor—is the only entity that reviews the bulk of bad checks submitted by merchants. *Id.*

To be sure, claims of "fraudulent inducement" as to a contract as a whole, rather than an arbitration provision specifically, may be referred to an arbitrator. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). But that principle does not apply here; under California law, where, as here, "a party's apparent assent to a written contract is negated by fraud in the inception, there is simply no arbitration agreement to be enforced." *Rosenthal*, 14 Cal. 4th. at 416. Thus, "*Prima Paint* does not preclude the court from deciding claims of fraud in the execution of the entire contract." *Id.* at 417. And, 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. Dec. 5, 2008); *Duffens v. Valenti*, 161 Cal. App. 4th 434, 448 (2008). In sum,

because the misrepresentations here constitute "fraud so fundamental" that Ms. Bonakdar was "deceived as to the basic character of the documents [she] signed and had no reasonable opportunity to learn the truth," her "apparent assent" to the contract is "negated," and no arbitration agreement exists. *Id.*

3. VSI failed to identify itself in the arbitration clause.

No valid contract was formed here for yet another reason: Under California law, "it is essential . . . not only that the [contract] parties should exist, but that it should be possible to identify them." Cal. Civ. Code § 1558. Although case law construing § 1558 is sparse, California courts understand it to mean that, at a minimum, where "[n]othing in the [contract] identifies the . . . defendants as parties to be bound or benefitted by the agreement," the parties were not "entitle[d] . . . to invoke the contract." *Westlye v. Look Sports*, 17 Cal. App. 4th 1715, 1728 (1993); *see also Myers v. Darnall*, 2005 WL 2715864, at *6 (Cal. Ct. App. 2005) (no contract where "[t]he parties are not identified"). This Court, too, has held that an arbitration agreement is not formed where the "essential element" of "identification of the parties" is lacking. *See Lee*, 737 F.3d at 1260 (holding no valid arbitration agreement existed where, as here, even "an exceptionally careful consumer" would have been unable to identify the party with whom it was contracting).

VSI intentionally conceals its identity from consumers. VSI does not identify itself anywhere in its form letter to Ms. Bonakdar. The letter, signed by the District Attorney, purports to be from the "El Dorado County District Attorney Bad Check Restitution Program." ER 413. While the notice states that it has been "printed and mailed on behalf of my office by a third party administrator" and the terms and conditions state that the "Agreement to Arbitrate" is between "You and Administrator," the identity of this "Administrator" is never revealed. ER 413, 415. More critically, it is not even "*possible* [for consumers] to identify" that the "Administrator" is VSI. Cal. Civ. Code § 1558 (emphasis added). The contact information provided refers only to the "El Dorado County District Attorney," although the phone number and mailing address in reality belong to VSI. ER 413, 415. And even those individuals who call the phone number are given the false impression that they are speaking with prosecutorial staff, not VSI employees; indeed, these employees "routinely make express and implicit threats of prosecution to check writers with whom they speak." ER 738. VSI's brazen efforts to disguise its identity violate § 1558, undermining the existence of any valid contract with Ms. Bonakdar.

II. COMPELLING ARBITRATION COERCED THROUGH THREATS OF CRIMINAL PROSECUTION RAISES SERIOUS CONSTITUTIONAL PROBLEMS.

A. 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* ER 255–58. 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 U.S. 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."[3]

Sanctioning mandatory arbitration here, for example, could chart a path forward for private-probation corporations to force probationers into arbitration.[4] 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."[5] 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,

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[3] Civil Rights Division and Office for Access to Justice, Dep't of Justice, letter to state and local courts 2, 6 (Mar. 14, 2016) ("DOJ Letter"), http://1.usa.gov/1M2cT7J, ER 239–47.

[4] 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.

[5] 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.

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, 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 the 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.), ER 249.

Or take the private-prison context as another example. A significant proportion of American prisoners are currently incarcerated in private facilities, whose inhumane conditions have been well documented.[6] 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

[6] *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.

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, whether prisoners are in private or public prisons has no bearing on whether they can access the courts.[7]

Endorsing VSI's position in this case, however, would allow private prisons to end such 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.

