No. 23-15999

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Katherine Chabolla,

Plaintiff – Appellee,

v.

ClassPass Inc., ClassPass LLC, and ClassPass USA LLC,

Defendants – Appellants.

On Appeal from an Order Denying Arbitration
U.S. District Court, N.D. Cal. No. 4:23-cv-00429
Honorable Yvonne Gonzalez Rogers

BRIEF *AMICUS CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF DEFENDANTS–APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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RULE 29(a)(4)(A) DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 29(a)(4)(A), *amicus curiae* National Federation of Independent Business Small Business Legal Center, Inc., a nonprofit corporation, states it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Amicus files in this case because the panel majority decision creates massive uncertainty for small and independent businesses, including members of *amicus*, that use online Terms of Use[2] agreements.

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[1] Pursuant to Federal Rule 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation of this brief.

[2] *Amicus* uses the phrase "Terms of Use" or "Terms" to encompass all use, service, or conditions agreements, regardless of label.

SUMMARY OF ARGUMENT

This *should* have been an uncomplicated case. A consumer sued a business, and the business sought to compel arbitration based on its Terms of Use agreement. The issue became whether the parties agreed to arbitrate, specifically whether the consumer had sufficient notice of, and assented to, the business's online Terms of Use. Because this Court had decided four similar cases in the past three years, proper resolution meant simply applying those precedents to the facts presented here.

But that is not what happened. Instead, the majority opinion held that what this Court has repeatedly said provides sufficient notice and assent for an online Terms of Use was no longer enough. The result? Upending this Court's recent published precedent, creating a conflict between the majority decision and previous panel decisions confronting nearly identical facts. It is little surprise, then, that this case produced the Court's first dissent on both whether a website's notice of Terms was reasonably conspicuous and whether a user manifested their assent to those Terms.

The panel majority missed the mark on both components of the analysis. In concluding that ClassPass's Terms of Use were not

reasonably conspicuous, the majority disregarded that ClassPass's multiple screens contained what this Court has previously blessed and what the California courts say is important: text provided in a readable font, gray text with a contrasting white background, the notice's text in the action box and directly above or below the action button, and a Terms of Use hyperlink in blue font. The majority then compounded this error by holding that the text of the notice and action button must match exactly, effectively creating a magic words requirement for *Berman*'s manifestation-of-assent analysis. This Court's cases do not support that requirement.

The majority's approach creates uncertainty and destroys predictability for small businesses seeking to conform their websites to this Court's decisions. Millions of businesses are now left guessing how to reconcile the majority's decision with previous panel decisions, while unsure of what minor website details could suddenly be essential. Making matters worse, businesses will be confused on how to create conforming Terms of Use hyperlinks and notices when panels read new mandates, like a magic words requirement, into this Court's precedent.

The Court should grant the petition for rehearing.

ARGUMENT

I. The Panel Decision Creates an Intra-Circuit Conflict Threatening Reliance on Past Decisions.

In the past three years, this Court has decided at least six cases regarding online Terms of Use agreements. *En banc* review is necessary because the majority decision creates an intra-circuit split that upsets the reliability of this Court's decisions.

Sign-in wrap agreements are enforceable contracts if 1) the "website provides reasonably conspicuous notice of the terms," and 2) the consumer does something that "unambiguously manifests his or her assent to the terms." *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022). The majority opinion deviates from the straightforward analysis *Berman* demands, rendering the validity of innumerable online Terms of Use agreements uncertain.

A. What Qualifies as Reasonably Conspicuous Notice of Terms is Now Unclear.

Until this case, online businesses had clear guidance on how to satisfy *Berman*'s first prong and provide reasonably conspicuous notice of terms. No longer. What was sufficient in April and February of last year was insufficient in February of this year. *Compare Chabolla v.*

ClassPass Inc., 129 F.4th 1147 (9th Cir. 2025), *with Keebaugh v. Warner Bros. Entertainment Inc.*, 100 F.4th 1005 (9th Cir. 2024), *and Patrick v. Running Wearhouse, LLC*, 93 F.4th 468 (9th Cir. 2024).

The "reasonably conspicuous" inquiry focuses on both "the context of the transaction" and the "visual elements" (*i.e.*, the "placement") of a notice. *Keebaugh*, 100 F. 4th at 1019–20. Context is important because it is expected that a consumer will look for contractual terms where the transaction is an "ongoing account" or a "continuing, forward-looking relationship." *Berman*, 30 F.4th at 866–67. Even so, context is a "non-dispositive factor," meaning courts must always evaluate a notice's visual elements. *Keebaugh*, 100 F.4th at 1019.

The context here indicates a continuing relationship, such that users of ClassPass should have been looking for contractual terms. Even the majority conceded that ClassPass's screens gave an "indication of a continuing relationship." *Chabolla*, 129 F.4th at 1155. To that end, both Screens 1 and 2 invited users to "join" ClassPass and offered "$40 off *First* Month." The word "First" on these screens indicates to the common-sense user—especially in the context of the gym and fitness industry—additional months thereafter. What this initial context suggests,

ClassPass made clear: Both Screens 1 and 2 state that "[a]fter first month, you'll auto-enroll in our $75/month plan." Screen 3 then verifies a "membership" that "automatically renew[s]."

