No. 23-2020

United States Court of Appeals

for the

Fourth Circuit

MICHAEL A. NAIMOLI, JR.; MORGAN FRENCH; ANDREW COLLINS; MARISSA SANTARLASCI,

Plaintiffs-Appellees,

– v. –

PRO-FOOTBALL, INC., now known as Pro-Football LLC, a/k/a Washington Commanders Football Team, f/k/a Washington Football Team, f/k/a Washington Redskins Football Team; WFI STADIUM, INC., now known as WFI Stadium LLC, f/k/a JKC Stadium, Inc.; CONTEMPORARY SERVICES CORPORATION, (CSC),

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2020 Caption: Michael A. Naimoli, Jr., et al. v. Pro-Football, Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Atlantic Legal Foundation
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Lawrence S. Ebner Date: 1/4/24

Counsel for: Atlantic Legal Foundation

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INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. Its mission is to advance the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state appellate courts. *See* atlanticlegal.org.

Consistent with the federal policy favoring arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., ALF has a longstanding interest in judicial enforcement of agreements to resolve

[1] Counsel for all parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel, and no person other than the *amicus curiae*, its supporters, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

consumer, employment, commercial, and other types of disputes through binding arbitration. As is the case here, ALF has participated as *amicus curiae* in many appeals that present cutting-edge legal questions relating to the enforceability of arbitration agreements and/or the FAA's primacy over state law. *See, e.g.*, *Coinbase, Inc. v. Suski*, No. 23-3, *cert. granted* (U.S. Nov. 3, 2023) (enforcement of arbitration agreement provisions that delegate arbitrability questions to arbitrators); *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51, *cert. granted* (U.S. Sept. 29, 2023) (scope of FAA exemption for transportation workers' employment agreements); *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023) (mandatory stay following appeal of denial of motion to compel arbitration); *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022) (FAA preemption of California law that invalidated class-action waivers in employment contracts); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (enforcement of arbitrator delegation provisions); and *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcement of class-action waivers in arbitration agreements).

The question presented here—the enforceability of arbitration provisions included in the terms & conditions accompanying electronic

tickets purchased and used to gain admission to sports, entertainment, and many other types of events and venues—is an important, recurring, Internet-age arbitration issue that squarely fits within ALF's free enterprise advocacy mission.

ALF long has supported arbitration as an alternative dispute resolution mechanism that in most cases is speedier, more efficient, and less costly than litigation. Countless sports fans, concertgoers, museum visitors and other individuals purchase, use, and/or benefit from now-ubiquitous electronic tickets. Given the vast number of electronic tickets, it is no coincidence that they, like their physical predecessors, incorporate terms and conditions that require arbitration of any and all disputes that may arise.

This amicus brief explains that the district court's refusal to compel arbitration of Appellees' football stadium-related personal injury claims is based on state common law that discriminates against arbitration and thus is preempted by the FAA. Further, as a practical matter, the district court's analysis fails to take into account the customary manner in which electronic tickets are purchased for and used by individuals who wish to attend sports or other events as a group. The fact that multiple electronic

tickets may be stored and displayed on a single individual's mobile phone does not affect FAA preemption of state common law that interferes with judicial enforcement of the arbitration provisions attendant to such tickets.

INTRODUCTION & SUMMARY OF ARGUMENT

Although the district court denied Appellants' motion to compel arbitration, *see* Mem. Op., JA264-287 (*Naimoli v. Pro-Football, Inc.*, 2023 WL 5985256 (D. Md. Sept. 14, 2023)), it made no finding as to whether Mr. Gordon—whom Appellees allege purchased electronic football tickets for their use and benefit—"entered into a contract including the arbitration clause." JA278. Instead, the district court indicated that "the Motion will be denied because regardless of whether Gordon entered into a contract including the arbitration clause Defendants [Appellants] have not demonstrated that Plaintiffs [Appellees] were bound by the terms of that contract." JA278.

