No. 24-6985

IN THE

United States Court of Appeals for the Ninth Circuit

GRETCHEN SHANAHAN, on behalf of herself and her minor children A.S. and B.S.; AMY WARREN, on behalf of herself and her minor child B.W.; KIMBERLY WHITMAN, on behalf of herself and her minor child H.W., individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

IXL LEARNING, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 3:24-cv-02724-RFL, Hon. Rita F. Lin

OPENING BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant IXL Learning, Inc. hereby states that it has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The Federal Arbitration Act ("FAA") "requires courts rigorously to enforce arbitration agreements." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018) (quotation marks omitted). But that enforcement here was absent. Plaintiff IXL Learning, Inc., agreed to supply educational software to Kansas public school districts (the "Schools") under the governing framework of its Terms of Service (the "Terms"). That document expressly applied to all users of IXL's software and prominently required related claims to be resolved through individual arbitration (the "Arbitration Provisions"). Yet when those very users—parents of students who used IXL's software—filed this putative class action challenging the software's legality, the District Court cast IXL's Arbitration Provisions aside. That decision was contrary to the FAA. Plaintiffs are bound to arbitrate under the Terms for three independent reasons, which the District Court rejected only by making a series of legal, procedural, and factual errors.

First, there is no question that Plaintiffs had detailed knowledge of the Terms, which would include awareness of the prominently featured Arbitration Provisions, and continued to use IXL's services. That should

be the end of the arbitration debate. Under bedrock contract principles, Plaintiffs' "voluntary acceptance of the benefit" of IXL's services "is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known." Cal. Civ. Code § 1589. The District Court declined to enforce the Arbitration Provisions on that basis because it erroneously flipped the burden of proof on the issue of voluntariness. Rather than place the burden on Plaintiffs to prove that their knowing use of IXL's services was involuntary (a point on which Plaintiffs presented no evidence at all), the District Court simply accepted the argument of Plaintiffs' counsel that their use was involuntary and required IXL to prove it was in fact voluntary. That was clear error.

Second, IXL was legally entitled under the Children's Online Privacy Protection Act ("COPPA"), along with related FTC guidance, to treat the Schools as Plaintiffs' authorized agents regarding the Arbitration Provisions. After assessing the unique challenges of education technology contracting, the FTC advised that providers like IXL "can presume that the school's authorization" for data collection "is based on the school's having obtained the parent's consent." 64 Fed. Reg.

59,888, 59,903 (Nov. 3, 1999)). Another court has already deemed that well-reasoned guidance persuasive. And the agency it created here necessarily entailed authority to accept ancillary terms (including IXL's Arbitration Provisions) as necessary to complete the objective of the Schools' agency—namely, the licensing of educational technology. In holding otherwise, the District Court disregarded the pivotal language in the FTC's guidance. It also impermissibly resolved a material factual issue—whether agreeing to arbitration terms was "necessary or proper and usual" when licensing software products like IXL's—without allowing discovery or conducting the evidentiary hearing that the FAA requires when material factual issues are contested.

Third, common-law agency principles separately establish that the Schools were authorized to accept the Arbitration Provisions on Plaintiffs' behalf. The Terms supply powerful, effectively unrebutted, evidence to that effect: When they agreed to the Terms, the Schools expressly "represent[ed] and warrant[ed] that [they] have the authority to provide consent on behalf of parents for IXL to collect information from students under 13." ER-134. Again, that agency necessarily included authority to accept the relevant Arbitration Provisions. The District

Court disagreed because it misapprehended IXL's argument and failed to consider the probative force of the Schools' representation as evidence of actual agency. And once more, the District Court also impermissibly resolved a material factual issue against IXL without conducting discovery or an evidentiary hearing, as the FAA commands.

For all of those reasons, the Court should reverse and compel arbitration, or at minimum remand for discovery and (if necessary) an evidentiary hearing to resolve material disputes of fact.

JURISDICTION

Plaintiffs filed this suit on May 7, 2024 in the Northern District of California under the Class Action Fairness Act of 2005. *See* 28 U.S.C. § 1332(d)(2), (6). IXL then moved to compel arbitration under the FAA, 9 U.S.C. § 3, on July 12, 2024. This Court has jurisdiction pursuant to 9 U.S.C. § 16(a) because the district court denied IXL's motion to compel arbitration on November 1, 2024. On November 15, 2024, IXL timely appealed the district court's order. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

(1) Did the District Court err in holding that it was IXL's burden—in response to mere argument from Plaintiffs' counsel—to offer evidence

negating Plaintiffs' conclusory assertion that their continued use of IXL's software (with knowledge that IXL required arbitration of disputes) was involuntary?

(2) Did the District Court err in ruling that IXL was not entitled under COPPA to treat the Schools as Plaintiffs' authorized agents, including for the purpose of agreeing to the Arbitration Provisions?

(3) Did the District Court err in finding that the Schools were not Plaintiffs' agents under common-law principles for the purpose of agreeing to the Arbitration Provisions?

ADDENDUM

The addendum to this brief contains the pertinent regulations. *See* Ninth Cir. R. 28-2.7.