The majority skirted the core context of the transaction by pointing to ClassPass's offer of "no commitments" and its assurance that users could "cancel anytime"—meaning users are not locked into a term contract. But the lack of a definite term does not mean the lack of a continuing relationship. Many businesses offer everyday services in continuing relationships with the ability to cancel anytime. Examples include streaming services, gyms, landscaping services, car washes, food delivery services, and more. Consumers prefer flexibility, and businesses offering that flexibility should not have it held against them.[3]

Turning to the visual elements of ClassPass's notice. To determine whether these visual elements are sufficiently conspicuous, courts consider: "(1) the size of the text; (2) the color of the text as compared to

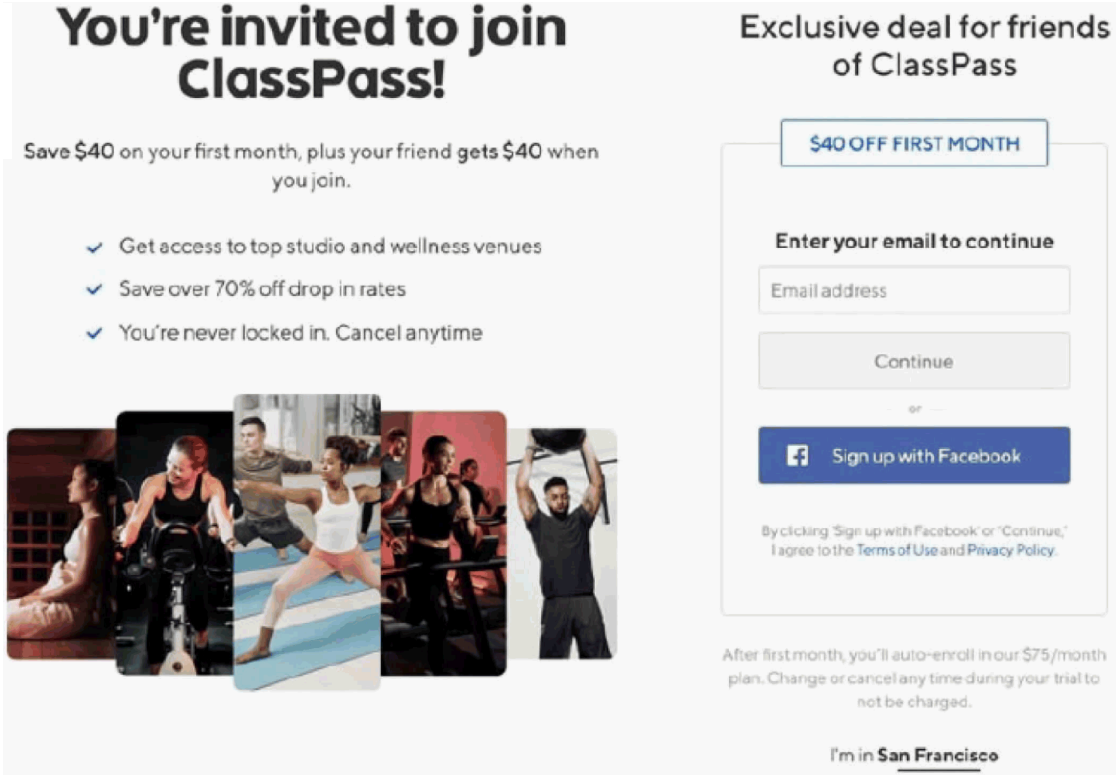
[3] Because context is a "non-dispositive" factor, *Keebaugh*, 100 F.4th at 1019, and the disagreement between the panel majority and dissent largely centered on the visual elements of ClassPass's notice, *amicus* focuses the rest of the reasonably conspicuous discussion on these visual elements.

the background it appears against; (3) the location of the text and, specifically, its proximity to any box or button the user must click to continue use of the website; (4) the obviousness of any associated hyperlink; and (5) whether other elements on the screen clutter or otherwise obscure the textual notice." *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 473 (2021). Terms and conditions may be disclosed through hyperlink if it is "readily apparent," which is usually accomplished by "contrasting font color (typically blue)," or "blue text." *Berman*, 30 F.4th at 857; *accord Sellers*, 73 Cal. App. 5th at 481.

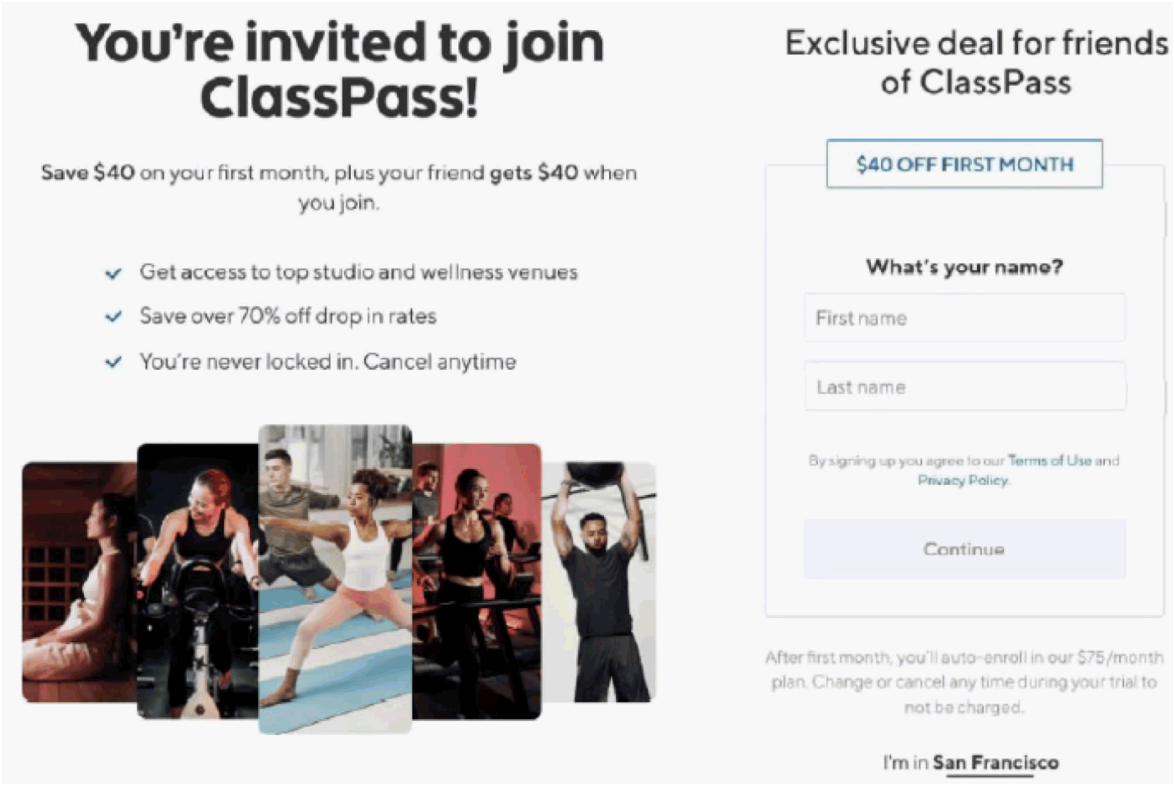
i. Visual Comparison

Amicus compares the screens and Terms of Use at issue here, and those in the Court's recent published decisions, to demonstrate the majority's error.

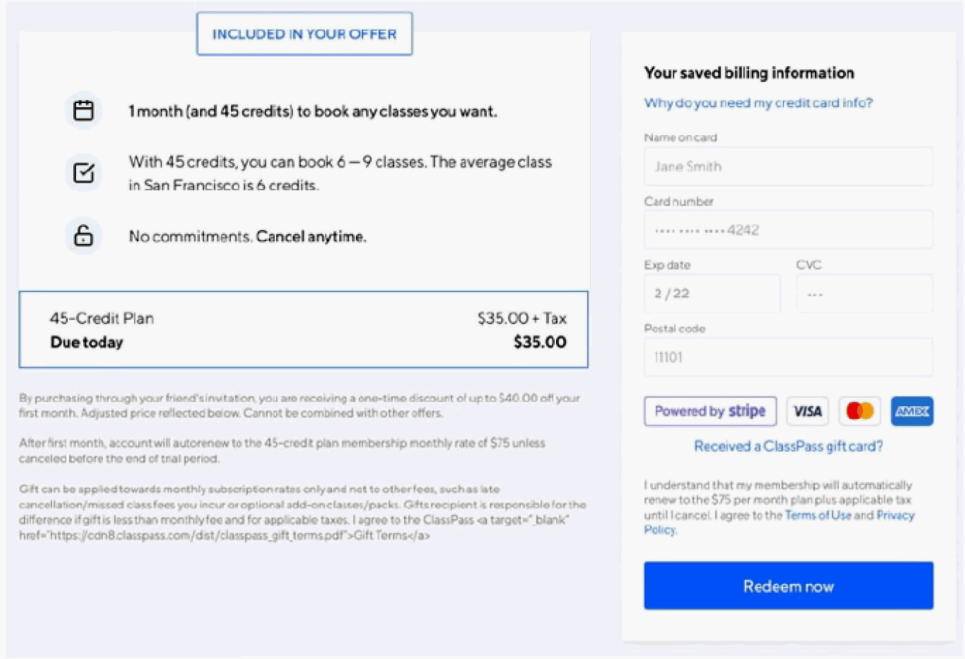
Chabolla Screen 1



Chabolla Screen 2



Chabolla Screen 3



Patrick

Desktop Version of Running Warehouse Website

Items Ordered	Quantity	In Stock	Price	Total Price
Nike Spark Lightweight Crew Socks 4 Black	1	Yes	$16.95	$16.95

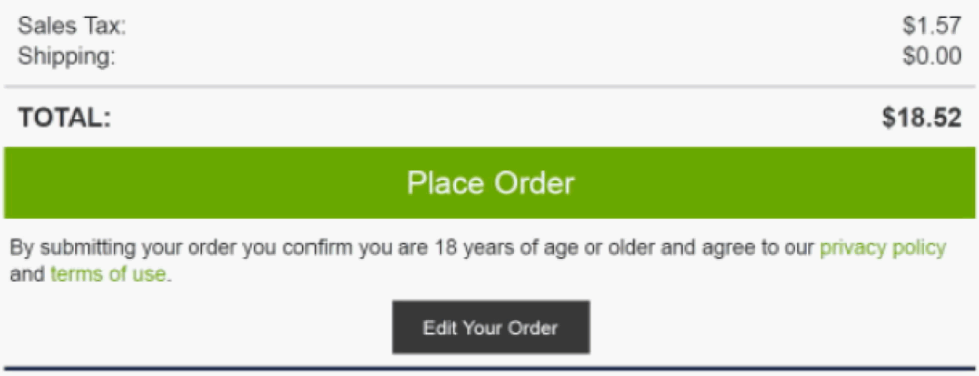
		Subtotal:	$16.95
Shipping Method:	UPS Ground	Sales Tax:	$1.57
Estimated Delivery:	4/1/22	Shipping:	$0.00
Edit Your Order		TOTAL:	$18.52

Place Order

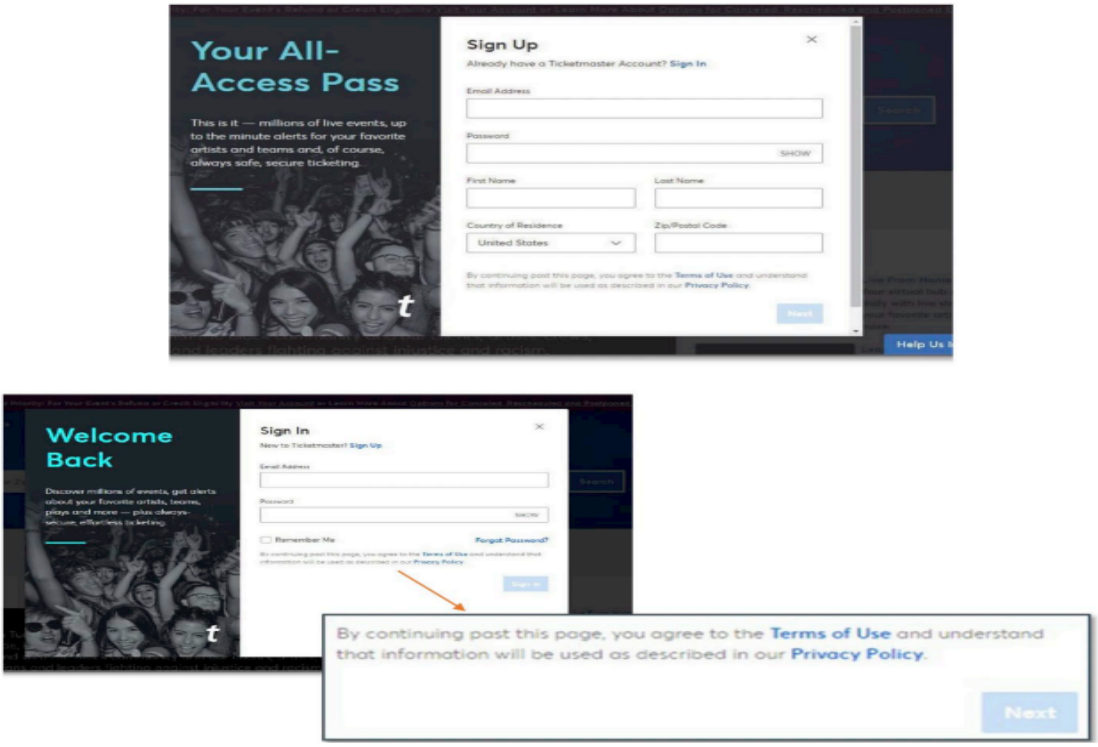
By submitting your order you confirm you are 18 years of age or older and agree to our privacy policy and terms of use.

Copyright © 2021 Running Warehouse. All Rights Reserved. Terms of Use | Privacy Policy | Your California Privacy Rights | Contact Us | Site Map | Accessibility
US: 1.800.606.9598 | Careers

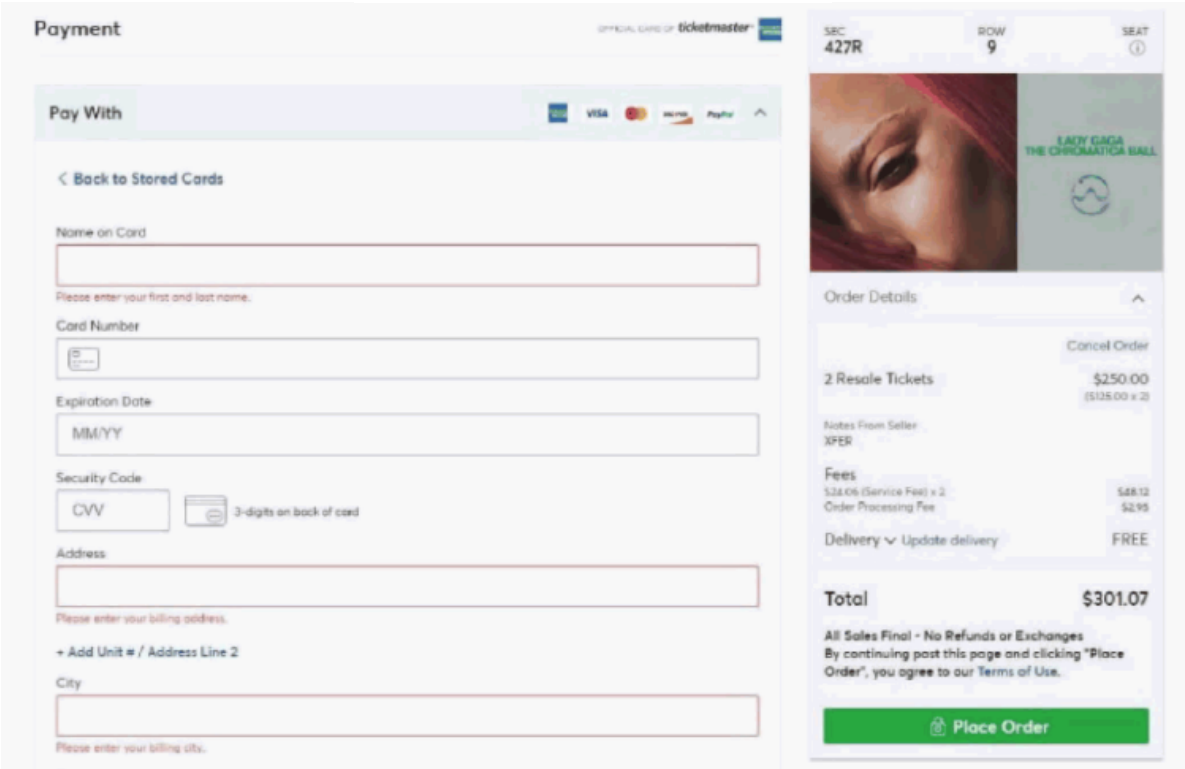
Mobile Version of Running Warehouse Website



Oberstein Beginning Screens



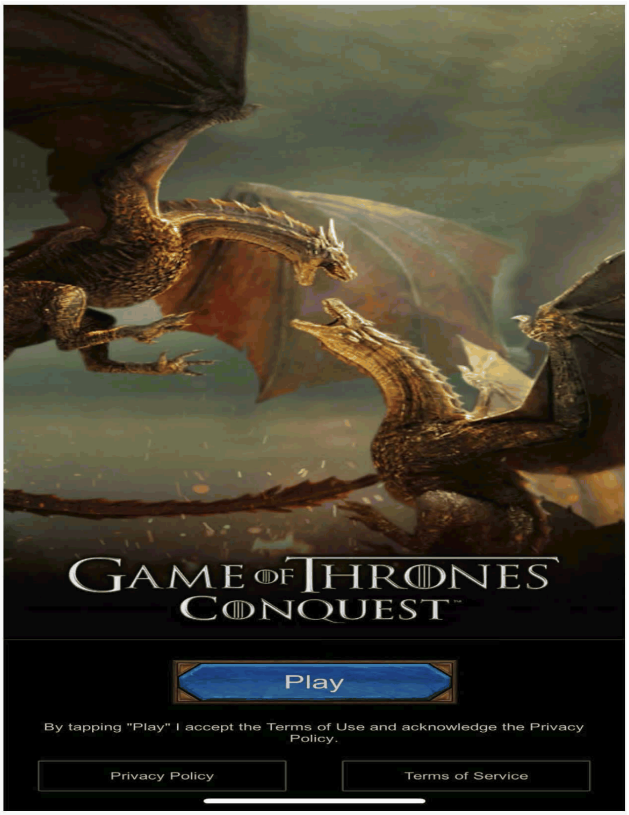
Oberstein Payment Screen



Keebaugh Version 1

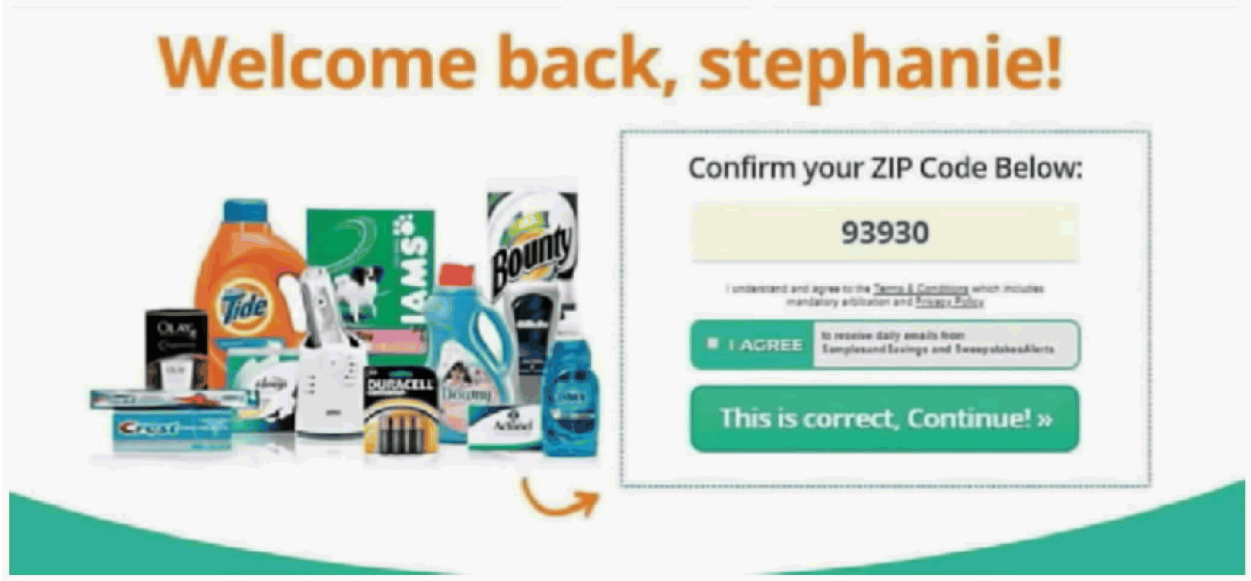
2019 Version

Keebaugh Version 2



2020 Version

Berman



Inspecting these screens confirms that ClassPass's visual elements are consistent with notices that the Court has previously deemed reasonably conspicuous. For example, each of ClassPass's three screens contained a Terms of Use hyperlink in blue text, just like those screens in *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023). And just like in *Oberstein* and *Patrick*, ClassPass provided the notice and Terms of Use directly above or below the action buttons.

ii. Chart Comparison

The majority's deviation from past cases becomes even more evident when the elements from each case are compared in chart format. In the two charts below, *amicus* has compiled the core visual considerations this Court looks at in determining whether a notice is reasonably conspicuous. In Chart 1, each of ClassPass's three screens is compared against each other. Chart 2 then compares the totality of ClassPass's three screens against the notices in *Keebaugh*, *Patrick*, *Oberstein*, and *Berman*—cases decided before *Chabolla*.[4]

[4] In these charts, "Y" stands for Yes, indicating the condition has been met, while "N" stands for No, the condition was not met. "NA" stands for "Not Applicable" while "RC" stands for Reasonably Conspicuous.

Chart 1

	Chabolla Screen 1	**Chabolla Screen 2**	**Chabolla Screen 3**
Readable Text/Not Barely Legible Font	Y	Y	Y
Hyperlink in Distinct Color	Y	Y	Y
Hyperlink in Blue	Y	Y	Y
Contrasting Color Between Text and Background	Y	Y	Y
Located in Action Box	Y	Y	Y
Directly Above or Below Action Button	N[5]	Y	Y

[5] This answer may be "Yes" if one considers "Sign up with Facebook" to be a second action button. If so, then the sentence containing the Terms of Use is directly below one of the two action buttons on Screen 1. Judge Bybee appears to have interpreted the page this way. *See Chabolla*, 129 F.4th at 1165–67 (Bybee, J., dissenting) (noting two action buttons on Screen 1 and that "ClassPass's Terms of Use is below the action button"). Being generous to the majority opinion and Appellees, *amicus* lists this as "No."

Chart 2

	Chabolla (2025)	**Keebaugh (2024)**	**Patrick (2024)**	**Oberstein (2023)**	**Berman (2022)**
Readable Text/Not Barely Legible Font	Y	Y	Y	Y	N
Hyperlink in Distinct Color	Y	N	Y (Green)	Y	N
Hyperlink in Blue	Y	N	N	Y	N
Hyperlink Underscored	N	N	N	N	Y
Contrast Between Text of Sentence and Background	Y	Y	Y	Y	Y
Located in Action Box	Y	NA (No action box)	NA (No action box)	Y	Y
Directly Above or Below Action Button	Y (at least 2, if not all 3, screens)	Y	Y	Y	N
Multiple Pages Where Terms of Use Displayed	Y	N	N	Y	N
Outcome	**Not RC**	**RC**	**RC**	**RC**	**Not RC**

iii. Summary

These charts validate Judge Bybee's observation that this case should have been a "straightforward application of *Berman* and its progeny." *Chabolla*, 129 F.4th at 1161 (Bybee, J., dissenting). But instead, the majority opinion "selectively pars[ed] the webpages at issue" and "ignor[ed] [] recent applications of the *Berman* test." *Id.*

The majority "decline[d] to consider" anything about ClassPass's 2nd and 3rd screens as to whether the notice was reasonably conspicuous. *Id.* at 1157–58 (majority op.). Focusing solely on Screen 1, it declared that the "notice's distance from the relevant action items, its placement outside of the user's natural flow, and its font—notably timid in both size and color" meant that the notice was not reasonably conspicuous. *Id.* at 1157.

The pictures and charts above reveal the majority's mistake. ClassPass's notices are located in the action box, and either directly below the action button to "Sign up with Facebook" or directly above the action button for a user to proceed. The notice is in gray font contrasted against a surrounding white background. The Terms of Use hyperlink is in blue font. While the gray text of the notice is smaller than other text on the

page, it is nevertheless "easily readable, unlike in *Berman*." *Id.* at 1166 (Bybee, J., dissenting). Put simply, "Screen 1 alone is as conspicuous as the notices deemed acceptable in *Oberstein* and *Patrick*." *Id.* at 1167. Here, just as in *Oberstein* and *Patrick*, there is a Terms of Use hyperlink in a distinct color, a notice in a darker font contrasted against a white background, and a notice directly above or below the action button. *See Oberstein*, 60 F.4th at 515–16; *Patrick*, 93 F.4th at 477.

Comparing this case with the only other pre-*Chabolla* case considering multiple screens—*Oberstein*—reveals virtually no differences except the outcome. *See* Chart 2. In *Oberstein* the Court held that the notice and Terms were reasonably conspicuous because the notice was "conspicuously displayed directly above or below the action button at each of three independent stages"; the language of the pages denoted continued use will act as a manifestation of an intent to be bound; and "crucially, the 'Terms of Use' hyperlink is conspicuously distinguished from the surrounding text in bright blue font, making its presence readily apparent." 60 F.4th at 516.

So too here. In each of ClassPass's three screens, the Terms of Use hyperlink was "conspicuously distinguished from the surrounding text in

bright blue font." Even if the "Sign up with Facebook" were not considered an action button, the notice and Terms of Use were directly above or directly below the action button in both Screens 2 and 3. Finally, the notice in both Screens 1 and 2 explicitly stated that, by clicking the action button or signing up, the user agreed to the Terms of Use.

The majority decision dismantled the clarity provided by the Court's previous decisions. Until this case, this Court had always held that a notice located directly above or below an action button and containing a distinctly colored Terms of Use hyperlink was reasonably conspicuous. *See Patrick*, 93 F.4th at 477 (Terms of Use hyperlink in bright green font and directly below action button was reasonably conspicuous); *Oberstein*, 60 F.4th at 516 (Terms of Use hyperlink in blue font and directly above or below the action button at each stage was reasonably conspicuous). The Court's cases were similarly clear that a notice containing a distinctly colored Terms of Use hyperlink and located within an action box was reasonably conspicuous. *Compare Oberstein*, 60 F.4th at 516 (Terms hyperlink in blue font and within action box was reasonably conspicuous), *with Berman*, 30 F.4th at 856–58 (not

reasonably conspicuous where Terms & Conditions in action box but not in distinct color).

ClassPass's website met at least four—and arguably all five—of the considerations identified in *Sellers*. 73 Cal. App. 5th at 473. The size of the text containing the notice and Terms of Use was in a readable font; the color of the text was gray, contrasted with a white background; the location of the text was within the action box of each of ClassPass's three screens, either directly above or below the action buttons; and the Terms of Use hyperlink was obvious, displayed with a blue font. Moreover, as Judge Bybee observed, the ClassPass screens were less cluttered than those found insufficient in *Berman*, and more closely resembled those upheld in *Patrick* and *Oberstein*. *Chabolla*, 129 F.4th at 1166–67 (Bybee, J., dissenting).[6]

[6] Because this section focuses on the *Chabolla* majority's deviation from Ninth Circuit precedent, it does not include *Godun v. JustAnswer LLC*, No. 24-2095, 2025 WL 1160684 (9th Cir. Apr. 14, 2025), a post-*Chabolla* case holding that a notice and Terms of Use were not reasonably conspicuous. *Godun* confirms that the screens here are reasonably conspicuous. The notices in *Godun* had none of the key features that ClassPass's screens contained—a blue Terms of Use hyperlink, a notice in the action box directly above or below the action buttons, and a notice in a readable and color-contrasted font. *See Godun*, 2025 WL 1160684, at *2–4, slip op. at 5–10 (showing screenshots of notices).

In sum, the panel majority created an intra-circuit split on what constitutes "reasonably conspicuous" notice. *En banc* review is warranted to provide uniformity for online contract formation, including whether the *Sellers* considerations still guide the visual elements analysis or to clarify their application.

B. The Panel's Manifestation of Assent Analysis Imposes a New Magic Words Requirement on Business Websites.

Under *Berman*'s second prong, a user must unambiguously manifest their assent to the terms of the agreement. The "click of a button can be construed as an unambiguous manifestation of assent only if the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of the agreement." *Berman*, 30 F.4th at 857. "The presence of an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound is critical." *Id.* (cleaned up; quoted source omitted).

The majority briefly acknowledged that Screen 1 provided the explicit textual notice alongside the click of a button that *Berman* requires. *Chabolla*, 129 F.4th at 1158. That acknowledgment should have been the end of the inquiry. Instead, the majority proceeded to find

Screens 2 and 3 ambiguous because the language of the notice text and the action button did not exactly match. *Id.* (relying on Screen 2's use of "By signing up" with an action button that reads "Continue" and Screen 3's use of "I agree" with an action button that reads "Redeem Now"). In doing so, the panel enacted a magic words requirement before a website user can manifest their assent to a notice and Terms of Use. *See Godun v. JustAnswer LLC*, No. 24-2095, 2025 WL 1160684, *7–8 (9th Cir. Apr. 15, 2025) (citing *Chabolla* for proposition that words must match); *id.* at *10 (Nelson, J., concurring) (noting that the Court's decision, like the majority in *Chabolla*, "demand[s] magic words"). But "*Berman* does not require magic words or a perfect match between the notice phrasing and the action button text." *Chabolla*, 129 F.4th at 1171 (Bybee, J., dissenting).

The panel's new magic words requirement is inconsistent with this Court's precedent.[7] For example, in *Oberstein*, the Court held that the manifestation of assent analysis was "straightforward" and that the "Ticket Purchasers unambiguously manifested assent" even though the

[7] It is also "inconsistent with historical and traditional contract law." *Godun*, 2025 WL 1160684, at *10 (Nelson, J., concurring).

notices and action button text did not exactly match. 60 F.4th at 517. In both of *Oberstein*'s sign in/sign up screens, the relevant notice stated, "By continuing past this page" with an action button reading "Next" instead of "Continue." Likewise in *Patrick* where the notice stated that "By submitting your order" even though the action button read "Place Order." 93 F.4th at 474. And just as in *Oberstein*, the lack of an exact match between the notice's text and action button text did not prevent the Court in *Patrick* from concluding that the plaintiff manifested assent to the Terms. The panel majority's approach here cannot be squared with *Oberstein* and *Patrick*, necessitating *en banc* review. As Judge Bybee explained, "[j]ust last year in *Patrick* we did not require an exact disclaimer/button match. The majority provides no explanation for why we should do so now, and in the process creates an intra-circuit split on what constitutes manifestation of assent under *Berman*." *Chabolla*, 129 F.4th at 1172 n.9 (Bybee, J., dissenting).

