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

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

Plaintiffs,

v.

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

Defendants.

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

**BRIEF OF EAST BAY
COMMUNITY LAW CENTER,
SOUTHERN CENTER FOR
HUMAN RIGHTS, AND
PROFESSORS OF ARBITRATION,
CONTRACTS, AND CONSUMER
LAW AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT
VICTIM SERVICES, INC.'S
MOTION TO COMPEL
ARBITRATION AND STAY
ACTION**

The Honorable Vince Chhabria

CLASS ACTION

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1 favor of arbitration” do not apply. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford*
2 *Junior Univ.*, 489 U.S. 468, 478 (1989) (“[W]e have recognized that the FAA does not require
3 parties to arbitrate when they have not agreed to do so.”).

4 *Amici* take interest in this case not solely because of the constitutional principles that it
5 implicates. They take interest in this case because the coercion inherent in the criminal justice
6 system is inconsistent with the sort of voluntary, bilateral contract formation that is a prerequisite
7 to compelling arbitration. By allowing Defendants unilaterally to insist on an arbitration
8 requirement to which Plaintiffs could not have agreed, the Court would provide other civil rights
9 violators with a blueprint for avoiding litigation to hold such wrongdoers accountable for
10 unlawful and inherently coercive conduct.

11 *Amici* ask this Court to deny Defendants’ Motion for the following reasons:

12 *First, amici* argue that compelling arbitration in this case would run afoul of blackletter
13 principles of contract formation that apply to all contracts, including arbitration agreements.
14 *Buckeye Check Cashing v. Cardegena*, 546 U.S. 440 (2006), does not change this analysis because
15 that case is premised on the parties having voluntarily entered into an agreement to arbitrate. In
16 this case, the parties never entered into such an agreement.

17 *Second, amici* argue that accepting Defendants’ arguments regarding contract formation
18 would allow future bad actors to insulate themselves from litigation targeting predatory practices
19 relating to court fines and fees and the privatization of the criminal justice system—litigation
20 now emerging across the country. What is more, were the analysis offered by Defendants
21 accepted decades ago, it would have nipped at its bud important civil rights litigation involving
22 state actor defendants who could (in theory) have insisted on arbitration requirements in the
23 course of their interactions with prisoners, recipients of public benefits, students, and others.

1 The **Southern Center for Human Rights** is a non-profit, public interest law firm
2 dedicated to enforcing the civil and human rights of people in the criminal justice system
3 throughout the Southeast United States. To enforce the right to counsel, the Center has brought
4 class action lawsuits, issued investigative reports, and advocated for legislative reforms on behalf
5 of indigent defendants across the State. The Center has also consistently advocated for fairness
6 and just treatment for those affected by other aspects of the criminal justice system, including
7 those affected by private probation systems. *See Southern Center for Human Rights,*
8 *Profiting From the Poor: A Report On Predatory Probation Companies in Georgia* (July
9 2008). Specifically, the Center aims to ensure that the quality of justice received by individuals is
10 not dependent on one's income.

11 Additionally, the Center is counsel for the plaintiffs in *Luse v. Sentinel Offender Servs,*
12 LLC, 2:16-mi-00030-UNA (N.D. Ga.). In that case, the defendant, a private probation company,
13 included an arbitration term in the standard form contract that probationers had to sign to enter
14 into the program. *See id.*, Dkt. 11-4.

15 The **Arbitration, Contracts, and Consumer Law Professors** teach and write about
16 arbitration, contracts, and consumer law issues. They have an interest in ensuring that arbitration
17 agreements are enforced only when consistent with basic principles of contract law and the
18 constitutional right to access the courts. As reflected in the citations throughout this brief, these
19 professors have written on many of the topics at issue in this case. These professors are:

20 ***Myanna Dellinger, University of South Dakota Law School.*** Myanna Dellinger is an
21 Associate Professor at the University of South Dakota Law School. She is the editor in chief of
22 the ContractsProfs Blog. She teaches and rights on contract law, among other things.

1 **Richard Frankel, Drexel University Thomas R. Kline School of Law.** Richard Frankel is
2 an Associate Professor of Law at the Drexel University Thomas R. Kline School of Law and is
3 the Director of the Law School’s Appellate Litigation Clinic. Professor Frankel has published
4 and spoken frequently on matters relating to mandatory arbitration and to the privatization of
5 government services, and has testified before Congress regarding the Arbitration Fairness Act.

