No. 20-15291

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Plaintiffs-Appellees.

v.

XAVIER BECERRA, LILIA GARCIA BROWER, JULIE A. SU, and KEVIN KISH, in their official capacities,
Defendants-Appellants,

On Appeal from the United States District Court
for the Eastern District of California
No. 2:19-cv-02456-KJM-DB (Hon. Kimberly J. Mueller)

BRIEF OF PLAINTIFFS-APPELLEES

Bruce J. Sarchet
Maurice Baskin
LITTLER MENDELSON, P.C.
500 Capitol Mall, Suite 2000
Sacramento, CA 95814
(916) 830-7200
(916) 561 0828 (fax)
bsarchet@littler.com

Attorneys for Plaintiffs-Appellees National Retail Federation, California Retailers Association, National Association of Security Companies, Home Care Association of America, and California Association for Health Services at Home

Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
apincus@mayerbrown.com

Attorneys for Plaintiffs-Appellees the Chamber of Commerce of the United States of America and California Chamber of Commerce

(additional counsel on inside cover)

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 331-2000
Facsimile: (650) 331-2060
dfalk@mayerbrown.com

Attorney for Plaintiffs-Appellees the Chamber of Commerce of the United States of America and California Chamber of Commerce

Erika C. Frank
CALIFORNIA CHAMBER OF COMMERCE
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

Counsel for Plaintiff-Appellee California Chamber of Commerce

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
(202) 463-5346 (fax)

Counsel for Plaintiff-Appellee Chamber of Commerce of the United States of America

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees the Chamber of Commerce of the United States of America (the "U.S. Chamber"), the California Chamber of Commerce (the "CalChamber"), the National Retail Federation ("NRF"), the California Retailers Association ("CRA"), the National Association of Security Companies ("NASCO"), the Home Care Association of America ("HCAOA"), and the California Association For Health Services At Home ("CAHSAH") each certifies that it does not have a parent corporation, and no publicly held corporation owns more than 10% of its stock.

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INTRODUCTION

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("the Act") to "promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). The Act achieves that goal by protecting both the "formation" and the "enforcement" of arbitration agreements, *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 1428 (2017). The Supreme Court therefore has repeatedly held that the Federal Arbitration Act preempts state laws that forbid or undermine both the formation and the enforcement of agreements to arbitrate, in the employment context and other settings within the federal statute's scope.

Despite these established principles, California enacted Assembly Bill 51 ("AB 51"), which imposes unprecedented criminal and civil sanctions on businesses that enter into arbitration agreements with their California workers as a routine condition of employment (even if workers have the right to opt out of arbitration). In a thorough, well-reasoned opinion and order, the district court issued a preliminary injunction against the State's enforcement of AB 51 as applied to arbitration agreements governed by the Federal Arbitration Act,

concluding that Plaintiffs had satisfied each of the four factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

On appeal, Defendants do not contest the district court's conclusions that Plaintiffs and their members would suffer irreparable harm if AB 51 were permitted to go into effect and that the balance of equities and the public interest weigh in favor of the injunction. ER29-33.

Defendants instead challenge only the district court's determination that Plaintiffs are likely to succeed on the merits of their claim. But the district court was correct in holding that, under binding Supreme Court precedent, AB 51 likely violates the Federal Arbitration Act for two independent reasons.

First, by imposing restrictions on the formation of arbitration agreements that do not apply to contracts generally, AB 51 violates Section 2 of the Federal Arbitration Act, which requires courts and state legislatures to "place arbitration agreements 'on equal footing with all other contracts.'" *Kindred*, 137 S. Ct. at 1424. AB 51 forbids businesses from asking their workers to agree, as a condition of employment or receipt of any employment-related benefits, to waive

any "right, forum, or procedure" provided by the California Fair Housing and Employment Act ("FEHA") or by the entire California Labor Code. Because California's FEHA and the Labor Code provide for the right to file complaints in court—the waiver of which is a "defining trait" of arbitration agreements (*Kindred*, 137 S. Ct. at 1427)—AB51 prohibits businesses from entering into mandatory arbitration agreements with workers as a routine condition of employment.

Yet businesses remain free under California law to offer numerous other non-negotiable contractual terms (such as compensation, work hours, job responsibilities, and the like) as conditions of the employment relationship. The differential treatment is clear; AB 51 improperly treats arbitration agreements as a harmful type of contract from which employees need special protection and heightened standards of consent—precisely what the Federal Arbitration Act forbids.

Defendants seek to excuse this differential treatment by asserting that the Federal Arbitration Act does not protect arbitration agreements between parties with different bargaining power or that

are offered on a take-it-or-leave-it basis. But decades of Supreme Court precedents interpreting the Act hold that the federal statute applies in those contexts.

Defendants also rely heavily on the language in AB 51 stating that the statute is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Labor Code § 432.6(f). In their view, AB 51 escapes the Federal Arbitration Act's reach because it punishes businesses for their "conduct" of entering into arbitration agreements in the first place, *e.g.*, Op. Br. 1, rather than invalidating those agreements after they are formed.

But the Supreme Court's decision in *Kindred* squarely forecloses Defendants' crabbed interpretation of the Federal Arbitration Act. As Justice Kagan explained for the Court, the Act invalidates *both* rules discriminating against enforcement of arbitration agreements, *and* rules "governing what it takes to enter into them." *Kindred*, 137 S. Ct. at 1428. Moreover, Defendants have no answer to the absurd results that follow from their approach: interpreting the Act to permit a State to impose criminal and civil penalties on the conduct of making an

arbitration agreement would "make it trivially easy for States to undermine the Act—indeed, to wholly defeat it." *Id.*

Second, and for many of the same reasons, AB 51 is also preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the Federal Arbitration Act. *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Penalizing the act of entering into an arbitration agreement completely undermines the Act's purpose "to promote arbitration." *Concepcion*, 563 U.S. at 345. The district court rightly acknowledged the common-sense point that "AB 51 will likely have a deterrent effect on employers' use of arbitration agreements given the civil and criminal sanctions associated with violating the law." ER23-24. Defendants' insistence that AB 51 does not "stand in the way of Congressional intent" because it "does not interfere with the enforceability of arbitration agreements" (Op. Br. 3) rests on their false dichotomy between regulating the formation of arbitration agreements and regulating their enforcement.

Aside from challenging the merits, Defendants try to narrow the scope of the district court's injunction. Those efforts fall short as well.

The district court properly limited its injunction to preclude Defendants from enforcing AB 51 only in connection with arbitration agreements governed by the Federal Arbitration Act. And it properly enjoined enforcement of all of AB 51's relevant provisions—both those (Cal. Labor Code §§ 432.6(a) & (c)) that prohibit businesses from offering arbitration agreements as a condition of employment, and the one (*id.* § 432.6(b)) that prohibits businesses from placing any consequence on a worker's or applicant's refusal to enter into an arbitration agreement.

Defendants are wrong that AB 51's two principal provisions can stand independently from one another. The district court correctly concluded that "preemption applies equally" to both provisions (ER35) because they prohibit mirror images of the same methods of contract formation. That is just another way of making it unlawful for businesses to offer arbitration agreements on a take-it-or-leave-it basis.

Finally, Defendants' suggestion that a court can save AB 51 from preemption by excising the potential for criminal liability but leaving the civil sanctions intact is legally nonsensical. Businesses still would risk monetary penalties for exercising their federally protected rights to enter into arbitration agreements on the same terms as other types of contracts. Removing the most draconian penalties would not cure the unconstitutionality of the rest.

The district court's order issuing a preliminary injunction should be affirmed.

STATEMENT OF JURISDICTION

The district court has subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The district court exercised its power under 28 U.S.C. § 1331 to enjoin unlawful actions by state officials, including where (as here) the state action is alleged to be preempted by federal law. ER11-13; *see, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Plaintiffs agree with Defendants that this Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether the district court abused its discretion by concluding that Plaintiffs are likely to succeed on the merits of their claim that Section 2 of the Federal Arbitration Act preempts AB 51 because AB 51 treats arbitration agreements differently from other contracts.

