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 GARCÍA-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

The Honorable Judge Kimberly J. Mueller, Chief Judge

DEFENDANTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

The district court abused its discretion, committing legal error, by assuming the Federal Arbitration Act (FAA) and its preemption jurisprudence applied to the new sections of the California Labor Code and Government Code added by California Assembly Bill 51 (AB 51). But the two key substantive provisions of AB 51, Labor Code Section 432.6 subdivisions (a) and (b), do not prohibit parties from entering into arbitration agreements or prevent their enforcement. Instead, they regulate employer conduct, prohibiting actions by employers that require applicants or employees to waive rights as a condition of employment, and prohibiting discrimination, retaliation, and termination of employees that decline to enter into such waivers. AB 51 applies equally to policies involving arbitration and non-arbitration employment agreements. For example, it would apply to policies requiring non-disclosure or non-disparagement agreements. There is no Supreme Court precedent that has asserted FAA preemption to a broadly applicable state law regulating employer policies where, like here, there is no underlying agreement guiding the analysis. It was error to apply it to AB 51 here.

The district court's application of FAA preemption to AB 51 could result in a seismic shift in employment law by essentially creating immunity

for employers at the state level who threaten, retaliate, or discriminate against or terminate an employee or prospective employee for refusing to consent to waiver of a right, forum, or procedure—*even when the waiver is unenforceable and void* —so long as it applies in some way to arbitration. The district court erred in applying the FAA to AB 51, carving an uncharted path for the expansion of FAA preemption jurisprudence.

The court also committed legal error in its analysis of FAA preemption jurisprudence. In finding that AB 51 places arbitration agreements on unequal footing compared to other contracts, the key Supreme Court decisions cited to in the order actually demonstrate why the FAA does not preempt AB 51. And the court's determination, through a review AB 51's legislative history, that arbitration agreements were the secret target of the California Legislature's intent, was inaccurate. It was the trend of employers *forcing* arbitration agreements and other waivers on California workers that the bill tried to curb, not the elimination of arbitration agreements or enforcement of arbitration agreements properly made. Moreover, the court's conclusion that AB 51 will deter employers from using arbitration agreements because they cannot force them on their employees (as opposed to entering into them voluntarily) is without legal

support. General contract law requires that parties voluntarily enter into agreements, arbitration or otherwise.

Furthermore, the court's conclusion that AB 51 likely interferes with arbitration because AB 51's provisions may be enforced through potential penalties, which penalties will likely have a deterrent effect on employers' use of arbitration agreements, misapplies the law and extends the "national policy favoring arbitration" past its breaking point. AB 51 regulates employers and does not create new contract defenses to arbitration agreements, and it is of no consequence that a law should have mechanisms of enforcement. AB 51 does not interfere with the enforceability of arbitration agreements or stand in the way of Congressional intent. Even assuming otherwise, the district court could have severed the criminal penalties provision without enjoining enforcement of the entire statute.

In the absence of preemption, Plaintiffs cannot establish the remaining elements for a preliminary injunction; therefore, the Court should reverse the decision of the district court and deny the motion for preliminary injunction.

STATEMENT OF JURISDICTION

Defendants-Appellants challenged the district court's jurisdiction over this matter under 42 U.S.C. § 1983 and its equitable jurisdiction, and the court subsequently exercised its equitable jurisdiction under 28 U.S.C. §

1331. (ER 11-13.) On January 31, 2020, the district court granted Plaintiffs-Appellees' motion for a preliminary injunction barring enforcement of Assembly Bill 51 in a minute order (ER 37-38), and later, on February 7, 2020, it supported its decision in a written order. (ER 1-36.) Defendants filed a timely notice of appeal on February 19, 2020. (ER 39-42); *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Did the district court abuse its discretion in finding the FAA applies to AB 51, including California Labor Code and California Fair Employment and Housing Act (FEHA) provisions that regulate the conduct of employers and do not prevent the formation, validity, or enforcement of arbitration agreements?

2. Did the district court err in finding the FAA applies to AB 51, where Labor Code and FEHA provisions regulate the conduct of employers in the absence of consent or lack of an arbitration agreement?

3. Did the district court err in finding the FAA applies to Labor Code and FEHA provisions so as to prohibit liability for employers who decline to hire prospective employees or fire current employees who decline to waive their rights by signing patently unlawful arbitration agreements?

4. Is it likely that the unequal-footing principles of FAA jurisprudence apply to preempt AB 51 because it singles out arbitration agreements for unequal treatment?

5. Did the district court err in concluding that the FAA likely preempts AB 51 because the Labor Code and FEHA provisions interfere with arbitration?

6. Are the provisions of AB 51 severable such that a portion of the statute survives without unenforceable provisions?

RELEVANT STATUTES

The primary provisions of AB 51 appear in California Labor Code section 432.6, which provides:

> (a) A person shall not, as a condition of employment, continued employment, or the 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 the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.
>
> (b) An employer 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

for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

(d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees. (e) This section does not apply to a person registered with a self regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self regulatory organization.

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

(g) This section does not apply to post dispute settlement agreements or negotiated severance agreements.

(h) This section applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

(i) The provisions of this section are severable. 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.

AB 51 also added Government Code section 12953 to FEHA:

> It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code.

STATEMENT OF THE CASE

I. ASSEMBLY BILL 51 AND ITS TWO PRIMARY COMPONENTS, LABOR CODE SECTION 432.6 SUBDIVISIONS (A) AND (B).

AB 51 was chaptered on October 10, 2019, with an effective date of January 1, 2020. 2019 Cal. Stats. Ch. 711 (A.B. 51) (Legislative Counsel's Digest), at § 3(h).[1] The California Legislature found that "it is the policy of this state to ensure that all persons have the full benefits of the rights, forums, and procedures established in the California Fair Employment and Housing Act [. . .] and the Labor Code." *Id.* at § 1(a).

[1] The full text of Assembly Bill No. 51 as well as its legislative history, including the legislative analyses referred to in this brief, may be found at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51 (last visited on May 18, 2020). The district court took "judicial notice of the various legislative materials related to AB 51 located on the Official California Legislative Information Website [above], as publically available government documents whose contents cannot be reasonably questioned." (ER 7 n.1.) Defendants-Appellants request this Court take judicial notice of these legislative materials as well.

AB 51 has two key substantive provisions, Labor Code Section 432.6, subdivisions (a) and (b). Section 432.6(a) regulates employer policies and practices:

> A person shall not, as a condition of employment, continued employment, or the 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 the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

Cal. Lab. Code § 432.6(a).

Subdivision (b) operates independently of subdivision (a) to prohibit employers from threatening, retaliating, or discriminating against and/or terminating prospective or current employees:

> An employer 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 for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

Cal. Lab. Code § 432.6(b). A violation of either subdivision is an "unlawful employment practice." 2019 Cal. Stats. Ch. 711 (A.B. 51) (Legislative Counsel's Digest), at § 2 (adding Cal. Gov't Code § 12953).

The only reference to arbitration in AB 51 provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the [FAA]." *Id*. at § 3(f) (adding Cal. Lab. Code § 432.6(f)). The California Legislature recognized the scope of and worked to avoid FAA preemption. The final Senate Floor analysis specifically noted:

> Both pre-dispute and post dispute agreements remain allowable and the bill takes no steps to invalidate any arbitration agreement that would otherwise be enforceable under the FAA. The steps help ensure this bill falls outside the purview of the FAA.

Senate Floor Analysis (A.B. 51), Sept. 1, 2019, at 4.

The Legislature explained that "the bill does not prohibit, restrict, or discourage anyone from entering into a mandatory arbitration agreement, if they wish to consent to do so freely and voluntarily. It does not interfere with enforcement of arbitration agreements. In fact, once a mandatory arbitration agreement has been signed, this bill has nothing more to say about the situation." Senate Floor Analysis (A.B. 51), Sept. 1, 2019, at 5-6. "*All the bill does is say that an employee cannot be forced to sign an*

arbitration agreement, and if the employee elects not to, the employee cannot be retaliated against." Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 8 (emphasis added). Moreover, "the bill does not discriminate against arbitration because *its edicts apply equally to waiver of any dispute resolution forum or procedure*. AB 51 takes seriously the courts' repeated admonition that consent is the touchstone of arbitration agreements. (*Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.* (2010) 559 U.S. 662, 681)." *Id*. at 8 (emphasis added).

AB 51 contains a severability clause that expressly states "The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect the other provisions or applications that can be given effect without the invalid provision or application." 2019 Cal. Stats. Ch. 711 (A.B. 51) (Legislative Counsel's Digest), at § 3 (adding Cal. Lab. Code § 432.6(i)).

II. PROCEDURAL HISTORY.

This lawsuit was brought by the Chamber of Commerce of the United States of America, California Chamber of Commerce, National Retail Federation, California Retailers Association, National Association of Security Companies, Home Care Association of America and the California Association for Health Services At Home. (ER at 125-152.)

On December 9, 2019, Plaintiffs filed a complaint asking the court to declare AB 51, as a whole, preempted by the FAA, to preliminarily and permanently enjoin defendants from enforcing AB 51 and to enter judgment in Plaintiffs' favor and award Plaintiffs' attorneys' fees and costs. (ER 147 (prayer for relief).) Plaintiffs also filed a motion for preliminary injunction seeking to enjoin Defendants from enforcing AB 51 pending final determination of the merits of Plaintiffs' claims. (CD 5 and 5-1.) In the meantime, Plaintiffs filed a motion for temporary restraining order (CD 8), the court held a telephonic hearing on December 23, 2019 (ER 100-121), and granted the motion on December 30, 2019. (ER 122-124.)

The motion for preliminary injunction was heard on January 10, 2020 (ER 57-97), after which the court modified its previous temporary restraining order to limit the order's application. (ER 98-99.) After supplemental briefing on jurisdiction and the severability of AB 51's primary components (CD 37; CD 40), the court granted the motion by minute order on January 31, 2020 (ER 37-38), with a detailed decision issued on February 7, 2020. (ER 1-36.)

In relevant part, the court's decision determined that Plaintiffs were likely to succeed on the merits of their preemption claim, finding that AB 51 does not place arbitration agreements on equal footing with other contracts

and that it interferes with the accomplishment of the FAA's objectives. (ER 19-25.) It then held the remainder of the factors supporting a preliminary injunction were present. (ER 29-33.) It also found preemption applied equally to all key components of AB 51, including Section 432.6(b), and did not sever either substantive component of the statute. (ER 33-35.) The district court narrowed the injunction, limiting it to instances where waivers include arbitration agreements covered by the FAA, but otherwise leaving the statute open to enforcement as to other types of waivers of rights, forums, or procedures. (ER 36.)

SUMMARY OF ARGUMENT

The district court abused its discretion, committing legal error, in finding Plaintiffs were likely to succeed on the merits of their preemption claim. First, the court incorrectly assumed the FAA applied to AB 51. It does not. The FAA applies to arbitration agreements and favors their enforceability on terms equal to other contracts, because the judiciary had been historically hostile towards such agreements even though arbitration agreements are governed by general contract law. AB 51 focuses on employer policies that require waivers as a condition of employment and does not prevent the formation, validity, or enforcement of arbitration agreements. There is no Supreme Court precedent supporting the

application of FAA preemption in the absence of one or more specific agreements. And Section 432.6(b), which prohibits employers from terminating, retaliating, or discriminating against employees and applicants who do not consent to waivers of rights and procedures, only applies in the absence of consent or lack of an agreement.

As a consequence of applying the FAA to Labor Code and FEHA provisions, the court incorrectly created a new law: the right of employers to mandate every term and condition of arbitration as a condition of employment. This new law will result in injustice for applicants and employees alike who may want to decline to waive certain rights or enter into an unconscionable agreement but are faced with not being hired or losing their job, without legal recourse, should they refuse. Such a harsh result, particularly in this economy so hard hit by the current pandemic, exceeds the intent of the FAA. Further, the over-breadth of the court's order improperly sanctions employers to use threats, retaliation, discrimination, and termination as a means to force prospective and current employees into unlawful and unenforceable contracts. Moreover, nothing in the FAA preempts a state law that allows an employee or job applicant to refuse to enter into an arbitration agreement that is *not enforceable under the FAA's*

Section 2 savings clause. Yet, the district court's decision results in this injustice.

The court's finding that AB 51 places arbitration agreements on unequal footing vis-à-vis other contracts is also legal error. The primary authorities relied upon by the court to show why AB 51 discriminates against arbitration agreements actually demonstrate why the FAA *does not* preempt AB 51. Both *Doctor's Associates, Incorporated v Casarotto*, 517 U.S. 681 (1996), and *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), involved state laws that either explicitly singled out arbitration agreements (*Casarotto*) or were crafted in a manner that effectively limited their application only to arbitration agreements (*Kindred Nursing*). AB 51, by contrast, applies broadly to a range of waivers of rights that employers may seek to leverage from employees. It turns the equal-footing doctrine on its head to conclude that the mere application of a state law to policies concerning arbitration agreements, among various other terms that may be embedded in a contract, subjects it to preemption under the FAA.

Further, the court's finding that the California Legislature intended to target and discriminate against arbitration agreements was a plain misreading of the law's legislative history. The focus of the bill was to help

level the playing field where employers have the lion's share of bargaining power, which is particularly true given the high unemployment resulting from the COVID-19 pandemic. It was employer behavior in forcing arbitration and other waiver-of-rights agreements related to employment that the bill sought to curb, not the enforcement of arbitration agreements; indeed, AB 51 cannot fairly be read as purporting to eliminate waivers of rights, including those effectuated through arbitration agreements, or reflecting any broad policy disfavoring arbitration agreements in general. Moreover, the court's supposition that AB 51 will deter employers from using arbitration agreements, because they cannot require them of their employees, is without legal support.

Furthermore, the court's conclusion that AB 51 likely interferes with arbitration because its enforcement penalties will have a deterrent effect on employers' use of arbitration agreement is legally unsupported and misconstrues the intent of the law. AB 51 promotes good faith and fair dealing, not the use of coercive tactics or behavior by an employer against job applicants or employees. Therefore, AB 51 does not preclude arbitration agreements or the enforcement of such agreements, but rather is aimed at employer conduct. And it is of no consequence that a law has procedures available for its enforcement.

