CASE NO. 16-16495 & 16-16549

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

Appeal from an Order of the United States District Court for the Northern District of California, Case No. 3:14-cv-05266-vc

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AMICUS CURIAE BRIEF OF PUBLIC JUSTICE, THE NATIONAL CONSUMER LAW CENTER, TOWARDS JUSTICE, AND PROFESSORS OF ARBITRATION, CONSUMER, AND CONTRACT LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Each of the *amici curiae* on behalf of whom this brief is submitted certifies that it does not have a parent corporation and that no publicly held corporation owns stock in it.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Public Justice is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. As part of this project, Public Justice has fought to protect the fundamental principle underlying both contract law and arbitration law: that parties may not be forced to abide by a contract—arbitration or otherwise—to which they have not consented.

In this case, Victim Services, a private debt collector, masqueraded as a district attorney and sent debt collection letters to consumers in the name of the state, falsely threatening that those who did not pay Victim Services and agree to all of its terms would be criminally prosecuted. It went even further. Despite coercing consumers to "agree" to its terms, the company still hid the terms—including an arbitration clause—in small print in the middle of a letter consumers had no reason to read beyond the first page. That is not consent. Companies should not be permitted to rent the authority of the state and then force consumers to "agree" to terms they never even saw, on penalty of criminal prosecution.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparation or submission of this brief.

Public Justice frequently represents consumers challenging unfair arbitration contracts. It, therefore, has a strong interest in ensuring that the law is clear: Arbitration agreements may not be enforced without consent.

The **National Consumer Law Center** ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (7th ed. 2015), Fair Debt Collections (8th Ed. 2014) and Consumer Class Actions (9th ed. 2016) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, fair debt collection practices, and access to justice for consumers. NCLC frequently appears as Amicus Curiae in consumer law cases before trial and appellate courts throughout the country.

Towards Justice is a non-profit legal organization based in Denver, Colorado and launched in 2014 to help ensure that everyone in this country can achieve a decent livelihood through work. Towards Justice fills a gap in direct legal services for low-wage, mainly immigrant victims of wage theft and provides systematic advocacy for low-wage workers nationwide. Towards Justice is currently litigating cutting-edge cases on behalf of large groups of low-wage workers, including shepherds, truck drivers, kitchen-hood cleaners, and

agricultural workers. These cases address systemic injustices in the labor market and use a combination of wage-and-hour, antitrust, racketeering, and anti-trafficking laws to protect and advance workers' rights.

The **Professors of Arbitration, Contracts, and Consumer Law** teach and write about arbitration, contracts, and consumer law issues. They have an interest in ensuring that arbitration agreements are enforced only when consistent with basic principles of contract law and the constitutional right to access the courts. These professors are:

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INTRODUCTION

This case is about coercion, but arbitration is a creature of consent.

Victim Services extracts payments from unsuspecting consumers by impersonating a district attorney and threatening the consumer with criminal prosecution. This is the epitome of coercion: pay up or go to jail. The company used this method on Ms. Bonakdar—not only to coerce her into paying the company hundreds of dollars, but also to extract an agreement that she would not sue Victim Services for its misconduct in court, and would instead arbitrate her claims.

That "agreement" is unenforceable. The fundamental principle underlying all of arbitration law is that arbitration is a matter of consent. Parties may not be forced to arbitrate if they did not freely agree to do so. And any "agreement" extracted on pain of criminal prosecution is, of course, not free. Because Ms. Bonakdar never consented to arbitrate her claims, she may not be compelled to do so.

Even if Victim Services had not threatened Ms. Bonakdar with the criminal power of the state if she did not capitulate to its terms, its arbitration clause would still be unenforceable. Ordinary principles of contract law require that to bind a consumer to an arbitration clause—or, for that matter, any agreement—the

consumer must have at least reasonable notice that the agreement exists. Here, there was no such notice.