2. Whether the district court abused its discretion by concluding that Plaintiffs are likely to succeed on the merits of their claim that the Federal Arbitration Act preempts AB 51 because AB 51 interferes with the purposes and objectives of the federal Act.

3. Whether the district court abused its discretion in preliminarily enjoining all three of the principal substantive provisions of AB 51 as applied to arbitration agreements governed by the Federal Arbitration Act.

STATEMENT OF THE CASE

A. Factual Background

The California Legislature has repeatedly sought to restrict arbitration in the employment context. *See* ER7-8. The Supreme Court has held that the Federal Arbitration Act preempted several of these

efforts; others have been stopped short by the California courts or the Governor.

- Over thirty years ago, the Supreme Court held that the Federal Arbitration Act preempted a California Labor Code provision requiring that wage collection actions be resolved in court "without regard to the existence of any private agreement to arbitrate." *Perry v. Thomas*, 482 U.S. 483, 484 (1987). The Court concluded that prohibiting arbitration of wage disputes was in "unmistakable conflict" with the Act and therefore preempted. *Id*. at 491.

- The California Legislature later purported to vest exclusive original jurisdiction in the Labor Commissioner over disputes between artists and talent agents even when the parties had agreed to arbitrate. *See Preston v. Ferrer*, 552 U.S. 346, 350-51 (2008). The Supreme Court held this provision preempted as well. *Id*. at 349-50.

- The California Court of Appeal held that the Federal Arbitration Act preempted California Assembly Bill 2617 ("AB 2617"), which sought to prohibit requiring waivers of rights under California civil rights laws, including the right to a judicial forum, as a condition to contracting for goods or services. *See* ER8; *see also* California AB 2617 (Civil Rights: waiver of rights) (Sept. 30, 2014). The court concluded that AB 2617 "unquestionably discriminate[s] against arbitration by placing special restrictions on waivers of juridical forums." *Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 323 (2018).

The Governor has vetoed other attempts by the California Legislature to restrict arbitration. Governor Brown vetoed California Assembly Bill 465 ("AB 465"), which sought to prohibit employers from requiring employees to waive rights under California's Labor Code as

a condition of employment. ER8; *see* California AB 465 (Contracts Against Public Policy) (Aug. 31, 2015).

More recently, the California Legislature passed Assembly Bill 3080 ("AB 3080") in September 2018. ER8; California AB 3080 (Employment Discrimination: enforcement) (September 30, 2018). AB 3080 sought to prohibit arbitration as a condition of employment and contained provisions almost identical to those in AB 51. *See id.* Governor Brown vetoed AB 3080 as well, explaining that the statute "plainly violates federal law." ER8 (quoting Governor's Veto Message, AB 3080 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080).

Governor Brown's veto message explained that AB 3080 was "based on a theory that the Act only governs the enforcement and not the initial formation of arbitration agreements and therefore California is free to prevent * * * arbitration agreements from being formed at the outset." Governor's Veto Message, *supra*. But Governor Brown recognized that "[t]he Supreme Court has made it explicit this approach is impermissible." *Id.* (citing *Kindred*, 137 S. Ct. at 1428).

Against this backdrop, the California Legislature passed AB 51 in September 2019. Governor Gavin Newsom signed AB 51 into law on October 10, 2019. ER1.

1. AB 51's provisions

AB 51 "applies to contracts for employment entered into, modified, or extended on or after January 1, 2020." Cal. Lab. Code § 432.6(h). AB 51 amends both California's Labor Code (Cal. Lab. Code § 1 *et seq.*) and the FEHA (Cal. Gov't Code § 1900 *et seq.*).

AB 51 adds Section 432.6 of the California Labor Code, which imposes the following substantive restrictions on employers:

- Section 432.6(a) provides that employers "shall not, as a condition of employment, continued employment, or receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum or procedure for a violation of any provision" of FEHA or the entire Labor Code, including "the right to file and pursue a civil action" in "any court." Cal. Lab. Code § 432.6(a).
- Section 432.6(b) provides that employers "shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum or procedure" of FEHA or the Labor Code, again including "the right to file and pursue a civil action" in "any court." *Id.* § 432.6(b).
- Section 432.6(c) deems a "condition of employment" for purposes of Section 432.6(a) even those agreements that allow employees to "opt out of a waiver or take any affirmative action in order to preserve their rights." *Id.* § 432.6(c). That is,

voluntary opt-out procedures are treated as if they provided no option at all.

These restrictions are backed by criminal and civil penalties:

- Under California Labor Code § 433, a pre-existing Labor Code provision, businesses that violate AB 51's restrictions are guilty of a misdemeanor. This misdemeanor is punishable by imprisonment not exceeding six months or a fine not exceeding $1,000, or both. Cal. Lab. Code § 23.

- Section 432.6(d) provides that individuals who prevail in an action enforcing their rights under Section 432.6 will be entitled to injunctive relief and attorneys' fees. *Id.* § 432.6(d).

- AB 51 adds Section 12953 to FEHA. Section 12953 provides that any violation of Section 432.6 in the Labor Code will be an "unlawful employment practice" under FEHA. This adds a distinct administrative remedy (and a distinct private right of action) for any violation of Section 432.6.

- Section 432.6(f) provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the FAA."

Finally, AB 51 contains a severability clause. The clause states that "[if] any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." Cal. Labor Code § 432.6(i).

2. AB 51's legislative history

The Senate and Assembly Floor analyses for AB 51 leave no doubt that AB 51 was designed to prohibit arbitration as a condition of

employment. For example, the author of AB 51 stated that the bill is needed to address what she condemned as "forced arbitration." *See* California AB 51 (Employment Discrimination: enforcement), Reg. Sess. 2019-2020, Senate Rules Committee Analysis 3-4 (as amended March 26, 2019) ("S. Floor Analysis"). The Senate Floor Analysis further states that the law is designed to combat "the specter of mandatory labor law arbitration." *Id.* at 5. The Assembly Analysis likewise acknowledges that the law targets "[t]he use of mandatory arbitration agreements in the employment context." California AB 51 (Employment Discrimination: enforcement), Reg. Sess. 2019-2020, Assembly Floor Analysis 1 (as amended March 26, 2019) ("A. Floor Analysis").

The Senate Judiciary Analysis for AB 51 acknowledged that AB 51 "shares many features with" prior bills that were either preempted (AB 2617) or vetoed (AB 465). California AB 51 (Employment Discrimination: enforcement), Reg. Sess. 2019-2020, Senate Judiciary Committee Analysis 8 (as amended March 26, 2019) ("S. Judiciary Analysis"); *see also* ER8-9. The Senate Judiciary Analysis explained that the Legislature sought to differentiate AB 51 from these prior

efforts by omitting prior efforts to declare noncompliant contracts unenforceable once formed. *See* ER8 (citing S. Judiciary Analysis at 8); Cal. Labor Code § 432.6(f). The Senate Judiciary Analysis also acknowledged that AB 51 is almost "identical" to the vetoed AB 3080, but similarly sought to distinguish AB 3080 by pointing out that AB 51 would not invalidate contracts once formed. *Id.* (quoting S. Judiciary Analysis at 9).

B. Procedural History

On December 9, 2019, Plaintiffs filed both a complaint (ER125-152) and a motion for a preliminary injunction against enforcement of AB 51 (ER4). Because the earliest possible hearing date for the preliminary injunction motion under the local rules was January 10, 2020, nine days after AB 51's effective date, Plaintiffs asked Defendants if they would agree to halt their enforcement of AB 51 until the district court could resolve the preliminary injunction motion. ER4. Defendants refused. *Id.* Plaintiffs then moved for a temporary restraining order. *Id.*

1. The district court grants Plaintiffs' request for a temporary restraining order

The district court granted Plaintiffs' request and issued a temporary restraining order on December 30, 2019, concluding that the Plaintiffs had raised "serious questions going to the merits" of the dispute and that the balance of hardships and public interest tipped in Plaintiffs' favor. ER122-124.

2. The district court issues a preliminary injunction

The district court held oral argument on the preliminary injunction motion on January 10, 2020. ER57-97. At that hearing, Defendants for the first time argued that the district court lacked federal subject matter jurisdiction and challenged Plaintiffs' Article III standing, leading the district court to order supplemental briefing on these issues as well as severability. ER96-97.