Because the legal conclusions of the district court's order are erroneous, it is not likely Plaintiffs will succeed on the merits of their preemption claim. Consequently, Plaintiffs cannot establish the remaining elements necessary for a preliminary injunction. Therefore, this Court should reverse the district court's decision and deny the motion for preliminary injunction.

Finally, should this Court determine that one or the other key provisions of AB 51 is unenforceable based on FAA preemption, AB 51's severability clause allows, for example, Section 432.6 subdivision (b) to survive because it is independent of 432.6 subdivision (a) and vice-versa, consistent with the intent of the California Legislature. Similarly, if the Court finds that AB 51 interferes with arbitration because employers violating the new law could potentially be charged with criminal penalties found elsewhere in the Labor Code, the bill will survive without such a penalty if the Court severs the applicability of the criminal penalty.

STANDARD OF REVIEW

To obtain a preliminary injunction, the party seeking such relief must establish that it is likely to succeed on the merits, that it will suffer irreparable harm absent an injunction, that the equities tip in its favor, and that the public interest is served by an injunction. *Winter v. Natural Res.*

Def. Council, Inc., 555 U.S. 7, 20 (2008). The Court reviews the grant of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). It reviews the district court's legal conclusions *de novo*, and a district court necessarily abuses its discretion when it makes a legal error. *Id.*

ARGUMENT

I. CONTRARY TO THE DISTRICT COURT'S ORDER, PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR PREEMPTION CLAIMS.

A. The District Court's Premise that AB 51 Falls Within the Purview of the FAA Is Incorrect.

The order's application of the FAA to AB 51 is unprecedented and untethered to the effects on actual arbitration agreements. No Supreme Court case has considered FAA preemption in the abstract, without a concrete agreement at issue and without a concrete connection to a facet of the law that specifically singles out arbitration agreements. The district court acknowledged as much at the January 10, 2020 hearing on the motion for preliminary injunction that the statute charted new territory:

> MR. STEGEMAN: I would add there has not been a Supreme Court case like this where the FAA has preempted a statute that doesn't affect directly an arbitration agreement. There is no arbitration agreement at issue. I think we're either premature, or

> we'll never really have an instance where FAA preemption should apply to this case.
>
> THE COURT: I think that's right. This carves out a new path.

(ER 92:1-8.) But carving a new path and expanding the scope of FAA preemption to encompass business policies and practices regulated by AB 51 goes too far. AB 51 does not apply to agreements and does not fall under the FAA's umbrella. The critical error of the district court is that it finds, as a matter of law, that the FAA applies to an employer forcing an applicant or employee to agree to waiving rights the employer chooses should be waived or else face not being hired or termination. The free will and voluntary nature of parties to arbitration agreements, which are fundamental elements to all contract law, are preserved by AB 51.

1. Like Other Provisions of the Labor Code and FEHA, AB 51 Regulates the Conduct of Employers; It Does Not Prevent Execution or Enforcement of Arbitration Agreements or Implicate the FAA.

AB 51 does not apply to arbitration agreements or other waivers of rights, forums, or procedures, and therefore does not implicate the FAA. Instead, it applies to employment *policies* and *practices* that force workers into waivers as a condition of employment, as opposed to allowing employees to voluntarily negotiate and enter into such agreements. The

district court erred in applying FAA preemption jurisprudence to AB 51, necessarily finding that the statute applies to arbitration agreements. Because Section 2 of the FAA reflects the "fundamental principle that arbitration is a matter of contract," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), and AB 51 does not implicate the enforcement of arbitration contracts, or agreements themselves, it falls outside the umbrella of the FAA, and preemption should not even be considered.

Both of AB 51's key provisions center around the hiring and employment practices of employers. *See* Cal. Lab. Code §§ 432.6(a)-(b). It regulates employer policies and practices by making it unlawful for employers to require anyone to "waive any right, forum or procedure for a violation of" the California Labor Code or FEHA, "as a condition of employment, continued employment, or receiving employment-related benefits." Cal. Lab. Code § 432.6(a). In addition, it prohibits employers from retaliating against and/or terminating prospective or current employees "because of the refusal to consent to the waiver of any right, forum, or procedure" under California labor and employment laws. Cal. Lab. Code § 432.6(b). By its plain language, AB 51 does not regulate or invalidate any agreement to arbitrate or single out arbitration agreements for regulation.

Instead, it prohibits the *practice* of mandating arbitration and other waivers of rights, forums, or procedures as a condition of employment.

Congress enacted the FAA in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes." *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612, 1643 (2018) (Ginsberg, J., dissenting); *see also Lamps Plus*, 139 S. Ct. at 1420 (Ginsberg, J. dissenting). The FAA was not designed to govern contracts "in which one of the parties characteristically has little bargaining power." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n. 9 (1967); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA] expected it to apply . . . to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.").

AB 51 reflects California's ongoing effort to address the inherent power imbalance in employer-employee relationships, which is particularly important today given the employment crisis following the wake of COVID-19. *See, e.g., Camp v. Alexander*, 300 F.R.D. 617, 625 (N.D. Cal. 2014) (recognizing "significant power imbalance between an employer and its employees"). California has enacted numerous other laws like AB 51 that

prohibit certain employer behavior, including policies that coerce waiver of an employee's rights on a take-it-or-leave-it basis. For instance, Senate Bill 820 (2019) added Code of Civil Procedure section 1001 to prohibit employers from requiring non-disclosure clauses in agreements settling claims of sexual assault and harassment. *See* 2019 Cal. Stats. Ch. 953 (S.B. 820). Senate Bill 1300 (2019) added Government Code section 12964.5, which makes it unlawful for an employer to require an employee to release FEHA claims or be silent about unlawful acts in the workplace unless the agreement is negotiated in the settlement of a lawsuit, and curtailing the use of non-disparagement agreements. *See* 2019 Cal. Stats. Ch. 955 (S.B. 1300). And Assembly Bill 3109 (2019), added Civil Code section 1670.11, which voids contract provisions that prevent a party from testifying about alleged criminal conduct or sexual harassment. *See* 2019 Cal. Stats. Ch. 9949 (A.B. 3109). The California Fair Pay Act (also known as Senate Bill 358) (2015), amended Section 1197.5 of the California Labor Code to prohibit employers from retaliating against employees for discussing their own wages or the wages of others. *See* 2015 Cal. Stats. Ch. 546 (S.B. 358). AB 51's prohibition on employment practices that coerce the waiver of employment rights and procedures by making agreements to such waivers a condition of employment is not unusual.

The primary substantive provision of the FAA is found in Section 2. *Concepcion*, 563 U.S. at 339. That section provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. The Supreme Court has "described this provision as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (internal quotation marks and citations omitted).

Because arbitration is fundamentally a "matter of contract," AB 51's regulation of employment policies and practices—not arbitration contracts—falls outside the ambit of Section 2 and the remainder of the FAA. Thus, AB 51 does not implicate the FAA.

2. The FAA Does Not Apply in the Absence of Consent or Lack of an Agreement.

The district court's analysis of AB 51's section 432.6(b) is also incorrect, because the FAA should not apply to Labor Code and FEHA provisions that address employer conduct that forces an applicant or

employee to waive rights or else face negative employment consequences, and it should not apply where parties do not consent to arbitration and there is no agreement at issue.

Section 432.6(b) mandates that an employer "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 for a violation of the California Fair Employment and Housing Act or this code." It does not implicate the validity or enforceability of arbitration agreements under the FAA.

Applying FAA preemption to a statute that addresses the absence of an arbitration agreement is not what the Supreme Court meant when it observed that the FAA reflects "the 'fundamental principle that arbitration is a matter of contract." *Conception*, 563 U.S. at 339 (citations omitted); *see also* Order (ER 18). The policy favoring enforcement of arbitration agreements, as a basic matter, requires the existence of an arbitration agreement, and consent as a necessary condition precedent.

"'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)). The Supreme Court has emphasized this "'foundational FAA principle'

many times." *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 684, and citing to *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985)). Then-Circuit Judge Gorsuch recognized that

> before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must *agree* to have their disputes arbitrated. While Congress has chosen to preempt state laws that aim to channel disputes into litigation rather than arbitration, even under the FAA it remains a 'fundamental principle' that 'arbitration is a matter of contract,' not something to be foisted on the parties at all costs.

Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 977 (10th Cir. 2014) (quoting *Concepcion*, 563 U.S. at 339) (emphasis in original).

Taking a long-serving employee approached by their employer to sign an arbitration agreement, the FAA should not support retaliation or discrimination against the employee who refuses to sign. They have not consented to the agreement, and neither the purpose nor the effect of the FAA should apply in the absence of consent or an agreement.

Because consent is a foundational principle of the FAA, as the Supreme Court consistently holds (*see, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415–16 (2019)), instances where there is no consent means the FAA should not apply. And because Section 432.6(b) does not implicate the enforcement of arbitration agreements, or agreements themselves, it falls outside the umbrella of the FAA and avoids preemption.[2]

[2] The court's determination with regard to Section 432.6(b) was also overbroad in that it is contrary to a body of law that recognizes that the FAA does not apply to, or conflict with, enforcement of anti-retaliation and other provisions under employment laws such as Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000e–3(a)), and parallel state laws. *See, e.g E.E.O.C. v. Waffle House*, 534 U.S. 279, 295–96 (2002) (an arbitration agreement signed by an individual employee does not bar the EEOC from pursuing claims on behalf of the employee); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (individual who signs an agreement to submit an employment discrimination claim to arbitration remains free to file a charge with EEOC); *E.E.O.C. v. River Oaks Imaging & Diagnostic*, No. CIV. A. H-95-755, 1995 WL 264003, at *1, (S.D. Tex. Apr. 19, 1995) (enjoining employer from retaliating against any past or present employee who files a complaint with the EEOC or because of that employee's opposition to the employer's mandatory arbitration policy); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261 (11th Cir. 2008) (discharge for employee's refusal to sign arbitration agreement that would have applied to his pending racial discrimination charge with the EEOC was retaliatory); *EEOC v. Doherty Enterprises, Inc*., 126 F. Supp. 3d 1305 (S.D. Fla. 2015) (denying motion to dismiss in EEOC action seeking to enjoin employer from using its arbitration agreement to deter employees from filing charges or cooperating with the EEOC or state Fair Employment Practices Agencies like the California Department of Fair Employment and Housing (DFEH)).

3. Improperly Forcing Labor Code and FEHA Provisions into an FAA Preemption Framework Creates New Substantive Rights for Employers Unsupported by Law, Resulting in Manifest Injustice.

By applying FAA preemption jurisprudence to Labor Code and FEHA provisions meant to protect California workers, the district court effectively created a new substantive right for employers and established a doctrine that prohibits *any* hypothetical interference with arbitration—even interference with forced *illegal and unenforceable* arbitration agreements. The order goes too far, with unintended effects that allow for unfettered retaliation against employees or applicants who refuse to enter into patently unlawful and unenforceable arbitration agreements. The unfairness of this circumstance further demonstrates that AB 51 does not implicate the FAA, and highlights the distinction between Labor Code and FEHA provisions seeking to regulate employer conduct and the FAA's protection of arbitration agreements themselves.

Under the district court's order, a twenty-year employee could be fired for refusing to sign an agreement waiving rights, even if the agreement is blatantly unconscionable and unenforceable.[3] An employee that signs

[3] Some examples of unconscionable provisions of arbitration agreements include: *Zaborowski v. MHN Government Services, Inc.,* 601

such an agreement may challenge its enforceability under the FAA's savings clause, which exempts agreements from the FAA where those agreements are subject to generally applicable contract defenses. 9 U.S.C. § 2.[4] But a

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Fed. App'x 461 (9th Cir. 2014) (arbitrator selection clause that gave employer near unfettered discretion to select arbitrator, six month limitations period for bringing claims, bilateral fee shifting, and requiring employee to pay arbitration filing fee all found substantively unconscionable); *Ferguson v. Countywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2004) (agreement compelled arbitration of claims employees most likely to bring but exempted from arbitration claims the employer most likely to bring, required employee to pay fees in excess of court fees, and provided for one-sided discovery favoring the employer); *Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165 (9th Cir. 2003) (agreement required employees but not employer to arbitrate claims, provided one year limitations period for bringing claims, bilateral fee shifting, required that employee pay arbitration filing fee, limited total damages, and precluded punitive damages); *Armendariz v. Foundation Health Psyche Services, Inc.*, 24 Cal.4th 83 (2000) (unilateral arbitration clause requiring employee only to arbitrate and unlawful damages provision, limiting employee damages to backpay); *Pinela v. Neiman Marcus* 238 Cal.App.4th 227 (2015) (Texas choice of law provision precluded California state law unconscionability defense and disabled California substantive law where employee's wage and hour claims based on state statutes); *Samaniego v. Empire Today LLC*, 205 Cal.App.4th 1138 (2012) (employees who spoke Spanish and did not read English were given arbitration agreement in English despite asking for translation, Illinois choice of law provision limited California employee's substantive rights, shortened period of limitations, employee obligated to pay employer's attorney's fees, and claims exempted from arbitration favored employer); *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519 (1997) (arbitration agreement found unconscionable based on unilateral right for employer to litigate in court, employee loss of salary during dispute, one year statute of limitations, and employee recovery limited to contract damages).

[4] Under the FAA's savings clause, arbitration agreements are not enforceable under "grounds as exist in or equity for the revocation of any contract." 9 U.S.C. § 2.

terminated or never-hired individual has no recourse if the employer retaliates, terminates, or refuses to hire the person when they refuse to sign an unenforceable arbitration agreement. Even if a proposed contract provision is clearly unenforceable, an employee must accept the terms or face termination or not getting the job. Striking down AB 51 in its entirety essentially weaponizes even an illegal and unenforceable arbitration agreement. The FAA does not bestow upon unlawful arbitration agreements such a power. In fact, Defendants-Appellants are aware of no parallel where a statute is struck down because it prohibits the use of unlawful and unenforceable contracts. The FAA does not require immunity for employers who use mandatory *unlawful and unenforceable* arbitration agreements.

