

21-999-cv
Zachman v. Hudson Valley Federal Credit Union

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT

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6 August Term, 2021

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8 (Argued: March 16, 2022

Decided: September 14, 2022)

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10 Docket No. 21-999-cv
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14 NICOLE ZACHMAN, ON BEHALF OF HERSELF AND ALL OTHERS
15 SIMILARLY SITUATED,

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17 *Plaintiff-Appellee,*

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19 v.

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21 HUDSON VALLEY FEDERAL CREDIT UNION,

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23 *Defendant-Appellant.*

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25 _____
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27 Before: POOLER, WESLEY, and MENASHI, *Circuit Judges.*

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29 Appeal from United States District Court for the Southern District of New
30 York (Vincent L. Briccetti, J.) denying defendant Hudson Valley Federal Credit
31 Union's ("HVCU") motion to compel arbitration. Because the record was

1 insufficiently developed for the district court to deny the motion to compel
2 arbitration, we vacate and remand for further proceedings consistent with this
3 opinion.

4 Vacated and remanded.

5

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7 Gitnik, Keith L. Gibson, *on the brief*), New York, N.Y.,
8 *for Defendant-Appellant Hudson Valley Federal Credit*
9 *Union.*

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13

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17 POOLER, *Circuit Judge:*

18 Hudson Valley Federal Credit Union (“HVCU”) appeals from the
19 judgment of the United States District Court for the Southern District of New
20 York (Briccetti, J.) denying HVCU’s motion to compel arbitration of Nicole
21 Zachman’s putative class action claims for breach of contract, breach of the
22 covenant of good faith and fair dealing, and claims under New York law and the
23 federal Electronic Fund Transfer Act.

1 Zachman alleged that HVCU wrongly assessed and collected overdraft
2 fees and insufficient funds fees on checking accounts that were not actually
3 overdrawn. As relevant to this appeal, HVCU moved to compel arbitration on
4 the basis that Zachman was bound by a mandatory arbitration clause and class
5 action waiver provision in the Truth-in-Savings Standard Disclosure and
6 Account Agreement (“Account Agreement”). Zachman contends that when she
7 opened her account with HVCU in 2012, the Account Agreement did not contain
8 any mandatory arbitration clauses or class action waiver provisions, and that
9 because she was never notified of the addition of those provisions to the Account
10 Agreement, she is not bound by them.

11 HVCU argued below that Zachman was on inquiry notice of the modified
12 Account Agreement. It contended that when Zachman signed up for online
13 banking with HVCU in 2019, she agreed to an Internet Banking Agreement that
14 incorporated by reference the revised Account Agreement containing the
15 arbitration and class action waiver provisions; and that HVCU published the

1 modified Account Agreement on the HVCU website which Zachman used for
2 online banking.¹

3 The district court agreed with Zachman, finding that she was not on actual
4 or inquiry notice of the terms of the mandatory arbitration clause or class action
5 waiver provisions. It denied HVCU's motion to compel arbitration. We conclude
6 that the district court erred in engaging in the inquiry notice analysis, which
7 requires an examination of the "design and content" of the webpage, without
8 reviewing the actual screenshots of the web-based contract. Therefore, we vacate
9 the district court's judgment and remand for further proceedings consistent with
10 this opinion.

11 BACKGROUND

12 A. Facts

13 HVCU is a not-for-profit credit cooperative and financial institution that
14 provides checking account services and other financial products to its members.

¹ On appeal, HVCU has abandoned its argument that Zachman was on notice of the Account Agreement because it was published on HVCU's website.

1 Zachman is an active member of HVCU, where she maintains a checking account
2 and debit card.

3 On February 21, 2020, Zachman filed a class-action complaint, alleging that
4 HVCU's practice of collecting overdraft or insufficient funds fees on accounts
5 that were not actually overdrawn violated New York General Business Law § 349
6 and the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, and its
7 implementing regulation, known as Regulation E, 12 C.F.R. § 1005. In response,
8 HVCU moved to dismiss the complaint, which the district court construed as a
9 motion to compel arbitration. The district court ordered limited arbitration-
10 related discovery for the purpose of deciding the motion.