After having "carefully considered" the principal and supplemental briefs, the district court granted Plaintiffs' motion for a preliminary injunction. ER2. The district court held that it had "no doubt regarding its jurisdiction to resolve plaintiffs' preemption claims" and that "plaintiffs have met the constitutional threshold to establish organizational standing." ER12-13, 17.

Turning to the *Winter* factors, the district court determined that Plaintiffs are likely to succeed on the merits of their claim that the Federal Arbitration Act preempts AB 51. ER25. First, the district court reasoned that AB 51 likely runs afoul of Section 2 of the Act because it fails to place arbitration agreements on an equal footing with other contracts. ER19. Specifically, the district court recognized that "AB 51's prohibition on California employers' use of 'right, forum, or procedure' waivers as a condition of employment * * * 'oh so coincidentally disfavors the contracts with the 'defining features' of arbitration." ER21 (quoting *Kindred*, 137 S. Ct. at 1426 (citation omitted)). In other words, AB 51 "plac[es] uncommon barriers on employers who require contractual waivers of dispute resolution options that bear on the defining features of arbitration." ER23.

Defendants argued below, as they do on appeal, that AB 51 escapes preemption because it regulates employer behavior, not the enforceability of arbitration agreements. The district court rejected this argument as a distinction "without a difference relevant here," because the behavior that AB 51 prohibits is "primarily that of requiring an arbitration clause as a condition of employment." ER20.

"[T]he law's clear target," the district court noted, "is arbitration agreements." ER22. Thus, the court concluded, "even if the law itself is artfully crafted to support the argument that it only regulates the behavior of employers, it cannot avoid being construed as [a] law that in effect discriminates against arbitration agreements." *Id.*

The district court additionally held that the Federal Arbitration Act likely preempts AB 51 for the independent reason that AB 51 interferes with the purposes and objectives of the Act. Because "AB 51 will likely have a deterrent effect on employers' use of arbitration agreements given the civil and criminal sanctions associated with violating the law," the district court explained, AB 51 stands as an obstacle to the Act's purpose of promoting arbitration. ER23-24.

The district court then determined that Plaintiffs had satisfied the remaining *Winter* factors. ER25-33. It concluded that Plaintiffs met their burden of showing irreparable harm should AB 51 go into effect, noting that "California businesses that rely on arbitration agreements as a condition of employment will be forced to choose between risking criminal or civil penalties, or both, based on the uncertainties surrounding AB 51's implementation, and foregoing the use of

arbitration agreements altogether to avoid penalties." ER29-30. Under either scenario posed by this "'Hobson's choice,'" the court continued, "the result is the same: California employers are faced with likely irreparable harm." ER30, 32 (quoting *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009)). With respect to the remaining factors, the district court determined that "[o]n balance, the equitable and public interest factors here weigh in favor of preliminary injunctive relief," because, among other reasons, it is always in the public interest to prevent the violation of a party's federal rights. ER33.

Finally, having determined that an injunction against Defendants' enforcement of AB 51 was warranted, the district court turned to the issue of the injunction's scope. The court recognized that all parties agreed "that an injunction should apply only with respect to arbitration agreements governed by the FAA." ER34. Defendants argued, however, that even if Sections 432.6(a) and 432.6(c) are enjoined, the district court should not enjoin Section 432.6(b)—which prohibits employers from "retaliat[ing]" against or "terminat[ing]" any "applicant for employment" or existing employee who is unwilling to agree to arbitration. Cal. Labor Code § 432.6(b); *see* page 11, *supra*.

The district court rejected that argument. "[T]he preemptive effect of the FAA applies equally to provisions (a), (b) and (c) of section 432.6," the court explained, because "the practical effect" of Section 432.6(b) is to prohibit employers "from responding in any way to an applicant or employee that refuses to sign a waiver," which is just another way of prohibiting employers from offering arbitration as a condition of employment. ER34-35. "In other words, if preemption does not apply to section (b), conditional arbitration agreements will not be conditional at all * * *." ER35.

Accordingly, the district court entered a preliminary injunction prohibiting Defendants "from enforcing sections 432.6(a), (b), and (c) of the California Labor Code where the alleged 'waiver of any right, forum, or procedure' is the entry into an arbitration agreement covered by the Federal Arbitration Act," and "from enforcing section 12953 of [FEHA] where the alleged violation of 'Section 432.6 of the Labor Code' is entering into an arbitration agreement covered by the FAA." ER36.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in issuing a preliminary injunction against enforcement of AB 51.

Controlling Supreme Court precedent confirms that AB 51, like California's prior efforts to restrict arbitration in the employment context, conflicts with Section 2 of the Federal Arbitration Act and the equal footing principle it embodies. The Court's decision in *Kindred* squarely forecloses Defendants' contention that a state law penalizing the formation of an arbitration agreement circumvents preemption so long as the agreement is enforceable once formed. And AB 51 is not a neutral rule generally applicable to all contracts; instead, it impedes the formation of employment arbitration agreements by singling them out for special restrictions not applicable to all contracts. *Kindred*, 137 S. Ct. at 1428. Specifically, AB 51 targets the defining feature of an arbitration agreement—"a waiver of the right to go to court" (*id.* at 1427)—and on that basis penalizes businesses that enter these agreements with their workers on the same terms as numerous other conditions of the working relationship.

Defendants' rejoinder that AB 51 merely ensures that employees consent to the waiver of their right to go to court also fails under Supreme Court precedent. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996). Singling out arbitration agreements as a

unique harm for which workers need special protection or heightened consent, while allowing employers to offer other employment-agreement provisions on a take-it-or-leave-it basis, not only puts arbitration on an unequal footing with other contracts, but reflects the very hostility to arbitration that the Act was enacted to prevent.

AB 51 is also preempted for the separate reason that it conflicts with the purposes and objectives of the Federal Arbitration Act. Imposing criminal or severe civil sanctions on businesses that enter into arbitration agreements is antithetical to the longstanding federal policy favoring arbitration. *See Concepcion*, 563 U.S. at 352. Having no response to that common-sense conclusion, Defendants double down on their erroneous assertion that the Federal Arbitration Act addresses only the enforceability of an agreement once formed, and that States have *carte blanche* to punish the act of forming the agreement. But the Act is not powerless against such blatant discrimination against arbitration.

Defendants fare no better in attempting to justify AB 51 on policy grounds, asserting that mandatory arbitration is "unfair" (Op. Br. 26) and that AB 51 addresses a perceived imbalance of bargaining power

between employers and employees (*id.* at 41). Their policy arguments are wrong and in any event irrelevant: It is well established that the Act's "'liberal federal policy favoring arbitration agreements'" applies "'notwithstanding any state substantive or procedural policies to the contrary.'" *Concepcion*, 563 U.S. at 346 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Defendants' references to the current COVID-19 pandemic are both unjustified and misplaced: there is no pandemic exception to federal preemption.

Finally, the scope of the district court's preliminary injunction was appropriate, and its order should therefore be affirmed in full. The injunction is properly limited to arbitration agreements governed by the Federal Arbitration Act. All of AB 51's principal substantive provisions are preempted as applied to such agreements, because each makes it unlawful for businesses to offer arbitration agreements (unlike other terms) on a take-it-or-leave-it basis. Defendants' suggestion that this Court could salvage the statute by removing the possibility of criminal penalties is meritless.