Under the district court's overly-broad order, employers could root decisions that are arguably discriminatory (race, sex, age, religion, etc.) with an effort to compel an employee's submission to patently unlawful arbitration terms, such as limiting damages available to contract damages only, reducing the statute of limitations, restricting employee claims with no reciprocal employer restriction, use of state law with no connection to the dispute, requirement that employee litigate out of state, forcing employee to pay all fees, allowing an employer withhold employee's salary during dispute, and agreement drafted in a language that employee does not read or

perhaps understand. While such an arbitration agreement would clearly be deemed unlawful and unenforceable—as courts have already done—AB 51 prohibits employers from requiring prospective or current employees from signing such a patently illegal arbitration agreement. Absent intervention from this Court, many employees will be subjected to unlawful arbitration agreements that are unenforceable under the FAA, based on the uneven bargaining power at play, particularly in present economic circumstances. An employee who declines to sign a patently illegal arbitration agreement can be fired, demoted, hours reduced, or not hired. And such employment decisions could be pretextual, hiding discriminatory motive; put differently, an employer seeking to discriminate against an employee based on a protected characteristic could compel the employee to sign a facially unconscionable arbitration agreement and then freely terminate an employee that declines, thereby laundering the discrimination.

AB 51, specifically Section 432.6(b), protects employees and applicants from this circumstance, and it regulates employer conduct outside the reach of FAA preemption. Under AB 51, employees or applicants could submit a complaint when they sought to negotiate terms of a clearly unconscionable arbitration clause, which attempt resulted in their termination or other retaliation. AB 51 will deter the use of demonstrably

unconscionable agreements, likely resulting in fairer, better, and ultimately more enforceable agreements.

While the FAA may promote arbitration and reflect a "national policy favoring arbitration," *Concepcion*, 563 U.S. at 345-346, such a policy does not mean arbitration must be promoted in every situation a party intones the word "arbitration." That fewer employees may enter into arbitration agreements because they are not required to enter into them as a condition of employment is not contrary to the FAA's purposes and goals. The FAA was never meant to elevate—or even weaponize—arbitration agreements against America's workforce. Rather, the FAA is designed to put arbitration agreements on equal footing with other contracts. Yet, the court's order effectively creates an affirmative right for employers to force employees to waive rights they do not want to waive as a condition of employment, and discriminate or retaliate against current employees or applicants who do not wish to waive their rights and protections under California law—even where the arbitration agreement is patently unlawful and unenforceable. Specifically, the court made the unprecedented and unqualified conclusion that "an employer can, as a condition of employment, require an applicant or employee to enter into mandatory arbitration agreements." (ER 34:27-28.) It then determined that, given this new right to require arbitration as a

condition of employment, employers were allowed to retaliate and discriminate against employees and others seeking to be hired who did not want to enter into such agreements. (ER 34-35.)

The FAA was designed to curb "widespread judicial hostility to arbitration agreements," *Concepcion*, 563 U.S. at 339, and the FAA Section 2's language focuses on contract validity and enforceability. However, it contains no language regulating the state, does not create any "obligations" incumbent on the state, and does not refer to any group of protected individuals or businesses. *See Alexander v. Sandoval*, 523 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"). As explained in further detail in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 25 n.32 (1983):

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. IV) or otherwise.

The FAA does not establish affirmative rights. In fact, absent a federal question or diversity jurisdiction, a case based merely on the FAA should be

dismissed. *See Luong v. Circuit City Stores, Inc*., 368 F.3d 1109, 1111 (9th Cir. 2004) (citing *Cone Mem'l Hosp*., 460 U.S. at 25 n. 32); *Kehr v. Smith Barney, Harris Upham & Co*., 736 F.2d 1283, 1287–88 (9th Cir. 1984); *Samsung Elecs. Am., Inc. v. Ramirez*, No. 1:17-cv-01462-AWI-SAB, 2018 WL 2198721, at *6 (E.D. Cal. May 14, 2018), *aff'd*, 777 F. App'x 243 (9th Cir. 2019). Contrary to the court's interpretation, the FAA does not confer an affirmative right to force arbitration, or rights to discriminate or retaliate against employees that do not enter into arbitration agreements. (ER 34-35.) Instead, the FAA simply does not apply here in the first place.

Furthermore, federal policy favoring arbitration does not favor enforcement of any arbitration agreement not validly created under state contract law. 9 U.S.C. §§ 1-14. And, as a natural extension of this policy, the FAA should not support forcing persons into agreements not validly created under state contract law in the first place. Implicit in the Supreme Court's "consent, not coercion" decree, is the ability of a party to negotiate or decline a term they believe is patently unfair or unconscionable. Neither the FAA nor the fundamental attributes of arbitration support insulating those employers who force unlawful arbitration agreements on prospective and current employees from the liability created by Labor Code section 432.6. In no other area of law is an invalid and unenforceable contract

enshrined with the unbridled power to create immunity from the Legislature's mandate.

The FAA policy favoring arbitration has no application in a context where no enforceable arbitration agreement exists, and even less so where there is no agreement to enforce in any case. *Accord* Cal. Lab. Code § 432.6(b). To hold otherwise would allow unscrupulous employers to use unlawful and unenforceable arbitration agreements against employees by requiring employees to submit to such terms as a condition of employment. Few employees are in a position to refuse a job because of an arbitration requirement. And given the extraordinary levels of unemployment due to nationwide COVID-19 shutdowns, a worker walking away from a job is simply not a real option.[5] The mere threat of an employer's enforcement of an illegal agreement to coerce a workforce into submission is an improper power. The FAA compels no such injustice.

The creation of a right to discriminate against employees who will not waive their rights—in the abstract where no actual agreements are at issue

[5] More than 36 million unemployment claims have been made since the beginning of the COVID-19 crisis. *See* Patricia Cohen, Tiffany Hsu, "'Rolling Shock' as Job Losses Mount Even With Reopenings," N.Y. Times, May 14, 2020, https://www.nytimes.com/2020/05/14/business/economy/coronavirus-unemployment-claims.html (last visited May 18, 2020).

and even where the agreement is illegal and unenforceable—is a troubling consequence of the misapplication of FAA preemption to the Labor Code. Employers can change the terms and conditions of employment on a whim, or mask discriminatory motive behind illegal and unenforceable arbitration agreements that employees will not agree to. This injustice further demonstrates why the FAA does not apply to AB 51, and the court's order should be reversed.

B. It Is Not Likely that AB 51 Singles Out Arbitration for Unequal Treatment, Places Arbitration Agreements on Unequal Footing, or Effects an Imbalance in the Enforcement of Arbitration Versus Other Agreements.

The district court erred in misapplying *Blair v. Rent-A-Ctr., Inc*., 928 F.3d 819 (9th Cir. 2019), and other authorities to expand the reach of FAA preemption. AB 51 simply regulates unfair employment practices. 2019 Cal. Stats. Ch. 711 (A.B. 51) (Legislative Counsel's Digest), at § 2 (adding Cal. Gov't Code § 12953). It neither discriminates against nor otherwise places arbitration agreements on unequal footing with other agreements.

The district court's order found that "[i]n its expressed purpose, and its operation, AB 51 singles out the requirement of entering into arbitration agreements and thus subjects these kind of agreements to unequal treatment." (ER 20:4-6.) The order concluded:

> It is AB 51's embodiment of a "legal rule hinging on the primary characteristic of an arbitration agreement," *Kindred*, 137 S. Ct. at 1427, and placing "arbitration agreements in a class apart from 'any contract,'" *Casarotto*, 517 U.S. at 688, that is the law's fatal flaw. AB 51's prohibition on California employers' use of "right, forum, or procedure" waivers as a condition of employment, Cal. Lab. Code § 432.6(a), "oh so coincidentally" disfavors contracts with the "defining features" of arbitration. *Kindred*, 137 S. Ct. at 1426.