11 Joyce Keehan, HVCU's senior compliance officer, testified that the
12 modified Account Agreement containing the arbitration provision and class
13 action waiver was published to the HVCU website. HVCU customers can access
14 the agreement via the HVCU website in two ways: 1) a user may run a search in
15 the website's search bar which will bring up the Account Disclosures webpage
16 with a hyperlink to the account agreement; or 2) a user can reach the Account
17 Disclosures webpage by selecting the "Resources" tab on the right-side of an

1 options menu on HVCU's website. App'x at 260-61. Keehan also testified that
2 users can obtain a physical copy by either requesting a hard copy be mailed to
3 them or going to a brick-and-mortar HVCU branch.

4 Keehan testified that she was not aware whether HVCU mailed or emailed
5 Zachman a copy of the revised Account Agreement containing the mandatory
6 arbitration and class action waiver provisions. HVCU did not post a notice of the
7 added arbitration and class action waiver provisions in its quarterly newsletters
8 or in members' electronic statements, and it did not otherwise provide written
9 notice of those provisions to Zachman. Keehan acknowledged that the "only way
10 that [HVCU] provided notice of the arbitration provision and class action waiver
11 was by posting the new agreement that contained the arbitration provision and
12 class action waiver to its website." App'x at 257. Additionally, HVCU did not
13 implement a "banner" notification on the webpage, provide a summary of any
14 changes made to the Account Agreement on the webpage where the agreement
15 is hyperlinked, or otherwise indicate any changes had been made to the Account
16 Agreement. App'x at 261.

1 Mark Timmerman, HVCU's vice president of legal, corporate compliance
2 and risk, explained in an affidavit that in October 2019 HVCU converted to a
3 new online banking system. To use HVCU's online banking services, users must
4 first register their accounts online. Registration requires that users first click
5 through and agree to various HVCU disclosures including an "Internet Banking
6 Disclosure and Agreement" ("Internet Banking Agreement").

7 The Internet Banking Agreement states in relevant part:

8 If you do not agree to the terms of this Agreement do not access or
9 use the Internet Banking services. If you remain on the site, or return
10 thereafter, you agree to be bound by this Agreement . . . We may
11 change terms or amend this Agreement from time to time without
12 notice or as otherwise provided by law . . . Each of your accounts at
13 Hudson Valley Credit Union is also governed by the applicable
14 account disclosures. Your use of the services is your
15 acknowledgement that you have received these agreements and agree
16 to be bound by them.

17 App'x at 290. The Internet Banking Agreement informs members that they are
18 bound by the terms and conditions of, among other things, the Account
19 Agreement and provides URLs to access the relevant agreements, which include
20 a "Mandatory Arbitration" provision and "Class Waiver" provision:

21

1 By clicking "I agree to the above terms and conditions" you agree to
2 be bound by the terms and conditions identified in this Agreement,
3 the terms and conditions of HVCU's Electronic Funds Transfer
4 Disclosure & Account Agreement, as amended, HVCU's Truth in
5 Savings Disclosure & Account Agreement, as amended and other
6 relevant agreements, all of which are incorporated herein by reference
7 as though fully set forth. You may access our Electronic Fund
8 Transfers Disclosure and Agreement at [https://www.hvcu.org/
9 Personal/Resources/Account-Disclosures](https://www.hvcu.org/Personal/Resources/Account-Disclosures). You may access our Truth
10 in Savings Disclosure and Account Agreement at [https://www.hvcu.
11 org/Personal/Resources/Account-Disclosures](https://www.hvcu.org/Personal/Resources/Account-Disclosures).

12 App'x at 287-88. Timmerman attested that Zachman first signed into the new
13 online banking system on October 23, 2019. A user audit report reflects that
14 Zachman registered and accepted the disclosures, including the Internet Banking
15 Agreement, on October 23, 2019.

16 Zachman asserts that she was not aware HVCU revised the 2012 Account
17 Agreement to add mandatory arbitration or class action waiver provisions. She
18 also attested that she never searched for or viewed the Account Agreement on
19 the HVCU website.

20 **B. The District Court's Decision**

21 As a threshold matter, the district court considered whether it had the
22 authority to determine if this matter was arbitrable. HVCU argued that the

1 question of arbitrability had been delegated to an arbitrator. The court, however,
2 noted that “[i]t is well settled” that a district court, not an arbitrator, must
3 determine whether a valid arbitration agreement exists. *Zachman v. Hudson Valley*
4 *Fed. Credit Union*, No. 20 CV 1579 (VB), 2021 WL 1092508, at *4 (S.D.N.Y. Mar. 22,
5 2021) (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530
6 (2019)).

7 Next, the district court considered whether Zachman agreed to submit to
8 arbitration any claims arising out of the agreement and waived her right to
9 proceed with a class action. The district court held that HVCU failed to establish
10 that Zachman had actual notice of the mandatory arbitration and class action
11 waiver provisions. *Id.* at *5. The district court then considered whether Zachman
12 was on inquiry notice of the mandatory arbitration and class action waiver
13 provisions.

14 First, the district court noted that HVCU failed to demonstrate that
15 Zachman’s registration for online banking put her on inquiry notice of the
16 provisions. *Id.* at *6. The district court found that HVCU “provides no visual aid
17 or description of any layout or design of the webpages that a user sees when

1 registering for online banking services.” *Id.* at *7. HVCU provided a copy of the
2 Internet Banking Agreement but did not provide screenshots of the webpage(s)
3 presenting the Internet Banking Agreement to online banking registrants.
4 Reviewing this copy, the district court found that the “the hyperlink and
5 language regarding the Account Agreement appear to be buried in the Internet
6 Banking Agreement.” *Id.* The district court concluded that HVCU “has failed to
7 establish that [Zachman] was put on inquiry notice” and denied the motion to
8 compel arbitration. *Id.* at *8.

9 Second, the court found that Zachman was not put on inquiry notice based
10 on HVCU’s publication of the revised Account Agreement to the HVCU website.
11 *Id.* at *7. Finally, the district court found that Zachman’s continued use of her
12 debit card and checking account was insufficient to establish her assent to the
13 terms of the modified agreement. *Id.* at *8.

14 HVCU appealed.²

² On May 10, 2021, the district court stayed the proceedings below pending HVCU’s interlocutory appeal. *Zachman v. Hudson Valley Fed. Credit Union*, No. 20 CV 1579 (VB), 2021 WL 1873235, at *1 (S.D.N.Y. May 10, 2021).

1 and thus may not be overturned unless clearly erroneous.” (citation and internal
2 quotation marks omitted)).

3 The district court must first determine whether an agreement to arbitrate
4 exists between the parties. *Schnabel*, 697 F.3d at 118. The question of whether the
5 parties agreed to arbitrate is determined by state contract law; here, the
6 applicable agreements are governed by New York law. *Id.* Courts deciding
7 motions to compel arbitration “apply a ‘standard similar to that applicable for a
8 motion for summary judgment.’” *Nicosia*, 834 F.3d at 229 (quoting *Bensadoun v.*
9 *Jobe–Riat*, 316 F.3d 171, 175 (2d Cir. 2003)). “If the undisputed facts in the record
10 require the matter of arbitrability to be decided against one side or the other as a
11 matter of law, we may rule on the basis of that legal issue and avoid the need for
12 further court proceedings.” *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir.
13 2017). If, however, there is an issue of fact as to the making of the agreement for
14 arbitration, then remand to the district court for a trial is necessary. 9 U.S.C. § 4;
15 *Meyer*, 868 F.3d at 74.