6 **Jake Linford, Florida State University College of Law.** Jake Linford is an assistant
7 professor at the FSU College of Law. He teaches and writes in contract law, among other
8 subjects.

9 **Keith A. Rowley, UNLV William S. Boyd School of Law.** Keith Rowley is the William S.
10 Boyd Professor of Law at the UNLV William S. Boyd School of Law. He writes and teaches on
11 issues related to contract law. He is an elected member of the American Law Institute and a former
12 chair of the Contracts and Commercial and Related Consumer Law Sections of the Association of
13 American Law Schools.

14
15 **Neil L. Sobol, Texas A&M University School of Law.** Neil Sobol is an Associate
16 Professor and the Director of Legal Analysis, Research & Writing at Texas A&M University
17 School of Law. Professor Sobol focuses his research on issues involving abuses by debt
18 collectors in both the civil and criminal justice arenas. His publications include: *Charging the*
19 *Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MARYLAND LAW REVIEW 486
20 (2016) and *Protecting Consumers from Zombie-Debt Collectors*, 44 NEW MEXICO LAW REVIEW
21 327 (2014).

22 **Jean Sternlight, UNLV William S. Boyd School of Law.** Jean Sternlight is Director of
23 the Saltman Center for Conflict Resolution and Michael and Sonja Saltman Professor of Law at

1 the UNLV William S. Boyd School of Law. She writes and teaches on issues related to
2 arbitration.

3 *Imre S. Szalai, Loyola University New Orleans College of Law.* Imre Szalai is the Judge
4 John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans
5 College of Law. He is the author of *Outsourcing Justice: The Rise of Modern Arbitration Laws*
6 *in America* (2013), which comprehensively explores the development and enactment of the
7 Federal Arbitration Act and similar state statutes during the 1920s. His scholarship has appeared
8 in top journals of dispute resolution, such as the *Harvard Negotiation Law Review*, *Pepperdine's*
9 *Dispute Resolution Law Journal*, and *Missouri's Journal of Dispute Resolution*, and he maintains
10 a blog focusing on arbitration law.

11 *Karen Tokarz, Washington University School of Law.* Karen Tokarz is the Charles
12 Nagel Professor of Public Interest Law, Director of the Negotiation & Dispute Resolution
13 Program, and Director of the Civil Rights & Community Justice Clinic at Washington University
14 School of Law. She writes and teaches on issues related to arbitration, among other subjects.

15 **BACKGROUND**

16 Plaintiffs argue that the Court can deny Defendants' Motion to Compel arbitration, as a
17 matter of law, based solely on the letter Ms. Bonakdar received from Victim Services, Inc.
18 ("VSI"), even though that letter does not once mention VSI. *See* Dkt No. 106-3. At the top of
19 that letter is the official seal of the El Dorado County District Attorney, and just below this seal
20 is a notice warning the recipient that "IMMEDIATE ACTION [IS] REQUIRED." *Id.* at 1. The
21 letter explains that Ms. Bonakdar has been accused of violating the California Penal Code and
22 that she faces a sentence of up to "one (1) year in the county jail" because she wrote a bad check.
23 *Id.* She can avoid these charges, the letter explains, only by enrolling in a "Bad Check

1 Restitution Program” that includes a required financial accountability class for which she must
2 pay a \$191.00 fee. *Id.* at 5.

3 The arbitration requirement that Defendants seek to enforce here appears on the third
4 page of the letter in small font and without any of the large font and capitalized warnings
5 demanding “immediate action.” It purports to bind any “Participant” who “pay[s] the fees
6 charged for the Program.” *Id.* at 3. Even if a participant had taken the time to read past the
7 District Attorney letterhead and the threat of incarceration, she would have understood the logic
8 of the offer as follows: Pay us money and give up your right to sue us, or risk criminal charges
9 and jail time.

10 Defendants ask this Court to conclude that those facts support a finding that Ms.
11 Bonakdar voluntarily consented to arbitrate disputes with VSI, even though its name does not
12 appear in the letter.