(ER 21:16-21.) The court also relied on AB 51's legislative history to show it targeted arbitration agreements (ER 22:5-17), and then found that employers were likely to be deterred from using arbitration agreements at all if they were not allowed to force them on employees and applicants on a take-it-or-leave-it basis. (ER 23:1-2.) The court erred in each of its conclusions.

1. Contrary to the Court's Order, *Kindred Nursing* and *Casarotto* Demonstrate why AB 51 Is Likely Not Preempted.

The Supreme Court has held that, under Section 2 of the FAA, "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 563 U.S. at 339, *accord Lamps Plus*, 139 S. Ct. at 1412. This admonition goes to the enforceability, on equal terms, of contracts, not to employer policies or practices.

In *Blair*, this court considered the equal-footing concept, recognizing that "a rule is generally applicable if it 'appl[ies] equally to arbitration and non-arbitration agreements.'" 928 F.3d at 825 (quoting *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015)). This Court continued: "[b]y contrast, a rule is not generally applicable if it 'prohibits outright the arbitration of a particular type of claim.'" *Id.* (quoting *Concepcion*, 563 U.S. at 341). While AB 51 does not apply to agreements, for sake of argument, in the context of this analysis it is generally applicable to all employment policies requiring old and new employees to waive state labor and employment procedures and protections as a condition of employment or continued employment. It does not prohibit the arbitration of any type of claim, rather, it addresses employment practices and equity in the employer-employee relationship.

AB 51 is not like the statutes at issue in *Casarotto*, 517 U.S. 681, and *Kindred Nursing*, 137 S. Ct. 1421, the two primary cases the district court relied on in making its equal-footing decision. (ER 21.) The laws at issue in *Casarotto* and *Kindred Nursing* specifically targeted arbitration agreements for unfavorable treatment by creating obstacles to enforcement tethered to contract conditions. The cases provide an instructive contrast to the present

case, which in no way creates a condition to the formation, validity, or enforcement of arbitration agreements.

In *Casarotto*, a Montana statute declared an arbitration clause unenforceable unless "'[n]otice that [the] contract is subject to arbitration' is 'typed in underlined capital letters on the first page of the contract.'" 517 U.S. at 683 (modifications in the original). In reviewing the courts' decisions below invalidating an arbitration clause in a Subway restaurant franchise agreement, the Court held that the "first-page notice requirement, which governs not 'any contract,' but specifically and solely contracts 'subject to arbitration,'" conflicted with the FAA. *Id.* The Montana law specifically applied to arbitration agreements and undermined their validity and enforceability by creating a condition to enforcement.

The Supreme Court's decision in *Kindred Nursing* is also distinguishable and is instructive as to where to draw the line between FAA preemption and the States' authority to regulate unfair employment practices. There, the Court invalidated a Kentucky rule requiring express authorization in a power-of-attorney before an individual's representative could waive the right to adjudication before a judge or jury on behalf of their principal—known as the clear-statement rule. *Kindred Nursing*, 137 S. Ct. at 1424-25. The clear-statement rule interfered with arbitration agreements

and was preempted because (1) the Kentucky court announced the rule specifically to limit authority of powers of attorney to waive the right to adjudication before a judge or jury through arbitration agreements, and (2) the rule created a barrier to enforcement of arbitration agreements by imposing additional requirements to demonstrate the validity of an arbitration agreement. *Id.* at 1426-29.

AB 51 does not preclude or affect the enforceability of arbitration agreements as the state laws in *Casarotto* and *Kindred Nursing* did. AB 51 does not specifically apply to arbitration agreements, nor does it undermine their validity and enforceability by creating a condition to enforcement. Moreover, unlike the laws at issue in those cases, AB 51 applies broadly to a range of employment practices and policies, which encompass but are not limited to arbitration agreements, either expressly (*Casrarotto*) or in practical effect (*Kindred Nursing*). Again, AB 51 only applies to employment practices and policies, but if it did apply to contracts, it is neutral as to arbitration and parties are free to enter into arbitration agreements without restriction. Moreover, the law in no way affects the validity or enforceability of arbitration agreements—even those entered into in violation of Section 432.6(a). *See* Cal. Lab. Code. § 432.6(f); Assembly

Committee on Labor and Employment Bill Analysis (A.B. 51), March 4, 2019, at 2.

Furthermore, while *Kindred Nursing* admonished that "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made[,]" *Kindred Nursing*, 137 S. Ct. at 1428, AB 51 differs considerably from Kentucky's clear-statement rule because it does not concern contract formation or validity, it does not create barriers to enforcement, and it does not single out of arbitration agreements for regulation. Employees and employers can freely enter into arbitration agreements. And even where employers' policies violate Section 432.6(a), employees cannot rely on Section 432.6(a) to argue the agreement is invalid. Cal. Lab. Code § 432.6(f). This is explicit in AB 51's legislative history:

> the bill's provisions regarding waivers shall not be construed to provide a basis on which to challenge the validity, enforceability, or conscionability of any contract or provision therein, once lawfully executed, nor to restrict or expand other legal grounds to challenge the validity, enforceability, or conscionability of a contract or provision therein, once executed.

Assembly Committee on Labor and Employment Bill Analysis (A.B. 51), March 4, 2019, at 2 (emphasis added); *see also* Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 10. AB 51 focuses on employer

behavior, not contract formation, and "AB 51 would not selectively invalidate arbitration contracts because [they are] improperly formed." Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 10. AB 51 merely seeks to ensure parties entering into waiver agreements do so consensually, consistent with the FAA.

Moreover, contrary to the court's holding below (ER 23), AB 51 does not subject arbitration agreements, "by virtue of their defining trait, to uncommon barriers," *Kindred Nursing*, 137 S. Ct. at 1427. AB 51 addresses unfair employment practices, not the formation of arbitration agreements (or any agreement) or the conditions that must be shown to demonstrate that an arbitration agreement (or any agreement) is either valid or invalid. There is no barrier, common or uncommon, to entering into arbitration agreements. Unlike the clear-statement rule in *Kindred Nursing* that was framed as protecting the fundamental right to trial by judge or jury and applied to no other fundamental right, *id.* ("No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees."), AB 51 is neutral and does not disfavor arbitration. It applies generally to any employer hiring policy or employment practice that ***requires*** waiver of "any right, forum, or procedure" (Section 432.6(a)); therefore, *Preston v. Ferrer*, 522 U.S. 346

(2008) (FAA preempts code provisions that disfavor arbitration), *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (same), and similar cases are not implicated here.