More specifically, the district court, analyzing whether, under Maryland common law, there was an agency relationship between Gordon and the Appellees, found that "Gordon had no actual authority to bind Plaintiffs to the arbitration clause." JA282. The court, again relying

on Maryland common law, also found that Gordon had no apparent authority. JA284. According to the court, "there is no claim or evidence that Plaintiffs were *aware of the arbitration clause*, or even the [Washington Football Team] Terms & Conditions more generally, so the Court cannot find that Gordon had apparent authority to enter into a contract containing an arbitration clause, or that Plaintiffs later ratified or assented to the contract and its arbitration clause." JA284 (emphasis added).

After summarizing Maryland common-law principles relating to establishment of agency relationships, JA279-280, the district court, relying primarily on two Maryland cases involving arbitration agreements, stated as follows:

> In applying these principles, Maryland courts have required *more* than the establishment or appearance of a general principal-agent relationship and instead have *drawn distinctions* based on the types of decisions that the principal appeared to authorize the agent to undertake, and they have *specifically distinguished the decision whether to enter into an arbitration agreement* as part of a broader contractual relationship *as requiring at least knowledge of its existence*.

JA280 (emphasis added) (citing *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010) & *Rankin v. Brinton Woods of Frankford, LLC*, 211 A.3d 645 (Md. Ct. Spec. App. 2019)).

In other words, the district court interpreted Maryland common law as creating *a distinct rule for enforcement of arbitration agreements* by requiring non-signatories (here, Appellees) to have "at least knowledge [of the arbitration agreement's] existence" to be bound by their actual or apparent agent (here, Gordon). JA280.

FAA § 2, which was enacted to reverse and prohibit judicial hostility to arbitration, "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The statute mandates judicial adherence to this "equal treatment principle," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017), by providing that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract . . . ." 9 U.S.C. § 2.

"The FAA thus preempts any state rule discriminating on its face against arbitration." *Kindred*, 137 S. Ct. at 1426. Because the lynchpin of the district court's arbitration-averse ruling—Maryland's putative common-law "awareness" requirement for non-signatories to arbitration agreements—"singles out arbitration agreements for disfavored treatment . . . it violates the FAA," *id.* at 1425, and is preempted.

Appellants' brief persuasively argues that the federal common-law equitable estoppel "direct benefits" doctrine and/or federal common-law agency principles relating to apparent authority compel reversal of the district court's denial of their motion to compel arbitration. This amicus brief does not repeat those arguments. Instead, ALF, as *amicus curiae*, seeks to inform the Court's consideration of this case by discussing the FAA's preemptive effect on the district court's state common-law "awareness" rule, which contrary to the FAA's purpose and text, singles out and discriminates against arbitration agreements.

ARGUMENT

The District Court Failed To Respect the Federal Arbitration Act's Preemptive Force

A. The Federal Arbitration Act preempts any state-law rule that discriminates against arbitration

"The FAA was enacted in response to judicial hostility to arbitration." *Viking River Cruises*, 142 S. Ct. at 1917; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984). "The entire point of the FAA was to 'reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law.'" *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). "[I]n Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621; *see also Adkins*, 303 F.3d at 500 ("Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation."). "So Congress directed courts to abandon their hostility and instead treat arbitration

agreements as 'valid, irrevocable, and enforceable.'" *Epic Sys.*, 138 S. Ct. at 1621 (quoting 9 U.S.C. § 2).

FAA § 2 "is the primary substantive provision of the Act, declaring that a written agreement to arbitrate . . . 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Supreme Court often has reiterated that § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.*; *see, e.g.*, *Epic Sys.*, 138 S. Ct. at 1621; *Concepcion*, 563 U.S. at 339.

Thus, "[c]ourts must place arbitration agreements on an equal footing with other contracts. . . and enforce them according to their terms." *Id.*; *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (FAA § 2's "text reflects the overarching principle that arbitration is a matter of contract"); *Kindred*, 137 S. Ct. at 1424, 1429.