STANDARD OF REVIEW

This Court reviews the district court's grant of a preliminary injunction for abuse of discretion. *See Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017). Any factual findings underlying the district court's decision are reviewed for clear error. *See id.* A party is entitled to a preliminary injunction if it shows that (1) it is "likely to succeed on the merits;" (2) it is "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "the balance of equities tips in [its] favor;" and (4) "an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The balance-of-the-equities and the public-interest factors merge where the government is an opposing party. *Nken v. Holder*, 556 U.S. 418, 425 (2009). And this Court employs a "sliding scale approach" to the *Winter* factors, "so that a stronger showing of one element may offset a weaker showing of another." *Hernandez*, 872 F.3d at 990 (quotation marks omitted). Here, Defendants challenge only the first factor—whether Plaintiffs are likely to succeed on the merits.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE AB 51 IS PREEMPTED BY THE FEDERAL ARBITRATION ACT

The Supremacy Clause directs that the "laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, the Supreme Court has repeatedly held that the Federal Arbitration Act preempts contrary state-law legislative or judicial rules.[1]

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[1] *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417-18 (2019) (use of California "public policy" rule interpreting ambiguities against the drafter to impose class procedures on the parties where the contract did not expressly authorize class arbitration); *Kindred*, 137 S. Ct. at 1426 (Kentucky rule requiring specific express authorization in power-of-attorney before an attorney-in-fact could agree to arbitration on behalf of her principal); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33 (2012) (per curiam) (West Virginia rule prohibiting predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes); *Concepcion*, 563 U.S. at 352 (California judicial rule declaring class-action waivers unconscionable); *Preston*, 552 U.S. at 353 (California Labor Code provision requiring an agency to hear certain disputes before arbitration); *Casarotto*, 517 U.S. at 687-88 (Montana statute conditioning enforcement of arbitration agreements on special notice requirements); *Perry*, 482 U.S. at 491 (California Labor Code provision requiring judicial forum for wage

The Supreme Court has identified at least two ways in which a state-law rule may run afoul of the Act. *First*, any state-law rule that "conflicts with § 2 of the Federal Arbitration Act * * * violates the Supremacy Clause." *Southland*, 465 U.S. at 10; *see Preston*, 552 U.S. at 353 ("The FAA's displacement of conflicting state law is 'now well-established.'"). Section 2 of the Act specifies that a "written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation *of any contract*." 9 U.S.C. § 2 (emphasis added). Under Section 2, "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339; *accord Lamps Plus*, 139 S. Ct. at 1412.

Second, a state-law rule that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the Federal Arbitration Act, is preempted

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collection actions); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (requirement that claims under California Franchise Investment Law be decided in court).

and invalid. *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

The district court correctly concluded (ER17-25) that Plaintiffs are likely to succeed on their claim that the Act preempts AB 51 for both of these independently sufficient reasons.

A. AB 51 Violates Section 2 Of The Federal Arbitration Act

Under Section 2's "equal footing" principle, the Act preempts state-law rules that "single out" arbitration agreements for disfavored treatment, whether in their "formation" or in their "enforcement." *Kindred*, 137 S. Ct. at 1428. Moreover, as Justice Kagan explained for the *Kindred* Court, Section 2 not only prohibits States from discriminating against arbitration on its face, but also prohibits States from achieving the same result "covertly," by "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426.

Under *Kindred*, the preemption analysis here is clear. AB 51 targets the defining feature of arbitration agreements: a waiver of the right to go to court. It then restricts the ability of businesses to enter into these agreements with their workers. The law's arbitration

restrictions—backed with criminal and civil penalties—do not apply to most other types of contracts or other contract terms governing the employer-worker relationship. Accordingly, the district court properly held that AB 51 "singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear defining features of arbitration." ER23.

Defendants resist this conclusion on two principal grounds. *First*, they insist that the Federal Arbitration Act governs only the *enforceability* of arbitration agreements, and thus does not preempt state-law rules governing their formation. *Second*, they insist that AB 51 is a neutral and generally applicable rule that does not disfavor arbitration. Both contentions directly conflict with Supreme Court precedent.

1. The Federal Arbitration Act preempts state barriers to the formation of arbitration agreements that do not equally apply to other types of contracts

Kindred squarely forecloses Defendants' argument that AB 51 "falls outside the umbrella of the FAA" because it does not affect "the enforcement of arbitration contracts." Op. Br. 19; *see also id.* at 23, 25, 33. Like Defendants here, the respondents in *Kindred* argued that "the

FAA has no application to contract formation issues." 137 S. Ct. at 1428 (quotation marks omitted). But the Supreme Court disagreed, making clear that the Act's "equal-footing principle" applies not only to the enforcement of arbitration agreements once formed, but also to "what it takes to enter into them." *Id.* Dismissing the argument that "States have free rein to decide—irrespective of the FAA's equal footing principle—whether such contracts are validly created in the first instance," Justice Kagan explained that "the FAA's text and our case law interpreting it say otherwise." *Id.* Indeed, that clear holding prompted Governor Brown to veto an earlier bill on the ground that it "plainly violate[d] federal law" because it purported to avoid preemption under the same rationale. *See* page 10, *supra*.

Defendants contend that the California Legislature fixed the problem Governor Brown identified by adding Section 432.6(f), which states that the statute is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Labor Code § 432.6(f). That language, Defendants say, means that AB 51 imposes criminal and civil sanctions on a business's "behavior" or "practices" in forming an arbitration

agreement as a condition of employment, rather than regulating the arbitration agreement itself—a refrain they repeat over a dozen times throughout their brief. Op. Br. 8, 15, 18, 21, 22, 34, 35, 36, 37, 38, 39-40, 44, 45, 48.

But Section 432.6(f) runs headlong into *Kindred* rather than avoiding it. Whether or not AB 51 invalidates an arbitration agreement governed by the Federal Arbitration Act, the law indisputably penalizes employers—with potential criminal liability, no less—for forming the agreement in the first place. Defendants thus merely repackage the very rationale foreclosed by *Kindred*—that the Federal Arbitration Act applies only after an agreement has been formed—by arguing that they are penalizing the employer's actions in forming of the contract, not its enforceability.

There is no daylight for preemption purposes between criminalizing or imposing civil penalties on the act of forming an arbitration agreement and refusing to enforce that agreement once (or if) made. Indeed, interpreting the Act to permit a State to impose criminal and civil sanctions on the making (or attempted making) of an arbitration agreement would "make it trivially easy for States to

undermine the Act—indeed, to wholly defeat it." *Kindred*, 137 S. Ct. at 1428. Under Defendants' interpretation, States would have *carte blanche* to halt the formation of arbitration agreements altogether under the fig leaf of regulating "employer behavior" (Op. Br. 21) by making it a felony to enter to such agreements or imposing civil penalties in the millions of dollars.

Kindred is not alone in making clear that the Federal Arbitration Act is concerned with more than just the enforceability of arbitration agreements once formed. In *Preston*, the California state statute allowed enforcement of arbitration agreements and "merely postpone[d]" arbitration until after an administrative adjudication, but the statute still impermissibly conflicted with the Act. 552 U.S. at 357-58.

And one of the three consolidated cases reviewed in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018), involved a determination by the National Labor Relations Board (NLRB) that requiring "employees to sign [an] arbitration agreement or seeking to enforce that agreement in federal district court" amounted to "unfair labor practices" in violation of the National Labor Relations Act (NLRA).

Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015), *aff'd sub nom. Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In the view of Defendants here, the Federal Arbitration Act would be irrelevant because the NLRB's determination did not preclude enforcement of the arbitration agreement if the employer were willing to incur liability under the NLRA by enforcing it. Yet the Supreme Court took a contrary view, concluding that nothing in the NLRA displaces the Federal Arbitration Act's protection of agreements to arbitrate on an individual basis, protection that precluded unfair labor-practice liability for entering into arbitration agreements with employees. *Epic*, 138 S. Ct. at 1632.

Other courts of appeals, anticipating *Kindred*, have long recognized that rules aimed at discouraging the formation of arbitration agreements are preempted by the Act just as much as rules declining to enforce those agreements once formed. The First Circuit concluded, for example, that state-law regulations allowing state officials to revoke the licenses of broker-dealers who required customers to sign pre-dispute arbitration agreements would violate the Act, even if the parties could still hypothetically enforce any

agreements that materialized despite the regulations. *See Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989). The state officials argued, much as Defendants do here, that the rules regulated only the conduct of the "broker-dealers" and not the arbitration agreements themselves. *Id.* at 1122. The court rejected that argument as "too clever by half," explaining that "[a] policy designed to prevent one party from enforcing an arbitration contract or provision by visiting a penalty on that party is, without much question, contrary to the policies of the FAA." *Id.* at 1122-24. And the Fourth Circuit expressly endorsed *Connolly*, agreeing that the Act bars rules that "discourage" arbitration, not just those that "prohibit" it. *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722-24 (4th Cir. 1990).

These cases further confirm that AB 51 is preempted: Defendants cannot explain how "restrict[ing] the FAA to existing agreements" would avoid "allow[ing] [S]tates to 'wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts.'" *Saturn*, 905 F.2d at 723 (quotation marks omitted).

Defendants' position that States may punish the exercise of federally protected rights so long as they do not deprive those actions

of their legal effect would lead to equally absurd results outside the arbitration context—which confirms that AB 51 violates Section 2's equal-footing principle. Federal law supersedes state law when it *authorizes* parties "to engage in activities that [a] State Statute expressly forbids"—here, to enter into arbitration agreements on the same basis as other contracts. *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (holding that a federal statute authorizing, but not requiring, national banks to sell insurance preempts a Florida statute prohibiting most banks from selling insurance); *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-59 (1982) (holding that a federal regulation permitting, but not requiring, national banks to include a debt accelerating "due on sale" clause in mortgage contracts preempts a California law forbidding the use of such a clause); *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 377-78 (1954) (holding that a federal statute authorizing national banks to "receive deposits" preempts state law prohibiting such banks from using the word "savings" in their advertising, even though the state law would not prohibit "national banks [from] taking savings deposits" themselves).

In addition, the Supreme Court unanimously rejected California's attempt, using justifications similar to Defendants' here, to regulate meat processing despite a federal-law prohibition on state meat-processing standards "in addition to, or different than" federal standards. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 458 (2012) (quoting 21 U.S.C. § 678). Federal law permitted and regulated the processing by slaughterhouses of meat from certain pigs. *Id.* Rather than directly regulate the slaughtering process itself, California sought to achieve the same result by prohibiting the processors from buying or selling the meat from those pigs. *See id.* at 462-67. But the Supreme Court recognized that regulating the input and output of the meat processors conflicted with the federal statute, and rejected California's attempt to circumvent the conflict. *Id.* Indeed, the Court explained, it "would make a mockery" of the federal statute's preemption provision to allow a State to "impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* at 464.

The State's reframing effort here is equally invalid, because it would improperly "render[]" the Federal Arbitration Act "helpless to

prevent even the most blatant discrimination against arbitration." *Kindred*, 137 S. Ct. at 1429.

Defendants fare no better in arguing that the district court's order forges a "new path" because Supreme Court decisions addressing preemption under the Federal Arbitration Act have done so in the context of addressing the enforceability of specific arbitration agreements after a dispute between the parties has arisen. Op. Br. 17-18. That shows only that States have not been so brazen as to attempt to circumvent preemption by imposing criminal and civil sanctions for entering (or trying to enter) into arbitration agreements in the first place. As the Supreme Court has warned, just as "antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,'" courts "must be alert to new devices and formulas that would achieve much the same result today." *Epic*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342).

Finally, Defendants' contention that the Federal Arbitration Act applies only when there is equal bargaining power between the parties (Op. Br. 20) borders on the frivolous. Defendants rely on a series of

dissenting opinions (*id.*), but this Court, like all lower courts, is bound by the decisions of the Supreme Court, not views that the Court rejected. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). And the Supreme Court has repeatedly applied the Act to arbitration agreements in non-negotiable form contracts. *See, e.g.*, *Lamps Plus*, 139 S. Ct. 1407; *Epic*, 138 S. Ct. 1612; *Imburgia*, 136 S. Ct. 463; *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Concepcion*, 563 U.S. 333; *Casarotto*, 517 U.S. 683; *see also* pages 42-43, *infra*.

As the Court made clear nearly three decades ago in holding that the Act required enforcement of an agreement to arbitrate statutory employment discrimination claims, "[m]ere inequality in bargaining power * * * is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

In short, Defendants' attempts to circumvent application of the Federal Arbitration Act are meritless.[2]

[2] In the alternative, the text of Cal. Labor Code § 432.6(f) should be interpreted to preclude application of AB 51 to any arbitration agreement governed by the Federal Arbitration Act. Section 432.6(f)

2. AB 51 imposes barriers to the formation of arbitration agreements that do not apply to other types of contracts

Shorn of their unpersuasive rationales for circumventing application of the Act altogether, Defendants quarrel with the district court's statement of the obvious: AB 51 violates Section 2 of the Act because it "singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration." ER23.

a. AB 51 targets the defining feature of an arbitration agreement—waiver of a judicial or administrative forum for dispute resolution.

Under California law, contract terms may be a condition of employment—except, under AB 51, for terms that substitute another dispute resolution process for litigation in court or before an administrative tribunal. That standard prohibits arbitration as a condition of employment, as it was explicitly designed to do. A rule that

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purports not to "invalidate" arbitration agreements governed by the Act. But again, as the U.S. Supreme Court explained in *Kindred*, the "validity" of arbitration agreements includes "their initial validity—that is, * * * what it takes to enter into them." 137 S. Ct. at 1428 (quotation marks and alterations omitted). Accordingly, Section 432.6(f) precludes enforcing the other provisions of AB 51 against any employer that enters into arbitration agreements governed by the Act.

"singl[es] out arbitration provisions for suspect status" in this manner "directly conflicts with § 2 of the FAA." *Casarotto*, 517 U.S. at 687; *see also Kindred*, 137 S. Ct. at 1426-27. Indeed, as noted above (at 9), the Supreme Court has twice specifically held that California Labor Code provisions that disfavor arbitration are preempted. *See Preston*, 552 U.S. 346; *Perry*, 482 U.S. 483.

AB 51 may incidentally sweep in some other types of agreements in prohibiting waivers of a "right, forum, or procedure" under California's FEHA or the Labor Code, but that does not render AB 51 "generally applicable." Op. Br. 36-38. The Federal Arbitration Act preempts both any State rule that "discriminates on its face against arbitration" and any rule "that covertly accomplishes the same objective by disfavoring contracts that * * * have the defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426. As the Supreme Court recently reiterated, Section 2's "savings clause does not save defenses that target arbitration either by name *or by more subtle methods*." *Epic*, 138 S. Ct. at 1622 (emphasis added).

For example, as the Supreme Court recognized in *Concepcion*, state-law rules requiring "disposition by a jury," "judicially monitored

discovery," or application of "the Federal Rules of Evidence" are all "obvious illustration[s]" of rules that would be preempted by the Act—even if they purport to apply "to 'any' contract." 563 U.S. at 341-42. That is because such rules would "[i]n practice * * * have a disproportionate impact on arbitration agreements" and "interfere[] with fundamental attributes of arbitration." *Id.* at 342, 344.

AB 51 is just such a rule. Just like the preempted rule in *Kindred*, AB 51 selects a defining feature of arbitration agreements—"a waiver of the right to go to court"—and on the basis of that feature "impede[s] the ability" of employers to enter arbitration agreements. 137 S. Ct. at 1427, 1429.

Defendants try to distinguish *Kindred* by asserting that the rule in that case was "framed as protecting the fundamental right to trial by a judge or jury," whereas, in their view, AB 51 is "neutral" in applying to the waiver of any right, forum, or procedure under California's FEHA or the Labor Code. Op. Br. 40. But the purported distinction does not diminish the focus on arbitration. As the district court observed, "[w]aivers of a 'right, forum, or procedure' include, even if they are not limited to, agreements to arbitrate instead of to litigate

in court." ER19. "As a result," the court continued, "AB 51 penalizes employers" who include arbitration provisions "as a take-it-or-leave it proposition" in their employment contracts even though employers may offer other contractual terms on that basis. ER19-20. AB 51 "thus subjects these kind of agreements to unequal treatment." *Id.*

Defendants therefore cannot avoid the conclusion that's AB 51's "clear target is arbitration agreements" (ER22) by attempting to cast the anti-waiver rule in slightly broader terms.[3] Under *Kindred, Epic,* and *Concepcion*, AB 51 does not become a rule of general applicability just because other types of waivers "may tangentially fall within AB 51's ambit." ER22.