AB 51 does not create an imbalance in the enforcement of arbitration agreements vis-à-vis other types of contracts. It is meant to ensure a measure of equity in employee-employer relationships. For example, requiring a twenty-year employee to enter into an agreement to waive state labor and employment protections as well as, among other rights, the Seventh Amendment right to a jury,[6] on pain of termination, does not promote an FAA objective. The twenty-year employee is already an employee, and is not in a position to "take-it-or-leave-it," based on a new condition of employment. (ER 19.) Given the extreme unemployment rates in current times due to COVID-19, employees scrambling for employment are also not in a position to "take-it-or-leave-it." AB 51's prohibition of this

[6] Ensuring that waivers of constitutional rights, such as the right to civil trial by jury under the Seventh Amendment, are consensual is at the fore of the Supreme Court's "consent, not coercion" mantra; the right of employees to choose whether or not to waive such rights is foundational to the FAA. *See, e.g., Lamps Plus*, 139 S. Ct. at 1415–16; *Stolt-Nielsen*, 559 U.S. at 681; *Granite Rock*, 561 U.S. at 299; *Howsam*, 537 U.S. at 83; *First Options of Chicago*, 514 U.S. at 943; *Mastrobuono*, 514 U.S. at 57; *Volt Information Sciences*, 489 U.S. at 479; and *Mitsubishi Motors*, 473 U.S. at 626. Because AB 51 is not limited only to this right, however, it is quite different from the clear-statement rule at issue in *Kindred Nursing*.

circumstance has nothing to do with the enforcement of arbitration agreements on unequal footing with other contracts. The district court's order should be reversed.

2. AB 51's Legislative History Shows the Bill Targeted Employer *Policies* of Forcing Waivers on Current and Prospective Employees; It Did Not Target Arbitration Agreements.

The district court raised concern about the legislative history of AB 51, and found that the underlying intent of the law was to disfavor arbitration agreements and put them on unequal footing with other agreements. (ER 19, 22.) But the court should not have engaged in the analysis of the Legislature's motives, and it was incorrect in its reading of the history in any case.

The Supreme Court has repeatedly recognized "that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). Such inquiries "are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1982), fraught with "evidentiary difficulty," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). After all, "[w]hat motivates one legislator to make a

speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384.

Even where an inquiry into legislative motive or purpose is called for, "the Supreme Court has consistently held that statutory construction must begin with the language employed by [the legislature] and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 401 (9th Cir. 2015); *accord HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019). Courts must "assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislature.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)) (emphasis added). The court should not have determined that the true intent of the Legislation in passing AB 51 was to undermine the use of arbitration agreements, particularly when the statute is clear on its face and the legislative history focused on policies compelling employee agreement to arbitration agreements as a condition of employment, not arbitration agreements themselves.

In fact, AB 51's legislative history reflects favorably on the arbitration mechanism: "[a]rbitration is a highly effective dispute resolution method when both parties chose it freely." Senate Floor Analysis (A.B. 51), Sept. 1, 2019, at 3; *see also* Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 3 ("Alternative dispute resolution mechanisms, arbitration among them, can provide companies and their workers with relatively inexpensive, informal options for resolving workplace claims.").

To the extent the Court finds the legislative history and intent critical to its equal-footing analysis, the target of the law and the intent of the legislature appears focused on the dangers of ***forced*** arbitration and similar waivers that close the door to the California Labor Commissioner and Department of Fair Employment and Housing. *See*, *e.g.*, Senate Floor Analysis (A.B. 51), Sept. 1, 2019, at 3 ("[Arbitration] is far less successful when the more powerful party forces the other to accept the terms"); Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 4 ("Whatever other purposes this contractual tool may serve, the #MeToo movement has made it clear that forced arbitration agreements can and do enable serial perpetrators to evade public detection and escape accountability.").

The Legislature was focused on employer policies and practices, not on hampering the enforcement of or eliminating arbitration agreements.

3. It Was Error To Find that Under AB 51 Employers Will Likely Be Deterred from Using Arbitration Agreements.

There is no reason to believe AB 51 would deter employers from using arbitration agreements entirely. Indeed, the law is meant to deter employers from forcing waivers of rights on applicants or employees on a take-it-or-leave-it basis. However, the court found that since an employer may be sanctioned for requiring an arbitration agreement as a condition of employment, it is likely that employers would be deterred from using arbitration agreements at all; therefore, "AB 51's design does not comport with the equal footing principle and its effort to avoid FAA preemption fails." (ER 23:1-2.)

AB 51 merely calls for employers to eliminate the practice of forcing employees to waive their rights, whether in the form of arbitration agreements or otherwise. It does not follow that eliminating the practice or policy of requiring arbitration agreements as a condition of employment will result in discontinuing the use of arbitration agreements altogether.

While arbitration agreements cannot be disfavored, they also cannot be exalted above other contracts. *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 n. 12, (1967) (the FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so."). The

court's order specifically singles out arbitration agreements subject to the FAA for special treatment above other agreements and arbitration agreements not otherwise subject to the FAA.[7] And because AB 51 does not fit comfortably into the preemption analysis, as a practical matter, the order effectively created a right to mandate arbitration as a condition of employment in order to invalidate a law that regulates employer policies. The court's order finding it likely that AB 51 is preempted under the FAA because it discriminates against arbitration agreements was based on legal error and should be reversed.

C. The Court Erred Finding AB 51 Likely Interferes with Arbitration Because It Contains an Enforcement Mechanism that May Deter Some Employers from Utilizing Arbitration Agreements Altogether.

The district court's conclusion that "AB 51 will likely have a deterrent effect on employers' use of arbitration agreements given the civil and

[7] The district court's order's reference to "an arbitration agreement covered by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA")" does not remedy its overbreadth. (ER 36.) That phrase acknowledges the Supreme Court's decision last year in *New Prime Inc. v. Oliveira*, 586 U.S.__, 139 S. Ct. 532 (2019). There, the Court affirmed denial of a petition to compel arbitration where the dispute was not covered by the FAA because it fell within the exclusion of section 1 exempting disputes involving "contracts of employment" of certain transportation workers. *Id.*, 139 S. Ct. at 537-538. "While a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional." *Id.* at 537.

criminal sanctions associated with violating the law" (ER 23:28-24:2), improperly assumes employers that use arbitration agreements under policies requiring them as a condition of employment will not simply eliminate the policy and enter into agreements voluntarily. It also assumes that the FAA favors arbitration at all costs, preferring forced agreements over consensual because the end goal is to promote arbitration agreements in the highest possible numbers.

The district court's order found 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." (ER 23:38-24:2.) Because AB 51 can be enforced, the court concluded "that the law also interferes with the FAA and for this reason as well is preempted." (ER 25:3-4.)

Supporting its decision, the court again cites to *Blair*, but quotes only a portion of the opinion's relevant analysis (ER 23), which states a "'doctrine normally thought to be generally applicable' is nonetheless preempted by the FAA if it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Blair*, 928 F.3d at 828 (quoting *Concepcion*, 563 U.S. at 341, 343). But *Blair* and *Conception* continued in their explanation of the FAA's

objectives, where the district court did not. (ER 23.) *Blair*, quoting *Conception*, further analyzed the type of interference subject to preemption:

> One objective of the FAA is to enforce arbitration agreements according to their terms "so as to facilitate streamlined proceedings." [*Concepcion*, 563 U.S.] at 344, 131 S.Ct. 1740. However, we "do not read *Concepcion* to require the enforcement of all waivers of representative claims in arbitration agreements." *Sakkab*, 803 F.3d at 436. Instead, "Congress plainly . . . intend[ed] to preempt ... only those [state contract defenses] that 'interfere[ ] with arbitration.'" *Id.* at 434 (quoting *Concepcion*, 563 U.S. at 346, 131 S.Ct. 1740).