Victim Services hid its arbitration clause in documents Ms. Bonakdar had no reason to read, and certainly no reason to believe contained contractual terms—documents Victim Services, in fact, affirmatively misled consumers into believing did *not* contain contractual terms. Parties cannot be "bound by inconspicuous contractual provisions of which" they are "unaware, contained in a document whose contractual nature is not obvious." *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (Cal. Ct. App. 1972). Thus, even if Victim Services' arbitration clause were an ordinary agreement—that is, one that wasn't extracted through false threats of criminal prosecution—it still would not be enforceable.

This Court need not look any further than these ordinary principles of contract and arbitration law to find that Victim Services' arbitration clause cannot be enforced. But careful adherence to these bedrock principles—to the requirement that arbitration is a matter of consent—takes on even more urgency here, for compelling arbitration in this context would raise serious constitutional questions.

Victim Services does not seek to enforce an arbitration agreement between two private parties. It seeks to enforce an arbitration *requirement*, imposed by a

state actor on penalty of criminal prosecution. The state forced Ms. Bonakdar to choose between giving up her constitutional right to go to court and being criminally prosecuted for a crime that no prosecutor had determined there was probable cause she committed. Regardless of the rules governing *private* arbitration agreements, the *state* may not coerce people into giving up their constitutional rights.

ARGUMENT

I. The Parties Never Formed an Arbitration Agreement.

It's blackletter arbitration law that courts may not compel arbitration unless the parties actually *agreed* to arbitrate. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *see also Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J.) ("Everyone knows the Federal Arbitration Act favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated.").

And it's blackletter contract law that forming an agreement requires "mutual assent." *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) ("It is undisputed that under California law, mutual assent is a required element of contract formation."); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law principles that govern the formation

of contracts.").[2]

Ms. Bonakdar did not assent. Therefore, there is no agreement.

A. Victim Services Failed To Provide Sufficient Notice of its Arbitration Clause.

An "offeree" cannot possibly assent to a "proposal" she "does not know . . . has been made." *Windsor Mills*, 25 Cal. App. 3d at 993. Thus, California courts have repeatedly held that parties cannot be "bound by inconspicuous contractual provisions of which" they are "unaware, contained in a document whose contractual nature is not obvious." *Id.*; *see Marin Storage & Trucking, Inc. v. Benko Contracting and Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049-50 (2001) ("[W]hen the writing does not appear to be a contract and the terms are not called to the attention of the recipient . . . . no contract is formed with respect to the undisclosed term."). But that is precisely what Victim Services is trying to do here. Victim Services seeks to bind Ms. Bonakdar to a fine-print arbitration clause she never saw in a document she had no reason to believe contained a contract. It may not do so.

While, ordinarily, a consumer may not escape a contract to which she agreed, simply because she chose not to read it, this rule does not apply where the consumer had no reason to believe she was being offered a contract in the first place. *Marin Storage*, 89 Cal. App. 4th at 1049. To bind a consumer to

[2] Unless otherwise specified, all internal quotation marks and alterations are omitted.

contractual terms, a company must, at the very least, give sufficient notice of the terms such that a "reasonably prudent" consumer would know they exist—and how to find them. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014); *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 863 (2016).

Thus, this Court refused to enforce Barnes and Noble's terms of service, when the only mention of those terms was a link at the bottom of the company's website. *Nguyen*, 763 F.3d at 1177. Similarly, the California Court of Appeal refused to enforce an arbitration clause written on the back of an "Acknowledgment of Order" form, because there was no indication the clause existed except a small print notice at the bottom of the form that there were terms on the back. *Windsor Mills*, 25 Cal. App. 3d at 996.

Victim Services' arbitration clause is even less conspicuous than other terms courts have refused to enforce. Victim Services hid its arbitration provision in small print on the third page of an unsolicited letter it sent to Ms. Bonakdar, while giving every indication on the first page of the letter that she need not—and probably should not—read further. The whole point of the first page of Victim Services' notice is to ensure that consumers act immediately.