13 ARGUMENT

14 I. Plaintiffs Did Not Voluntarily Enter into an Agreement to Arbitrate.

15 A. Ms. Bonakdar Was Not on Notice of the Arbitration Requirement.

16 Under well-established precedent, VSI’s arbitration requirement is enforceable against
17 Ms. Bonakdar only if a “reasonably prudent” person in her situation would have been on
18 constructive notice of it. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir.
19 2014) (“[W]here a website makes its terms of use available via a conspicuous hyperlink on every
20 page of the website but otherwise provides no notice to users nor prompts them to take any
21 affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant
22 buttons users must click on—without more—is insufficient to give rise to constructive notice”);
23 *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012). But the arbitration clause in this

1 case fails even that test. Like an unenforceable “browsewrap” clause “buried at the bottom of [a
2 web]page[,]” VSI’s arbitration requirement—set out in small font on the third page of an
3 unsolicited letter—would be unlikely to provide notice to a reasonable person. Dkt. No. 106-3 at
4 3; *see also Nguyen*, 763 F.3d at 1177.

5 Moreover, a reasonably prudent recipient of VSI’s letter would not understand that by
6 sending payment to VSI, he or she would accept terms written in legalese on the third page of the
7 communication. Dkt. No. 106-3 at 1. Courts sometimes compel arbitration even where the
8 arbitration requirement does not call for express assent by, for example, checking an
9 acknowledgment box online. But in those cases, unlike here, the alleged contract refers the
10 consumer to its “terms and conditions” as part of the process of purchasing the good or enrolling
11 in the service. *Compare Nguyen*, 763 F.3d at 1177, with *Fagerstrom v. Amazon.com, Inc.*, No.
12 15-CV-96-BAS-DHB, 2015 WL 6393948, at *12 (S.D. Cal. Oct. 21, 2015) (finding arbitration
13 clause enforceable where “[p]laintiffs need not scroll to another part of the checkout page or
14 click on any additional link to be put on notice that they are bound by the COUs when they place
15 an order”).

16 In this case, no reasonable person would have considered the possibility that an
17 arbitration term might apply when writing a check to VSI or calling VSI to provide credit card
18 information. Indeed, the letter draws the recipient’s attention away from the terms and conditions
19 on its third page and toward the first and fifth pages of the letter, which both include District
20 Attorney letterhead and the warning that “IMMEDIATE ATTENTION [IS] REQUIRED.”
21 *Sgouros v. TransUnion Corp.*, --- F.3d ----, No. 15-1371, 2016 WL 1169411, at *5 (7th Cir. Mar.
22 25, 2016) (“That text distracted the purchaser from the Service Agreement by informing him that
23 clicking served a particular purpose unrelated to the Agreement.”); *see also Berkson v. Gogo*

1 LLC, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015). What is not good enough for TransUnion and
2 Barnes & Noble cannot be good enough for Victim Services, Inc.

3 **B. Ms. Bonakdar Was under Duress When She Became a Participant in VSI's**
4 **Program.**

5
6 “Arbitration is simply a matter of contract between parties; it is a way to resolve
7 disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *First*
8 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). For this reason, the FAA provides
9 that a court may compel arbitration only “upon being satisfied that the making of the agreement
10 or the failure to comply therewith is not at issue.” 9 U.S.C. § 4.

11 Constructive notice is a necessary condition of contract formation, but it is not a
12 sufficient condition. Even if Ms. Bonakdar was on constructive notice of the arbitration term, she
13 did not enter into an agreement with VSI if her consent to that agreement was not voluntary.
14 *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing “duress” as a defense
15 to enforcement of an arbitration requirement); *Adkins v. Sogliuzzo*, No. CIV.A. 09-1123 SDW,
16 2010 WL 502980, at *9 (D.N.J. Feb. 9, 2010) (ordering trial on question of whether arbitration
17 agreement was signed under undue influence); *Casteel v. Clear Channel Broad.*, 254 F. Supp. 2d
18 1081 (W.D. Ark. 2003) (striking down arbitration clause because plaintiff employees were under
19 extreme duress when signing, in that their managers were standing over them).

