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California Association for Health Services
at Home*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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 CALIFORNIA
ASSOCIATION FOR HEALTH SERVICES
AT HOME,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
the Attorney General of the State of California,
LILIA GARCIA BROWER,
in her official capacity as the Labor
Commissioner of the State of California, JULIE
A. SU, in her official capacity as the Secretary
of the California Labor and Workforce
Development Agency, and KEVIN KISH, in his
official capacity as Director of the
Department of Fair Employment and Housing of
the State of California.

Defendants.

Case No. 2:19-cv-02456-KJM-DB

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR A TEMPORARY
RESTRAINING ORDER**

Proposed Hearing Date: December 19, 2019
Proposed Hearing Time: 2:00 p.m.
Courtroom: 3, 15th Floor

Hon. Kimberly J. Mueller

ORAL ARGUMENT REQUESTED

1 TO DEFENDANTS XAVIER BECERRA, in his official capacity as the Attorney General
2 of the State of California, LILIA GARCIA BROWER, in her official capacity as the Labor
3 Commissioner of the State of California, JULIA A. SU, in her official capacity as the Secretary of
4 the California Labor and Workforce Development Agency, and KEVIN KISH, in his official
5 capacity as Director of the California Department of Fair Employment and Housing (collectively,
6 “Defendants”), AND THEIR COUNSEL OF RECORD:
7

8 PLEASE TAKE NOTICE THAT, on December 19, 2019, or as soon thereafter as the
9 matter may be heard, Plaintiffs the Chamber of Commerce of the United States of America (the
10 “U.S. Chamber”), the California Chamber of Commerce (the “CalChamber”), the National Retail
11 Federation (“NRF”), the California Retailers Association (“CRA”), the National Association of
12 Security Companies (“NASCO”), the Home Care Association of America (“HCAOA”), and the
13 California Association For Health Services At Home (“CAHSAH”) (collectively, “Plaintiffs”) will
14 and hereby do make the following motion before the Honorable Kimberly J. Mueller, at the Robert
15 T. Matsui United States Courthouse, 501 I Street, Sacramento, CA, Courtroom 3, 15th Floor.
16

17 Plaintiffs respectfully move this Court for a temporary restraining order prohibiting
18 Defendants from enforcing Assembly Bill 51, or AB 51, pending the Court’s ruling on Plaintiffs’
19 previously filed motion for a preliminary injunction. The motion for a preliminary injunction is
20 currently set to be heard on January 10, 2020, but AB 51 goes into effect nine days earlier on
21 January 1, 2020. This motion is made pursuant to Federal Rule of Civil Procedure 65 and Local
22 Civil Rule 231, on the grounds that Plaintiffs are likely to prevail on the merits of their claims,
23 they will suffer irreparable injury if a temporary restraining order is not granted, and the balance
24 of equities and consideration of the public interest weigh in favor of granting a temporary
25 restraining order, as well as on the grounds that Plaintiffs have no other adequate legal remedy to
26 preserve the status quo before the Court can resolve Plaintiffs’ pending motion for a preliminary
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1 injunction. This motion is based on Plaintiffs' Complaint; the memorandum of law in support of
2 this motion; Plaintiffs' Motion for a Preliminary Injunction (Dkt. 5), and the memorandum of law
3 in support thereof (Dkt. 5-1); the Declaration of Brian Maas, which reflects the existence of
4 irreparable injury should AB 51 come into effect even on a temporary basis (Dkt. 5-2); and the
5 Declaration of Donald M. Falk, which explains the notice given to Defendants' counsel and the
6 efforts on the part of Plaintiffs' counsel to make it unnecessary to file this motion; and any such
7 testimony, evidence, or argument that may be submitted to the Court.
8