In giant, bold font at the top of the page, it warns "IMMEDIATE ATTENTION REQUIRED." ER 413. It then states that Ms. Bonakdar has been accused of a crime, punishable by up to a year in jail, and offers her a way out of

criminal prosecution: the bad check restitution program. *Id.* The page appears to offer a complete description of the terms of this program, stating that it contains only "two steps"—restitution (and fees) and a financial accountability class. *Id.* And it provides all the information Ms. Bonakdar would need to sign up. *Id.*

Thus, all the information a consumer might need about the restitution program appears to be on the very first page of the notice. A reasonable person reading this notice would have no reason to believe that she should waste time reading any other documents. To the contrary, she would likely be inclined to do exactly as the notice said as soon as possible—act "immediately" to avoid criminal prosecution. *Cf. Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (refusing to enforce contractual terms where the offer "did not carry an immediately visible notice of the[ir] existence"); *Nguyen*, 763 F.3d at 1179 ("[C]onsumers cannot be expected to ferret out . . . terms and conditions to which they have no reason to suspect that they will be bound.").

The notice does nothing to counteract this impression. In fact, it does precisely the opposite. It suggests that Ms. Bonakdar *need not* read the subsequent pages. It states: "For additional information or if you believe you received this Notice in error, please see the reverse side." ER 413. This suggests that the additional pages contain information Ms. Bonakdar may or may not wish to read, depending on whether she wants more information (presumably about the

restitution program, though the notice doesn't say) or believes she received the notice by mistake. It does *not* suggest—let alone provide reasonable notice—that the additional documents contain binding contractual terms. *Cf. Sgouros v. TransUnion Corp*, 817 F.3d 1029, 1036 (7th Cir. 2016) (refusing to enforce service agreement where website "actively misle[d]" customers about whether they were consenting to the agreement).

If a company wants to bind a consumer to an arbitration clause, it must do so in a way that ensures the consumer "'will fully and clearly comprehend that the agreement to arbitrate exists.'" *Knutson*, 771 F.3d at 566 *(*quoting *Com. Factors Corp. v. Kurtzman Bros.,* 131 Cal.App.2d 133, 136, 280 P.2d 146 (1955)). It may not hide its arbitration clause in documents a consumer has no reason to believe contain contractual terms. *See Norcia v. Samsung Telecommunications Am., LLC,* 845 F.3d 1279, 1290 (9th Cir. 2017).

Ms. Bonakdar had no way of knowing that hidden behind a notice from a district attorney accusing her of a crime was a binding contract with a private debt collector.[3] And by all appearances, that was exactly the point. Contract formation

[3] Even if Ms. Bonakdar understood that she was entering into a contract, there was no way for her to know that she was entering contract *with Victim Services.* The letter appears to be from the El Dorado County District Attorney. ER 413. It is on District Attorney letterhead and is signed by the District Attorney. *Id.* It mentions that the District Attorney has hired a "private entity . . . to administer the Program," and defines that entity as the "Administrator," but nowhere does it mention that entity is Victim Services (or that it is Victim Services—and not the

requires notice, not subterfuge. *See Norcia v. Samsung Telecommunications Am., LLC*, No. 14-CV-00582-JD, 2014 WL 4652332, at *7 (N.D. Cal. Sept. 18, 2014) (California law "bars contract formation through such stealth tactics."). Lack of notice alone renders Victim Services' arbitration clause unenforceable.

B. Ms. Bonakdar Did Not Consent to Arbitration of Any Dispute, Including Disputes About Whether She Consented to Arbitration.

Even if Victim Services could provide reasonable notice of its arbitration clause by hiding it in a document Victim Services itself indicated did *not* contain contractual terms, Ms. Bonakdar still would not be bound by the arbitration clause here. Arbitration agreements—like all contracts—require consent. *See Toal v. Tardif*, 178 Cal. App. 4th 1208, 1221 (2009). And Ms. Bonakdar did not consent.