20 In this case, the absence of voluntary assent is apparent (also as a matter of law) from the
21 face of VSI's communication. VSI purported to employ the threat of arrest to coerce people to
22 pay it money. Unfortunately, coercion of this sort is not anomalous in our legal system.
23 Particularly when entities charged with the implementation of criminal justice policies have a
24 profit motive, those entities frequently threaten criminal prosecution, arrest, or incarceration to
25 extract payments from individuals like Ms. Bonakdar. *See, e.g.*, U.S. Dep't of Justice,

1 *Investigation of the Ferguson Police Dep't*, March 4, 2015, at 55 (“*DOJ Rep. on Ferguson*”)
2 (“The evidence we have found shows that these arrest warrants are used almost exclusively for
3 the purpose of compelling payment through the threat of incarceration.”). These threats, whether
4 or not valid under the law, are immensely disruptive to the lives of the people against whom they
5 are made. Commentators have observed that the threat of incarceration for inability to pay court
6 debts is a constant, looming fear for many Americans, which causes them to remain “tethered to
7 the criminal justice system.”³ As one Ferguson, Missouri resident said about that community,
8 “[i]n some cases people. . . decide the threat of arrest [for inability to pay court fines and fees]
9 makes it not worth trying to commute outside their neighborhood [to go to work].”⁴ It is not
10 difficult to see why someone in Ms. Bonakdar’s position would feel compelled to pay the entity
11 that sent her the letter.

12 This case is unique, however, because Defendants now hope to use this same coercive
13 influence to force Ms. Bonakdar to waive her right to sue in a public forum to challenge
14 Defendants’ wrongdoing. Defendants, in other words, would have this Court believe that they
15 can force Ms. Bonakdar to pay them money and, in the course of this exercise of coercive power,
16 force her to waive her right to sue them for the acts of coercion that led to the payment. They
17 seek to use the “coercive power of criminal process . . . to serve the end of suppressing
18 complaints against official abuse, to the detriment not only of the victim of such abuse, but also
19 of society as a whole.” *Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O’Connor, *J.*
20 concurring). The Court should not sanction these efforts. *See Regan*, 85 F. Supp. 3d at 1364

³ American Civil Liberties Union, *In for a Penny: The Rise of America’s New Debtors’ Prisons*, Oct. 2010, available at https://www.aclu.org/files/assets/InForAPenny_web.pdf.

⁴ Jelani Cobb, What I Saw in Ferguson, *NEW YORKER* (Aug. 14, 2014), available at <http://newyorker.com/news/news-desk/saw-ferguson?currentPage=all>.

1 (denying enforcement of arbitration term in case involving pre-paid card in part because the
2 “[p]laintiff received the [c]ard while he was being discharged from jail, *i.e.* from a condition of
3 absence of liberty of choice which [the d]efendant reasonably could have anticipated”).

4 **C. *Buckeye Check Cashing Is Inapposite.***

5 Defendants argue that the Court must compel arbitration of even the initial question of
6 whether Ms. Bonakdar’s assent was voluntary because she alleges that she entered into her entire
7 relationship with VSI under duress. For support, Defendants rely on *Buckeye Check Cashing,*
8 *Inc. v. Cardegna*, 546 U.S. 440 (2006). That case holds that when a party challenges the validity
9 of a contract containing an arbitration clause, the FAA makes that arbitration clause severable
10 from the rest of the contract, so that the parties must arbitrate their challenges to the agreement as
11 a whole. *Id.* at 445. If Plaintiffs’ sole argument against enforcement of the arbitration
12 requirement had been that it was situated within a substantively unfair and illegal contract in
13 violation of the FDCPA, *Buckeye* might have required them to arbitrate that question. After all,
14 the Court could sever the arbitration term and consider it as a valid, stand-alone agreement.

15 It is inconsistent, however, with the FAA and *Buckeye* to force Plaintiffs to arbitrate the
16 question of whether they entered into an arbitration requirement. The Court cannot compel
17 arbitration *at all* unless it is assured that there is an agreement to arbitrate. *Granite Rock Co. v.*
18 *Int’l Bhd. of Teamsters*, 561 U.S. 287, 305 (2010); *see also BG Grp., PLC v. Republic of*
19 *Argentina*, 134 S. Ct. 1198, 1222 (2014) (Roberts, *C.J.*, dissenting); *Howard v. Ferrellgas*
20 *Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (“[E]veryone knows the Federal Arbitration
21 Act favors arbitration. But before the Act’s heavy hand in favor of arbitration swings into play,
22 the parties themselves must *agree* to have their disputes arbitrated.”). Because defenses that turn
23 on the voluntariness of assent, including duress and undue influence, go to the question of

1 whether the parties have entered into an agreement to arbitrate, those defenses are thus for the
2 Court to decide. *Adkins*, 2010 WL 502980, at *9 (concluding that *Buckeye*'s severability
3 principle does not apply to an undue influence defense). The Court cannot, after all, sever an
4 arbitration term from a contract entered into under duress and consider that term to be a valid,
5 stand-alone agreement. That term too would be vitiated by the absence of voluntary consent.