Indeed, the first clause of § 2 is "[a]n enforcement mandate, which renders agreements to arbitrate enforceable as a matter of federal law." *Viking*, 142 S. Ct. at 1917; *see also Moses H. Cone*, 460 U.S. at 27 n.34

(referring to "Congress' intent to mandate enforcement of all covered arbitration agreements"). "Section 2's mandate protects a right to enforce arbitration agreements. That right would not be a right to *arbitrate* in any meaningful sense if generally applicable principles of state law could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace . . . .'" *Viking*, 142 S. Ct. at 1918 (quoting *Epic*, 138 S. Ct. at 1623). For these reasons, courts are required to "give due regard to the federal policy favoring arbitration and resolve 'any doubts concerning the scope of arbitrable issues . . . in favor of arbitration.'" *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *Moses H. Cone*, 460 U.S. at 24-25).

In short, "[t]he overarching purpose of the FAA, evident in the text . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344.

> The FAA thus *preempts* any state rule discriminating on its face against arbitration—for example, a law prohibit[ing] outright the arbitration of a particular type of claim. . . . The Act *also displaces* any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.

Kindred, 137 S. Ct. at 1426 (internal quotation marks omitted) (emphasis added); *see also Concepcion*, 563 U.S. at 343 (FAA § 2 preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").

"When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341; *see, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (collecting cases) (holding that the FAA preempted a West Virginia common-law rule that rendered unenforceable, all arbitration agreements applicable to personal-injury and wrongful-death claims against nursing homes); *see generally Edwards v. CXS Transp., Inc.*, 983 F.3d 112, 120 (4th Cir. 2020) ("'Congress may preempt state common law as well as state statutory law through federal legislation.'") (citation omitted).

The "inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. The Supreme Court has explained, for example, that holding consumer arbitration

agreements "unconscionable or unenforceable as against public policy," is preempted by the FAA—otherwise "this would enable the court to effect what . . . the state legislature cannot." *Id.* Thus, the second clause of FAA § 2 (a "saving clause" referring to "grounds as exist at law or in equity for the revocation of any contract") does not extend to "defenses that apply only to arbitration," or as is the case here, "that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339.

The Supreme Court repeatedly has applied these principles, including where, as here, preempted state law is in the form of court-made rules that discriminate against, or otherwise disfavor, arbitration.

Concepcion, for example, involved a class action alleging that AT&T advertising was misleading because the company charged sales tax on the retail value of "free" cell phones provided to customers who signed a cell phone service contract. "The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" 563 U.S. at 336. Affirming the district court's denial of AT&T's motion to compel

arbitration, the Ninth Circuit relied on the California Supreme Court's "*Discover Bank* rule," which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 338, 339 (discussing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

The Supreme Court held in *Concepcion*, however, that FAA § 2 preempted California's court-made, public policy-based, state-law *Discovery Bank* rule because it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343; *see also id.* at 352. In his concurring opinion, Justice Thomas added that "[i]f § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'" *Id.* at 352-53 (Thomas, J., concurring).

Kindred Nursing Centers is another example of FAA preempting a state common-law rule that discriminated against arbitration. The Kentucky Supreme Court had adopted a state-law "clear statement" principle under which "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." 137 S. Ct. at 1426. The Supreme Court held in *Kindred* that

the FAA preempted "[t]he Kentucky Supreme Court's clear statement rule [because it] fails to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426-27. "[T]he [state supreme] court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1427. The Supreme Court further explained that the "[t]he Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." *Id.* at 1429.

Most recently, the Supreme Court in *Viking River Cruises* reaffirmed the FAA's preemptive force by invalidating yet another California common-law rule as applied to arbitration agreements. *Viking* involved a former employee's allegations that the defendant company had violated the California Labor Code. The employee had agreed to arbitrate any dispute arising out of her employment. *See* 142 S. Ct. at 1915-16. The arbitration agreement included a waiver clause, "providing that in any arbitral proceeding, the parties could not bring any dispute as a

class, collective, or representative action" under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). *Id.* at 1916.

The Supreme Court considered whether the FAA "preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims" under PAGA. *Id.* at 1913. The Court explained that under the California Supreme Court's "*Iskanian* rule," "pre-dispute agreements to waive the right to bring 'representative' PAGA claims are invalid as a matter of public policy." *Id.* at 1916; *see Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). California's *Iskanian* rule not only prohibited waivers of "representative" PAGA claims, but also agreements to separately arbitrate individual PAGA claims. *See Viking*, 142 S. Ct. at 1916-17.