Any purported agreement by Ms. Bonakdar to arbitrate her claims was obtained through false threats of prosecution by a private debt collector masquerading as a district attorney. That's not consent—that's coercion. *See Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119, 127 (1993) ("It is clear that consent to arbitrate obtained by threat of prosecution is invalid."); *Shasta Water Co. v. Croke*, 128 Cal. App. 2d 760, 764

District Attorney—that drafted the letter). ER 413, 415. An "essential" element of a contract is the identity of the parties. Cal. Civ. Code § 1558. That element is lacking here. For that reason, too, the arbitration clause may not be enforced. *See Lee v. Intelius Inc.*, 737 F.3d 1254, 1260 (9th Cir. 2013) (applying same principle under Washington law, which has the same requirement); *Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th 1715, 1728 (1993).

(1954) (threats of criminal prosecution "constitute menace destructive of free consent"); *Tiffany & Co. v. Spreckels*, 202 Cal. 778, 784 (1927) ("The consent of a party to a contract must be free, and it is not free when obtained through duress or menace.").

In the district court, Victim Services' primary argument was not that Ms. Bonakdar had consented to arbitration, but rather that the district court was required to compel arbitration regardless. *See* ER 326-330. In the company's view, because the arbitration clause was part of a larger contract to which Ms. Bonakdar also did not consent, the Federal Arbitration Act requires that an arbitrator—not the court—decide whether she consented to arbitration in the first place. That makes no sense.

If Victim Services were right, a stand-alone arbitration agreement signed at gunpoint would be unenforceable. But if you were forced at gunpoint to sign a contract that required you both to arbitrate *and* to pay the gunman a million dollars, a court would have no choice but to compel arbitration. The law does not require such an absurd—and unfair—result.

To the contrary, whether a party consented to arbitration is *always* a matter for the court to decide—regardless of whether the arbitration clause is a stand-alone agreement or contained within a larger contract to which the party also did not consent. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299

(2010); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1222, 1224 (2014) (Roberts, C.J., dissenting) (whether the parties agreed to arbitrate is "for the court to decide"); *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("[C]hallenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration."); *see also* Federal Arbitration Act, 9 U.S.C. § 4 (providing that a court may compel arbitration only after "being satisfied that the making of the agreement for arbitration is not at issue").

That's because the "fundamental" principle of arbitration law is that arbitration is a "matter of consent, not coercion." *See Stolt-Nielsen*, 559 U.S. at 681. Parties may not be forced to arbitrate against their will—they must freely agree to do so. *See id.*; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). A court, therefore, may not compel parties to arbitrate a dispute about whether they agreed to arbitrate, because if it turns out they did not agree, then requiring them to arbitrate even that gateway dispute would have impermissibly forced them into arbitration without their consent. *See Howsam*, 537 U.S. at 84.

Consistent with this principle, courts have repeatedly refused to compel arbitration where a defense to arbitration would vitiate consent—despite the fact that these defenses necessarily implicate not just the arbitration clause but the whole contract. *See, e.g.*, *Spahr v. Secco*, 330 F.3d 1266, 1270 (10th Cir. 2003) (whether the signatory of a contract containing an arbitration clause had the mental

capacity to validly consent was for the court, not an arbitrator to decide); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 589–592 (7th Cir. 2001)(a court—not an arbitrator—must decide disputes about whether the person who signed the contract had the legal authority to do so); *Sandvik AB v. Advent Intern. Corp.*, 220 F.3d 99, 105–107 (3d Cir. 2000) (same).

So too here. Ms. Bonakdar argues (convincingly) that Victim Services' threat that she would face prosecution if she did not agree to its terms vitiated any purported consent to its arbitration clause. Ms. Bonakdar may not be required to arbitrate that claim.