6 Defendants do not escape this analysis by arguing that Plaintiffs' duress defense would
7 render the agreement (including the arbitration clause) voidable as opposed to void. Perhaps
8 without realizing it, in making this argument, Defendants appear to fall into a trap that *Buckeye*
9 warned against. *Buckeye* instructs that whether a defense "voids" the contract or makes it
10 "voidable" is irrelevant in determining whether an issue is for the court or the arbitrator. *Buckeye*
11 *Check Cashing*, 546 U.S. at 44; *Doug Brady, Inc. v. New Jersey Bldg. Laborers Statewide*
12 *Funds*, No. CIV. A. 07-5122, 2009 WL 349147, at *3 (D.N.J. Feb. 11, 2009) ("*Buckeye Check*
13 *Cashing* appears to have displaced the . . . void/voidable distinction regarding which contract
14 disputes must be determined by courts.>").

15 Rather, *Buckeye* and cases interpreting it teach that whether a defense is for the court or
16 the arbitrator depends on if the defense concerns a contract's validity or its formation. If a
17 defense goes to the validity of an agreement, the court must ask whether the defense concerns the
18 agreement as a whole or the arbitration term "standing alone" to determine whether it is for the
19 court or the arbitrator. *See, e.g., Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622
20 F.3d 996, 1000 (9th Cir. 2010). If, however, a defense goes to whether the parties have formed a
21 contract—or in the words of *Buckeye*, whether an agreement was "concluded," *Buckeye Check*
22 *Cashing*, 546 U.S. at 444 n.1—then it is necessarily for the court to decide. *Granite Rock*, 561
23 U.S. at 296; *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 741 (7th Cir. 2010). In this case,

1 Plaintiffs assert that Ms. Bonakdar’s duress prevented her from voluntarily entering into an
2 agreement with VSI, and the Court must decide this threshold question of contract formation.

3 **II. Compelling Arbitration Here Would be Incompatible with Pending Civil Rights**
4 **Litigation Concerning the Privatization of the Criminal Justice System.**
5

6 The faithful application of blackletter principles of contract law is essential here because
7 of the coercive nature of the relationship between the state (or entities acting on behalf of the
8 state) and the individual. Some of the most pressing racial and economic justice problems of our
9 day concern court fines and fees and the private contracting of criminal and civil justice
10 functions. Across the country, the poor and marginalized fall victim to state programs that police
11 and incarcerate for profit.⁵ These programs have particularly dire consequences for the poor, who
12 often become trapped in the criminal justice system, as the inability to pay court debt results in
13 the imposition of additional fees, or “poverty penalties,” in the form of charges for interest,
14 installment payments, late payments, and collection.⁶

15 If we cast aside blackletter principles of contract law and allow Defendants here to
16 unilaterally insist on an arbitration provision through the threat of criminal prosecution, it is
17 difficult to see how any of the most important recent cases involving these issues could not also
18 be forced out of court. Consideration of a few of these recent cases illustrates the unfairness that

⁵ See, e.g., *DOJ Rep. on Ferguson*; Law. Comm. For Civil Rights of the S.F. Bay Area, East Bay Cmty. Law Ctr., Western Ctr. for Law and Poverty, *A New Way of Life Re-Entry Proj., Legal Servs. For Prisoners with Children, Not Just a Ferguson Problem*, Apr. 20, 2015, available at <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf>; Sarah Stillman, *Get Out of Jail Inc.*, NEW YORKER, July 23, 2014, available at <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>; Am. Civil Liberties Union, *Banking on Bondage: Private Prisons & Mass Incarceration*, Nov. 2011, available at <https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration>.

⁶ Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 518 (2016)

1 would result from Defendants’ proposal. Although most of these cases do not involve arbitration
2 requirements, the defendants in these cases easily could have imposed such requirements on the
3 plaintiffs through the same kind of coercive influence that Defendants employed here.