The majority's new magic words requirement for manifestation of assent cannot be reconciled with this Court's precedent. Only *en banc* review can provide clarity on which of the conflicting readings of *Berman*—the panel's below, or *Oberstein* and *Patrick*—is correct.

II. Small Businesses Need Certainty and Predictability from this Court on How to Structure Online Agreements.

The outcome in this case will significantly impact small business within this circuit. The majority's unprecedented approach could force as many as 6,847,259 small businesses to restructure their websites.[8] These businesses can no longer rely on the certainty and predictability that *Berman*, *Oberstein*, *Patrick*, and *Keebaugh* provided.

Uncertainty in the law is a significant impediment to small business operations. Every four years, the NFIB Research Center surveys small businesses about the biggest obstacles to their success. In the most recent 2024 survey, small businesses identified two types of uncertainty as significant obstacles. *See* NFIB Research Center, *Small Business Problems & Priorities*, at 9 (2024), https://tinyurl.com/p58khrjt. "Uncertainty over Government Actions" was the 8th biggest obstacle, with 23% labeling it a "critical" problem. *Id.* When businesses "cannot rely on [this Court's] decisions in *Patrick* and *Oberstein*, which approve[d]

[8] U.S. Small Business Administration Office of Advocacy, *2024 Small Business Profiles for the States, Territories, and Nation* (Nov. 19, 2024), https://advocacy.sba.gov/2024/11/19/2024-small-business-profiles-for-the-states-territories-and-nation/ (adding numbers of small businesses in Ninth Circuit states).

nearly identical language" to that of ClassPass's screens, it "sows great uncertainty." *Chabolla*, 129 F.4th at 1172 (Bybee, J., dissenting). This is especially true for small businesses, which lack the financial resources, lawyers, and consultants to adapt to conflicting court decisions quickly.

Predictability in the law is also important. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 410–11 (2024) (highlighting lack of reliance and predictability as a reason for jettisoning a judicial decision that "fosters unwarranted instability in the law[] leaving those attempting to plan . . . in an eternal fog of uncertainty"). Businesses of all sizes "structure their websites to respond to [this Court's] opinions" and an inability to predict how the Court will react to each new case causes "destabliz[ation] in law and business." *Chabolla*, 129 F.4th at 1172 (Bybee, J., dissenting).

Before *Chabolla*, businesses knew what the law required of their notices. Post-*Berman*, businesses could predict that a legible notice of Terms and "clearly denote[d]" Terms hyperlink with a contrasting font color, such as blue, would be reasonably conspicuous. *Berman*, 30 F.4th at 856–57 (not reasonably conspicuous where notice in "barely legible" font and Terms hyperlink was not "clearly denote[d]" by "contrasting font

color"). After *Oberstein*, nothing changed. A business using a multi-screen process, like ClassPass, could predict that a legible notice included in the action box and directly above or below the action button, with the Terms hyperlink displayed by a contrasting color, would be reasonably conspicuous. *See Oberstein*, 60 F.4th at 515–16 (reasonably conspicuous in multi-screen process where notice in action box was "directly above or below the action button" and "crucially, the 'Terms of Use' hyperlink . . . [was] in bright blue font"). *Patrick* followed *Oberstein* and *Berman* exactly, maintaining predictability for businesses. *See Patrick*, 93 F.4th at 477 (notice of Terms reasonably conspicuous where notice was directly below action button and Terms of Use was hyperlinked in contrasting bright green font). The majority decision in this case has shattered this predictability, rendering uncertain how businesses need to fashion their notices and Terms of Use to pass muster going forward.

The majority's newfound magic words mandate further erodes predictability. None of this Court's previous cases read *Berman* to require magic words in order to show manifestation of assent. Post-*Chabolla* cases have recognized this new mandate, meaning *Chabolla* cannot be cast aside as a one-off with little future impact. *See Godun*, 2025 WL

1160684, at *8 (citing *Chabolla* to hold no manifestation of assent because words in notice and action button did not match); *id.* at *10 (Nelson, J., concurring) ("[h]ere, we demand magic words" while citing the *Chabolla* dissent). If the Court is going to require magic words to show manifestation of assent, businesses need the *en banc* Court to explicitly say so.

This Court should provide certainty and predictability to small businesses. They must know whether *Berman*, *Oberstein*, and *Patrick* still govern, or whether the majority's deviation imposing new standards is the new North Star for notices and Terms of Use agreements. Only *en banc* review can provide the answer.

CONCLUSION

The Court should grant the petition for rehearing.

DATED: April 24, 2025

Respectfully submitted,

s/ *Stephen M. Duvernay*
Stephen M. Duvernay

Attorney for Amicus Curiae National Federation of Independent Business Small Business Legal Center, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2) because this brief contains 3,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type.

Dated: April 24, 2025

s/ Stephen M. Duvernay
Stephen M. Duvernay

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Stephen M. Duvernay
Stephen M. Duvernay