IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

PJ Sloat, through her next friend, Pamela Loudon; SS, through Pam Scott his legal guardian; and Disability Rights South Carolina, Plaintiffs, v. **Active Day, Inc.,** Defendant.	Civil Action No.: 3:23-cv-1518-SAL

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Active Day, a provider of daytime services for adults with developmental disabilities, is abusing its position as a provider of a critical government benefit by forcing its vulnerable clients to sign an unconscionable arbitration agreement that strips them of basic rights and jeopardizes their safety. At the same time, the arbitration agreement releases Active Day from any meaningful form of accountability or government oversight. Medicaid beneficiaries who have relied on day care and nursing services at Active Day for years are now faced with an impossible choice: sign a contract no reasonable person would sign, or lose services. Active Day's decision to condition receipt of this critical, often life-sustaining government benefit on the signing of an oppressive arbitration agreement violates plaintiffs' rights under state law and the U.S. Constitution and renders the agreement invalid and unenforceable.

Active Day has moved to dismiss, arguing that plaintiffs have suffered no injury. But the company overlooks that recipients of its service, including plaintiffs PJ Sloat and SS, have been subjected to severe, unconstitutional coercion, and dignitary harms. Active Day's unlawful conduct has also denied these plaintiffs access to adult day care services under more desirable and less dangerous terms, and SS has been denied adult day care services altogether. Finally, plaintiff Disability Rights South Carolina (DRSC), which is statutorily authorized to advocate for the rights of South Carolinians with disabilities, has adequately alleged associational standing on behalf of its constituents.

In the same brief that Active Day argues that enforcement of the arbitration agreement is speculative, it tries to enforce the agreement and send PJ and DRSC's claims to arbitration. The company even seeks fees pursuant to the agreement to penalize these plaintiffs for coming to court to begin with. But it is well established that courts—not arbitrators—decide threshold questions like if an arbitration agreement was formed and if its delegation provision is enforceable. Here, no

valid contract was formed because PJ signed the agreement under duress and such a contract is prohibited under the unconstitutional conditions doctrine. The delegation clause is also unconscionable and thus unenforceable. Because plaintiffs have adequately alleged standing and claims for relief under both state and federal law, Active Day's motion to dismiss should be denied and plaintiffs should have the opportunity to present evidence in support of their claims.

FACTUAL ALLEGATIONS

Active Day is a Medicaid provider of daytime services for adults with developmental disabilities. Am. Compl., ECF 30, ¶ 10. They are the largest network of owned and operated centers for adult day services in the country. *Id.* The company is authorized to provide services in accordance with the Intellectual Disability/Related Disabilities Medicaid Waiver (ID/RD)—a program that permits states to offer an array of home and community-based services that an individual with intellectual disabilities may need to avoid institutionalization. *Id.* ¶ 30.

In March of this past year, Active Day rolled out a mandatory, pre-dispute arbitration agreement and required its clients to either sign the agreement or be discharged from Active Day's program. *Id.* ¶¶ 16–19; *see also* Ex. A to Am. Compl., Arbitration Agreement ("AA"), ECF 30-1. Their clients often have severe disabilities and rely on Active Day's daytime supervision and nursing services. Am. Compl. ¶¶ 15, 17, 44. Nor was it an ordinary arbitration agreement. The agreement is littered with a host of facially unconscionable, one-sided terms and conditions that together ensure Active Day can operate its facilities with impunity. *See id.* ¶¶ 25–27. For example, the agreement requires plaintiffs to bring all claims, of any kind, in arbitration *in Pennsylvania*, even though many of Active Day's clients have severe physical disabilities that make such travel from South Carolina dangerous if not impossible. *See id.* ¶¶ 26–27. The agreement also includes a confidentiality clause, precluding clients from sharing information about Active Day's unlawful conduct—from sexual abuse to negligent medical practices—with other clients who may be at risk

of harm or the public entities that are authorizing and funding Active Day to provide services. *See id.* ¶ 27. The scope of the agreement is also so broad and applies to disputes with a host of third parties, that it can be read to prohibit clients from filing Medicaid appeals over Active Day's provision of services. *See id.* ¶ 25.

Individual plaintiffs PJ and SS were two Active Day clients receiving daytime services under the ID/RD waiver program when they were told that they had to sign the new, binding arbitration agreement or lose services. PJ is a twenty-year-old woman with an intellectual disability and Cerebral Palsy. *Id.* ¶ 6. She is quadriplegic, legally blind, and incontinent, and has significant hearing loss and a gastrostomy tube. *Id.* PJ's mother cannot safely leave her alone. *Id.* PJ attends Active Day's adult daytime services so that her mother may work and complete basic errands. *Id.* PJ's mother signed the arbitration agreement so that PJ could continue to receive services; she felt she had no choice. *Id.* ¶ 20.

The other individual plaintiff in this action, SS, is a twenty-six-year-old man with autism who had been receiving Active Day's daytime services for around two years. *Id.* ¶ 7. For SS, Active Day's services were essential to receiving appropriate supervision, support, and socialization with peers at his level of intellectual disability, which he cannot readily receive elsewhere. *Id.* ¶¶ 17, 28, 44. Nonetheless, SS's guardian, his mother, refused to sign the agreement. *Id.* ¶ 21. As a result, SS was discharged and is no longer receiving adult daytime services. *Id.*

Plaintiff Disability Rights South Carolina is a nonprofit organization and South Carolina's Protection and Advocacy (P&A) system authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals with disabilities. *Id.* ¶ 8. Several of DRSC's constituents have sought DRSC's

assistance with respect to Active Day's new arbitration agreement requirement but do not want to pursue litigation themselves for fear of retaliation. *Id.* ¶ 9.

Plaintiffs PJ, SS, and DRSC claim that Active Day violated the South Carolina Unfair Trade Practices Act, as well as the First Amendment's Petition Clause and Free Speech Clause, and Article III of the U.S. Constitution. *Id.* ¶¶ 57–71. They seek to enjoin Active Day from requiring its clients to sign the agreement as a condition of receiving services, and request a declaratory judgment that the agreement is invalid and unenforceable. *Id.* ¶¶ 43–56. Active Day has moved to dismiss, and Plaintiffs oppose the motion.

LEGAL STANDARD

In assessing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court "must accept as true all material allegations of the complaint," and "construe the complaint in favor of the complaining party." *Meyer v. McMaster*, 394 F. Supp. 3d 550, 558 (D.S.C. 2019) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). For standing, "general factual allegations of injury resulting from the defendant's conduct may suffice" because courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Meyer*, 394 F. Supp. 3d at 558.

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court likewise "accept[s] the factual allegations of the complaint as true and construe[s] them in the light most favorable to the nonmoving party." *Corder v. Antero Res. Corp.*, 57 F.4th 384, 401 (4th Cir. 2023) (citation omitted). To survive a Rule 12(b)(6) motion, the complaint "must contain enough facts to 'state a claim for relief that is plausible on its face.'" *Id.* (citation omitted).

Finally, in assessing a Rule 12(b)(3) motion to dismiss for improper venue, the Court again "must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff." *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F. App'x 612, 615 (5th Cir. 2007)

(citing, *inter alia*, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1352 (3d ed. 2004)). The Court may "consider evidence outside the pleadings," but a plaintiff is "obliged, however, only to make a prima facie showing of proper venue in order to survive a motion to dismiss," and the Court "view[s] the facts in the light most favorable to the plaintiff." *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 365–66 (4th Cir. 2012).

ARGUMENT

I. Plaintiffs Have Alleged Article III Standing.

A. PJ Has Alleged an Injury in Fact.

PJ has alleged a concrete injury that is "not conjectural or hypothetical" because she has been forced to sign away core constitutional rights and any meaningful legal recourse against Active Day as a condition for continuing to receive critical nursing and care services. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). Contrary to Active Day's characterization, PJ is not bringing a pre-enforcement challenge to an arbitration agreement based on some future hypothetical; she is challenging Active Day's existing requirement that she sign an unconscionable and illegal agreement as a condition for continuing to receive the services she is entitled to. *See Bowen v. First Fam. Fin. Servs., Inc.*, 233 F.3d 1331, 1339 (11th Cir. 2000) (concluding plaintiffs "do have standing to claim that [defendant] violated the [law] by requiring them to sign the arbitration agreement in order to obtain a loan"); *see also Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 283 n.13 (4th Cir. 2008) (distinguishing premature challenge to arbitration agreement from situation where plaintiffs "allege that they were coerced into signing an arbitration provision in exchange for exercising a statutory right").

By conditioning the continued provision of services on the signing of the arbitration agreement, Active Day has injured PJ in a number of ways. ***First***, by requiring PJ to sign the agreement or lose critical, life sustaining services, Active Day caused PJ to suffer a severe form of

coercion, itself an injury. PJ is severely disabled and highly dependent on Active Day's nursing services and daytime supervision. In addition to her intellectual disability, she has Cerebral Palsy, significant hearing loss, and a gastronomy tube, and is also quadriplegic, legally blind, and incontinent. Am. Compl. ¶ 6. PJ's mother, her primary caregiver, cannot safely leave her alone but also works five days a week. *Id.* PJ therefore needs to go to Active Day to be safe and ensure her basic needs are met and so that her mother can work and run necessary errands. *Id.* PJ has relied on Active Day's services for over two and a half years and there is no available alternative that will satisfy her unique medical needs. *Id.* ¶¶ 28, 44; *see also infra* at IV.A. Active Day took advantage of PJ's severe disabilities and dependence on its services by requiring her to sign the facially unconscionable and unlawful agreement to continue receiving its critical day care services.

This was an attempt to control PJ's conduct through unlawful conduct—in other words, to coerce her—and "being coerced is a cognizable injury." *Arizona v. Yellen*, 34 F.4th 841, 853 (9th Cir. 2022); *see also Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217, 223 (2d Cir. 2008) (finding injury in fact where unlawful conduct "deprived [consumers] of any meaningful choice on a critical term and condition of their general purpose card accounts" and "reduced choice" of credit card services); *W. Va. by & through Morrisey v. U.S. Dep't of Treasury*, 59 F.4th 1124, 1136 (11th Cir. 2023) ("analogiz[ing] the relationship between Congress and the States in Spending Clause situations to that between contracting parties" to conclude that West Virginia alleged an injury when it claimed it was "coerced into accepting an offer with an unascertainable condition").

Further, while Active Day's coercion of PJ is an injury on its own, it is certainly an injury to the extent Active Day's conduct constituted state action, as the Amended Complaint alleges. *See* Am. Compl. ¶¶ 30–42, 62–71. Under the unconstitutional conditions doctrine, *the conditioning* of a government benefit on the forfeiture of a constitutional right is the harm that the longstanding,

common law doctrine is meant to protect against. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[T]he unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (recognizing that the issue in unconstitutional conditions cases is "coercion").

This coercive harm recognized by the unconstitutional conditions doctrine is all the more pronounced where, as here, access to a government benefit—adult daytime services under the ID/RD waiver program—is used to coerce PJ into forfeiting her First Amendment rights. *See Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (explaining "standing requirements are somewhat relaxed in First Amendment cases"). The arbitration agreement restricts PJ from speaking to others about disputes with Active Day and penalizes her for petitioning the courts through an unfair cost-shifting provision. Am. Compl. ¶ 27; AA ¶¶ (i), (l). These provisions have a chilling effect on PJ's First Amendment rights as they are "likely to deter a person of ordinary firmness from the exercise" of such rights. *See Cooksey,* 721 F.3d at 236 (citation omitted). Nor is Active Day's use of the arbitration agreement to chill PJ's First Amendment rights speculative; the company is already seeking fees and costs pursuant to the arbitration agreement to penalize her for exercising her First Amendment right to petition the courts. *See* MTD, ECF 38-1, at 25–26.

Second, Active Day's particular coercive conduct, which takes advantage of the severity of PJ's disabilities and strips her of any meaningful choice in light of her complete dependence on its services, is also a cognizable "dignitary harm." *Griffin v. Dep't of Lab. Fed. Credit Union,* 912 F.3d 649, 654 (4th Cir. 2019) (recognizing "dignitary harms are readily inferred by allegations of unequal treatment"); *see also Kirk v. Comm'r of Soc. Sec. Admin*., 987 F.3d 314, 324 (4th Cir. 2021) (recognizing "distinct dignitary harm" where Social Security disability beneficiaries were

denied opportunity to dispute allegation that they received undeserved benefits) (citation omitted); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 874 (9th Cir. 2017) (recognizing employer's unlawful mandatory arbitration agreement with disabled employee caused "dignitary harm").

Third, beyond the coercion and dignitary harm, PJ has been injured because while she is still receiving services, she is now receiving service that is less desirable than the service she previously enjoyed. PJ wanted to continue to receive Active Day's service without being subject to the oppressive and unlawful conditions of the arbitration agreement. But because Active Day unlawfully conditioned its provision of services on the signing of an unconscionable agreement, PJ can no longer receive her desired service. Am. Compl. ¶ 20. This harm, the denial of the desired service, is analogous to the denial of a desired product, which the D.C. Circuit has recognized as an Article III injury in fact. In a long line of cases, the D.C. Circuit has repeatedly held that the "lost opportunity to purchase a desired product is a cognizable injury." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017); *see also Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("[A] lost opportunity to purchase vehicles of choice" is an injury in fact); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986) (similar).[1]

PJ is still receiving adult care services from Active Day, but on worse terms, and *that* is the injury. For example, in *Orangeburg*, the D.C. Circuit held that a municipality could challenge a decision by the Federal Energy Regulatory Commission that prevented the municipality from

[1] While the Fourth Circuit has not yet applied this line of cases, it also has not rejected it. *See Braidwood Mgmt. Inc. v. Becerra*, No. 4:20-CV-00283-O, 2023 WL 2703229, at *5 (N.D. Tex. Mar. 30, 2023) ("[T]hat the Fifth Circuit has not expressly adopted the purchaser standing doctrine does not bar its application here because neither has the Fifth Circuit rejected the theory. Nor is it uncommon or improper for a district court to look to outside Circuits for persuasive legal authority where there is no binding precedent on the issue at hand.").

obtaining "the best terms it can" during the next round of contract negotiations. 862 F.3d at 1079. Because the city could not "purchase wholesale power from the provider of its choice nor on its preferred terms," the Article III injury requirement was satisfied. *Id.* at 1078. Likewise, here, PJ could not obtain Active Day's adult day care service on her preferred terms.

Moreover, even if PJ could have found an alternative program to provide the nursing services she requires (which she could not have, *see* Am. Compl. ¶¶ 28, 44), she has still suffered an injury. A consumer's inability "to buy a desired product may constitute injury-in-fact even if they could ameliorate the injury by purchasing some alternative product." *See Orangeburg*, 862 F.3d at 1078 (quoting *Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003)). In *Consumer Federation*, for example, the D.C. Circuit held that even though the plaintiffs "could obtain high-speed internet access" from another source, they nonetheless suffered an injury-in-fact because they could not obtain that access from the service provider of their choice. 348 F.3d at 1012. Similarly, in *Competitive Enterprise Institute*, consumers were injured where they alleged unlawful conduct made larger cars less available and they preferred larger cars "for reasons of safety, comfort, and performance." 901 F.2d at 112–13. Here, PJ prefers Active Day's services.

Nor are the undesirable terms that PJ is now subject to ancillary or inconsequential. The arbitration agreement impacts PJ's ability to hold Active Day, the company responsible for her daily physical safety and wellbeing, accountable. The agreement makes it difficult, even impossible, for PJ to seek recourse in the event that an Active Day nurse negligently harms her because it requires her to arbitrate her claims in another state despite her severe physical disabilities, imposes unfair fees and costs, and eliminates the substantive discovery rules and statute of limitations that would apply in court. Am. Compl. ¶ 27. For someone like PJ, whose conditions put her safety and health at risk throughout the day, the inability to effectively hold her

caretakers accountable presents a very real threat to her safety and wellbeing. The agreement also restricts Active Day's clients from speaking about disputes subject to arbitration, which impacts the safety and quality of care provided because issues can be kept secret while the company evades any government oversight. *Id.* Not only do these provision directly impact the service Active Day is providing, but they subject signatories like PJ to an increased risk of harm, which is a ***fourth*** cognizable injury in fact. *See O'Leary v. TrustedID, Inc.*, 60 F.4th 240, 243 (4th Cir. 2023) (recognizing non-speculative increased risk of harm as injury in fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (same).

Active Day's arguments disputing PJ's standing hold no weight. Active Day argues that to challenge the arbitration agreement itself, PJ would need to have an underlying dispute that is subject to arbitration. But PJ is not just challenging the arbitration agreement, she is challenging Active Day's decision to terminate service for anyone who refuses to sign it. A declaratory judgment that the arbitration agreement is invalid and unenforceable is a way to *remedy* that unlawful and injurious conduct. *See United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 493 (4th Cir. 1998) ("[A] declaratory judgment is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding) (citation omitted) (cleaned up).

Additionally, to the extent this Court interprets Active Day's standing arguments as a challenge to ripeness, Active Day's own conduct confirms that enforcement of the arbitration agreement is not hypothetical or speculative. Active Day is already seeking to enforce the agreement with respect to this dispute and is specifically seeking attorney's fees pursuant to a provision of the agreement. *See* MTD at 22–26. There is nothing advisory about deciding whether

PJ signed the agreement under duress (or whether the agreement is otherwise unconstitutional, unconscionable, or unenforceable) when Active Day is actively seeking to enforce it.

B. SS Has Alleged an Injury in Fact.

SS has alleged an injury the same reasons as PJ, *see supra* at I.A, but also because SS—by refusing to sign the arbitration agreement—was denied adult day care services. Like PJ, SS was told that he must sign the arbitration agreement or be discharged from Active Day's care. *See* Am. Compl. ¶¶ 16, 21. When SS's guardian refused to sign, SS stopped receiving services. As a result, he was denied the opportunity for socialization with peers, to engage in necessary therapies, and other services he received from Active Day. Am. Compl. ¶ 28; Ex. 1 to Opp. to MTD, Decl. of C. Kilgore ("Kilgore Decl.") ¶ 7. *Cf. Pashby v. Delia*, 709 F.3d 307, 329 (4th Cir. 2013) (denying public assistance beneficiaries "needed medical care" constitutes "irreparable harm") (abrogated on other grounds); *Daniels v. Arcade, L.P.*, 477 F. App'x 125, 129 (4th Cir. 2012) (denying access to services offered constitutes injury).

In addition to being denied services, SS also suffered the same coercive harm as PJ. *See supra* at I.A. Active Day argues that SS cannot allege such a harm because he was not actually coerced—he ultimately decided not to sign the agreement. But the coercive harm that the unconstitutional conditions doctrine guards against is not limited to instances "when the condition is actually coercive, in the sense of an offer that cannot be refused." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Even where "someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Koontz*, 570 U.S. at 607.

SS, like PJ, also suffered an injury under the undesirable products doctrine. *See supra* at I.A. The fact that SS was ultimately deterred from attending Active Day—rejecting the undesirable product—does not mean he was not injured under this doctrine. For example, in *Consumer*

Federation, the D.C. Circuit held that a plaintiff had standing to challenge a decision by the Federal Communications Commission where the plaintiff alleged that "he would like to subscribe to Comcast's high-speed internet service" but was ultimately "deterred by his inability to choose his [Internet service provider] and by the fact that Comcast could restrict his access to content." 348 F.3d at 1012. Likewise, here, SS wanted to continue to receive Active Day's services but was deterred by the fact that Active Day could restrict his ability to hold the company accountable, to petition the courts, or to communicate about any concerns he had about Active Day's operations with government authorities. Active Day's unlawful imposition of the arbitration condition denied SS the service he preferred, which is itself an injury, and also caused him to lose access toadult day care service.

Active Day's arguments as to why SS lacks standing do not withstand scrutiny. Active Day first argues that SS cannot challenge the terms of the arbitration agreement because he did not sign the agreement. MTD at 11. But, again, Active Day misunderstands the nature of plaintiffs' claim for declaratory relief. SS seeks declaratory relief that the arbitration agreement is invalid, unenforceable, and unconscionable because that would remedy SS's injury caused by Active Day imposing an unlawful condition on his ability to receive services. Declaratory relief that the contract was invalid would mean SS could re-enroll in Active Day services free of the unlawful and oppressive conditions imposed by the arbitration agreement.

Further, under Active Day's logic, there is no one who can challenge Active Day's unlawful conditioning of its services on the signing of an illegal and unconscionable agreement. Active Day claims PJ can't challenge the requirement because she was not denied services and if she ever does have a dispute, it must be brought in arbitration. At the same time, SS cannot challenge the arbitration requirement because he was not subjected to the abusive and unlawful

agreement. By this logic, recipients of Active Day's services must either suffer without critical adult day care services or subject themselves to the coercive, dehumanizing, illegal, less desirable and less safe terms and conditions of the arbitration agreement.

Active Day also argues that the injury of being denied access to Active Day's adult daytime services cannot be attributed to, or fairly traced to, Active Day's unlawful conduct because SS was simply exercising his freedom to contract and could have agreed to the terms and conditions. MTD at 11–12. But the fairly traceable standard may include "injury produced by determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). A fairly traceable injury should not be equated with an injury as to which "the defendant's actions are the very last step in the chain of causation." *Id.* Further, Active Day's argument assumes it is right on the merits: that SS was not subject to duress, that the agreement was not unlawful, unconscionable, or otherwise unenforceable. But in assessing standing, the Court "must assume the Plaintiffs' claim has legal validity"—"that on the merits the plaintiffs would be successful in their claims." *Cooksey,* 721 F.3d at 239 (citations omitted).

Active Day further contends that SS was not injured by Active Day's unlawful arbitration requirement because SS could have accessed an alternative service. But there was no readily available alternative that would satisfy SS's unique needs. *See* Am. Compl. ¶¶ 28, 44. Active Day presents a declaration showing other adult day care services in the area but makes no representation that these services had openings at the time SS was discharged from Active Day or that these facilities can accommodate SS's unique needs. The process of identifying an alternative service that is both available and appropriate given an individual's particular needs involves far more than a thirty second Google search. *See* Kilgore Decl. ¶ 5. And as SS's case manager explains, there was no comparable alternative because placing him in a program in which most others do not

function as highly as he does would be detrimental to his progress at social development. *Id.* ¶ 7. At Active Day's site, SS had a group of individuals with similar abilities and needs, there was a program (with staff and a separate room) specifically for individuals like SS, and he had developed some relationships with others in the program. *Id.* That critical socialization is not readily replaceable. *Id.*

Finally, at minimum, Active Day offers evidence that it generally takes an average of three weeks to process the necessary paperwork, obtain authorization from regulatory authorities, and arrange for the transfer from one adult day care center to another, and Active Day never offered to provide SS services to fill any gap in transferring services. Ex. 2 to MTD, Decl. of C. Green, ECF 38-3, ¶ 5. A disruption of services, even if just for three weeks, is an injury in fact.

C. DRSC Has Associational Standing to Sue on Behalf of its Constituents.

In addition to the individual plaintiffs, DRSC also has standing to seek the requested relief. Active Day's argument to the contrary misapplies the law on associational standing. An organization may sue on behalf of others when at least one of "its members would otherwise have standing to sue" and "the interests it seeks to protect are germane to the organization's purpose." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). An organization without formal members may still have associational standing when its "constituents" have the "indicia of membership"—that is, they exert influence over the organization's priorities and activities. *Id.* at 344–45. DRSC satisfies both *Hunt* requirements for Article III standing.

First, the complaint establishes that at least one of DRSC's constituents would have standing to sue Active Day. Not only does the complaint establish that Plaintiffs PJ and S.S. (both constituents of DRSC) have standing, *supra* at I.A–I.B, DRSC also identifies non-party constituents who have standing to sue Active Day because they, too, were forced to sign the unconscionable arbitration agreement or lose much-needed adult day care services, *see* Am.

Compl. ¶ 9 (additional individuals approached DRSC for help "regarding the Draconian arbitration agreement that Active Day is forcing on its customers" but fear retaliation if further identified).

It does not matter that these constituents are not formal DRSC members because, "[i]n a very real sense," DRSC "represents the State's [individuals with disabilities] and provides the means by which they express their collective views and protect their collective interests." *See Hunt,* 432 U.S. at 345. DRSC is South Carolina's Protection and Advocacy ("P&A") system, which means it is mandated by federal and state law to protect and advance the rights of South Carolinians with disabilities.[2] Am. Compl. ¶ 8. Although the Fourth Circuit has yet to address this issue, two courts of appeal have concluded, and one has implied, that a P&A system "may sue on behalf of its constituents like a more traditional association may sue on behalf of its members." *Doe v. Stincer,* 175 F.3d 879, 885–86 (11th Cir. 1999); *Or. Advoc. Ctr. v. Mink* ("*OAC*"), 322 F.3d 1101, 1111–12 (9th Cir. 2003) (same); *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (assuming same).

OAC is instructive. Applying *Hunt*, the Ninth Circuit concluded that Oregon's P&A system was the "functional equivalent of a voluntary membership organization." *Id.* at 1111. The court emphasized that Congress created P&A systems specifically to serve individuals with disabilities as a "specialized segment of [the] community," including through litigation. *Id.* (citing *Hunt,* 432 U.S. at 344). The court then explained that Congress afforded these individuals the "means to influence [P&A systems'] priorities and activities" by requiring such systems: to establish

[2] The federal statutes are the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. § 15041, *et seq.*; the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. § 10801, *et seq.*; and the Protection and Advocacy of Individual Rights Act ("PAIR Act"), 29 U.S.C. § 794e, *et seq.* South Carolina law incorporates these federal statutes and similarly requires the state P&A system to "protect and advocate for the rights of all persons with a developmental or other disability." S.C. Code, § 43-33-350(1).

governing boards and advisory councils with certain percentages of constituents or their family members; provide that such advisory councils be chaired by those individuals; and ensure access to grievance procedures. *Id.* at 1112 (citing 42 U.S.C. §§ 10805(a)(6)(B–C), (a)(9), & (c)(1)(B)).

The overwhelming majority of district courts to consider the issue agree with the Ninth and Eleventh Circuits that state P&A systems are the functional equivalents of membership organizations and may sue on behalf of their constituents. *See Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 397 (D. Conn. 2009) ("The greater weight of authority, particularly within this circuit, establishes that organizations like [Connecticut's P&A system] routinely are found to fit within the requirements for associational standing under *Hunt*."); *see also, e.g., Ind. Protection & Advocacy Servs. Comm'n v. Ind. Family & Social Servs. Admin.*, 630 F. Supp. 3d 1022, 1028–29 (S.D. Ind. 2022) (finding that Indiana's P&A system had "sufficient 'indicia of membership'" for associational standing); *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1167–68 (M.D. Ala. 2016) (same for Alabama's system); *Wilson v. Thomas*, 43 F. Supp. 3d 628, 632 (E.D.N.C. 2014) (same for North Carolina's system); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 416–17 (S.D.N.Y. 2012) (same for New York's system).

Ignoring this majority rule, Defendant cites a decision from the Fifth Circuit widely critiqued as inconsistent with *Hunt*, *see Doe*, 175 F.3d at 885, and "overly formalistic," *OAC*, 322 F.3d at 1110. In *Association of Retarded Citizens v. Dallas County Mental Health & Retardation Center Board of Trustees* ("*ARC*"), 19 F.3d 241 (5th Cir. 1994), the court simply asserted without analysis that Texas's P&A system lacked associational standing because "most of its 'clients' . . . are unable to participate in and guide the organization's efforts." *Id.* at 244 (quoted at MTD at 9). The Fifth Circuit provided no basis for this conclusion and, unlike the Ninth and Eleventh Circuits, failed to even consider the statutorily mandated structure of state P&A systems

that vests constituents with significant control over their system's activities and priorities. By ignoring the practical ways non-members relate to the state P&A, the Fifth Circuit skipped the functional analysis contemplated under *Hunt*.

Under that analysis, DRSC is the functional equivalent of a membership organization because its constituents are involved in all levels of the organization and help direct its priorities and activities. As in *Hunt*, DRSC serves a "specialized segment" of the population: South Carolinians with disabilities, also referred to as "clients" under the DD, PAIMI, and PAIR Acts. Am. Compl. ¶¶ 8–9; Ex. 2 to Opp. to MTD, Apr. 25, 2023 Hearing Tr. ("Hearing Tr.") at 45:2–5.

Moreover, as explained in *OAC* and *Doe*, a state P&A system like DRSC is required under the PAIMI Act to give its constituents a central role in its management and activities. *Supra* at 15–16. DRSC's other two authorizing statutes, the DD Act and the PAIR Act, impose requirements similar to the PAIMI Act that likewise make clear that DRSC's constituents act like members. For example, a majority of DRSC's governing board must be individuals with disabilities or their authorized representatives. 42 U.S.C. § 15044(a)(1)(B). In addition, DRSC must take public comment from clients on "the goals and priorities established by the system" and "the activities of the system," and establish a grievance procedure for clients and prospective clients to ensure they have "full access" to the system's services. *Id.* §§ 15043(a)(2)(D)(i-ii), (E); 29 U.S.C. § 794e(f).

Beyond these statutory requirements, DRSC has made a specific factual showing of how its constituents participate in and guide its efforts. DRSC's governing board has 14 members, 12 of whom are persons with disabilities, or their family members. *See* Hearing Tr. at 45:24–46:4. In addition, DRSC hosts a series of focus groups with people with disabilities, *id.* at 47:15–20; its advisory councils use the feedback from the focus groups "to look at [DRSC's] goals and

priorities," "adjust how we're doing our work," and make recommendations to the governing board, *id.* at 48:13–49:2.

Second, the interests DRSC "seeks to protect" here are "germane" to its statutory purpose, *see Hunt*, 432 U.S. at 343: protecting and advancing the rights of South Carolinians with disabilities, *see* Am. Compl. ¶¶ 8–9. DRSC seeks to benefit its constituents who receive, have received, or want to receive services from Active Day, but who do not want to be forced to sign an unconscionable arbitration agreement. Not signing the agreement means losing critical services that help ensure constituents' physical safety and well-being. But signing the agreement puts those interests in jeopardy because the various substantively unconscionable terms in the agreement make it more difficult for constituents to assert and vindicate their rights, including those related to the quality or safety of services provided. *See infra* at IV.B.

Take PJ. If she is injured due to negligent healthcare or unsafe conditions at Active Day's facility, she will effectively have no recourse to seek damages or injunctive relief to prevent similar injuries in the future. For one, the arbitration agreement forces her to bring any claims in Pennsylvania, where Active Day is headquartered, even though PJ's severe physical disabilities make travel extremely difficult if not impossible: she is quadriplegic, legally blind, incontinent, and relies on a gastronomy tube. Am. Compl. ¶¶ 6, 26; *infra* at IV.B. The agreement also impacts her ability to vindicate her right to be treated with due care and receive safe services because it threatens unfair and prohibitive costs to seeking recourse, dispenses with the more lenient statute of limitations and discovery rules she would benefit from in court, and prohibits her from reporting any safety issue that may be the subject of the arbitration to government officials. *See* Am. Compl. ¶¶ 25–27. Thus, despite Active Day's bald assertion, this action directly implicates "health [and] safety issues" that impact DRSC's constituents and are germane to its purpose. *See* MTD at 9.

Third and finally, Active Day cites a prudential factor courts may consider when assessing associational standing, MTD at 8–9—whether the claims or relief sought "require[] the participation of individual members in the lawsuit," *Hunt*, 432 U.S. at 343—but that factor is not relevant here. Congress can abrogate this prudential requirement, *see United Food & Com. Workers Union Local 751 v. Brown Grp., Inc.* ("*Brown*"), 517 U.S. 544, 557–58 (1996), and has done so here through three statutes that explicitly authorize P&A systems to litigate to protect and advocate for constituents' rights. *See* 42 U.S.C. § 15043(a)(2)(A)(i); *id.* § 10805(a)(1)(B); 29 U.S.C. § 794e(f)(3). These sorts of statutory grants are "sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties." *Brown*, 517 U.S. at 557; *see also OAC*, 322 F.3d at 1110 ("Congress intended to confer standing to pursue suits like this one on organizations like [Oregon's P&A system].").

Insisting individual participation is needed to proceed, Active Day faults Plaintiffs for not satisfying Rule 23's requirements for class certification. This critique is misplaced. The Supreme Court has expressly declined to equate Rule 23 and associational standing because such a view "fails to recognize the special features . . . that distinguish suits by associations on behalf of their members from class actions." *UAW v. Brock*, 477 U.S. 274, 289 (1986); *see also, e.g.*, *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 310 n.24 (E.D.N.Y. 2009) (rejecting similar "contention that [New York's P&A system] is attempting to 'evade' Rule 23" because "[a]ssociational standing is a substitute for class certification").

II. Plaintiffs Plausibly Allege Constitutional Claims.

Plaintiffs have adequately alleged that Active Day's conduct requiring recipients of the ID/RD Medicaid waiver to forfeit their constitutional rights in order to receive Active Day's services violates the longstanding unconstitutional conditions doctrine. Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes

his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In other words, while the government may be able to deny the person access to the government benefit for many reasons, it cannot deny the benefit because the person refuses to waive a constitutional right. *Koontz*, 570 U.S. at 607–09. This doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *id.* at 604, and "prevents the Government from using conditions 'to produce a result which it could not command directly,'" *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1377 n.4 (2018) (quoting *Perry*, 408 U.S. at 597). The doctrine applies to a host of different government benefits, including health care benefits. *See Koontz*, 570 U.S. at 607–09 (citing cases). Here, plaintiffs have alleged that Active Day is engaged in state action when setting conditions on who may receive its services under the ID/RD Medicaid waiver program, and that Active Day unlawfully conditioned the provision of a government benefit on a recipient's agreement to forfeit an array of constitutional rights. *See* Am. Compl. ¶¶ 30–42, 62–71.[3]

Before reaching the substance of plaintiffs' claims, Active Day seizes on a technicality to say plaintiffs cannot bring any constitutional claims because they did not expressly invoke § 1983. MTD at 13–14. To state a claim under § 1983, the complaint must allege the deprivation of a right secured by the federal Constitution or statutory law, and that the deprivation was committed by a person acting under color of state law. *See Wirth v. Surles*, 562 F.2d 319, 321 (4th Cir. 1977). The complaint includes specific facts alleging both. *See* Am. Compl. ¶¶ 30–42, 62–71. These allegations are sufficient: Section 1983 "merely provides a mechanism for enforcing individual

[3] Plaintiffs had no alternative means of obtaining the care they need under the waiver program. *See id.* ¶ 28. But even if there had been comparable alternatives, Active Day was still unlawfully conditioning the receipt of a government benefit—one that plaintiffs preferred over alternatives—on the forfeiture of constitutional rights in violation of the unconstitutional conditions doctrine.

rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws" of the United States. '[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002).

To the extent the complaint should have clarified that those claims operate under § 1983, such a technical error is not grounds for dismissal. "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" and "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014). Particularly relevant here, the Supreme Court has emphasized that "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." *Id.*

Active Day next argues that the unconstitutional conditions doctrine does not apply because Active Day is not a state actor, but the doctrine extends to private entities performing state action. "The judicial obligation is . . . to assure that constitutional standards are invoked 'when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Thus, "the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed." *Id.* Such "state action" exists if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Id.* (citation omitted). "[T]here is no bright-line rule separating state action from private action, and that . . . the inquiry is highly fact-specific in nature." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023). "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity . . . . [N]o one fact can function as a necessary condition across the board for finding state action." *Brentwood*,

531 U.S. at 295. Active Day's challenged conduct, specifically its conditioning of its Medicaid service on the signing of the arbitration agreement, constitutes state action in several ways.

First, Active Day's conduct constitutes state action because the state has "outsourced" to Active Day "one of its constitutional obligations" to ensure government benefits are not used to coerce individuals into forfeiting their constitutional rights. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019); *see also Peltier*, 37 F.4th at 115–16 (recognizing there is state action "when a state has outsourced or otherwise delegated certain of its duties to a private entity, thereby rendering the acts performed under those delegated obligations 'under color of law'"); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000) (same). The state has a constitutional duty to ensure government benefits are not used to coerce individual into forfeiting their constitutional rights. *See Perry*, 408 U.S. at 597; *Koontz*, 570 U.S. at 604.

Here, Active Day's conditioning of the provision of a Medicaid benefit on recipients' forfeiture of constitutional rights is state action because the state outsourced its constitutional duty to ensure government benefits are not used to coerce individual into forfeiting their constitutional rights. *See Perry*, 408 U.S. at 597; *Koontz*, 570 U.S. at 604. To the extent the state permits Active Day to impose conditions on the receipt of the company's provision of a government benefit, the state has also delegated the corresponding constitutional obligation to ensure the benefit is not used to coerce anyone into forfeiting a constitutional right.

Second, Active Day's conduct is state action because setting the conditions for receipt of government benefits for those with intellectual disabilities has been "traditionally the exclusive prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (cleaned up). Section 1915(c) of the Social Security Act provides that states may offer an array of home and community-based services that an individual needs to avoid institutionalization. Am. Compl. ¶ 30. The statute

then sets out specific criteria for who may receive the government benefit and under what conditions, and imposes specific, substantive conditions on private providers who receive public funds to provide the government benefit. *Id.* ¶¶ 31–33. Providers under the ID/RD waiver program are authorized and funded by the state to provide adult day care service to a specific population.

Thus, to the extent the provider is identifying who may receive its services under the waiver program, it is engaged in a traditional and exclusive state function. *Cf. Peltier*, 37 F.4th at 119 (finding charter schools served function traditionally and exclusively reserved to state where schools operated "under authority conferred by the North Carolina legislature and funded with public dollars, functioning as a component unit in furtherance of the state's constitutional obligation"). While the day-to-day provision of a government benefit may not be an exclusive government function, the act of determining *who* may receive a government benefit or entitlement is. *See* Am. Compl. ¶ 36. Such a determination regarding the proper use and distribution of government funds is the corollary to, if not a part of, taxation, which is "an authority [the Supreme Court] ha[s] recognized as central to state sovereignty. *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994).

Third, there is "pervasive entwinement" of public institutions and Active Day with respect to setting the conditions on who may receive Active Day's adult day care service. *See Peltier*, 37 F.4th at 115. Through statutes and implementing regulations, the state has specifically defined who may and may not receive services under the waiver program, and closely regulates and monitors the selection of providers and the conditions that they, in turn, impose on recipients. Am. Compl. ¶¶ 31–42, 62–71. Accordingly, Active Day's setting of conditions for individuals to receive its services through the IRD/ID waiver program has "become so entwined with governmental policies

or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

Blum v. Yaretsky, 457 U.S. 991 (1982), says nothing to the contrary. In *Blum*, the Supreme Court held that a private nursing home's decision to transfer a patient to a lower level of care did not constitute state action because it was a professional judgment made "in the day-to-day administration of a nursing home" that certain care was not medically necessary. *Id.* at 1011–12. The *Blum* Court also emphasized that there were no laws requiring the nursing home to provide any particular type of care or regulating its decisions to discharge or transfer patients because the care they are receiving is medically inappropriate. *Id*. at 1011. In this case, plaintiffs are not challenging any medical determinations made by Active Day or any of its day-to-day operations in the provision of care; they challenge only a blanket condition on receipt of services in the first place. Further, unlike in *Blum*, here there are laws directly regulating who may and may not receive these adult day care services under the waiver program, the type of service the providers must offer, as well as laws regulating the type of conditions that private providers may themselves impose on recipients. *See* Am. Compl. ¶¶ 31–40; *id.* ¶ 41 (explaining governing statutes and regulations prohibit providers from "discriminat[ing] in selecting the Medicaid beneficiaries they will treat or services they will render"); *see also* 45 C.F.R. part 84 (1987) (effectuating § 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance).

Active Day tries to change the inquiry and reframe the state action in question. In particular, it says plaintiffs must establish that the *provision* of care to adults with intellectual disabilities is exclusively the prerogative of the state or is sufficiently entangled with state institutions. This is but misdirection. "In evaluating whether a private entity's conduct amounts to state action, we

identify the specific conduct of which the plaintiff complains"—here, the *conditioning* of adult day care service under the ID/RD Medicaid waiver program on the forfeiture of constitutional rights—"to determine whether that conduct is fairly attributable to the State." *Peltier*, 37 F.4th at 120 (cleaned up). Thus, whether caring for intellectually disabled adults was traditionally and exclusively the prerogative of the state is irrelevant to whether Active Day's particular conduct here amounts to state action and is unlawful under the unconstitutional conditions doctrine.

Active Day's theory of limited state action—which would exclude conduct conditioning the receipt of its services on the forfeiture of constitutional rights –would effectively gut the unconstitutional conditions doctrine. States are more and more frequently relying on private entities to aid them in the provision or distribution of government benefits. If private entities can require recipients to waive constitutional rights as a condition of providing the service, then states have an easy end run around the unconstitutional conditions doctrine, and the coercive use of government benefits that the doctrine is designed to prevent will go unchecked. This Court should not permit the state to achieve such an outcome by simply permitting private entities to impose the conditions in its stead. *Cf. Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 639 (Tex. 2004) (explaining government should not be permitted to "sidestep constitutional protections"). "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. Nat'l R.R. Passenger Corp*., 513 U.S. 374, 397 (1995).

Finally, these complex questions of state action should not be decided on a motion to dismiss. "[T]he state action determination requires an examination of all the relevant circumstances, in an attempt to evaluate 'the degree of the Government's participation in the private party's activities.'" *Goldstein*, 218 F.3d at 342 (deciding question of state action on a

motion for summary judgment) (citation omitted); *see also Evans v. Newton*, 382 U.S. 296, 299–300 (1966) ("Only by sifting facts and weighing circumstances can we determine whether the reach of the Fourteenth Amendment extends to a particular case." (citation omitted)). Through discovery, plaintiffs will likely unearth more entanglement between Active Day and state entities with respect to imposing conditions on its service.

Aside from challenging the characterization of its conduct as state action, Active Day does not meaningfully challenge the substance of plaintiffs' unconditional conditions claim. As alleged, the arbitration agreement, imposed as a condition of receiving services, requires recipients of the government benefit to forfeit their constitutional rights, including their right to petition the courts under the First Amendment, their right to speak freely about any alleged misconduct under the First Amendment, and their right to an Article III court—all in violation of the longstanding unconstitutional conditions doctrine. Am. Compl. ¶¶ 62–71; *see also* MTD at 20–21 (challenging First Amendment claims solely on the ground that there is no state action).

While ignoring the substance of plaintiffs' First Amendment claims, Active Day does say that the right to an Article III court can be waived. *See* MTD at 21–22. This misses the point: under the unconstitutional conditions doctrine, the provision of a government benefit cannot be contingent on the waiver of a constitutional right. And while there are exceptions to an individual's right to an Article III court, such non-Article III entities have been either "legislative courts or administrative agencies." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion). The Supreme Court has permitted Congress to vest the power to adjudicate public rights claims only in governmental forums presided over by federal officers. *See Buckley v. Valeo*, 424 U.S. 1, 141 (1976). A statute that compelled individuals to resolve their disputes with the government through binding private arbitration thus could not be reconciled with

Article III, and the doctrine of unconstitutional conditions "prevents the Government from using conditions 'to produce a result which it could not command directly.'" *Oil States Energy Servs., LLC*, 138 S. Ct. at 1377 n.4 (quoting *Perry*, 408 U.S. at 597).

III. This Court Has Federal Question and Diversity Jurisdiction.

Active Day argues that this Court lacks subject matter jurisdiction because, by its telling, "Plaintiffs have not actually alleged an amount in controversy of more than $75,000." MTD at 12. Even if Active Day were right about the alleged damages, and it is not, that would pose no jurisdictional obstacle, because this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. District courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," regardless of the amount in controversy. *Id.*; *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 377 (2012). And here, Plaintiffs allege that Active Day has violated, among other laws, the First Amendment and Article III of the Constitution. Am. Compl. ¶¶ 62–71.