4 **Private probation cases.** Over 1,000 courts in at least twelve states use private probation
5 companies to monitor misdemeanor defendants. Typically, private probation companies’ sole
6 source of revenue are fees that they charge and collect from defendants.⁷ Concerns about private
7 probation companies have led to numerous lawsuits.⁸ Like the relationship at issue here, the
8 plaintiffs in these cases often entered into a relationship with the defendants under false threats
9 of incarceration. *See Edwards, et al. v. Red Hills Cmty Probation, et al.*, No. 15-cv-00067 (M.D.
10 Ga.) (filed Apr. 10, 2015), ¶ 5. And yet, under Defendants’ approach, the plaintiffs in these cases
11 could have been forced to enter into arbitration requirements as part of their supervision. Indeed,
12 at least one probation company has already attempted to include an arbitration term in a standard
13 form agreement with probationers. *Luse v. Sentinel Offender Servs, LLC*, 2:16-mi-00030-UNA
14 (N.D. Ga), Dkt. No. 11-4.

15 **Debtors’ prison cases.** Some plaintiffs have challenged policies that result in the
16 incarceration of court debtors who cannot afford their debts. *See, e.g., Compl., Bell, et al., v. The*
17 *City of Jackson*, 15-cv-732 (S.D. Miss.) (filed Oct. 9, 2015) (alleging that Jackson, MS instituted
18 a “pay or stay” policy where those who had court debt resulting from traffic violations or other
19 misdemeanors were required to pay off their debt or remain in jail). But the plaintiffs in these

⁷ HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 1, 12, 23-27 (2014), available at http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

⁸ *See, e.g., Rodriguez v. Providence Community Corrections, Inc.*, No. 3:15-cv-01048 (M.D. Tenn. Oct. 1, 2015); *Edwards, et al. v. Red Hills Cmty Probation, et al.*, No. 15-cv-00067 (M.D. Ga.) (filed Apr. 10, 2015); *Reynolds v. Judicial Correction Services, Inc.*, No. 2:15-CV-00161-MHT-CSC (M.D. Ala. Mar. 12, 2015).

1 cases could have been forced to enter into arbitration requirements as part of payment plans that
2 would allow their release.

3 **Criminal justice fee cases.** In other cases, plaintiffs have sued prisons, courts, or others
4 who charge excessive or unauthorized fees related to the administration of criminal justice. *See,*
5 *e.g., Williams, et al. v. Clinch Cnty, et al.*, No. 05-cv-00124 (M.D. Ga.) (filed Nov. 2, 2004)
6 (alleging that Clinch County sheriff and others forced pre-trial detainees to pay “room and
7 board” fees). These plaintiffs could have been forced to enter into arbitration requirements when
8 entering jail, upon release, or in payment plans to pay off fees.

9 **Civil detention & forced labor cases.** Finally, in other cases, plaintiffs have alleged that
10 private companies administering civil detention programs have forced them, under threat of
11 solitary confinement, to perform work for the company. *See, e.g., Menocal v. GEO Grp., Inc.*,
12 113 F. Supp. 3d 1125 (D. Colo. 2015). Under Defendants’ theory here, there is no reason that
13 these plaintiffs could not have been coerced into entering into arbitration requirements as part of
14 these same work programs, also under threat of solitary confinement. An arbitration agreement
15 entered into under these circumstances is not enforceable, but Defendants would say that it
16 should be.

17 The harmful results that would follow from accepting Defendants’ position are further
18 illustrated by what it would have meant for seminal civil rights cases had it been accepted at the
19 time those cases were filed.⁹ In theory, in most civil rights cases involving the government, the
20 presence of coercion should necessarily undermine the argument that the parties entered into an
21 agreement to arbitrate. These cases usually involve either the provision of a statutory or

⁹ It is true that VSI is—as this Court notes—a “private company.” Dkt. No. 92. But there is no reason why Defendants’ arguments would not apply equally to a state performing these or other core government services in its own capacity.