STATEMENT OF THE CASE

I. IXL Agrees To Provide Schools With Its Educational Technology Only Upon Agreement That All Users Must Submit Related Claims To Individual Arbitration

IXL is a leading provider of educational technology. Schools across the country use its software tools to deliver "adaptive, dynamic curricula" that can be "individually tailored" to each student in ways that improve their quality of learning. ER-161. To deliver those services, IXL collects information about students' "proficiency" across "various skills" and

empowers teachers to adjust their learning plans accordingly. *Id.* Like virtually any modern software product, IXL's educational tools rely on a connection to the internet.

When schools wish to purchase IXL's technology for their students' use, IXL uses its comprehensive Terms to establish the governing provisions. *See* ER-134-41. The Terms expressly apply to ***any*** users "who access or otherwise use" IXL's "online and/or mobile services, websites, and software provided on or in connection with www.ixl.com." ER-134. In this case, the Schools signed the Terms and bought IXL's products for their Kansas classrooms. *See* ER-143. In doing so, the Schools expressly "represent[ed] and warrant[ed] that [they] have the authority to provide consent on behalf of parents for IXL to collect information from students under 13." ER-134.

The Schools also agreed to IXL's Arbitration Provisions, which the Terms prominently and repeatedly disclosed. The very first page, for example, cautioned:

> **THIS AGREEMENT CONTAINS A MANDATORY INDIVIDUAL ARBITRATION AND CLASS ACTION/JURY TRIAL WAIVER PROVISION THAT REQUIRES THE USE OF ARBITRATION ON AN INDIVIDUAL BASIS**

TO RESOLVE DISPUTES, RATHER THAN JURY TRIALS OR CLASS ACTIONS."

ER-134; *see* ER-140. The Arbitration Provisions require users of IXL's services to arbitrate "any claim, dispute, or controversy … arising out of or in connection with or relating to this agreement" through "JAMS, under the Optional Expedited Arbitration Procedures then in effect for JAMS," and pursuant to "the Federal Arbitration Act (9 U.S.C. §§ 1-16)." ER-140. They also prohibit covered claims from proceeding as a "class action' or "other representative proceeding." ER-140 (capitalization altered).

II. Plaintiffs File This Putative Class Action Claiming That IXL's Services Violate Federal And State Law, And IXL Moves To Compel Arbitration

Plaintiffs are the parents of children who attended the Schools and used IXL's services as part of their curricula. ER-151-53. Plaintiffs and their children used those services with knowledge of the Terms. Their Complaint makes that clear: It discusses the specific language of the Terms at length (e.g., ER-167-71) and notes that they are "located on [IXL's] website" (ER-177). Plaintiffs even cite the Terms' choice-of-law

provisions in an effort (albeit a meritless one[1]) to show that they, as Kansas residents, are entitled to invoke California law. (ER-150, 194-95).

Notwithstanding their familiarity with the Terms, Plaintiffs selectively disavow the Arbitration Provisions. Instead, Plaintiffs filed putative class claims in a San Francisco federal court asserting that IXL's services collect and use students' data in violation of the Federal Wiretap Act, various California statutes, and California common law. ER-195-204.

On July 12, 2024, IXL timely moved to compel Plaintiffs to arbitrate their claims. ER-114-30; *see* ER-72-82. Plaintiffs opposed, ER-91-113, and the FTC filed an amicus brief focused narrowly on COPPA, ER-83-90. IXL argued that the substance of Plaintiffs' claims—users objecting to how IXL's services collect data—falls squarely within the scope of the Arbitration Provisions. ER-129. IXL then explained that the Arbitration Provisions bind Plaintiffs for at least three independent reasons.

First, IXL argued that Plaintiffs consented to the Arbitration Provisions by continuing to accept the benefits of IXL's services with

[1] Although not relevant at this stage, the Terms' choice-of-law provisions do not authorize Plaintiffs, as Kansas residents, to bring claims under California laws that apply only to California residents.

actual knowledge of the Terms. ER-126-27, ER-76-78. Plaintiffs did not contest that other portions of the Terms were binding—indeed, they affirmatively relied on the Terms' choice-of-law provisions to bring claims under California law. *Supra* 8. When it came to arbitration, though, Plaintiffs attempted to vitiate their consent by arguing that their acceptance of IXL's services was "not voluntary," on the theory that parents who declined to let their children use the services might "face fear of retaliation, or of being cast as adversarial to teachers and the school system." ER-107. Plaintiffs cited no support whatsoever for that speculation. *Id.*

Second, IXL explained that it was legally entitled under COPPA, along with related FTC guidance, to treat the Schools as Plaintiffs' authorized agents when consenting to IXL's data collection—an agency that necessarily encompassed the incidental authority to accept the Arbitration Provisions. ER-124-26, ER-74-75. In particular, the FTC's guidance—which another court had already adopted as persuasive authority on COPPA's meaning—clarified that when educational technology providers negotiate a contract to provide services for a school, they "***can presume*** that the school's authorization is based on the

school's having obtained the parent's consent" required by COPPA. 64 Fed. Reg. 59903 (emphasis added). Notwithstanding that express endorsement of a presumption of agency, the FTC urged in its amicus brief that IXL had somehow "mischaracterize[ed]" its guidance, and that COPPA was not the source "of any agency relationship." ER-87-90.