In any event, plaintiffs have adequately alleged diversity jurisdiction because the amount in controversy exceeds $75,000. "In general, the damages claimed by the plaintiff in his complaint are controlling in determining whether the jurisdictional amount is satisfied, if the claim is made in good faith." *Moch v. Asheville Hotel Assocs., Ltd.*, 977 F.2d 573, at *1 (4th Cir. 1992) (unpublished). Plaintiffs need only prove "that it does not appear to a legal certainty that its claim is for less than the jurisdictional amount." *Kirkley v. Educ. Aids Publ'g Co.*, 461 F. Supp. 561, 564 (D.S.C. 1978). And "in actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. Courts in this Circuit "ascertain the value of an injunction for amount in controversy purposes by reference to the larger of two figures: the injunction's worth to the plaintiff or its cost to the defendant." *See JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010). Finally,

plaintiffs may aggregate smaller claims in order to reach the jurisdictional threshold. *Id.* (citing *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995)).

Here, plaintiffs allege significant damages and request costly injunctive relief, which exceeds the requisite amount in controversy. Plaintiffs seek an injunction enjoining Active Day from demanding anyone sign the agreement and from enforcing it against those who have already signed it, as well as further relief the court deems just and equitable. Am. Compl. at 15–16. Active Day itself stated that it was imposing the arbitration agreement as a cost-saving measure that would "allow the Company to control its expenses," so the object of the litigation—the arbitration agreement—must have significant value to the company and the company would suffer significant losses if it was declared unenforceable. *See* AA at 1. Active Day has not proven that the value of having the arbitration agreement is certainly under $75,000. Additionally, to fully remedy the coercion that has already taken place, Active Day would need to provide adequate notice to its current and former members that the contract is not lawful and will not be enforced, which would be costly. Finally, plaintiffs seek actual, treble, and punitive damages in connection with Active Day's violations of the South Carolina Unfair Trade Practices Act. *See* Am. Compl. at 16. SS has alleged significant monetary damages since he has been denied access to day care services altogether, which would be trebled under the statute, and given the vulnerable population that Active Day has taken advantage of through its unlawful conduct, punitive damages under the statute may be significantly more than $75,000.

IV. PJ and DRSC's Claims Should Proceed in Court, Not Arbitration.

Active Day relies on a delegation clause in the arbitration agreement to contend that even if the Court does not dismiss PJ and DRSC's claims, it must send them to arbitration. That clause purports to delegate to the arbitrator questions "regarding the making, execution, validity, enforceability, severability, scope, arbitrability or interpretation of this Arbitration Agreement, or

waiver, duress, preemption or any other defense to the enforceability of this Arbitration Agreement." AA ¶ (a). Notwithstanding this language, it is the Court that decides threshold questions regarding the formation of an arbitration agreement and the enforceability of any delegation clause. And here, the arbitration agreement was not formed and the delegation clause is unconscionable.[4]

A. No Valid Arbitration Agreement Was Formed.

Under Section 4 of the Federal Arbitration Act, "it is up to courts" and not arbitrators to decide at the outset "whether a contract has been formed." *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (explaining that disputes over formation of agreement to arbitrate are "generally for courts to decide"). Courts retain this responsibility when, as here, the contract in question contains a delegation clause. *Rowland*, 993 F.3d at 258; *York v. Dodgeland of Columbia, Inc.*, 749 S.E.2d 139, 144–45 (S.C. Ct. App. 2013) (Because "a 'gateway matter' to arbitrability is the existence of an agreement to arbitrate[,]" "[w]hether a valid arbitration agreement exists is a matter for judicial determination." (citation omitted)).

PJ alleges that no arbitration agreement was formed because Active Day used duress to force her and other clients to sign. Am. Compl. ¶¶ 24, 28–29, 44, 54. Duress goes to contract formation because it "involves unfair dealing at the contract formation stage." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 255 (2017) (citation omitted); *York*, 749 S.E.2d at 145 (in determining whether "valid arbitration agreement exists" when evaluating motion to compel

[4] At this stage of the litigation, Plaintiffs do not present a full evidentiary record supporting their duress and unconscionability arguments, which overlap with the merits of this case. The limited evidentiary record establishes lack of formation and unconscionability with respect to the delegation clause, but if this Court disagrees, PJ requests an opportunity to supplement the record and to have a trial on the question of formation as required by § 4 of the Federal Arbitration Act.

arbitration, "trial courts consider 'general contract defenses' to ensure a meeting of the minds to arbitrate existed," including "duress") (citation omitted); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (Thomas, J., concurring) (explaining that a party may "challenge[] the formation of the arbitration agreement . . . by proving fraud or duress").

Under South Carolina law, "[d]uress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." *Holler v. Holler*, 612 S.E.2d 469, 474 (S.C. Ct. App. 2005). Whether a party signed an agreement under duress is a "subjective test" based on their "individual characteristics" and "circumstances," including whether they had "no reasonable alternative." *Id.* at 475. So in *Holler*, the court concluded that a prenuptial agreement was signed under duress where an American man told a Ukrainian woman that if she did not sign, they would not get married—an untenable threat given that she was pregnant, completely dependent on him, and at risk of deportation if they did not marry. *Id.* at 475–76.

Here, too, the circumstances make clear that PJ signed the arbitration agreement under duress. Active Day threatened to terminate PJ's services unless she signed the agreement. Am. Compl. ¶ 16; Ex. 3 to Opp. to MTD, Aff. of P. Loudon ISO Mot. for Ex Parte TRO, ECF 5-2 ("Loudon Aff.") ¶ 8. Like the wife in *Holler*, PJ and her mother felt they "had no choice but to sign the agreement." Am. Compl. ¶¶ 20, 24; Hearing Tr. at 72: 9–13 (PJ's mother explaining that "I did not have another choice. I am not in a position to play chicken with my daughter or my family or my income."). PJ relies on Active Day for "critical" socialization, nursing, attendant care, and transportation services. Loudon Aff. ¶ 3; Am. Compl. ¶ 28. Her mother also depends on Active Day: she works full time to support her family as a single mother and can only do so when PJ is

receiving services. Loudon Aff. ¶¶ 2–3; Am. Compl. ¶¶ 6, 28. She would "have a very hard time keeping [her] job" without Active Day. Hearing Tr. at 69:5–6.

Active Day is the only program in the area that can provide the nursing services PJ needs on the schedule her mother needs. Hearing Tr. at 68:9–24 (PJ's mother called various providers in the area and determined they weren't options because they aren't licensed, don't have adequate nursing staff, can't provide care five days a week, or are two hours away by bus); *see also* Ex. 4 to Opp. to MTD, Apr. 25, 2023 Hearing Pls.' Ex. 7, Decl. of S. Todd, ¶¶ 9–10 (according to PJ's caseworker, "If Active Day cuts off her services, PJ will have no place to go. . . . [H]er mother Pam will have to stay home and take care of PJ."). In other words, PJ and her mother had no choice but to sign Active Day's arbitration agreement—the very definition of duress.

In addition to duress, the parties did not form a valid arbitration agreement because contracts that are "contrary to statutory enactments or constitutional provisions, . . . are void." *Batchelor v. Am. Health Ins. Co.*, 107 S.E.2d 36, 38 (S.C. 1959) (citation omitted). And here, the arbitration agreement was an unconstitutional condition on the provision of government benefits. *See supra* at II. Finally, DRSC never signed any agreement with Active Day and is representing members, like SS, who likewise never signed the agreement. Thus, the organization cannot be compelled to arbitrate its claims. *See Equal Rts. Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62, 81 (D.D.C. 2021) (recognizing an association still has standing to litigate on behalf of its non-bound members, particularly where, as here, the organization seeks declaratory and injunctive relief).