1 constitutional right—like education or public benefits—or the threatened or actual deprivation of
2 a statutory or constitutional right—as with most cases involving criminal justice. In any of these
3 cases, the defendant could have insisted on an arbitration requirement as part of this coercive
4 relationship. If coercion were not a bar to contract enforcement, then state-actor defendants could
5 have forced important litigation out of court by requiring civil rights plaintiffs to enter into
6 arbitration agreements as a condition of their release from incarceration,¹⁰ as a condition of
7 receiving public benefits,¹¹ or even as a condition of enrollment in a public, segregated school.¹²

8 **III. Because Defendants are State Actors, the Court Cannot Compel Arbitration**
9 **without Considering Plaintiffs’ Constitutional Right to Access the Courts.**

10 If the Court declines to deny Defendants’ Motion on blackletter principles of contract
11 formation, it must also contend with the constitutional issues implicated by Defendants’ Motion.
12 VSI’s arbitration requirement infringes Plaintiffs’ constitutional right to access the courts, and
13 because Plaintiffs did not “knowingly, voluntarily, and intelligently” waive that right, the
14 requirement cannot be enforced against them.
15

16 **A. The State Action Subject to Constitutional Scrutiny is the Creation of the**
17 **Arbitration Requirement.**

18 In this case, the Court must address whether a *public* entity may insist on *private* dispute
19 resolution for claims that would otherwise be available in a *public* forum. It is this insistence by
20 a state actor that is subject to constitutional scrutiny. Put another way, there should be no
21 question that the Constitution would apply to a regulation promulgated by a state actor providing
22 that any person who receives its services must use a special, private dispute resolution system for
23

¹⁰ *Robinson v. California*, 370 U.S. 660 (1962) (concluding that incarceration for drug addiction violates Eighth Amendment).

¹¹ *Goldberg v. Kelly*, 397 U.S. 254, 257 (1970) (requiring hearing before termination of public benefits).

¹² *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954).

1 resolving disputes related to that service. *See Delaware Coal. for Open Gov't, Inc. v. Strine*, 733
2 F.3d 510 (3d Cir. 2013) (addressing constitutionality of Delaware statute providing for
3 confidential arbitration forum for business parties); *see also Henderson v. Ugalde*, 147 P.2d 490,
4 491 (Ariz. 1944) (“When the effect of arbitration statutes is to coerce parties to submit to
5 arbitration, without any agreement or assent on their part to do so, the courts have not hesitated
6 to declare them unconstitutional.” (internal quotation marks omitted)). Defendants here cannot
7 avoid constitutional scrutiny by embedding their rule within a sham, coerced agreement in an
8 attempt to gain the FAA’s protection.¹³

9 It is important to note that these constitutional considerations do not necessarily implicate
10 private arbitration agreements. The constitutionality of private arbitration agreements has
11 sometimes been called into doubt,¹⁴ but the Supreme Court on numerous occasions has
12 addressed the legitimacy of these agreements as a matter of federal law, and *amici* do not take a
13 position on their constitutionality here.

14 **B. The Arbitration Requirement Infringes Plaintiffs’ Constitutional Right to**
15 **Access the Courts, and Waiver of that Right Must be “Knowing, Voluntary,**
16 **and Intelligent.”**
17

18 VSI’s arbitration requirement violated Ms. Bonakdar’s constitutional right to access a
19 public, judicial forum to bring her claims. That right is deeply embedded in our constitutional
20 framework and derives from a number of constitutional sources. *See, e.g., Christopher v.*

¹³ For more on state action and arbitration, *see, e.g., Sarah Rudolph Cole, Arbitration and State Action*, 2005 B.Y.U. L. REV. 1 (2005)(arguing that government-imposed arbitration involves state action, whereas private contractual arbitration does not.).

¹⁴ *Richard C. Reuben, Democracy and Dispute Resolution: The Problem of Arbitration*, 667 LAW & CONTEMPORARY PROBLEMS 279 (2004); Jean R. 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 TULANE L. REV. 1-100 (1997); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85, CAL. L. REV. 577 (1997).