[7] 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).

B. Compelling arbitration in the absence of meaningful consent 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 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 due process.

1. VSI is a state actor. There is no question that VSI is a state actor. *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).[8] 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.

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[8] To be sure, this Court has never held that private entities like VSI are *not* state actors. In *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008), the Court held only that they do not have state immunity, but, 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.").

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 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) (en banc) (Kennedy, J.) (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).

To be sure, many commentators have argued that forced arbitration even between *private* parties is unconstitutional for the same reasons.[9] Neither Ms. Bonakdar nor this Court 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,

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[9] *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).

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 conducted by a private entity wielding state 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*, ER 246; *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).

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.

C. Although this Court need not reach it, the district court's interstate-commerce analysis offers another basis on which to affirm the denial of the motion to compel.

Consistent with the reach of Congress's Commerce Clause power, the FAA applies only to "contract[s] evidencing a transaction involving interstate commerce." 9 U.S.C. § 2. The district court held that VSI's form letters fall outside this threshold interstate-commerce requirement, that the FAA therefore does not apply here, and that California law does not permit the arbitration of disputes in the criminal-justice context as a matter of public policy.

If this Court were to agree with the district court's analysis, it would supply yet another basis on which to affirm the denial of VSI's motion to compel arbitration. But, as VSI's brief explains, and as we candidly concede, there is reason to doubt the soundness of that analysis—both because of the breadth of Congress's Commerce Clause power and because the form letters themselves include language stating that the FAA applies. Although there is no reason to believe that Congress specifically contemplated arbitration in the privatized criminal-justice context when it enacted the FAA in 1925, the Act "provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003). As the Supreme Court has explained, it is "perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce" and may be applied "if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." *Id.* VSI is a national for-profit business that uses the U.S. mail to collect debt arising from checks written by consumers to national retail merchants, and often does so across state lines. The district court's analysis fails to properly account for VSI's central role in administering the bad-check program, the fact that the arbitration clause purports to be an agreement between the consumer and the private "Administrator" of the program, and the nature of VSI's for-profit collection business.

On the other hand, the district court's opinion correctly recognizes the need for judicial caution before extending the FAA to a new and troubling scenario that Congress surely did not contemplate—a purported arbitration agreement with an *unidentified* private corporation, secured through *false threats of criminal prosecution*. Because "arbitration is a matter of consent, not coercion," *Stolt-Nielsen*, 559 U.S. at 681, VSI's attempt to compel arbitration fails because it does not satisfy the FAA's other threshold requirement: the existence of "a contract" in the first place.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Matthew W.H. Wessler
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Paul Arons
LAW OFFICES OF PAUL ARONS
685 Spring Street, Suite 104
Friday Harbor, WA 98250
(360) 378-6496

Beth E. Terrell
Blythe Chandler
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, WA 98103
(206) 816-6603

Michael F. Ram
ROBINS KAPLAN LLP
2440 West El Camino Real #100
Mountain View, CA 94040
(650) 784-4040

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Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify that my word processing program, Microsoft Word, counted 11,406 words in the foregoing brief, exclusive of the portions excluded by Rule 32(f).

/s/ Deepak Gupta
Deepak Gupta

April 19, 2017

STATEMENT OF RELATED CASES

As required by Circuit Rule 28-2.6, Plaintiffs-Appellees state that this case is related to Case No. 15-16549, *Breazeale v. Victim Services, Inc.*, an appeal now pending before this Court. The two appeals arise out of the same case and have been consolidated. The other appeal raises three issues: (1) whether the Court lacks collateral-order jurisdiction over the district court's denial of VSI's anti-SLAPP motion; (2) whether the district court correctly concluded that because the plaintiffs' class action was "brought solely in the public interest or on behalf of the general public," it falls squarely within the anti-SLAPP statute's public-interest exception; and (3) whether, if the public-interest exception does not apply, this Court should reach the merits of VSI's anti-SLAPP motion in the first instance.

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing Brief for Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta