No. 23-15999

Published opinion issued February 27, 2025
Before: Jay S. Bybee and Salvador Mendoza, Jr., Circuit Judges,
and Michael W. Fitzgerald, District Judge

United States Court of Appeals for the Ninth Circuit

KATHERINE CHABOLLA,

Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v.

CLASSPASS, INC., et al.,

Defendants-Appellants.

Appeal from an Order Denying Arbitration
Northern District of California No. 4:23-cv-00429-YGR
Hon. Yvonne Gonzalez Rogers, District Judge

BRIEF OF *AMICI CURIAE* ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL, DRI CENTER FOR LAW AND PUBLIC POLICY AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* represented on this brief hereby state that the Association of Southern California Defense Counsel and the Center for Law and Public Policy (DRI) are voluntary professional associations comprised of attorney members, they have no parent corporation and have issued no stock, and the Civil Justice Association of California is an association that has no parent corporation and has issued no stock.

RULE 29 STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae*, the Association of Southern California Defense Counsel, DRI and the Civil Justice Association of California each states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund preparing or submitting this brief; and (3) no person other than *amicus* or its counsel has contributed money that was intended to fund the preparation or submission of this brief.

CONSENT

Pursuant to Ninth Circuit Rule 29-2(a), Appellants consented in writing to the filing of this amicus brief. Counsel for Appellee responded that her client takes "no position." In the absence of consent from all parties, a motion to file accompanies the brief.

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No. 23-15999

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Defendants-Appellants.

IMPORTANCE OF ISSUE AND INTEREST OF AMICI

Amici curiae, the Association of Southern California Defense Counsel (ASCDC), DRI Center for Law and Public Policy (DRI) and the Civil Justice Association of California (CJAC) (collectively "amici"), submit this brief to respectfully urge the court to grant the pending petition for rehearing or rehearing en banc by Appellants ClassPass, et al. (hereafter Appellant or ClassPass) following a 2-1 opinion published as *Chabolla v. ClassPass, Inc.*, 129 F.4th 1147 (9th Cir. 2025).

The rehearing petition presents an extremely important and frequently recurring question that requires this Court to clarify and conclusively resolve the conflict that

has arisen in defining the proper standard for contract formation that applies when determining:

> Whether a consumer has received reasonably conspicuous notice of, and then objectively manifested his or her assent to, the Terms of Use of an agreement offered by a business as part of an online transaction?
>
> (Pet. at 1-2.)

Here, those applicable "terms" were conspicuously presented to plaintiff Katherine Chabolla in multiple windows before her consent to the transaction was acknowledged by "clicking" her acceptance and providing other detailed information required to conclude the online transaction. The Terms of Use included an agreement to arbitrate disputes (i.e., the claims alleged in this action) arising between Chabolla and ClassPass, which Ms. Chabolla contends is invalid because no binding agreement was formed.

Berman v. Freedom Financial Network, 30 F.4th 849 (9th Cir. 2022) sets forth a two-part standard that has been followed by a line of decisions in this Circuit (including the *Chabolla* panel majority opinion which ostensibly applied the *Berman* test) when addressing issues of online contract formation. Other Circuits have adopted similar tests to

ascertain whether "mutual assent" was objectively manifested by both parties to the contract.

The separate majority and dissenting opinions in *Chabolla* reflect strongly conflicting views. The deeper sources of this conflict are explored by a more recent published decision, *Gudon v. JustAnswer, Inc.*, ___ F.4th ___, 2025 WL 1160684 (9th Cir., Apr. 15, 2025, No. 24-2095) (*Gudon*), in which Judge Nelson authored both the majority opinion and a separate "concurrence." As discussed at greater length in the brief that follows, the *Gudon* concurrence calls into question the doctrinal validity of *Berman*'s approach in ascertaining whether mutual assent was manifested to the Terms of Use of an online transaction in closely analogous, if not substantially identical, circumstances presented by the factual background in *Chabolla*.