1 *Harbury*, 536 U.S. 403, 415 n.12 (2002) (collecting cases locating the right of access to courts
2 within the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause,
3 the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and
4 Due Process Clauses). The Supreme Court has concluded in other contexts, for example, that “it
5 would be destructive of rights . . . of petition [protected by the First Amendment] to hold that
6 groups with common interests may not . . . use the channels and procedures of state and federal
7 agencies and courts to advocate their causes and points of view.” *California Motor Transp. Co.*
8 *v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). In other words, the Constitution recognizes
9 an interest in accessing a **public** judicial forum to air grievances against a public actor. *See*
10 *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (“[L]ike others, prisoners have the constitutional
11 right to petition the Government for redress of their grievances, which includes a reasonable
12 right of access to the courts.”). That right is implicated by VSI’s arbitration requirement, which
13 deprives individuals like Ms. Bonakdar of the opportunity to bring suit against VSI in court.

14 Defendants ask this Court to conclude that Ms. Bonakdar surrendered this
15 constitutionally-recognized right by entering into a contract with VSI. An individual may, of
16 course, contract with the government to surrender a constitutional right, even if the government
17 would otherwise have to comply with procedural due process to deprive her of that right. But to
18 ensure that state actors do not bypass procedural due process by **forcing** individuals to waive
19 protected interests, the Constitution requires that the government obtain such waivers only
20 through “knowing, voluntary, and intelligent” consent. *See Boykin v. Alabama*, 395 U.S. 238,
21 243 n.5 (1969) (“[I]f a defendant’s guilty plea is not equally voluntary and knowing, it has been
22 obtained in violation of due process.”); *see also Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct.
23 1932, 1948 (2015); *Godinez v. Moran*, 509 U.S. 389, 400 (1993). In other words, although the

1 Constitution may not require courts to apply a “knowing and voluntary” standard to determine
2 whether private parties have entered into an arbitration agreement, when one of those parties is a
3 state actor, constitutional waiver principles apply. *See, e.g., Leonard v. Clark*, 12 F.3d 885, 890
4 (9th Cir. 1993) (concluding that fire fighter union had voluntarily, knowingly, and intelligently
5 waived its First Amendment rights in collective bargaining agreement with city).

6 The “knowing, voluntary, and intelligent” inquiry is necessarily fact specific and should
7 be based on a careful analysis of the “totality of the circumstances.” *United States v. Amano*, 229
8 F.3d 801, 805 (9th Cir. 2000). In her controlling concurrence in a case involving the
9 enforceability of release-dismissal agreements, in which criminal defendants release claims
10 against the state in exchange for the state dropping claims against them, Justice O’Connor set out
11 the following guidance:

12 Many factors may bear on whether a release was voluntary and not
13 the product of overreaching, some of which come readily to mind.
14 The knowledge and experience of the criminal defendant and the
15 circumstances of the execution of the release, including,
16 importantly, whether the defendant was counseled, are clearly
17 relevant. The nature of the criminal charges that are pending is also
18 important, for the greater the charge, the greater the coercive effect.
19 . . . And, importantly, the possibility of abuse is clearly mitigated if
20 the release-dismissal agreement is executed under judicial
21 supervision.

22 *Rumery*, 480 U.S. at 401-02 (O’Connor, *J.* concurring); *see also Wise v. Bandy*, No. 2:12-CV-
23 0291-RWS, 2014 WL 645024, at *8 (N.D. Ga. Feb. 18, 2014) (concluding that defendant-state
24 actors had not met their burden of establishing the enforceability of a release-dismissal
25 agreement in light of Justice O’Connor’s factors).

26 In conducting its own “knowing, voluntary, and intelligent” analysis on the facts of this
27 case, the Court should consider factors like the language, prominence, and clarity of the
28 arbitration requirement within VSI’s letter, Ms. Bonakdar’s experience with the American legal

1 system, and the truthfulness and likely coerciveness of statements made in the communication
2 that induced the putative waiver. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (noting
3 that statements to police officer must be suppressed if they are not “the product of a rational
4 intellect and a free will”); *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1103 (9th Cir. 2005)
5 (describing analysis in case involving waiver of right to jury trial). For the same reasons that, as
6 a matter of law, Defendants cannot establish simple contractual assent, they also cannot establish
7 that Ms. Bonakdar’s assent met this higher, constitutional-waiver standard. And to the extent that
8 the Court has any doubt about the enforceability of Ms. Bonakdar’s waiver, it must hold an
9 evidentiary hearing on the matter.

10 CONCLUSION

11 This Court should deny Defendants’ motion to compel arbitration.

12 April 20, 2016

Respectfully submitted,

13 /s/ Miguel Soto
14 _____

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