In arguing to the contrary before the district court, Victim Services relied heavily on the Supreme Court's decision in *Buckeye*. *See* ER 325-29 (repeatedly citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)). That reliance was misplaced. The plaintiffs in *Buckeye* challenged a loan contract that they argued was illegal under state law because it imposed a usurious finance charge. *Buckeye*, 546 U.S. at 443. The plaintiffs argued that they weren't required to arbitrate their claims because the arbitration clause was contained within this illegal loan contract. *See id.* If the loan contract as a whole was illegal, it was also—as a whole—unenforceable. And because the arbitration clause was part of the loan contract, they reasoned, the arbitration clause too would be unenforceable. *See id.*

The Supreme Court disagreed. *Buckeye*, 546 U.S. at 446. It held that while challenges to the validity of an arbitration clause itself are for a court to decide, challenges to the contract as a whole are for an arbitrator. *See id.* The *Buckeye* plaintiffs never contended that they had not freely consented to arbitration when they entered the contract. Nor did they argue that the usurious interest rate somehow rendered the arbitration clause itself illegal. Their only argument—that the loan contract imposed usurious interest—could not possibly affect the validity of the arbitration agreement itself; it went *solely* to the contract as a whole. The Supreme Court, therefore, held that this argument was for the arbitrator to decide. *See id.* The Court explained that parties cannot avoid arbitration by arguing *solely* that the arbitration clause is contained within a flawed contract—the problems have to somehow implicate the arbitration provision itself. *See id.*

Buckeye does not apply here for two reasons. First, *Buckeye* is explicitly limited to cases like *Buckeye* itself—cases in which there is no dispute that the parties consented to the contract; the dispute is about whether, *despite the parties' agreement*, the contract is nevertheless unenforceable. *Buckeye*, 546 U.S. at 440 n.1. By its terms, *Buckeye* does not apply to cases like this one, where no agreement "was ever concluded" in the first place. *Id.*; *see also Granite Rock*, 561 U.S. at 299 (confirming that courts decide disputes over contract formation).

This follows directly from the principle that parties cannot be forced to arbitrate without their consent. If the parties did not consent to the contract containing the arbitration clause, they did not consent to arbitration. *Cf. Adams v. Suozzi*, 433 F.3d 220, 226 (2d Cir. 2005) ("If the contract embodying a purported arbitration agreement never existed, the arbitration agreement itself does not exist."). It makes no analytical sense to try to sever the two: A challenge to the parties' consent to the contract as a whole *is* a challenge to their consent to arbitration. *See Spahr*, 330 F.3d at 1273. And that challenge must be decided by a court before arbitration may be compelled.

Second, *Buckeye* held only that a party cannot escape arbitration where the *sole* defense to arbitration is that the contract as a whole is invalid. It did not hold that courts must compel arbitration even if an arbitration clause is *itself* invalid simply because other contract terms—or the contract as a whole—are *also* invalid for the same reason. *Cf. Spahr*, 330 F.3d at 1273 (holding that because the plaintiff's "mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract," his "claim that he lacked the mental capacity to enter into an enforceable contract placed the 'making' of an agreement to arbitrate at issue under § 4 of the FAA."); *Adkins v. Sogliuzzo*, No. CIV.A. 09-1123 SDW, 2010 WL 502980, at *9 (D.N.J. Feb. 9, 2010) (explaining that the Supreme Court requires courts to "order arbitration where a defense would

be valid against the contract as a whole but . . . *ineffective* against the arbitration provision").

The Supreme Court made this distinction explicit in *Rent-A-Center*. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010). There, the plaintiff argued that an arbitration clause was unenforceable solely because it was located within an unconscionable agreement.[4] *See id.* at 75. The Court emphasized that the plaintiff had *not* argued that the unconscionability "*as applied* to" the arbitration provision "rendered *that provision* unconscionable." *Id.* at 74. Rather, he had argued only that the agreement, as a whole, was unconscionable. *See id.* at 75. Following *Buckeye*, the Court held that this challenge to the agreement as a whole was for the arbitrator to decide. *See id.* at 71-72, 75.