Indeed, Defendants confirm the match between this case and *Kindred* when they attempt to justify AB 51 by asserting that it "[e]nsur[es] that waivers of constitutional rights, such as the right to civil trial by jury under the Seventh Amendment," are subject to heightened consent. Op. Br. 41 n.6. That was the precise justification rejected by the Court in *Kindred*, which confirmed that a rule that

[3] AB 51's legislative history also leaves no doubt that the California Legislature was specifically targeting arbitration agreements. *See* pages 47-49, *infra*.

imposes special requirements on the waiver of those rights "is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." 137 S. Ct. at 1427.[4]

In short, AB 51 is the "embodiment" of the kind of "'legal rule hinging on the primary characteristic of an arbitration agreement'" that Section 2 prohibits. ER21 (quoting *Kindred*, 137 S. Ct. at 1427).

b. AB 51 treats arbitration as a disfavored term that requires a heightened level of consent

Defendants also argue that AB 51 does not conflict with Section 2 of the Federal Arbitration Act because, in their view, it reflects the Supreme Court's recognition that arbitration is a matter of "consent, not coercion." Op. Br. 23-25, 32. Defendants are wrong to equate "consent" with the ability to negotiate a contractual term, and "coercion" with the offering of any term on a take-it-or-leave-it basis.

[4] Defendants' *amicus* is even more explicit in making the argument—already rejected in *Kindred*—that AB 51 may impose more "exacting standards" on the formation of arbitration agreements because arbitration agreements involve the waiver of a constitutional right to a jury trial. Cal. Employment Lawyers Ass'n Br. 15-18.

To begin with, Defendants' argument finds no support in the Supreme Court's precedents. The Court's reference to "consent" means entering into arbitration agreements that are valid under generally applicable rules of contract formation (including any applicable federal rules). And the Court's reference to "coercion" means actions by courts or legislatures that subject contractual parties to obligations different from those grounded in a valid contract. "Coercion" does *not* mean requiring acceptance of a contract term as a condition of entering into an employment relationship.

Lamps Plus makes this distinction crystal clear. The plaintiff signed the arbitration agreement at issue "as a condition of his employment." *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 671 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407. Yet the Supreme Court did not suggest that there was anything coercive or improper about agreeing to arbitration as a required condition of employment. *See also* page 36, *supra* (collecting cases enforcing arbitration agreements in non-negotiable form contracts). Rather, the "coercion" deemed problematic in *Lamps Plus* was the imposition upon the contracting parties of class procedures—based on California "public policy"—where the contract

did not expressly authorize class arbitration. 139 S. Ct. at 1415, 1417. As the Court explained, "class arbitration, to the extent it is manufactured by state law rather than consent, is inconsistent with the FAA." *Id.* at 1417-18 (quoting *Concepcion*, 563 U.S. at 348) (alterations omitted). The "consent" involved the obligations resulting from the valid agreement to arbitrate; the "coercion" was the judicial imposition of state public policy different from the parties' agreement.[5]

In addition, Defendants' attempt to redefine those terms finds no basis in generally applicable California contract law. Businesses can and do include a variety of non-negotiable conditions in form contracts in multiple contexts—and those conditions generally are permissible and enforceable under California law.

For example, California law still allows an employer to offer on a take-it-or-leave-it basis payment of, say, $15 an hour for 40 hours a week, or 20 days a year of paid vacation. But under AB 51, if the employer offers to resolve disputes by arbitration on the same basis, it

[5] The Ninth Circuit judgment reversed in *Epic* also involved arbitration agreements signed "[a]s a condition of employment." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *rev'd*, 138 S. Ct. 1612. That circumstance posed no obstacle to the Supreme Court's conclusion that those agreements were enforceable under the Act.

is subject to criminal prosecution or civil enforcement actions. As the Supreme Court has put it, States may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Casarotto*, 517 U.S. at 686 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

Defendants also try to defend AB 51 by pointing out that California imposes restrictions on other types of employment practices, such as preventing workers from discussing wages or testifying about alleged criminal conduct. Op. Br. 21. But the Federal Arbitration Act precludes California from grouping arbitration agreements with disfavored practices—making clear by Section 2's reference to state laws invalidating "any contract" that arbitration agreements may only be subject to state-law rules that apply to contracts generally.

The Supreme Court's decision in *Casarotto* confirms as much. *Casarotto* involved a Montana statute requiring contracts containing an arbitration clause to include a notice of the clause in underlined capital letters on the first page of the contract. 517 U.S. at 683. The Montana Supreme Court had held that the law was not preempted,

asserting—nearly identically to Defendants' argument here—that the law "simply prescribed" that arbitration agreements "be entered knowingly." *Id.* at 685 (quotation marks omitted). The U.S. Supreme Court reversed. As Justice Ginsburg explained for the Court, the state statute "directly conflicts with § 2 of the FAA" because it imposes "a special notice requirement not applicable to contracts generally." *Id.* at 687. In reaching that holding, the Court concluded that "'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted.'" *Id.* (quoting 2 I. Macneil et al., Federal Arbitration Law § 19.1.1 (1995)). Because AB 51 does exactly that, *Casarotto* confirms that it is preempted.[6]

Put another way, AB 51 treats mandatory arbitration as an unfair contract provision that requires special protective rules. But because state law would not find unfairness when other routine

[6] Defendants' only response to *Casarotto* is to point out that the Montana statute in that case explicitly applied to arbitration agreements. *E.g.*, Op. Br. 37. But that is a distinction without a difference; a state-law rule that targets contracts with the defining features of arbitration agreements fares no better under Section 2 than a rule that singles out arbitration agreements by name.

employment terms are presented on a take-it-or-leave-it basis, AB 51 at best applies state contract doctrine "in a fashion that disfavors arbitration," and is preempted. *Concepcion*, 563 U.S. at 341; *see also Kindred*, 137 S. Ct. at 1428.

Finally, *Epic* forecloses any argument that, because punishing "illegal" conduct is a general state-law principle unaffected by Section 2, AB 51 may validly prohibit the specified employer conduct as illegal. In *Epic*, the employees argued that the arbitration agreements violated federal labor law and were therefore unenforceable under the general rule barring "illegal" contracts. The Court squarely rejected that contention, holding that "an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration" even if "it sounds in illegality." *Epic*, 138 S. Ct. at 1623. "Placing arbitration agreements within [a] class" of objectionable terms, as AB 51 does, "reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA," and "only makes clear the arbitration-specific character of the rule." *Kindred*, 137 S. Ct. at 1428.

c. The legislative history of AB 51 confirms that AB 51 targets arbitration agreements for disfavored treatment

Defendants cannot dispute what the author of AB 51 and the California Legislature's floor analyses unanimously state: AB 51 is designed to address "mandatory labor law arbitration." S. Floor Analysis, *supra*, at 5; *see also* pages 12-14, *supra*. Indeed, Defendants concede that "the legislative history focused on policies compelling employee agreement to arbitration agreements as a condition of employment." Op. Br. 43. Defendants further acknowledge that "the target of the law and the intent of the legislature appears focused on the dangers of forced arbitration and similar waivers." *Id.* at 44 (emphasis omitted).

Although Defendants rely on AB 51's legislative history when it suits them (*e.g.*, Op. Br. 39), they fault the district court (*id.* at 42-43) for pointing to this history in acknowledging that "the law's clear target is arbitration agreements." ER22. Defendants' critique misses the mark.

For example, Defendants assert that the district court failed to "assum[e] that the ordinary meaning of [AB 51's] language accurately

expresses the legislative purpose." Op. Br. 43 (quoting *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 401 (9th Cir. 2015)). But there is no conflict between the text and the legislative history, and the district court did not suggest otherwise: AB 51's prohibition on "right, forum, or procedure" waivers on its face impermissibly targets contracts with the defining features of arbitration agreements. *See* ER19-21; pages 37-46, *supra*.

Defendants are even wider off the mark in pointing, without context, to the Supreme Court's warning that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." Op. Br. 42 (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)). The Court was acknowledging that requiring legislators to testify at trial "frequently will be barred by privilege" (429 U.S. at 268)—not ordering federal courts to ignore written legislative history that the Supreme Court itself routinely takes into account.[7]

[7] *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020); *Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018). This Court does the same. *See, e.g.*, *Gonzales v. CarMax Auto Superstores, LLC*,

In short, the district court did not abuse its discretion in noting that the written Senate and Assembly analyses accompanying AB 51 confirm what the statutory text shows: AB 51 targets arbitration agreements for disfavored treatment.