The 2-1 panel majority opinion conflicts with opinions from the U.S. Supreme Court and California Supreme Court governing the formation and enforceability of contracts generally, and agreements that include arbitration of disputes in the "terms" of service in particular. Judge Bybee's dissenting opinion, and more recently Judge Nelson's *Gudon* concurrence, compel the conclusion that the majority panel opinion in *Chabolla* starkly conflicts with the better-reasoned authority of other federal Circuits, applying this supposedly uniform approach. This may also require

careful re-examination of *Berman*'s two-step test to avoid inconsistent and arbitrary application of the most basic contract formation rules in the internet sphere.

In light of this fundamental conflict, closer scrutiny of the rules governing the formation and enforceability of such contracts is warranted by this Circuit. That process should begin by granting rehearing. Amici each have considerable experience and interest in assuring the clear and consistent development of this area of contract law, as described below:

For over 65 years, ASCDC has been the nation's largest and preeminent regional association of trial and appellate lawyers devoted to defending civil actions. Comprised of 1,100 attorney-members practicing in Southern and Central California, ASCDC is actively involved in assisting the courts and organized bar in addressing legal issues of interest to its members and the general public. ASCDC's mission includes providing specialized continuing legal education to enhance the skills of California's civil trial and appellate practitioners, representation of its constituents' interests in legislative matters, and offering amicus support before the courts focusing on issues to improve the administration of justice in state and federal litigation practice.

DRI is an international organization that includes more than 16,000 civil defense attorneys and in-house counsel who represent the interests of businesses across all industry groups in civil litigation. DRI is committed to

enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI has long been a voice in the ongoing effort to assure the civil justice system is fair and efficient, and where national issues are involved—consistent. To promote these objectives, DRI and its members participate as amicus curiae in cases that present issues of significance to DRI members, their clients, and the judicial system.

Founded in 1979, the Civil Justice Association of California (CJAC) is a nonprofit organization representing businesses, professional service providers, and financial institutions before a variety of official and government forums. CJAC's principal purpose is to educate the public about ways to make our civil liability laws and the judicial process more fair, certain, economical and effective.

Toward this end, in recent years amici have submitted briefs and arguments before numerous California state courts, federal courts within this Circuit and the United States Supreme Court raising questions about whether restrictions on contract formation and related procedures for the enforcement of agreements to arbitrate disputes violated the Federal Arbitration Act's protective ambit (9 U.S.C. § 1, et seq.; hereafter "FAA") which requires the equal treatment of such agreements in the same manner as other contracts. In this Circuit and the United States Supreme Court, these amicus presentations include, among others: *Coinbase, Inc.*

v. Bielski, 599 U.S. 736 (2023); *Chamber of Commerce of the United States of America v. Bonta*, 62 F.4th 473 (2023) (opn. after rhg.). Before California appellate courts: *Harrod v. Country Oaks Partners, LLC*, 15 Cal.5th 939, *cert. denied*, 145 S.Ct. 175 (2024); *Saheli v. White Mem. Medical Center*, 21 Cal.App.5th 308 (2018); *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015); *Richey v. AutoNation, Inc.*, 60 Cal.4th 909 (2015); *Ruiz v. Podolsky*, 50 Cal.4th 838 (2010).

Amici and their members are therefore substantially interested in the development of clear and consistent rules of the law in California and this Circuit that apply to the enforceability of contracts entered into by businesses and their customers in online transactions. Internet transactions reflect a rapidly-growing economic sector in the modern stream of commerce. (Pet. at 23.)

The approach taken by recent published cases also reflects a disturbing antagonism toward the enforceability of "Terms of Use" that include arbitration as the mechanism for dispute resolution. (This and similar cases arise from orders denying motions to compel arbitration.) It is hardly "coincidental" that the party opposing arbitration will be strongly inclined to wage a frontal assault on any contract offered by online providers of goods and services containing this "term of use"—the alleged *lack* of conspicuous disclosure becomes the primary focus of opposing arguments in putative class actions, such as this lawsuit. Greater clarity

in defining contract formation rules would guide parties and trial courts.

The majority opinion here cannot be reconciled with the *Berman* test, or more objective formulations for determining mutual assent that have been employed and consistently applied by other Circuits to such transactions. Judge Bybee's dissent is comprehensive and compelling in this regard. And as Judge Nelson rightly observed in his concurring analysis of *Gudon* earlier this month:

> As to [*Berman's*] step-two analysis, *we have committed to an erroneous doctrinal path*. There, our precedent demands that we consider whether some action taken by the internet user unambiguously manifests her assent to proposed contractual terms, requiring that a website *explicitly* advise a user that certain acts will be taken to signal that assent. *Berman*, 30 F.4th at 857. That holding drove portions of the majority decision.
>
> *Gudon*, 2025 WL 1160684, at 10 (conc. opn. by Nelson, J.) (brackets and italics added).

This erroneous path leads to ignoring the common sense rule that *context* is the key, and "no magic words" are required to manifest assent. *Id.* at 10-11. (*Cf.* Pet. at 24.)

Rehearing en banc would be desirable to conclusively resolve these fundamental differences of opinion. At a minimum, panel rehearing is necessary to reconcile the conflicts that are clearly posed by the majority opinion.

SUMMARY OF ARGUMENT

A. Background of this online transaction

Katherine Chabolla signed up for a subscription with ClassPass for online fitness classes. She entered her name and credit card number, including the expiration date and three-digit CVC number. *Chabolla*, 169 F.4th at 1151 (maj. opn.). By the time she had entered her credit card information, Chabolla had navigated three screens, each of which informed her that by continuing and enrolling with ClassPass, she was agreeing to its Terms of Use. Three times Chabolla clicked an action button that was just above or just below the Terms of Use provision. *Id.* at 1151-1153; *see also id.* at 1166-1172 (diss. opn.).[1]

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[1] Screenshots depicting the proposed subscription contract with prompts directing Ms. Chabolla to the "Terms of Use" in contrasting blue text are included in the dissenting opinion, and also appear sequentially in the Appendix to the petition for rehearing. *Chabolla*, 129 F.4th at 1166-1169 (diss. opn.); Appendix at 72-76. The dissent additionally provides several examples of screenshots from other decisions addressing the consumer's objective consent to those offered "terms of use." *Chabolla*, 129 F.4th at 1162-1165 (diss. opn.).

The majority and dissenting opinions describe this type of internet transaction as most closely resembling a "sign-in wrap" format. Ms. Chabolla navigated through four webpages to purchase her subscription: the landing page and screens 1, 2, and 3. *Chabolla*, 129 F.4th at 1154-1155 (maj. opn.); *see also id.* at1160-1161 (diss. opn.).

In return for a $39 initial payment, Chabolla knew she would receive six to nine classes each month and that the membership would automatically renew at $79 monthly until she cancelled it. During 2020, when the COVID-19 pandemic and government response closed California's gyms, studios, and fitness and wellness classes, ClassPass paused its monthly charges. A little over a year later, ClassPass resumed charging subscribers, including Chabolla. *Chabolla*, 129 F.4th at 1152-1153 (maj. opn.); *id.* at 1160-1161 (diss. opn.).

When Chabolla realized she was being charged for classes she no longer wanted, she sued to void her membership and reclaim the money ClassPass charged her credit card. *Chabolla*, 129 F.4th at 1153-1154 (maj. opn.). ClassPass sought to enforce the arbitration clause contained in its Terms of Use. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 … (2011) [*Concepcion*] ("[C]ourts must place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms ....")

(internal citations omitted). *Chabolla*, 129 F.4th at 1160 (diss. opn.).

The district court denied ClassPass's motion to compel arbitration. The panel majority opinion affirmed over Judge Bybee's dissent.

B. *Berman* and its progeny – the panel majority opinion conflicts with the contract formation test adopted by this and other Circuits

The majority opinion concludes that neither the landing page nor the first of three separate screens provided plaintiff with reasonably conspicuous notice of the Terms of Use applying the *Berman* test. Even if screens 2 and 3 did so, at no point did Chabolla *unambiguously manifest* her assent to the Terms of Use on those screens. Plaintiff's use of the website, viewed in total, did not amount to *unambiguous* manifestation of assent to the Terms of Use; consequently, she did not agree to be bound to the arbitration clause within those Terms of Use. *Chabolla*, 129 F.4th at 1156-1159.

Judge Bybee, dissenting, would hold that Chabolla had unequivocally agreed to ClassPass's Terms of Use. The screens, considered individually, required plaintiff to manifest her assent to the Terms of Use. When considering all three screens together, that conclusion is overwhelming.

She received three conspicuous notices of the Terms, and unambiguously assented three times during the sign-up process. This was enough to bind her in contract. The courts here and in other Circuits enforce contracts that employ similar disclosures which are not objectively ambiguous in context. *Chabolla*, 129 F.4th at 1171-1173 (diss. opn.).

Judge Bybee expresses legitimate concerns that few, if any, internet transactions could be predictably upheld when applying the panel majority's rationale.

> I fear the effects of the majority's opinion extend far beyond this case. The majority's decision demonstrates that we will examine all internet contracts with the strictest scrutiny and that minor differences between websites will yield opposite results. A website such as ClassPass cannot rely on our decisions in [post-*Berman* cases], which approve nearly identical language. That sows great uncertainty in this area.
>
> *Chabolla*, 129 F.4th at 1172 (diss. opn.)

Indeed it does. Those concerns are underscored by the thoughtful analysis of Judge Nelson's *Godun* concurrence. Like Judge Bybee, his opinion aptly calls for this court to re-examine and clarify the proper test to decide questions of mutual assent in the realm of internet transactions. *Gudon*, 2025 WL 1160684, at 10-11 (conc. opn. by Nelson, J.).

C. The panel majority's approach runs afoul of the FAA's "equal treatment rule"

Another undesirable, but entirely predictable, consequence of this uncertainty is the growing number of challenges amici's members are seeing when they move to enforce agreements to arbitrate. The lack of clarity in adhering to settled rules of contract interpretation that have prevailed in California and throughout this Circuit for decades are frustrating the rights of parties who have chosen to arbitrate disputes.

The unwieldly approach employed by the majority opinion thus also conflicts with the longstanding policy stated by Congress' adoption of the FAA, that *all* state and federal "courts must place arbitration agreements on an equal footing with other contracts ... and *enforce them according to their terms*." *See Chabolla*, 129 F.4th at 1160 (diss. opn.), citing *Concepcion*, 563 U.S. 339 (italics added).

REASONS WARRANTING PANEL REHEARING OR REHEARING EN BANC

I. THE PANEL MAJORITY OPINION CONFLICTS WITH OPINIONS OF THE UNITED STATES AND CALIFORNIA SUPREME COURTS, THIS AND OTHER CIRCUITS

A. The Majority Panel Opinion Creates Conflict with the Objective Reasonableness Test for Contract Formation As Articulated by This Circuit in *Berman* and Consistent Approaches Adopted and Followed in Other Circuits

The *Chabolla* majority opinion maintains that ClassPass's webpages failed to meet both prongs of the *Berman* test. The majority insists that "more" is required for the subscriber in Ms. Chabolla's position to "*unambiguously manifest* her assent to the Terms of Use." *E.g.*, *Chabolla*, 129 F.4th at 1159-1160 (maj. opn.) (italics added). How so?

Judge Bybee cogently explains step-by-step, in the *context* of this transaction, why the opposite is true. No specific formula or "magic words" are required to show assent.

The dissent points to recent decisions in this Circuit decisions applying *Berman*; such as, *Patrick v. Running*

Warehouse, LLC, 93 F.4th 468 (9th Cir. 2024), and *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023). In factually similar, if not substantially identical cases applying *Berman*, "we have held that '[u]nder California law a sign-in wrap agreement may be enforceable based on inquiry notice,' so long as a "reasonably prudent Internet user" (1) has "reasonably conspicuous notice" of the Terms of Use, and (2) unambiguously manifests assent to the Terms of Use when examining what was offered in complete context. No particular form of "click this box" or "push this button" is mandated to attest that the subscriber agrees. *Keebaugh v. Warner Bros. Ent. Co.*, 100 F.4th 1005, 1014 (9th Cir. 2024) (citing *Berman*, 30 F.4th at 856, and approving "a sign-in wrap agreement"); *Patrick*, 93 F.4th at 477 (approving a browsewrap agreement); *Oberstein*, 60 F.4th at 516–17 (approving a "hybrid form of agreement" without identifying it precisely); *see also Domer v. Menard, Inc.*, 116 F.4th 686, 694–95, 699–700 (7th Cir. 2024) (relying on this court's *Berman* test in approving an "online agreement [that] fall[s] somewhere in between" browsewrap and clickwrap). *Chabolla*, 129 F.4th at 1161.

Like any "paper" contract setting, the context of the words used on the webpages should dictate whether there the disclosures are "reasonably conspicuous" such that a *reasonable* internet user's attention would be drawn to terms for which her assent is requested. *Chabolla*, 129 F.4th at

1161-1166 (diss. opn.); *accord*, *Gudon*, 2025 WL 1160684, at 4, 7 (maj. opn.).

Ms. Chabolla's objective manifestation of assent is graphically illustrated by the exemplars from other cases in comparison to ClassPass's webpages. *Chabolla*, 129 F.4th at 1165-1172 (diss. opn.).

Judge Bybee sums up the conflict as follows: "This case should present a straightforward application of *Berman* and its progeny. ClassPass provided conspicuous notice of its Terms of Use on three separate occasions, and Chabolla unambiguously manifested her assent to those conditions at multiple points in the registration process by clicking either 'Continue' or 'Redeem now.' This was a sign-in wrap agreement similar to others we have approved. [Citing] Maj. Op. at 1154-55; *see Keebaugh*, 100 F.4th at 1014. Nonetheless, the majority holds that ClassPass's sign-in wrap fails the *Berman* test and therefore failed to bind Ms. Chabolla to its Terms of Use, including the arbitration and class action provisions therein. The majority reaches its result by selectively parsing the webpages at issue here and ignoring our recent applications of the *Berman* test." *Chabolla*, 129 F.4th at 1162 (diss. opn.)

The consequences in the marketplace are obvious: "When companies structure their websites to respond to our opinions but can't predict how we are going to react from one

case to another, we destabilize law and business. After today's decision, a website will have to guess whether any nuance at all in its sign-in wrap will be held against it. The result is one of *caveat websitus internetus* (roughly translated as "internet websites beware!")." *Chabolla*, 129 F.4th at 1162 (diss. opn.).

Judge Nelson echoes those sentiments in his *Gudon* concurrence. He warns that when courts, such as the majority in *Chabolla*, insist on the use of particular "advisements" or "magic words" to reveal manifestations of intent, this fundamentally alters the law of contracts. *Gudon*, 2025 WL 1160684, at 10-11 (conc. opn.) ("Online contracts are subject to the same elemental principles of contract formation as paper contracts.").

The clear majority rule in California, as elsewhere is employs an objective test for "manifestations of assent, where parties' words and acts are given their "reasonable meaning." *Eagle Fire & Water Restoration, Inc. v. City of Dinuba*, 102 Cal.App.5th 448, 468 (2024) (citing *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 460 (2021)). This means that an offeree's assent may be reasonably or "fairly ... inferred." *Sivin-Tobin Assocs., LLC v. Akin Gump Strauss Hauer & Feld LLP*, 68 A.D.3d 616, 892 N.Y.S. 2d 71, 73 (N.Y. App. Div. 2009) (quotation omitted); *see also Schwarz v. St. Jude Med., Inc.*, 254 N.C. App. 747, 756, 802 S.E.2d

783 (2017)." *Gudon*, 2025 WL 1160684, at 11 (conc. opn.). Until recently, the law governing the formation of internet contracts has developed with relative uniformity in this regard. *Id.* at *3, fn. 1.

Traditionally, "[t]he phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct .... A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct." Restatement (Second) of Contracts § 2 cmt. b (1981). "As long as the conduct of a party is volitional and that party knows or *reasonably ought to know* that the other party *might reasonably infer from the conduct an assent to contract*, such conduct will amount to a manifestation of assent." 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:2 (4th ed. May 2024 Update) (emphasis added). Nothing must be spelled out, and nobody needs to be explicitly advised of anything. There are, in the world of paper contracts, no magic words necessary." *Gudon*, 2025 WL 1160684, at 11 (conc. opn.).

Judge Nelson urges this court to embrace Judge Bybee's "more sensical approach, [in which] we would open the inquiry to look at more than the mere presence of an explanatory phrase. We would instead take the approach advocated for by Judge Bybee in his dissent in *Chabolla*, 129 F.4th at 1171–72 (Bybee, J., dissenting): consider what's reasonable in context. If we were writing on a blank slate,

historical and traditional principles of contract law—and California contract law itself—would demand this approach." *Gudon*, 2025 WL 1160684, at 11 (conc. opn.).

Actually, the California courts have steadfastly hewed to this commonsense approach for decades—applying an objectively *reasonable interpretation* to the plain meaning of words used in the *context* of each transaction. There are no abstract "ambiguities" that depart from the reasonable and *objective intentions* of the parties as expressed by the words used on paper – or, in the modern commercial world, "online."

This Circuit should adhere to those logical principles.[2]

B. The Majority Panel Opinion is Contrary to the Long Line of United States and California Supreme Court Decisions Applying the "Equal Treatment Rule" That Governs the Formation and Enforcement of Agreements to Arbitrate Under the Federal Arbitration Act

The California and United States Supreme Courts have long recognized the many benefits of arbitration in

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[2] *See generally Bay Cities Paving & Grading, Inc. v. Lawyers Mut. Ins. Co.*, 5 Cal.4th 854, 867 (1993): "Equally important are the requirements of *reasonableness and context.* ... There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an application" when construing the parties' agreement. (Italics added, internal citations omitted.)

resolving disputes that arise under contracts: "[T]he informality of arbitral procedure … enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 649 (1985); *Madden v. Kaiser Foundation Hospitals,* 17 Cal.3d 699, 706-707 (1976) ("arbitration has become an accepted and favored method of resolving disputes, praised by the courts as an expeditions and economical method of relieving overburdened civil calendars ….").

"The majority reaches its result by selectively parsing the webpages …." to conclude that the agreement to arbitrate was invalid. *Chabolla*, 129 F.4th at 1161 (diss. opn.). This impermissibly *disfavors* agreements to arbitrate contrary to section 2 of the FAA which preempts any state or federal law (including judicial rules) that operates to frustrate the formation and enforcement of contracts to arbitrate disputes. *Ibid*; *accord, Kindred Nursing Centers Ltd. Partnership v. Clark*, 581 U.S. 246, 248 (2017) (section 2 places agreements to arbitrate "on equal footing with all other contracts") (citing 9 U.S.C., § 2; *see* U.S. Const., Art. VI, Cl. 2).

Congress enacted the FAA "in response to judicial hostility to arbitration. Section 2 of the statute … establishes an 'equal treatment principle: … When the FAA applies …. [section 2] 'preempts any state rule discriminating on its face

against arbitration' and 'displaces any rule [adopted by the Legislature or the courts] that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Harrod v. Country Oaks Partners, LLC*, 15 Cal.5th at 965 (brackets added, other internal citations omitted).

This court should resolve the constitutional infirmity by articulating clear and consistent rules placing contracts containing these "Terms of Use" on equal footing with other contracts. *Chabolla*, 129 F.4th at 1160.[3]

[3] See also *Bonta*, 62 Cal.4th at 482-483 (opn. after rhg.) (digesting U.S. Supreme Court authority preempting legislative and judicial "rules" that discriminate against the enforcement of arbitration contracts) (citing, among other caess, *Doctors' Assocs., Inc. v. Cassarotto*, 517 U.S. 681, 683 (1996) (section 2 of the FAA preempted Montana state law requiring that an arbitration clause in franchise contracts must be printed on the first page, capitalized and underlined.) Cf. *Chabolla*, 129 F.4th at 1153, 1155 (similarly requiring "arbitration" and waiver of class action terms to be more "conspicuous" on the screens presented to Ms. Chabolla).

II. CONCLUSION

For all of these reasons, amici respectfully submit that the court should grant rehearing or rehearing en banc.

Dated: April 24, 2025

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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

Dated: April 24, 2025

s/ Harry W.R. Chamberlain II
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