But if the plaintiff had argued that the unconscionability *as applied* to the arbitration provision rendered *that provision* unconscionable, it would have been for the court to decide. *See Rent-A-Ctr.*, 561 U.S at 74; *Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692, 694 n.2 (9th Cir. 2013) (under *Rent-A-Center*, "provisions outside the specific arbitration clause may be considered in determining whether an

[4] In that case, the larger contract was itself an arbitration agreement, and the arbitration clause at issue was a delegation clause—an agreement to arbitrate disputes about whether the arbitration agreement within which it is contained is enforceable. *See Rent-A-Ctr.*, 561 U.S. at 71-72. But, as the Court held in *Rent-A-Center*, the principles that apply to delegation clauses contained within larger arbitration agreements are precisely the same as those that apply to ordinary arbitration clauses contained in other contracts. *Id.* at 72. *Rent-A-Center*, therefore, is equally applicable here.

arbitration agreement is unconscionable if those provisions 'as applied' to the arbitration clause render it unconscionable"); *cf. Saizhang Guan v. Uber Techs., Inc.*, No. 16-CV-598, -- F. Supp. 3d --, 2017 WL 744564, at *13 (E.D.N.Y. Feb. 23, 2017) ("[T]o the extent that Plaintiffs argue that the [arbitration clause] itself is unconscionable for the same reasons that the [contract] as a whole [is] unconscionable . . ., the Court considers those arguments *as applied* to the [arbitration clause].").

In *Buckeye*, the plaintiffs didn't—and couldn't—argue that a usurious interest rate somehow rendered the arbitration clause itself unenforceable. Here, on the other hand, the threat of criminal prosecution if Ms. Bonakdar did not agree to Victim Services' terms, as applied to the arbitration clause, certainly would render that clause unenforceable.[5]

[5] The Supreme Court's decision in *Prima Paint* is not to the contrary. In that case, the plaintiff argued that it would not have entered into a consulting contract with the defendant had it known that the defendant was planning to file for bankruptcy. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98 (1967). The plaintiff's substantive claim was that the consulting agreement was unenforceable because it was fraudulently induced by the defendant's representations that it was solvent—and therefore able to fulfill its obligations under the contract. *Id.* at 398. The plaintiff argued that it need not arbitrate this claim—despite having agreed to an arbitration clause—because that arbitration clause was contained within the consulting contract, and, in the plaintiff's view, that consulting contract was unenforceable. *Id.* at 398.

The Supreme Court held otherwise. *Prima Paint*, 388 U.S. at 404. The Court explained that while the plaintiff's decision to hire the defendant to consult may have been fraudulently induced, there was no reason to believe the arbitration clause itself was fraudulently induced—that is, there was no reason to believe that any misrepresentations about the defendant's solvency would have changed the plaintiff's decision to agree to arbitrate or that the plaintiff did not intend to

Posing as a district attorney, Victim Services threatened Ms. Bonakdar with criminal prosecution if she didn't agree to its terms. Whether this threat is understood as vitiating consent to the contract as a whole or as rendering the arbitration clause itself invalid, Ms. Bonakdar is not required to arbitrate her claims. *Cf. Adkins*, 2010 WL 502980, at *9 (concluding that undue influence defense is for court to decide and rejecting contention that *Buckeye* holds otherwise).

II. REQUIRING MS. BONAKDAR TO ARBITRATE HER CLAIMS WOULD RAISE SERIOUS CONSTITUTIONAL CONCERNS.

Ordinary principles of arbitration law dictate that Ms. Bonakdar cannot be forced to arbitrate her claims. Holding otherwise would raise serious constitutional concerns that this Court can avoid by resolving this case on principles of state contract law.[6]

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arbitrate disputes about the legality of the consulting contract. *Id.* at 406. To the contrary, the Court emphasized that the plaintiff was "entirely free" to contract for a different dispute resolution provision, and it chose not to do so. *Id.*

Here, on the other hand, Ms. Bonakdar was not "entirely free" to decide not to arbitrate her disputes. Victim Services coerced Ms. Bonakdar not only into entering the restitution program but also into agreeing to arbitrate any disputes related to that program. If she did not "agree" to arbitrate, Victim Services threatened, she would not be able to enter the restitution program, and therefore she risked criminal prosecution. Thus, Victim Services' coercion "goes to the making of the agreement to arbitrate" and, therefore, under *Prima Paint*, it is an issue for the court to decide. *Prima Paint*, 388 U.S. at 403.