B. AB 51 Interferes With The Purposes And Objectives Of The Federal Arbitration Act

Much of the preceding discussion also explains why AB 51 is preempted on the additional basis that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" expressed in the Federal Arbitration Act. *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

Congress enacted the Act in 1925 to "reverse the longstanding judicial hostility to arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); *see Allied-Bruce*, 513 U.S. at 272 (the Act "seeks broadly to overcome judicial

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840 F.3d 644, 652 & n.8 (9th Cir. 2016) (California legislative history); *In re Findley*, 593 F.3d 1048, 1053 (9th Cir. 2010) (same). Defendants are similarly off base in quoting (Op. Br. 42) a decision explaining that "[t]he distinction between [legislators] being aware of racial considerations and being motivated by them" in redistricting is an "evidentiary difficulty" that "may be difficult to make." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). There was no difficult evidentiary determination made here.

hostility to arbitration agreements"). The Supreme Court's "cases place it beyond dispute that the FAA was designed to promote arbitration," *Concepcion*, 563 U.S. at 345-46, and that the Act "establishes 'a liberal federal policy favoring arbitration agreements,'" *Epic*, 138 S. Ct. at 1621 (quoting *Moses H. Cone*, 460 U.S. at 24).

As the district court determined, AB 51 "interferes with the FAA's goal as interpreted by the Supreme Court and is thus subject to preemption on that basis as well." ER23. After all, it is hard to imagine what could more forcefully impede the Act's purpose "to promote arbitration" (*Concepcion*, 563 U.S. at 345) than to criminalize or impose weighty civil sanctions on the formation of an arbitration agreement.

Defendants offer no serious response. Their insistence that AB 51 does not "interfere[] with arbitration" because it does not create a defense to the *enforcement* of a contract (Op. Br. 48) repackages the same false dichotomy between regulating the behavior of businesses in forming arbitration agreements and regulating the agreements' enforcement once formed. *See* pages 27-36, *supra*.

The First Circuit's decision in *Connolly* is again instructive. As that court held, the state-law rule that permitted Massachusetts

officials to revoke the broker-dealer license of broker-dealers who entered into pre-dispute arbitration agreements was plainly "at odds with the policy which infuses the FAA." 883 F.2d at 1124. That was so, the court continued, because "[t]he worry that requiring a [pre-dispute arbitration agreement] might forfeit a firm's ability to function as a broker-dealer at all is an obstacle of greater proportions even than the chance that, in a given dispute, an arbitration agreement might be declared void." *Id.*[8]

There can be no serious dispute that AB 51 embodies the improper attempt by the California Legislature to discourage the formation of arbitration agreements as a condition of employment by making businesses criminally and civilly liable for forming those agreements. And Defendants certainly have not shown clear error in the district court's now-unchallenged factual finding that "AB 51 will

[8] For the same reasons, Defendants' reliance on the Supreme Court's reference in *Concepcion* to "contract defenses" (563 U.S. at 343)—and this Court's quotation of the same in *Blair v. Rent-A-Center*, 928 F.3d 819, 828 (9th Cir. 2019)—is unavailing. That language reflects only that the state-law rules at issue in those cases were defenses to the enforcement of arbitration agreements—not an implied holding that the Federal Arbitration Act is powerless against state-law rules that penalize the formation of arbitration agreements.

likely have a deterrent effect on employers' use of arbitration agreements given the civil and criminal sanctions associated with violating the law." ER23-24; *see also id.* at 24 (evidence established that "the exposure to penalties will cause uncertainty in [the] hiring market such that employers are likely to alter their employment contracts to exclude arbitration agreements").

Defendants' assertion that the "penalties for violating AB 51" have "no place in the analysis" (Op. Br. 49) is puzzling. As Defendants acknowledge, the penalties are the means by which "the provisions [of AB 51] can be enforced." *Id.* at 50. And the danger of that enforcement—making businesses criminally or civilly liable for forming arbitration agreements—is precisely why AB 51 conflicts with the Federal Arbitration Act. "A policy designed to prevent one party from enforcing an arbitration contract or provision by visiting a penalty on that party is, without much question, contrary to the policies of the FAA." *Connolly*, 883 F.2d at 1124.

In fact, if allowed to go into effect, AB 51 likely would interfere with arbitration far more substantially than the California law, held preempted in *Preston*, that required exhaustion of administrative

remedies before arbitration. The party opposing arbitration in that case argued that the California law was not preempted because it "merely postpones arbitration." 552 U.S. at 357. The Court concluded that this argument could not "withstand examination," explaining that the California rule was preempted because requiring an agency to hear a dispute before arbitration took place would frustrate the "prime objective of an agreement to arbitrate * * * to achieve streamlined proceedings and expeditious results," and would, "at the least, hinder speedy resolution of the controversy." 552 U.S. at 357-58 (quotation marks omitted); *accord Concepcion*, 563 U.S. at 346.

Here, AB 51 will (by design) prevent many arbitration agreements from being made at all—even agreements indisputably enforceable under the Federal Arbitration Act.

Likewise, outside the arbitration context, the Supreme Court has rejected attempts by States to impose liability on conduct that federal law permits. For example, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court held that the federal National Traffic and Motor Vehicle Safety Act of 1966 and subsequent regulations preempted a state-law tort action seeking to impose liability on an

automobile manufacturer for failing to include airbags in a certain model of automobile. The attempted use of state law to achieve that result, the Court explained, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought," given that the federal standard permitted the use of a variety of "passive restraint systems" other than airbags. *Id.* at 881.

Put simply, federal law granted the auto manufacturer a right—protected under federal law and thus the Constitution's Supremacy Clause—to manufacture and sell cars without airbags. Because a state tort claim would interfere with that right, the claim was preempted. A state statute imposing criminal or civil liability on manufacturers that built the same cars without airbags would be preempted for the same reasons. *See also Barnett Bank*, 517 U.S. at 31; *Fidelity Federal*, 458 U.S. at 154-59; *Franklin Nat'l Bank*, 347 U.S. at 377-78.

In short, California's attempt to penalize businesses for exercising their federally protected right to enter into arbitration agreements with their workers squarely conflicts with the Federal Arbitration Act's purposes.

C. Defendants' Policy Justifications Aimed At Buttressing AB 51 Are Both Irrelevant And Misplaced

Unable to rebut the district court's preemption analysis, Defendants pepper their brief with arguments that enjoining enforcement of AB 51 is bad policy. For example, they repeatedly express concern that "unscrupulous" businesses will enter into "patently unlawful and unenforceable arbitration agreements" with their workers. Op. Br. 26, 33. And they awkwardly try to leverage the COVID-19 pandemic and the resulting unemployment levels to suggest that it is unfair to present arbitration agreements on the same take-it-or-leave-it terms as numerous other conditions of employment. *Id.* at 15, 20, 33, 41.

To begin with, those policy arguments are irrelevant to the preemption questions presented here. Under the Supremacy Clause, the answer is clear: the Federal Arbitration Act's "national policy favoring arbitration" trumps "any state substantive or procedural policies to the contrary." *Concepcion*, 563 U.S. at 346 (quotation marks omitted). California courts or legislators "are certainly free to note their disagreement" with the Act and the Supreme Court's precedents

interpreting it, but they nonetheless "must follow it." *Imburgia*, 136 S. Ct. at 468.

But even if they were relevant, Defendants' policy arguments also make no sense. For example, all parties agree that courts can and do refuse to enforce arbitration agreements that are unenforceable under generally applicable California unconscionability doctrine. *See* Op. Br. 26-29 & n.3 (collecting cases). So businesses have no incentive to enter into "blatantly unconscionable and unenforceable" (*id.* at 26) agreements with their workers. Nothing in AB 51 or the district court's injunction changes that calculus—indeed, AB 51 does not explicitly affect enforcement—and Defendants certainly offer no support for their speculation to the contrary.

But AB 51 is not limited to unenforceable agreements. On the contrary, the statute penalizes businesses for entering into *any* arbitration agreement as a condition of employment—even those agreements that are "validly created" and enforceable under generally applicable "state contract law." Op. Br. 32.