16 On a motion for summary judgment, the court “consider[s] all relevant,
17 admissible evidence submitted by the parties and contained in pleadings,

1 depositions, answers to interrogatories, and admissions on file, together with . . .
2 affidavits.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (second
3 alteration in original) (internal quotation marks omitted). In deciding such a
4 motion, we “draw[] all reasonable inferences in favor of the non-moving
5 party.” *Meyer*, 868 F.3d at 74.

6 **I. Applicable Law**

7 **A. Agreement to Arbitrate**

8 In deciding whether to compel arbitration, a court must first decide
9 whether the parties agreed to arbitrate. *Spear, Leeds & Kellogg v. Cent. Life Assur.*
10 *Co.*, 85 F.3d 21, 25 (2d Cir. 1996). Only if the court concludes an agreement to
11 arbitrate exists does it determine (1) the scope of the agreement to arbitrate; (2)
12 whether Congress intended any federal statutory claims asserted to be non-
13 arbitrable; and (3) if some, but not all, of the claims in the case are arbitrable,
14 whether to stay the balance of the proceedings pending arbitration. *JLM Indus.,*
15 *Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004).

16 Section 4 of the FAA provides, in relevant part, that “[i]f the making of the
17 arbitration agreement . . . be in issue, the court shall proceed summarily to the

1 trial thereof.” 9 U.S.C. § 4. The party seeking to compel arbitration bears an initial
2 burden of demonstrating that an agreement to arbitrate was made. *See, e.g.,*
3 *Doctor’s Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 254 (2d Cir. 2019) (vacating the
4 denial of a motion to compel arbitration for the district court to consider
5 unresolved issues regarding contract formation); *Almacenes Fernandez, S.A. v.*
6 *Golodetz*, 148 F.2d 625, 628 (2d Cir. 1945) (noting that the parties seeking a stay in
7 favor of arbitration “supported their application . . . by showing at least prima
8 facie that” an agreement to arbitrate was proposed and accepted); *see also*
9 *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 462 F.2d 673, 675 (2d Cir.
10 1972) (describing the evidence included in the initial petition of the party seeking
11 to compel arbitration). This burden does not require the moving party to show
12 that the agreement would be enforceable—only that an agreement to arbitrate
13 existed. *See Doctor’s Assocs., Inc.*, 934 F.3d at 251. Once the existence of an
14 agreement to arbitrate is established, the burden shifts to the party seeking to
15 avoid arbitration to “show[] the agreement to be inapplicable or invalid.”
16 *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 124 (2d Cir. 2010).

17

1 **B. Inquiry Notice**

2 “It is a basic tenet of contract law that, in order to be binding, a contract
3 requires a meeting of the minds and a manifestation of mutual assent.” *Starke v.*
4 *SquareTrade, Inc.*, 913 F.3d 279, 288 (2d Cir. 2019) (internal quotation marks
5 omitted). “Where an offeree does not have *actual* notice of certain contract terms,
6 he is nevertheless bound by such terms if he is on *inquiry* notice of them and
7 assents to them through conduct that a reasonable person would understand to
8 constitute assent.” *Id.* (emphases in original). “In determining whether an offeree
9 is on inquiry notice of contract terms, New York courts look to whether the term
10 was obvious and whether it was called to the offeree’s attention.” *Id.* at 289. “This
11 often turns on whether the contract terms were presented to the offeree in a clear
12 and conspicuous way.” *Id.*

13 We apply these same contract law principles to online transactions. “In the
14 context of web-based contracts, we look to the design and content of the relevant
15 interface to determine if the contract terms were presented to the offeree in [a]
16 way that would put her on inquiry notice of such terms.” *Id.*; *see also Soliman v.*
17 *Subway Franchisee Advert. Fund Tr., Ltd.*, 999 F.3d 828, 835 (2d Cir. 2021)

1 (“Reasonable conspicuousness turns on the design and content of the relevant
2 interface.” (internal quotation marks omitted)). “We have emphasized that
3 ‘[c]lassification of web-based contracts alone . . . does not resolve the notice
4 inquiry,’ and ‘[i]nsofar as it turns on the reasonableness of notice, the
5 enforceability of a web-based agreement is clearly a fact-intensive inquiry.’” *Id.*
6 (quoting *Meyer*, 868 F.3d at 76).