The Supreme Court held in *Viking* that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Id.* at 1924. As a result, Viking was entitled to compel arbitration of the plaintiff's individual PAGA claim. *Id.* at 1925.

The Fourth Circuit's frequently cited opinion in *Adkins v. Labor Ready, Inc.* also is instructive. There, this Court methodically rejected a

constellation of anti-arbitration arguments asserted by Adkins, an employee who alleged federal and state labor code violations against a temporary employment agency. *See* 303 F.3d at 499. Holding that the arbitration agreement signed by Adkins "is enforceable and all of Adkins' claims are arbitrable," *id.*, the Court invoked the FAA's "'clear federal directive in support of arbitration.'" *Id.* at 500 (quoting *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001)). Affirming the district court's judgment compelling arbitration, this Court stated as follows:

> Adkins' claims amount to little more than an attempt to undermine repeated pronouncements by Congress and the Supreme Court that federal law incorporates a liberal policy favoring arbitration agreements. A refusal on our part to heed these pronouncements would be a dereliction of our duty under law.

Id. at 506-07.

B. The district court's decision is based on a preempted, arbitration-specific, state-law rule

Relying on two Maryland cases, *Dickerson* and *Rankin*, *supra*, the district court predicated its refusal to compel arbitration on an *arbitration-specific*, state-law agency principle "requiring at least knowledge of [the arbitration agreement's] existence" on the part of non-signatory principals (i.e., Appellees). JA280. Applying this state-law

"awareness" principle—a rule that the court explained is "specifically distinguished" from "general principal-agent relationship" principles and directed to "the decision whether to enter into an arbitration agreement,"—the district court found no evidence "that Plaintiffs were aware of the arbitration clause." JA280. JA284.

The state-law "awareness" rule "discriminat[es] on its face against arbitration," *Kindred*, 137 S. Ct. at 1426, or at least "deriv[es] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Because the rule "singles out arbitration agreements for disfavored treatment [it] violates the FAA" and is preempted. *Kindred*, 137 S. Ct. at 1425. The district court erred by predicating its denial of Appellants' motion to compel arbitration on this preempted state-law rule, and therefore, its holding must be reversed.

In *Dickerson*, a wrongful death suit, the Court of Appeals of Maryland (subsequently renamed the Supreme Court of Maryland) denied a nursing home's motion to compel arbitration on the ground that there was no evidence that the decedent patient "*was ever aware* of the arbitration agreement" signed by his alleged legal representative in connection with his admission to the nursing home. *See* 995 A.2d at 740

(emphasis added). The court purported to apply "general agency principles," *id.*, but actually created a special "awareness" rule for arbitration agreements that are signed by an agent on a principal's behalf. *See id.* at 737 ("Although we have never addressed this issue, other courts have drawn a distinction between a health care decision and a decision to sign an arbitration agreement, even where the arbitration agreement is related to a health care decision."). Rather than adhering to the dictates of the FAA by resolving any doubts as to arbitrability in favor of arbitration, *see Hill*, 412 F.3d at 543, the court, despite the indisputable existence of the arbitration agreement, expressed concern about the patient waiving "his right of access to the courts and his right to a trial by jury." *Dickerson*, 995 A.2d at 739.

Along the same lines, in *Rankin*, another wrongful death suit against a nursing home, the Court of Special Appeals of Maryland (subsequently renamed the Appellate Court of Maryland) refused to enforce an arbitration agreement contained within the nursing home admission contract signed by the decedent's daughter on his behalf. Relying in part on *Dickerson*, the court indicated that the patient's "apparent acquiescence of the admission contract, by moving into the

facility, does not mean he has ratified the terms of the contract, *unless he was made aware of the arbitration clause* and still took no action." 211 A.3d at 654 (emphasis added). Based on this state-law awareness requirement for binding non-signatories to arbitration agreements, the court found that there was no "apparent agency" between the patient and his daughter.[2]