Third, partly in response to the FTC amicus brief's unfounded gloss on its own COPPA guidance, IXL explained that common-law agency principles separately establish that the Schools were authorized to accept those provisions on Plaintiffs' behalf. ER-124, ER-126-27, ER-74-75. Plaintiffs insisted that IXL had offered "no evidence" of actual agency, ER-102-03, ignoring that the Schools had expressly "represent[ed] and warrant[ed]" in the Terms "that [they] have the authority to provide consent on behalf of parents for IXL to collect information from students under 13," ER-10.

III. The District Court Denies IXL's Motion To Compel Arbitration Without Permitting Discovery

On November 1, 2024, the District Court denied IXL's motion to compel without permitting discovery or holding an evidentiary hearing to determine the scope of the schools' agency. *See* ER-4-15. The District Court acknowledged that the record established "the school districts'

assent to the Terms." ER-5 n.1. And it never suggested that the substance of Plaintiffs' claims lies outside the scope of the Arbitration Provisions. But the District Court concluded that Plaintiffs were not bound by those provisions and therefore declined to compel arbitration.

Regarding IXL's consent-by-conduct argument, the District Court acknowledged that a California statute expressly provides: "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." ER-14 (quoting Cal. Civ. Code § 1589). And the District Court did not dispute either that Plaintiffs had accepted the benefit of IXL's services or that they did so with knowledge of the Terms. The District Court declined to find consent by conduct under § 1589 solely because it believed that it was ***IXL's*** burden to prove "that [Plaintiffs'] ongoing use [of IXL software] is ***voluntary*** for either the students or their parents," and that IXL had failed to satisfy that burden. ER-14 (emphasis added). The District Court placed no burden on

Plaintiffs to show that any acceptance of IXL's services took place under such duress as to render it involuntary.

Turning to COPPA, the District Court did not dispute that—as another district court has held—the FTC's guidance on that statute's scope in educational settings is "persuasive." *New Mexico ex rel. Balderas v. Google, LLC*, 489 F. Supp. 3d 1254, 1261 (D.N.M. 2020). Like the FTC's amicus brief, however, the District Court simply ignored the guidance's express statement that educational technology providers "***can presume*** that the school's authorization is based on the school's having obtained the parent's consent." 64 Fed. Reg. 59903 (emphasis added). Instead, the District Court misunderstood the FTC's guidance as stating merely that COPPA "does not *preclude* schools from ... serving as the parents' agent"—not that the statute "establishes" any form of "agency." ER-7-8 (quoting 64 Fed. Reg. 59903).

The District Court then ruled that even if IXL ***was*** entitled to presume that the Schools acted as Plaintiffs' agents when consenting to the data collection inherent in IXL's services, the Schools' agency did not extend to accepting the Arbitration Provisions. The District Court recognized that, under California law, "[a]n agent has implied authority

to do everything 'necessary or proper and usual, in the ordinary course of business, for effecting the purpose of their agency.'" ER-9 (quoting 2B Cal. Jur. 3d Agency § 65). But it concluded that agreeing to an arbitration provision could not possibly be considered "necessary" to the purpose of the School's agency under COPPA, ER-9—that is, necessary for "parents and students" to "obtain" IXL's "educational services" without undue disruption, ER-12. The District Court refused to grant IXL's request for discovery on what parties ordinarily consider "necessary" in similar transactions, deeming it both "waived" and "futile." ER-13. The Court did not conduct an evidentiary hearing to determine the scope of the Schools' agency before denying IXL's motion.

Finally, the District Court concluded that the Schools had not acted as Plaintiffs' agents under common-law principles when they accepted the Arbitration Provisions. ER11-13. The District Court found that "there is no evidence that Plaintiffs directed or controlled the school districts' decisionmaking" in contracting with IXL. ER-11. The District Court did not consider, as potential evidence on this point, the fact that the Schools expressly "represent[ed] and warrant[ed]" in the Terms "that [they] have the authority to provide consent on behalf of parents for IXL to collect

information from students under 13." ER-10. The District Court instead treated that fact solely as purported evidence of the Schools' "apparent" agency—a doctrine that IXL had never invoked, but which the court deemed both "waived" and insufficient on the merits. ER-10.

On November 15, 2024, IXL timely noticed this interlocutory appeal of the District Court's order under the FAA, 9 U.S.C. § 16(a). ECF No. 1.

SUMMARY OF THE ARGUMENT

I. The District Court rejected IXL's consent-through-conduct argument only by applying the wrong legal test. There is no dispute that Plaintiffs' "voluntary acceptance of the benefit of a transaction" establishes their "consent to all the obligations arising from it, so far as the facts are known, or ought to be known." Cal. Civ. Code § 1589. Nor is there a dispute that Plaintiffs continued to accept the benefits of IXL's services with detailed knowledge of IXL's accompanying Terms, which prominently feature the Arbitration Provisions. That leaves just one question: whether their acceptance was "voluntary" and thereby establishes consent under § 1589. Under longstanding California law, Plaintiffs bear the burden of proving that their acceptance was involuntary. They have not done so, and the District Court should have

ruled on that basis that Plaintiffs impliedly consented to the Arbitration Provisions. It found otherwise only by impermissibly shifting the burden to IXL to prove Plaintiffs acted voluntarily, a clear and prejudicial error of law. Once the burden of proof is allocated correctly to Plaintiffs, their claim of involuntary use fails because there is no record evidence to support it. Accordingly, this Court should reverse the District Court denial of IXL's motion to compel arbitration and remand with instructions to grant it.