[6] Before the district court, Victim Services argued that there was no state action here. As the appellees point out, however, that contention is clearly wrong. Appellees' Br. 38. The Supreme Court has held that where, as here, a state "delegates its authority to [a] private actor," the state is "sufficiently involved" to

1. The right to access the courts is a fundamental constitutional right. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977). It is "the right conservative of all other rights." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Victim Services' forced arbitration scheme deprived Ms. Bonakdar of this right. It deprived her of the right to petition the government, *see BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524–25 (2002) (the "right to petition" is "one of the most precious of the liberties safeguarded by the Bill of Rights"); the right to a jury trial, *Palmer v. Valdez*, 560 F.3d 965, 971 (9th Cir. 2009) ("[T]he right of jury trial . . . is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment."); and the right to bring her claims before an Article III tribunal—despite the fact that federal law makes Article III courts available to her, *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc) ("Article III adjudication is, in part, a personal right of the litigant.").[7]

Before the district court, Victim Services argued that it did not deprive Ms. Bonakdar of her constitutional rights—she waived them. *See* ER 151. Not so. The government—or a private corporation acting on its behalf—may not force its citizens to waive their constitutional rights. They must do so knowingly and

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treat that private actor's conduct as "state action." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

[7] The remainder of this section will refer to these rights together as the right to access courts or the right to go to court.

voluntarily. And courts "do not presume" that individuals have relinquished their fundamental constitutional rights to the state. *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011). To the contrary, they "indulge every reasonable presumption *against*" a finding a waiver. *Id.* (emphasis added). Therefore, to demonstrate that Ms. Bonakdar waived her right of access to the courts, Victim Services would have to prove by "clear and convincing evidence" that her waiver was "voluntary, knowing and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993). It has not done so.

Victim Services, acting as an agent of the state, threatened that if Ms. Bonakdar did not give up her right to go to court, she would be criminally prosecuted—despite the fact that there was no probable cause to believe she committed a crime. That is not voluntary. And the company hid its purported waiver in the middle of a letter Ms. Bonakdar had no reason to read beyond the first page. That is not knowing. There is *no* evidence that Ms. Bonakdar knowingly and voluntarily waived her right to go to court—let alone clear and convincing evidence.

Ms. Bonakdar did not give up her right to go to court. The state—through Victim Services—violated it. This violation is not permissible simply because the state achieved it through a coerced arbitration clause rather than by legislation.

2. Enforcement of the arbitration clause here would also implicate Ms.

Bonakdar's right to due process. State and federal law provide Ms. Bonakdar with a cause of action against Victim Services for its misconduct—an entitlement that is protected under the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *id.* (explaining that the Due Process Clause "protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances").

As far as we are aware, no court has yet decided precisely what process is due when the state invokes the criminal justice system to deprive litigants of their interest in bringing a cause of action in court and instead forces them to resolve their disputes in private arbitration. But the general framework for analyzing due process claims is well-established. Under the *Mathews v. Eldridge* test established by the Supreme Court, courts consider "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, including the burdens of additional procedural requirements." *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Here, Ms. Bonakdar has a strong interest in being able to go to court to challenge the misconduct of a debt collector coercing payments from consumers in

the name of the state. And it's difficult to imagine what possible interest the government has in depriving her of this right. Moreover, the Supreme Court itself has acknowledged that the informality of arbitration—and the "absence of "[m]ultilayered review"—increases the risk of errors and "makes it more likely that errors will go uncorrected." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Thus, under *Mathews*, allowing the state to deprive Ms. Bonakdar of her right to bring her cause of action in court and force her—on pain of criminal prosecution—to resolve her disputes in private arbitration would, at the very least, raise serious questions as to whether her right to due process was violated.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: April 26, 2017

Respectfully submitted,

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