Maryland's arbitration-specific awareness requirement is preempted because it not only disfavors, but also discriminates against, arbitration agreements that are accepted by agents on behalf of principals. The Fourth Circuit "determines whether an agency relationship exists according to the common law of agency." *Ashland Facility Ops., LLC v. NLRB*, 701 F.3d 983, 990 (4th Cir. 2012). "Apparent authority is the power held by an agent or other actor [here, Gordon] to affect a principal's [here, Appellees'] legal relations with third parties [here, Appellants]." Restatement (Third) of Agency § 2.03 (2006) (Apparent Authority). "A putative agent has apparent authority 'when a

[2] The state court in *Rankin* alternatively found "the terms and conditions of the arbitration clause to be overbearing, and as such, unenforceable as unconscionable." 211 A.3d at 659. This finding of unconscionability directly conflicts with *Concepcion*. *See* 563 U.S. at 341.

third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.'" *Ashland*, 701 F.3d at 990 (quoting Restatement (Third) of Agency § 2.03); *see also Williams v. Dimensions Health Corp.*, 279 A.3d 954, 961 n.9 (Md. 2022).

Appellants, based on customary and widespread usage of electronic tickets, had every reason to believe that Gordon had authority to act on behalf of Appellees, and that belief was traceable to Appellees' conduct: They used, and benefited from, the electronic tickets that Gordon had purchased (after accepting the arbitration provisions and other accompanying Terms & Conditions) by entering the stadium, and staying for the duration of the game.

Contrary to Maryland's special "awareness" rule for non-signatories to arbitration agreements, there is no general common-law requirement under Restatement (Third) of Agency § 2.03 or otherwise that Appellees needed to be aware of the arbitration agreement, which Gordon had accepted on their behalf when purchasing the tickets, in order to be bound by it. Further, under general agency principles, Gordon's actual or constructive knowledge of the arbitration agreement

is imputed to the Appellees. *See* Restatement (Third) of Agency § 5.03 (2006) (Imputation of Notice of Fact to Principal) ("For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal . . . .").

The district court, therefore, relied on a special state-law rule that discriminates against arbitration by imposing an awareness requirement that does not apply to principals under general common-law agency principles.

Unlike the district court here, a Texas federal district court in a suit strikingly similar to this one got it right. The plaintiff attended a "WrestleMania" event with his nephew, who purchased electronic tickets for himself and the plaintiff, stored them on his mobile phone, and displayed them to gain access to the event. *See Jackson v. World Wrestling Entertainment, Inc.*, 2023 WL 3326115, at *1 (N.D. Tex. May 9, 2023), *appeal filed*, No. 23-10491 (5th Cir. May 11, 2023). The court presumed that the plaintiff, who claims he suffered hearing loss as a result of the event, never "held or accessed his ticket or reviewed the

Arbitration Agreement" that was part of the terms and condition of purchase. *Id.* at *3. Nonetheless the court, citing the FAA, granted the defendant sports entertainment company's motion to compel arbitration. The court held that the plaintiff's nephew "acted as [his] agent in acquiring the ticket to WrestleMania, and by attending the event using the ticket [the plaintiff] is legally chargeable with notice of the Arbitration Agreement." *Id.* at *4.

The Maryland district court should have reached the same conclusion here.

CONCLUSION

The district court's denial of Appellants' motion to compel arbitration should be reversed.

Respectfully submitted,

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January 4, 2024

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit established by Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because it contains **4,142** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with Fed. R. App. P. 32(a)(5) & (6) because it has been prepared with Microsoft 365 Word using 14-point Century Schoolbook font.

/s/ Lawrence S. Ebner
Counsel for *Amicus Curiae*
Atlantic Legal Foundation

January 4, 2024

CERTIFICATE OF SERVICE

I certify that on January 4, 2024, I electronically filed the foregoing Brief of Atlantic Legal Foundation As *Amicus Curiae* In Support of Defendants-Appellants and Reversal with the Clerk of Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lawrence S. Ebner
Counsel for *Amicus Curiae*
Atlantic Legal Foundation

January 4, 2024