Next, both the Federal Arbitration Act and general rules of contract law continue to apply during COVID-19. A pandemic does not

give the California Legislature a free pass to violate federal law (leaving aside that AB 51 was enacted well before the pandemic). Moreover, current economic circumstances weigh *against* enforcing AB 51, given the district court's unchallenged finding that "California employers are faced with likely irreparable harm" by enforcement of AB 51. ER32. The current economic climate places a premium on encouraging employment rather than deterring it by imposing additional and unlawful burdens on employers.

Finally, by denouncing arbitration as a contract term "weaponize[d]" against workers (Op. Br. 30), Defendants invoke "the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). As the Supreme Court put it in the employment context, attacks on arbitration that "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30 (quotation marks and alterations

omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

II. THE SCOPE OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION IS APPROPRIATE

The district court's preliminary injunction is narrowly tailored to the claims in this case, and does not prohibit Defendants from enforcing the provisions of AB 51 outside of the context of arbitration agreements governed by the Federal Arbitration Act. Instead, the injunction prohibits Defendants only "from enforcing sections 432.6(a), (b), and (c) of the California Labor Code where the alleged 'waiver of any right, forum, or procedure' is the entry into an arbitration agreement covered by the Federal Arbitration Act," and "from enforcing section 12953 of [FEHA] where the alleged violation of 'Section 432.6 of the Labor Code' is entering into an arbitration agreement covered by the FAA." ER36.

Defendants nonetheless suggest that the injunction should be narrowed still further. There is no sound basis to do so.

For example, Defendants assert that the district court's injunction is "overbroad" because the Federal Arbitration Act does not prevent enforcement of laws that give workers the right to notify

government agencies of alleged misconduct or prohibit agencies from pursuing claims on behalf of workers. Op. Br. 25 n.2. But Defendants apparently misunderstand the injunction, which has no bearing on those rights. Plaintiffs have *not* challenged—and the district court's order does *not* enjoin—Defendants' ability to enforce the language in Sections 432.6(a) and (b) that are based on waivers of the right to "*notify* any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added).

Unlike the waiver of the right to go to court or to pursue a civil action in court or with an agency—which is the type of waiver at issue in the preliminary injunction—waiver of the right to notify law enforcement officials of alleged misconduct is not a fundamental characteristic of arbitration agreements. On the contrary, the Supreme Court has long recognized that employees may notify enforcement authorities of alleged violations of law, and those authorities may, if the law allows, pursue remedies for the alleged violation on their own behalf. *See Waffle House*, 534 U.S. at 290-96.

Next, Defendants argue that this Court should hold only Section 432.6(a) or Section 432.6(b) preempted, and to leave the other section standing. Op. Br. 50-53.[9]

But as the district court recognized, "the preemptive effect of the FAA applies equally to" both Section 432.6(a) and Section 432.6(b). ER34. The two provisions prohibit mirror images of the same methods of contract formation—and therefore both must be enjoined to vindicate the Act's protection of arbitration agreements.

For example, Section 432.6(b)'s prohibition on "retaliat[ing]" against or "terminat[ing]" any "applicant for employment" who is unwilling to agree to arbitration is just another way of implementing Section 432.6(a)'s prohibition on including arbitration as one among many standard contract terms offered on a non-negotiable basis "as a condition of employment." Similarly, Section 432.6(b)'s prohibition on terminating existing employees who decline to agree to arbitration is

[9] Defendants do not specify which of the two sections they believe should survive preemption, although in the district court they sought to salvage Section 432.6(b). Defendants appear to agree, as they did in the district court, that if Section 432.6(a) is enjoined, Section 432.6(c), which treats as a "condition of employment" even those agreements that permit an employee "to opt out," must be enjoined as well.

no different than Section 432.6(a)'s prohibition on including arbitration as a condition "of continued employment." "In other words," as the district court put it, "if preemption does not apply to section (b), conditional arbitration agreements will not be conditional at all, as employers will lose the ability to act on an employee's refusal to abide by the requirement of entering into an agreement." ER35.

In addition, Section 432.6(b) applies to an "applicant for employment," not only to "a long-serving employee," as Defendants suggest. Op. Br. 24. But even as applied to existing employees, Section 432.6(b) is preempted. Just as the State may not prohibit businesses from including arbitration among the contract terms presented as conditions of employment to new employees, the State may not prohibit businesses from discharging existing employees (assuming they are at will) who refuse to agree to such provisions in revised agreements. For example, subject only to generally applicable principles of unconscionability or duress, a business may require an existing employee to accept different compensation, benefits, or work responsibilities as a condition of continued employment. Under the Federal Arbitration Act, a business has the federal right to include

arbitration among the terms offered on the same basis—a right that Section 432.6(b) squarely impedes.

Finally, Defendants argue that, if AB 51's criminal penalties deter the formation of arbitration agreements, the district court could have enjoined only criminal enforcement of the statute and permitted AB 51 to stand enforced by civil penalties alone. Op. Br. 3, 53. That argument fares no better than Defendants' other points.

To begin with, Defendants do not actually ask to sever any provision of AB 51, but instead seek a significant judicial rewrite of the statutory scheme. As Defendants elsewhere acknowledge, "AB 51 did not create a new criminal sanction." Op. Br. 49 n.8. Instead, the California Legislature chose to insert Section 432.6 into the article of the California Labor Code subject to criminal penalties under Section 433, which provides that "[a]ny person violating this article is guilty of a misdemeanor." Cal. Labor Code § 433. Defendants' proposal would therefore effectively require moving the provisions of AB 51 to a different article of the Labor Code, or else rewriting Section 433 to say that "[a]ny person violating this article, *except for Section 432.6*, is guilty of a misdemeanor." Yet this Court has "expressed concern" on

multiple occasions that "federal courts ought not be redrafting state statutes" under the guise of avoiding constitutional conflicts in the statute as drafted. *United States v. Manning*, 527 F.3d 828, 840 (2008) (quoting *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 937 (9th Cir. 2004)).

In all events, excising the criminal penalties from enforcement of AB 51 would not remove the conflict with the Federal Arbitration Act. AB 51 would continue to impose harsh civil penalties on businesses that present their workers with arbitration agreements as a routine condition of employment. AB 51 would thus continue to single out arbitration agreements for disfavored treatment and to attach restrictions that impede the formation of these agreements. And the risk of these civil penalties and investigations would continue to deter businesses from exercising their federally protected rights.

CONCLUSION

The district court's order issuing a preliminary injunction should be affirmed.

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Respectfully submitted,

/s/ Andrew J. Pincus

Bruce J. Sarchet
Maurice Baskin
LITTLER MENDELSON, P.C.
500 Capitol Mall, Suite 2000
Sacramento, CA 95814
(916) 830-7200
(916) 561 0828 (fax)
bsarchet@littler.com

Attorneys for Plaintiffs-Appellees National Retail Federation, California Retailers Association, National Association of Security Companies, Home Care Association of America, and California Association for Health Services at Home

Erika C. Frank
CALIFORNIA CHAMBER OF COMMERCE
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

Counsel for Plaintiff-Appellee California Chamber of Commerce

Andrew J. Pincus
Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
apincus@mayerbrown.com

Donald M. Falk
MAYER BROWN LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 331-2000
Facsimile: (650) 331-2060
dfalk@mayerbrown.com

Attorneys for Plaintiffs-Appellees the Chamber of Commerce of the United States of America and California Chamber of Commerce

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
(202) 463-5346 (fax)

Counsel for Plaintiff-Appellee Chamber of Commerce of the United States of America

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Plaintiffs-Appellees is unaware of any related cases pending in this Court.

/s/ Andrew J. Pincus
Andrew J. Pincus
Attorney for Plaintiffs-Appellees

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/s/ Andrew J. Pincus
Andrew J. Pincus
Attorney for Plaintiffs-Appellees

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I hereby certify that on this 17th day of August, 2020, I electronically filed the foregoing brief 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.

August 17, 2020

MAYER BROWN LLP

/s/ Andrew J. Pincus
Andrew J. Pincus
Attorney for Plaintiffs-Appellees