II. Separately, IXL was legally entitled under COPPA to treat the Schools as Plaintiffs' agents for the purpose of consenting to data collection when acquiring IXL's services. In implementing COPPA, the FTC has struck a careful balance by requiring parental consent to the collection of their children's data, but authorizing educational technology providers to "presume" that schools are parents' authorized agents for that purpose in order to avoid undue delay in technology acquisition. 64 Fed. Reg. 59903. IXL properly relied on that agency here. The District Court held otherwise only by overlooking the critical language in the FTC guidance.

The Schools' agency to consent to data collection when acquiring IXL's services, in turn, necessarily included the incidental agency to agree to accompanying dispute resolution procedures—namely, the Arbitration Provisions. That sort of agreement was "necessary or proper and usual, in the ordinary course of business, for effecting the purpose of their agency" by completing the acquisition of IXL's technology without undue delay. ER-9 (quoting 2B Cal. Jur. 3d Agency § 65). Indeed, courts routinely find that an agent's authority to acquire a product or service on the principal's behalf includes incidental authority to accept accompanying arbitration terms. That is a reality of modern commerce. The District Court was wrong to conclude otherwise—and, at minimum, erred by resolving this factual dispute without granting IXL's request for discovery or holding an evidentiary hearing. For these reasons alone, the Court should reverse the District Court's order or, at minimum, remand for further evidentiary proceedings to resolve any factual dispute about the scope of the Schools' agency.

III. Finally, even setting COPPA aside, the record establishes that the Schools were Plaintiffs' authorized agents under state common law for the purpose of consenting to data collection when acquiring IXL's

services. When the Schools signed IXL's Terms, they expressly "represent[ed] and warrant[ed] that [they] have the authority to provide consent on behalf of parents for IXL to collect information from students under 13." ER-134. That statement is powerful—and essentially unrebutted—evidence that Plaintiffs in fact granted the Schools that authority. The District Court never disagreed; it simply misapprehended IXL's argument and so assessed the statement only in connection with the distinct issue of apparent agency, which IXL never raised. Once the Schools' statement is considered as evidence of ***actual*** agency, it should compel a finding that such agency existed here. And, as explained, the Schools' agency to consent to data collection necessarily implied agency to accept the accompanying Arbitration Provisions. Accordingly, this Court should reverse the District Court's order or, at minimum, remand for further evidentiary proceedings.

STANDARD OF REVIEW

This Court reviews "the district court's decision to deny the motion to compel arbitration de novo." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1091 (9th Cir. 2014). Procedurally sound "[f]actual findings are reviewed for clear error." *Id.*

ARGUMENT

I. The District Court Applied The Wrong Legal Standard In Finding Plaintiffs Did Not Consent To The Arbitration Provisions Through Their Conduct

Consent through conduct is such a fundamental principle of contract law that California has made it part of the state's Civil Code: Once a party performs "[a] voluntary acceptance of the benefit of a transaction," they implicitly "consent to all the obligations arising from it, so far as the facts are known, or ought to be known." Cal. Civ. Code § 1589. This rule bars a party from extracting the value of an agreement only to wriggle out when their side of the bargain comes due. And, critically, California law allocates distinct burdens of proof to each side of the transaction.

At the outset, the party ***invoking*** the consent-through-conduct doctrine (here, IXL) must make two showings: that their counterparty (1) accepted the benefit of a transaction and (2) knew, or should have known, about an accompanying obligation. *Id.* Those showings presumptively establish consent to the obligation under § 1589. The party invoking the doctrine is not, however, required to make a separate showing that their counterparty's acceptance was voluntary. Instead, the

burden on that issue shifts to "the party ***opposing*** enforcement of [the] contract" (here, Plaintiffs), who must "show" their "assent was ***involuntary***." *Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 324 (2018) (citations omitted) (emphases added).

That burden shifting makes sense. As courts have long emphasized in similar circumstances, the party invoking the consent-by-conduct doctrine should not "have to try to prove a negative, the absence of coercion." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 590 (1st Cir. 1979). It is much more sensible for "the burden" on that issue to fall on the party opposing enforcement, who is better positioned to marshal any purported "evidence of coercion." *Id.* at 589-90. California soundly applies that framework when assessing consent by conduct. *See Saheli*, 21 Cal. App. 5th at 324; *Doe v. Steele*, No. 20-cv-1818-MMA, 2021 WL 927363, at *8 (S.D. Cal. Mar. 11, 2021) ("The party asserting that an agreement was formed under duress bears the burden of proof by a preponderance of the evidence."); *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997) ("a party opposing the petition [to compel arbitration] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense").