7 **II. Application**

8 **A. Agreement to Arbitrate**

9 We conclude that the record is insufficiently developed on the issue of
10 whether the parties entered into an agreement to arbitrate and, as a consequence,
11 we cannot determine the matter of arbitrability “as a matter of law.” *Meyer*, 868
12 F.3d at 74. Therefore, we remand for the district court to consider further
13 evidence or, if necessary, hold a trial. *See* 9 U.S.C. § 4; *Meyer*, 868 F.3d at 74 (“If a
14 factual issue exists regarding the formation of the arbitration agreement,
15 however, remand to the district court for a trial is necessary.”).

16 Drilling down on that record, HVCU provided evidence that Zachman
17 registered as an online banking user on October 23, 2019. This meant that when

1 Zachman signed up for internet banking, she first had to read or scroll through
2 the Internet Banking Agreement, and then click a button at the bottom of the
3 Agreement stating, “I agree to the above terms and conditions.” App’x at 287 ¶ 6.

4 The Internet Banking Agreement was a “clickwrap” or a “scrollwrap”
5 agreement. We have consistently upheld such agreements because the user has
6 affirmatively assented to the terms of the agreement by clicking “I agree” or
7 similar language. *See, e.g., Meyer*, 868 F.3d at 75. For her part, Zachman does not
8 dispute that she signed up for internet banking. *See* App’x at 273 ¶ 5 (“Since
9 opening my account with Hudson, I have not visited Hudson's website for any
10 purpose other than to conduct online banking activity, including reviewing my
11 banking statements, and to inquire about an automobile loan.”). That, however,
12 does not end our analysis. When it comes to digital contract formation, courts
13 also evaluate visual evidence that demonstrates “whether a website user has
14 actual or constructive notice of the conditions.” *Nicosia*, 834 F.3d at 233. The
15 outcome often turns on “whether the design and content of th[e] webpage
16 rendered the existence of terms reasonably conspicuous.” *Id.*

1 Here, HVCU did not submit evidence of how the Internet Banking
2 Agreement was presented to users. *See Zachman*, 2021 WL 1092508, at *7
3 (“[D]efendant provides no visual aid or description of any layout or design of the
4 webpages that a user sees when registering for online banking services.”). As a
5 result, the district court could not resolve whether *Zachman* was on inquiry
6 notice because, as it noted, it was “unable to assess whether the relevant
7 language and hyperlink are clear and conspicuous.” *Id.*; *see also Nicosia*, 834 F.3d
8 at 233 (“Whether there was notice of the existence of additional contract terms
9 presented on a webpage depends heavily on whether the design and content of
10 that webpage rendered the existence of terms reasonably conspicuous.”).

11 Accordingly, we agree with the district court that granting HVCU’s
12 motion to compel arbitration was not warranted in light of this evidentiary gap
13 in the record.

14 However, we have remanded cases for trial on the issue of contract
15 formation where the record was insufficiently developed. *See, e.g., Interbras*
16 *Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 5 (2d Cir. 1981) (record
17 consisted of affidavits and other papers); *Interocean Shipping*, 462 F.2d at 676

1 (record consisted of pleadings, affidavits, and documentary attachments). In
2 contrast, where the parties conducted sufficient discovery and developed an
3 ample record, we have decided the issues of reasonable notice and objective
4 manifestation of assent as a matter of law. *See Specht*, 306 F.3d at 28.