B. The Delegation Clause Is Unenforceable.

Even if the Court finds that a valid agreement was formed, the Court may consider "specific[]" challenges to the "validity of the delegation clause itself." *Gibbs v. Haynes Invests. LLC*, 967 F.3d 332, 337 (4th Cir. 2020). "In specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration

provisions." *Id.* at 338 (citation omitted) (cleaned up). Here, there are several reasons why the delegation clause, like the arbitration agreement overall, is unconscionable and thus unenforceable.

First, the delegation clause is unconscionable because PJ had no meaningful choice in agreeing to it. *See Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668–69 (S.C. 2007) (holding a contract is unconscionable when there is an "absence of meaningful choice on the part of one party" combined with "oppressive, one-sided terms."). PJ had no meaningful choice because the delegation clause was an adhesion contract "offered on a 'take-it-or-leave-it' basis" *id.* at 669, as a condition for accessing services she desperately needed, *see supra* at IV.A. The South Carolina Supreme Court has held adhesion contracts to purchase such a "necessity" are unconscionable. *See Simpson*, 644 S.E.2d at 670 (finding unconscionable an adhesion contract for the purchase of "a vehicle intended for use as [the consumer's] primary transportation, which is critically important in modern day society").

Second, the delegation clause is substantively unconscionable because it requires that arbitration of the threshold arbitrability questions take place at Active Day's Pennsylvania headquarters, even though the agreement was signed in South Carolina for services to be provided in South Carolina to South Carolinians such as PJ. Am. Compl. ¶ 26; AA at ¶ (f). Active Day imposed this forum selection clause even though it's aware that PJ and other clients are often severely physically disabled and that travel to Pennsylvania would therefore be exceedingly burdensome if not impossible. Indeed, PJ's mother moved her from one adult daycare program to Active Day because "she had to travel [] pretty far," around two hours, "and she can't do that." Hearing Tr. at 75:12–16. PJ was coming home "extremely soiled" because of her incontinence. *Id.* Also impeding her ability to travel, PJ's "positioning is very critical" because she has scoliosis, hip dysplasia, and "severe osteoporosis" and so cannot "bear weight." *Id.* at 66:16–67:5.

Such arbitral forum-selection clauses that effectively shield one party from liability have been found to be substantively unconscionable. *See Mitchell v. HCL Am., Inc.*, 190 F. Supp. 3d 477, 494 (E.D.N.C. 2016) (finding unconscionable arbitral forum selection clause that required employee to "abandon her work and submit to arbitration in a forum several thousand miles away" where employer was headquartered); *see also Fouad ex rel. Digital Soula Sys. v. State of Qatar*, 846 F. App'x 466 (9th Cir. 2021) (finding unconscionable forum selection clause where "the selected forum is so 'gravely difficult and inconvenient' that the complaining party will for all practical purposes be deprived of its day in court"). Such contract terms that "are so prohibitive as to effectively deny [one party] access to the arbitral forum" are also unenforceable under the federal effective vindication doctrine. *See Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 554 (4th Cir. 2001); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (analyzing whether cost-shifting provision would preclude litigant "from effectively vindicating her federal statutory rights in the arbitral forum").

Third, the delegation clause is unconscionable because it provides that any party who *unsuccessfully* challenges the enforceability of the arbitration agreement must pay the opposing party's legal fees. AA ¶ (i). There is no reciprocal requirement should the party *successfully* challenge the enforceability of the arbitration agreement. *See id.* Such a one-sided challenge penalty is a transparent attempt to bully PJ and others into accepting Active Day's demand for arbitration regardless of the strength of that demand. Such one-sided arbitration provisions benefitting the drafter are regarded as unconscionable. *See Boyd v. Allied Home Mortg. Cap. Corp.*, 523 F. Supp. 2d 650, 659 (N.D. Ohio 2007) (refusing to enforce fee-shifting clause requiring plaintiff to pay for drafter's attorney's fees in defending arbitration clause); *see also Damico v.*

Lennar Carolinas, LLC, 879 S.E.2d 746, 757 (S.C. 2022) (stating "mutuality is a paramount consideration when assessing the substantive unconscionability of a contract term" (cleaned up)).

Fourth, the delegation clause is unconscionable because of its sweeping scope. The clause purports to apply not only to "[a]ny and all claims, disputes or controversies between the Signatories arising out of, connected with or **in any way** relating" to the agreement and Active Day's services, but also "any other cause or reason." AA ¶ (a) (emphasis in original). Given that broad language, the delegation clause could apply to any conceivable dispute, even one unrelated to the services that PJ receives in exchange for signing the delegation clause and arbitration agreement. That broad clause is made even worse by the fact that, although it purports to be limited to disputes between the Signatories, the arbitration agreement then states that it actually applies to a whole host of people who are not signatories and who barely have any relationship to PJ or Active Day, including any person who provided PJ with "food, shelter, clothing, or medicine." *Id.* (b). Such a broad arbitration provision, with no limiting provision, "render[s] the clause impermissibly broad, and therefore inoperable." *See Mey v. DIRECTV, LLC*, No. 5:17-CV-179, 2021 WL 973454, at *11 (N.D.W. Va. Feb. 12, 2021) (quoting *Thomas v. Cricket Wireless, LLC*, 506 F. Supp. 3d 891, 904 (N.D. Cal. 2020)).

Because the delegation clause specifically is both procedurally and substantively unconscionable and imposes an unconstitutional condition on the receipt of government benefits, this Court should hold that it is not enforceable and that Plaintiffs' challenges to the validity and enforceability of the arbitration agreement must be heard by this Court.

V. Active Day's Request for Leave to Petition for Fees Should be Denied.

After twenty-five pages of arguing why this Court should not consider whether the parties formed an arbitration agreement or whether the agreement is unlawful or unenforceable, Active Day tries to enforce a provision of that agreement. *See* MTD at 25–26. But this Court cannot

enforce a provision of the arbitration agreement without first deciding plaintiffs' arguments on the merits that the agreement is invalid and unenforceable. PJ has alleged that she signed the agreement encompassing the fee-shifting provision under duress, that the entire agreement and the fee-shifting provision in particular violated the unconstitutional conditions doctrine, and that the agreement—including specifically this fee-shifting provision—is unconscionable and unenforceable. Thus, if this Court entertains this request for fees, plaintiffs must have an opportunity to fully brief, and present evidence regarding, the validity and enforceability of the arbitration agreement, including the loser pays provision.

Not only is the loser pays provision invalid and unenforceable, but it does not say what Active Day says it does. For starters, the provision appears under the heading "allocation of Fees, Costs and Expenses *for Arbitration*." AA ¶ (i) (emphasis added). Thus, the provision only requires a party who unsuccessfully challenges the enforcement of the arbitration agreement to pay fees and costs incurred for any *arbitration* proceeding regarding enforcement. This makes sense: arbitrators can, and routinely do, assess the enforceability of arbitration agreements. The text clearly limits the provision to fees incurred in arbitration, but even if it were ambiguous, the Court would be required to construe the text against the drafter, which was Active Day. *See State Farm Mut. Auto. Ins. Co. v. Windham*, 882 S.E.2d 754, 758 (S.C. 2022), *reh'g denied* (Feb. 9, 2023). Additionally, per the text of the contract, the loser pays provision only applies to "signatories," *see* AA ¶ (i), and DRSC never signed the agreement and is bringing this action on behalf of its members, many of whom also did not sign the agreement.

CONCLUSION

For the foregoing reasons, this Court should deny Active Day's motion to dismiss.

Date: September 7, 2023

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