The District Court discarded California's governing legal framework. There was no dispute below that IXL, as the party invoking the consent-by-conduct doctrine, made its two required showings. Citing Plaintiffs' express and implied admissions, IXL demonstrated that they (1) accepted the benefit of IXL's services (by continuing to use its educational tools) and (2) did so with detailed knowledge of the Terms. ER-136-37, ER-77. Plaintiffs were hardly in a position to disagree. Their Complaint parsed the language of the Terms at length, *supra* 7, and affirmatively (if mistakenly) invoked the choice-of-law provisions as the basis for bringing claims under California law, *supra* 8. Even the District Court acknowledged that "it may be true that Plaintiffs had knowledge of the Terms at least by the time they decided to file the present suit." ER-13. Plaintiffs did not (and could not) contend that despite all that, they were somehow in the dark about the Terms' conspicuously bolded Arbitration Provisions. *Supra* 6-7.

That leaves only the issue of voluntariness. But the District Court never asked whether ***Plaintiffs***, as the parties disputing the agreement, had carried their burden of showing that they had accepted IXL's services involuntarily. Instead, the District Court erroneously flipped the burden

onto ***IXL*** to demonstrate the absence of coercion—exactly what governing precedent rejects. The District Court repeatedly faulted IXL for "fail[ing] to show that Plaintiffs' continued use of IXL was voluntary." ER-14. In the District Court's telling, IXL had been obligated—but failed—to "produce[ ] ... evidence that [Plaintiffs'] ongoing use is voluntary for either the students or their parents." ER-14; *see id.* ("IXL has not presented proof that Plaintiffs' voluntary assent to the Terms can be inferred"). On that basis alone, the District Court ruled that Plaintiffs had never performed a "voluntary acceptance of the benefits—and burdens—of using IXL products." ER-14.

The District Court's ruling inverted the applicable legal framework. It cited only *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082 (9th Cir. 2020), as authority for that approach. But *Stover* did not address the issue of contractual voluntariness. It stated merely that "the party alleging the existence of a contract" bears the burden of establishing "***notice***" of its terms. *Id.* at 1086 (emphasis added). That is entirely consistent with California's framework. One of the showings IXL was required to make was that Plaintiffs had notice of IXL's Arbitration Provisions, such that their obligation to arbitrate was "known, or ought

to be known." Cal. Civ. Code § 1589. As noted, IXL undisputedly made that showing by establishing Plaintiffs' detailed knowledge of (and reliance on) the Terms before filing this lawsuit, along with the Terms' conspicuous presentation of the Arbitration Provisions. *Supra* 19-20. Voluntariness is a separate issue, and the law is clear that Plaintiffs bear the burden of disproving it.

Reversal is warranted under the correct legal standard. Plaintiffs never even invoked the exacting test for involuntariness, which would require proof that IXL performed "coercive" and "wrongful" acts that left Plaintiffs "no reasonable alternative" but to use its educational services. *Martinez-Gonzalez v. Elkhorn Packing Co.*, 25 F.4th 613, 620 (9th Cir. 2022) (quoting *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953, 959 (2007)). And Plaintiffs certainly submitted no evidence of such dramatic pressure by IXL. At most, their opposition brief in the District Court speculated, in passing and without record support, that parents who declined to use IXL's services might have "face[d] fear of retaliation, or of being cast as adversarial to teachers and the school system." ER-106-07. Such unfounded "attorney argument" is not "meaningful evidence." *Steele*, 2021 WL 927363, at *6 (citing *Flaherty v. Warehousemen, Garage & Serv.*

Station Emp. Local Union No. 334, 574 F.2d 484, 486 n.2 (9th Cir. 1978)). And it falls short even on its own terms. The mere prospect of potentially being deemed "adversarial" ***by teachers*** falls far short of showing coercion ***by IXL***. As this Court has emphasized, "speculation about unfavorable outcomes" cannot establish contractual duress. *Martinez-Gonzalez*, 25 F.4th at 623 (enforcing arbitration agreement). All the more so where, as here, the speculation lacks ***even hypothetical*** coercive acts by the defendant. *Cf., e.g.*, *La Printex Indus., Inc. v. Macy's Inc.*, No. CV 08-06017 DDP (Ex), 2010 WL 11508338, at *3 (C.D. Cal. Mar. 2, 2010) (no duress where "[t]here is no evidence in the record that" the defendant "sought to exert improper pressure").

Plaintiffs also noted in their District Court opposition brief that "children are required to attend school" in Kansas. ER-106-07. But that statute mandates only "compulsory school attendance," Kan. Stat. § 72-3120, not the use of any particular educational tool. And, critically, Plaintiffs offered no evidence whatsoever that parents who declined to have their children use IXL's services would have suffered adverse action from their school—let alone consequences so dire that they eliminated any "reasonable alternative" to using IXL's platform. *Martinez-Gonzalez*,

25 F.4th at 620. The District Court conjured the image of parents considering whether to "pull their child out of public school." ER-14. But the record does not contain a shred of evidence that anyone was put to the choice (let alone by ***IXL*'s** conduct) of using IXL's services or abandoning the public school system. The District Court also speculated, again without citation, that parents might prefer not to "stop using a platform that is part of the curriculum." ER-14. That is a far cry from the evidentiary showing of coercion required to set aside an arbitration agreement. *Martinez-Gonzalez*, 25 F.4th at 620.