5 Given the district court’s finding that HVCU failed to meet their
6 evidentiary burden, the district court’s conclusion that “the hyperlink and
7 language regarding the Account Agreement appear to be buried in the Internet
8 Banking Agreement,” *Zachman*, 2021 WL 1092508, at *7, is surprising. The district
9 court may have been evaluating the copy of the Internet Banking Agreement that
10 HVCU submitted and commenting on the nature of the text’s reference to the
11 Account Agreement. Nonetheless, its conclusion that the hyperlink and language
12 regarding the Account Agreement are “buried” in the Internet Banking
13 Agreement seems inconsistent with its finding that it was “unable to assess
14 whether the relevant language and hyperlink are clear and conspicuous.” *Id.* The
15 district court could not have concluded the reference to the Account Agreements
16 was not conspicuous or buried simply based on reading the copy of the contract

1 attached to Timmerman's affidavit without knowing the design and content of
2 the webpage and how the terms were presented.

3 The record in this case is insufficiently developed for us to determine
4 whether Zachman was placed on inquiry notice of the amended Account
5 Agreement containing the mandatory arbitration and class action provisions
6 when she began to use HVCU's internet banking site. Therefore, the district
7 court's outright denial of the motion to compel arbitration, which had the effect
8 of determining that Zachman is not bound by the amended Account
9 Agreement's arbitration clause, was premature; the record was not sufficiently
10 developed to indicate whether Zachman knowingly agreed to the arbitration
11 clause. Given the lingering issues as to the matter of arbitrability, the district
12 court should have required further evidence or proceeded to trial on that issue.
13 *See Meyer*, 868 F.3d at 74.

14 **B. Incorporation by Reference**

15 We write further to bring to the district court's attention our precedents
16 regarding inquiry notice in the context of web-based contracts in New York.
17 Under New York law, it is well established that contract terms and other

1 agreements may be incorporated by cross-reference. *PaineWebber Inc. v. Bybyk*, 81
2 F.3d 1193, 1201 (2d Cir. 1996) (citing *Chiacchia v. Nat'l Westminster Bank USA*, 507
3 N.Y.S.2d 888, 890 (1986)). This case presents a unique question regarding
4 whether and how to address incorporation by reference in web-based contracts
5 under New York law.

6 Under our precedents regarding inquiry notice of terms in web-based
7 contracts, a district court must consider the design and content of the relevant
8 interface. *Nicosia*, 834 F.3d at 233. To the extent that a second agreement is clearly
9 incorporated by reference into a scrollwrap or click-through agreement, ordinary
10 principles of contract interpretation and incorporation by reference under New
11 York law must still apply.

12 If the Internet Banking Agreement was provided to Zachman on paper
13 and she received hard copies of the Account Agreements, there is little doubt she
14 would be bound by the terms in the Account Agreements if she signed the
15 Banking Agreement. Applying that logic to the situation here, we would
16 consider whether the Account Agreements were “clearly identified” in the
17 scrollwrap Internet Banking Agreement and made accessible to the user.

1 *PaineWebber*, 81 F.3d at 1201. If so, then “as long as the layout and language of the
2 site give the user reasonable notice that a click will manifest assent to an
3 agreement,” *Meyer*, 868 F.3d at 75 (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d
4 1029, 1033-34 (7th Cir. 2016)), clicking “I agree to the above terms and
5 conditions” would have bound Zachman to the Internet Banking Agreement
6 along with the Account Agreements incorporated by reference.

7 Unfortunately, the record does not contain screenshots of the webpage(s)
8 used to register HVCU customers for online banking. Therefore, we cannot
9 engage in this analysis, and it was error for the district court to engage in the
10 inquiry notice analysis based on the copy of the Internet Banking Agreement,
11 which does not depict the content and design of the webpage as seen by users
12 signing up for online banking. On remand, the district court should consider the
13 design and content of the Internet Banking Agreement as it was presented to
14 users in determining whether Zachman assented to its terms. And the district
15 court should assess whether the Account Agreements are clearly identified and
16 available to the users based on our precedents.

CONCLUSION

1

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For the reasons given above, we vacate the district court's judgment and

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remand for further proceedings consistent with this opinion.