Blair, 928 F.3d at 828 (modifications in the original).

AB 51 does not create a new contract defense that interferes with arbitration. Indeed, it specifically indicates that it does not create a contract defense to arbitration agreements: "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)." Cal. Lab. Code § 432.6(f). And it does not conflict with the FAA or pose any obstacle to the achievement of the FAA's purpose of enforcing arbitration agreements according to their terms. Instead, its focus is on *forced* waivers of rights and procedures. By regulating employment practices, AB 51 seeks to ensure that any waiver of rights and remedies in the employment context is consensual.

This is fully consistent with the spirit and foundational principles of the FAA.

Even arbitration agreements entered into as a condition of employment after AB 51 becomes effective will be enforceable because it is only the conduct of employers that is at issue, not the agreements themselves. *See* Section 432.6(f); Assembly Committee on Labor and Employment Bill Analysis (A.B. 51), March 4, 2019, at 2; Senate Judiciary Committee Bill Analysis (A.B. 51), July 8, 2019, at 10. AB 51 does not interfere with the concept of arbitration or any policy favoring arbitration.

Finally, the court's focus on penalties for violating AB 51,[8] and its concern that employers who subscribe to forced-arbitration policies might be discouraged by the penalties to use voluntary arbitration as an alternative dispute mechanism (ER 23-25), has no place in the analysis here. There is no legal authority that supports a holding that the potential for unhappy employers to stop utilizing arbitration on a consensual basis equates to interference with arbitration. There is nothing unusual about the penalties here, and the court acknowledged that AB 51 does not create new sanctions

[8] AB 51 provides for civil enforcement of its provisions. *See* Cal. Gov't Code §§ 12953, 12963.7, 12965. And while AB 51 did not create a new criminal sanction, violations could also be charged as a misdemeanor. Cal. Lab. Code § 433.

specific to violations of this law. (ER 24.) The same penalties apply generally to other violations of the Labor Code or FEHA. (*Id.*) The penalties apply so the provisions can be enforced. If certain employers will only utilize arbitration if they can force it on employees, then that is an individual decision made by these employers that is immaterial to the preemption analysis here. Penalties are merely instruments of enforcement, and AB 51 is no different than other laws in this regard.

II. BECAUSE PREEMPTION DOES NOT APPLY, PLAINTIFFS CANNOT ESTABLISH THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

Plaintiffs cannot show a likelihood of success on the merits, and "[b]ecause it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, [the Court] need not consider the remaining three *Winter* elements." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). In the absence of preemption, Plaintiffs cannot establish the remaining elements for a preliminary injunction; therefore, the Court should reverse the decision of the district court and deny the motion for preliminary injunction.

III. UNENFORCEABLE PROVISIONS OF THE STATUTE MAY BE SEVERED.

Should this Court find that one of the key provisions of the statute is not enforceable as applied to arbitration agreements, and the other is not

preempted by the FAA, the enforceable provision may be severed and effectuated on its own.

Whether a portion of a state statute is severable from the remainder of the statute is a question of state law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is . . . a matter of state law."). Under California law, the existence of a severability clause within the statute "establishes a presumption in favor of severance." *Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal. 4th 231, 271 (2011) (citing *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 331 (1975)). The final determination of severability depends on whether "'the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute,'" *Santa Barbara Sch. Dist.*, 13 Cal. 3d at 331 (quoting *In re Bell*, 19 Cal.2d 488, 498 (1942)).

AB 51 contains a severability clause and the presumption in favor of severability applies. California Labor Code section 432.6(i) states:

> The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect the other provisions or applications that can be given effect without the invalid provision or application.

The district court acknowledged the validity of the severability clause in modifying its temporary restraining order (ER 98-99) and in limiting the

applicability of its preliminary injunction without invalidating the entire statute. (ER 36.) By its limitation and in its analysis, the court agreed that AB 51 applies to more than just hiring or employment policies requiring arbitration agreements as a condition of employment. (*See id.*; ER 34.) It applies to a host of other types of waivers and to employers with employees not subject to the FAA.[9] The court found the *application* of Section 432.6, subdivisions (a) and (b), to forced-arbitration policies unenforceable, but the application of those provisions to non-arbitration waivers or employees not subject to the FAA survived intact. (ER 36.) In making this finding, the court necessarily found Section 432.6(i) valid, and that the intention of the California Legislature was that the statute should survive.

In this vein, Section 432.6 subdivisions (a) and (b) stand independently of each other, should the Court find one provision is unenforceable and the other is not, which was the intent of the California Legislature when it

[9] More than 1.16 million transportation workers in California are not covered as a result of the FAA exemption under 9 U.S.C. § 1 ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"; *see also Harden v. Roadway Package Systems, Inc.*, 249 F. 3d 1137, 1140 (9th Cir. 2001)). *See* May 2018 State Occupational Employment and Wage Estimates, California, Transportation and Material Moving Occupations, line 53-0000, 2018 Bureau of Labor Statistics https://www.bls.gov/oes/current/oes_ca.htm#53-0000 (last visited on May 18, 2020).

included the severability clause. Accordingly, in the event this Court does find subdivision (a) preempted and unenforceable as it concerns entry into arbitration agreements covered by the FAA, subdivision (b) should independently survive without limitation. Similarly, if the Court were to find subdivision (b) preempted, and subdivision (a) valid, subdivision (a) stands on its own independent of subdivision (b).

Finally, if the Court believes potential criminal liability under California Labor Code section 433 will deter the use of arbitration agreements by employers and therefore such penalties interfere with arbitration and are not enforceable, the statute would survive and remain enforceable without the criminal penalties. The Legislature provided for another mechanism for enforcement, which allows the statute to survive as intended. *See* Cal. Gov't Code § 12953 (declaring Labor Code section 432.6 a violation under FEHA); *id*. §§ 12963.7, 12965 (providing enforcement procedures for DFEH Director to follow and private right-to-sue options attendant thereto).

CONCLUSION

For the forgoing reasons, the Defendants-Appellants request that this Court reverse the district court's order granting the motion for preliminary injunction. And should the Court affirm the district court's preemption

analysis of any, but not all of the provisions of the statue, the Court should find AB 51 is severable and allow the enforceable sections to survive.

Dated: May 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 27(d)(2)
FOR 20-15291

Pursuant to Federal Rules of Appellate Procedure 28 and 32, I certify that the attached Defendants-Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points, was produced on a computer and, according to the word count of the computer program used to prepare the Opening Brief, contains 11,909 words, exclusive of those items set forth in Federal Rule of Appellate Procedure 32(f), within the above-stated limits applicable to said Brief.

May 18, 2020
Dated

s/ Chad A. Stegeman
Chad A. Stegeman
Deputy Attorney General

SA2019104158

CERTIFICATE OF SERVICE

Case Name: ***Chamber of Commerce of the United States of America, et al. v. Xavier Becerra, et al.*** Case No. **20-15291**

I hereby certify that on May 18, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS-APPELLANTS' OPENING BRIEF**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 18, 2020, at San Francisco, California.

M. Mendiola
Declarant

Signature

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