In short, Plaintiffs failed to submit any evidence that their use of IXL's products was involuntary. And they do not otherwise dispute that their continuing use of IXL's services constitutes consent by conduct under § 1589 to the Arbitration Provisions. This Court should therefore reverse the District Court and rule that Plaintiffs are bound by those provisions.

II. COPPA Authorized IXL To Treat The Schools As Plaintiffs' Agents For The Purpose Of Accepting The Arbitration Provisions

Even setting aside Plaintiffs' consent through conduct, the record demonstrates that the Schools separately assented to IXL's Arbitration

Provisions on Plaintiffs' behalf. That unique form of agency is essential to the sensible balance that Congress and the FTC have struck between two competing objectives: protecting children's online privacy and ensuring schools can acquire critical classroom technology without undue disruption.

A. IXL was legally entitled to presume the schools were authorized to consent on Plaintiffs' behalf to IXL's data collection.

Congress enacted COPPA in 1998 to protect children's privacy online. The statute requires the FTC to "promulgate" regulations requiring any "website or online service directed to children that collects personal information from children" to, as relevant here, "obtain verifiable parental consent for the collection, use, or disclosure of personal information from children." 15 U.S.C. § 6502(b)(1). Those provisions continue to provide critical protections across the internet.

In the decades since COPPA's enactment, however, schools have come to depend far more on internet-connected educational technology in the classroom. As the FTC has documented, that development raised concerns that COPPA's parental-consent requirement would have the unintended consequence of preventing schools from acquiring the

classroom technology they needed. As a matter of common sense, it could be prohibitively difficult for providers to directly obtain consent from every parent across classrooms. *See Balderas*, 489 F. Supp. 3d at 1260-61 (noting concern at FTC "COPPA Rule Review Roundtables" about the difficulties of identifying "the custodial parent who has the legal rights over this kid"). And "if parental consent were not received for only one or two children," that could "interfere with classroom activities." 64 Fed. Reg. 59903.

The solution is a measured presumption that schools contracting with educational technology providers have agency to authorize data collection on parents' behalf. The FTC's regulations define "[o]btaining verifiable consent" from parents to encompass "any reasonable effort" to do so. 16 C.F.R. § 312.2. That means a technology provider's approach must be "reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent." *Id.* § 312.5. For educational technology providers, in particular, the FTC has explained (in the preamble accompanying its regulations) what that reasonable calculation looks like:

> [W]here an operator is authorized by a school to collect personal information from children, after

> providing notice to the school of the operator's collection, use, and disclosure practices, the operator ***can presume that the school's authorization is based on the school's having obtained the parent's consent***."

64 Fed. Reg. 59903 (emphasis added). The FTC struck that balance to ensure COPPA's protections do not unduly hinder educational technology providers in delivering vital classroom services. Recognizing the agency's expertise on this issue, another district court has afforded this exact guidance *Skidmore* deference and ruled that a technology provider could "lawfully presume that the school's authorization" for its services, including related data collection, "is based on the school having obtained the parent's consent." *Balderas*, 489 F. Supp. 3d at 1260-61.

The District Court never disagreed that the FTC's guidance warrants *Skidmore* deference. It simply misread the guidance. Quoting a single clause out of context, the District Court suggested that the agency had construed COPPA merely "not" to "*preclude* schools from … serving as the parents' agent." ER-7 (quoting 64 Fed. Reg. 59903). The FTC's amicus brief offered the same cramped reading. ER-88, 90. As explained, however, the FTC's full guidance says far more than that. It expressly permits educational technology providers to "***presume***" that a school

contracting for services ***is in fact serving*** as parents' agent. 64 Fed. Reg. 59903 (emphasis added). As *Balderas* recognized, that presumption is the heart of the FTC's solution to potential classroom disruption. 489 F. Supp. 3d at 1260-61. The District Court simply overlooked that critical portion of the agency's guidance. The FTC may of course consider issuing new guidance through proper channels, but it cannot undo its express endorsement of presumed agency under COPPA by mischaracterizing it in an amicus brief.

Compounding that misunderstanding, the District Court raised an illusory concern: that under "IXL's view" of the FTC's guidance, "school districts would be authorized to sign away any privacy rights of children under thirteen without consulting their parents." ER-8. That is wrong. Nothing about IXL's argument suggests that schools can disregard the wishes of parents. They are still bound to "seek parental consent for in-school internet use." 64 Fed. Reg. 59903. Educational technology providers are simply entitled to ***presume*** schools are acting properly, sparing providers the challenging and disruptive task of independently contacting parents for direct verification. That is not, as the District Court erroneously concluded, a "perverse scheme." ER-8. It is the federal

government's carefully considered means of balancing the needs of children, parents, and educators in an era when internet-connected services have become classroom essentials.

B. The Schools' agency extended to accepting arbitration agreements.

The only remaining question is whether the Schools' agency to consent to IXL's data collection also included, as a necessary extension, agency to consent to IXL's accompanying Arbitration Provisions. Bedrock agency principles confirm that it did.

As the District Court acknowledged, "[a]n agent has implied authority to do everything 'necessary or proper and usual, in the ordinary course of business, for effecting the purpose of their agency.'" ER-9 (quoting 2B Cal. Jur. 3d Agency § 65). Here, the purpose of the schools' presumptive agency was to acquire IXL's classroom services by consenting to the data collection they require, ***without*** obligating IXL to attempt to contact every class parent. *Supra* 24-25. That IXL would condition use of its services on the acceptance of an accompanying process for resolving disputes regarding those services (here, arbitration) is entirely "usual" in "the ordinary course of business." 2B Cal. Jur. 3d Agency § 65. As any modern consumer knows, and the discovery IXL

sought would have confirmed, technological services (not to mention countless other products) are now routinely sold only subject to arbitration provisions. That is why courts have repeatedly held that "a plaintiff who dispatches an agent to deal with a defendant on his or her behalf is bound by an arbitration agreement entered into by the agent in the course of those dealings." *Indep. Living Res. Ctr. San Francisco v. Uber Techs., Inc.*, No. 18-cv-06503-RS, 2019 WL 3430656, at *3 (N.D. Cal. July 30, 2019). Put simply, signing arbitration clauses has become a "necessary step" in the mine run of transactions. *Crypto Asset Fund, LLC v. OPSkins Grp. Inc.*, 478 F. Supp. 3d 919, 927 (C.D. Cal. 2020). That includes acquisitions of products or services, like an agent's purchase of a "cryptocurrency token." *Id.*

Just as signing onto arbitration was a "necessary step" to acquiring the cryptocurrency token in *Crypto Asset Fund*, 478 F. Supp. 3d at 927, it was necessary here for schools to acquire IXL's services, including the requisite data collection. Had the Schools offered consent to IXL's data collection but ***not*** the accompanying Arbitration Provisions, that would have stopped the transaction in its tracks and recreated the precise problem that spawned the Schools' agency under COPPA to begin with.

That is, IXL would have had to somehow identify each parent in each class and individually verify their consent to arbitrate data collection-related disputes before moving forward. The resulting delays and uncertainties would have threatened to "interfere with classroom activities," 64 Fed. Reg. 59903, squarely undercutting "the purpose of [the Schools'] agency,'" 2B Cal. Jur. 3d Agency § 65. As in *Crypto Asset Fund*, agency would have been hollow without incidental authority to sign the arbitration agreement. 478 F. Supp. 3d at 927.

The District Court simply missed the ultimate purpose of the Schools' presumptive agency: facilitating the acquisition of vital educational technology without undue disruption, an essential balance struck under COPPA. So, the District Court failed to recognize that agreeing to IXL's Arbitration Provisions was vital to the schools' agency. That decision was wrong on the merits and should be reversed.

The District Court separately erred by denying discovery and an evidentiary hearing. If the District Court disagreed with IXL as to whether arbitration agreements are "necessary … in the ordinary course of [its] business," ER-9 (quoting 2B Cal. Jur. 3d Agency § 65), then that raised a material factual dispute. This Court recently cautioned that

district courts are "not authorized to dispose of a motion to compel arbitration until after [material] factual disputes have been resolved," including through "discovery," "summary judgment," and "a mini-trial, if necessary." *Knapke v. PeopleConnect, Inc.*, 38 F.4th 824, 831, 833 (9th Cir. 2022) (citations omitted). That is why, once Plaintiffs and the FTC filed briefs at least arguably disputing this point, IXL's reply noted the need for "discovery" to resolve any such "disputed question of fact as to what is 'usual and necessary' to provide educational technology like that licensed from IXL." ER-75 (citing *Knapke*). The District Court was not authorized to summarily deny the motion to compel without allowing an opportunity for evidence to be presented on the question through discovery or a mini-trial, if necessary.

It was no answer for the District Court to suggest IXL somehow "waived" its request for discovery. ER-13. That was an abuse of discretion: IXL timely asked for discovery "in response" to potential factual disputes raised for the first time by other parties' "opposition" briefing. *Remington v. Mathson*, No. CV 09-4547 NJV, 2010 WL 1233803, at *2 n.3 (N.D. Cal. Mar. 26, 2010); *see Schwendeman v. Health Carousel, LLC*, No. 18-cv-07641-BLF, 2019 WL 6173163, at *5 (N.D. Cal. Nov. 20,

2019) (reply arguments made in response to challenges to scope of agreement in plaintiff's opposition not waived). The District Court's only other ground for denying discovery was its belief that fact development would be "futile" because it disagreed that COPPA permitted IXL to treat the Schools as Plaintiffs' agents in ***any*** respect. ER-13. As explained, however, the District Court separately erred on that issue. *Supra* 25-28.

* * *

The District Court mistakenly overlooked both the Schools' agency to consent to data collection (as set out in persuasive FTC guidance) and the necessity of defining the scope of that agency to encompass arbitration agreements. This Court should reverse and hold that, for this separate reason, Plaintiffs are bound by IXL's Arbitration Provisions. At minimum, the Court should remand with instructions to "hear" IXL's motion to compel in accordance with Section 4 of the FAA, which requires the Court to resolve any "material factual disputes" through "discovery," "summary judgment," and "a mini-trial, if necessary." *Knapke*, 38 F.4th at 833.

III. The Schools Were Plaintiffs' Agents Under Common Law For Purposes Of Accepting The Arbitration Provisions

Even setting COPPA aside, the record establishes that the Schools acted as Plaintiffs' agents, and accepted the Arbitration Provisions on their behalf, under California common law. The evidence for that agency is simple and powerful. As the District Court recognized, IXL submitted "sufficient proof to demonstrate the school districts' assent to the Terms." ER-5 n.1. And through that assent, the Schools expressly "represent[ed] and warrant[ed] that [they] have the authority to provide consent on behalf of parents for IXL to collect information from students under 13." ER-134. That express representation of authority to act on the parents' behalf—i.e., as the parents' agent—is compelling evidence that such an agency relationship ***in fact*** existed.

The District Court overlooked this point. It erroneously found that "there is no evidence that Plaintiffs directed or controlled the school districts' decisionmaking" in contracting with IXL. ER-11. That was because the District Court misunderstood IXL to have cited the Schools' representation of authority only to support a distinct argument about "apparent authority." ER-10. It separately rejected that purported argument, noting that apparent authority may be created only by an act

of the principal—not an act of the apparent agent, like the Schools' representation of authority in signing the Terms. ER-10 (citing *Rogers v. Roseville SH, LLC*, 75 Cal. App. 5th 1065, 1074-75 (2022)).

IXL never invoked the doctrine of apparent authority. Instead, it cited the Schools' representation of authority in the Terms as ***evidence*** that proved their ***actual*** authority to act as Plaintiffs' agents. ER-25-34. Just as a document describing an event is relevant (even if not necessarily conclusive) evidence of that event having occurred, the Terms' description of the Schools' obtaining authority to act on parents' behalf is relevant evidence of Plaintiffs granting that authority. And that evidence is especially compelling here, not just because the record contains no evidence to the contrary, but also because there is no reason that the Schools would have lied when making their representation. Moreover, even if the District Court had not viewed the Terms as conclusive on this point (although it should have, given the absence of contrary evidence), at the very least they established a factual dispute on the question of agency. That would, at minimum, require discovery and then summary judgment proceedings, if not a mini-trial. *Knapke*, 38 F.4th at 833.

The District Court suggested that IXL's arguments based on "a common-law agency relationship between the school districts and parents" were "waived" because they were "raised for the first time on reply." ER-10-11. That is wrong even on its own terms. As noted, arguments raised in reply are not forfeited when they "respon[d]" to points raised in "opposition" briefing. *Remington*, 2010 WL 1233803, at *2 n.3. That was the case here, where both Plaintiffs (ER-102-03) and the FTC (ER-84 n.1) raised the issue of common-law agency when arguing against arbitration.

In any event, there is plainly no forfeiture before ***this*** Court. "As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 71 (9th Cir. 2022) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). IXL has always contended that the Schools "consented to the Terms as Plaintiffs' agents." ER-124 (capitalization altered). IXL is thus free to "make any argument in support of th[at] claim on appeal," including that the source of the agency is state common law. *Allen*, 38 F.4th at 71 (quoting *Yee*, 503 U.S. at 534).

Once more, the Court should reverse and hold that Plaintiffs are bound by IXL's Arbitration Provisions, this time pursuant to common law, and, on this basis, the court should reverse with instructions to the District Court to grant IXL's motion. At minimum, the Court should reverse and remand with instructions to conduct the discovery, summary judgment proceedings, and perhaps mini-trial that *Knapke* mandates regarding the existence of actual agency.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's denial of IXL's motion to compel and remand with instructions to grant IXL's motion to compel, or at minimum remand for the evidentiary proceedings that the FAA requires.

May 9, 2025

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATUTORY ADDENDUM

Page

69 Fed. Reg. 59,888
Federal Trade Commission
16 C.F.R. Part 312
RIN 3084-AA84
Children's Online Privacy Protection Rule

***

D. Section 312.5: Verifiable Parental Consent

***

4. Response to Comments Requesting an Exception for Information Collection in the Educational Setting

Numerous commenters raised concerns about how the Rule would apply to the use of the Internet in schools.[229] Some commenters expressed concern that requiring parental consent for online information collection would interfere with classroom activities, especially if parental consent were not received for only one or two children.[230] In response, the Commission notes that the Rule does not preclude schools from acting as intermediaries between operators and parents in the notice and consent process, or from serving as the parents' agent in the process. For example, many schools already seek parental consent for in-school Internet access at the beginning of the school year. Thus, where an operator is authorized by a school to collect personal information from children, after providing notice to the school of the operator's collection, use, and disclosure practices, the operator can presume that the school's authorization is based on the school's having obtained the parent's consent.

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[229] Association of American Publishers ("AAP") (Comment 70) at 4-5; EdPress (Comment 130) at 1-2; MaMaMedia (Comment 85) at 3-4; ZapMe! (Comment 76) at 4-5; ALA (Comment 68) at 2-3.

[230] *Id.*

Operators may wish to work with schools to educate parents about online educational activities that require websites to collect personal information in the school setting. To ensure effective implementation of the Rule, the Commission also intends to provide guidance to the educational community regarding the Rule's privacy protections.