9 Before filing this Motion, Plaintiffs' counsel sought to confer with Defendants' counsel
10 regarding Plaintiffs' intent to seek a temporary restraining order, the anticipated timing of the
11 hearing to be requested of the Court, and the nature of the relief to be requested. Defendants were
12 not yet able to stipulate to an agreement that would avoid the need for this Court's intervention,
13 necessitating the filing of this Motion. Deputy Attorney General Chad Stegeman has not yet been
14 formally authorized to represent Defendants Brower, Su, and Kish, and so was unable to state
15 Defendants' position. Plaintiffs have provided courtesy copies of this Notice, Motion, and
16 accompanying papers, to the persons we understand to be responsible for the representation of the
17 other Defendants. Plaintiffs already served all Defendants with a Motion for a Preliminary
18 Injunction with a hearing date of January 10, 2020.
19
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22 Dated: December 16, 2019

Respectfully submitted,

23
24 By: /s/ Donald M. Falk
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California Retailers Association, National
Association of Security Companies, Home Care
Association of America, and California Association
for Health Services at Home*

** Motion for Admission Pro Hac Vice To Be Filed*

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

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 CALIFORNIA
ASSOCIATION FOR HEALTH SERVICES
AT HOME,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
the Attorney General of the State of California,
LILIA GARCIA BROWER,
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Commissioner of the State of California, JULIE
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Department of Fair Employment and Housing of
the State of California.

Defendants.

Case No. 2:19-cv-02456-KJM-DB

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER**

Proposed Hearing Date: December 19, 2019
Proposed Hearing Time: 2:00 p.m.
Courtroom: 3, 15th Floor

Hon. Kimberly J. Mueller

ORAL ARGUMENT REQUESTED

1 INTRODUCTION

2 As the clock strikes midnight on January 1, 2020, Assembly Bill 51 (“AB 51”) will
3 criminalize the use of arbitration agreements that are protected under federal law. Without this
4 Court’s urgent intervention, Plaintiffs and their members will face immediate, irreparable harm,
5 as businesses operating in California must choose whether to comply with a state law that is clearly
6 preempted and thus unconstitutional or face the risk of criminal sanctions. That would deprive
7 employers and employees alike of the recognized and “real benefits” of arbitration, which
8 “allow[s] parties to avoid the costs of litigation, a benefit that may be of particular importance in
9 employment litigation, which often involves smaller sums of money than disputes concerning
10 commercial contracts.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). The
11 Court should enter a temporary restraining order to maintain the status quo and allow this Court to
12 hear and decide Plaintiffs’ pending motion for a preliminary injunction.

13 The Supreme Court has spoken with unmistakable clarity on the legal principles that
14 control this case. The Federal Arbitration Act (FAA) “reflects an emphatic federal policy in favor
15 of arbitral dispute resolution.” *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012)
16 (per curiam) (quotation marks omitted). “The FAA’s displacement of conflicting state law is ‘now
17 well-established.’” *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (Ginsburg, J.) (explaining that
18 FAA preempted California law). And “[a] rule selectively finding arbitration contracts invalid
19 because improperly formed fares no better under the Act than a rule selectively refusing to enforce
20 those agreements once properly made.” *Kindred Nursing Ctrs. Ltd. P’Ship v. Clark*, 137 S. Ct.
21 1421, 1428 (2017). Governor Brown vetoed the nearly identical predecessor of AB 51, noting that
22 its restrictions on the formation of arbitration agreements were preempted under *Kindred*.¹ Yet
23 AB 51 contains the same restrictions, while Supreme Court precedent is unchanged.

24 Businesses around the country, including in California, routinely enter into arbitration
25 agreements with workers, either as a condition of the working relationship or on an opt-out basis,
26 so that both parties can make use of alternative dispute resolution procedures. In addition to the

27 _____
28 ¹ Governor’s Veto Message, AB 3080 (Sept. 30, 2018), available at
http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080.

1 lower expenses recognized in *Circuit City*, 532 U.S. at 122-23, arbitration is faster than litigation
2 in court and employees do at least as well in arbitration: A recent study found that employees who
3 filed claims that reached a judgment won almost three times as often in arbitration as in court—
4 32% compared to 11%—and recovered an average award nearly twice as large in arbitration. *See*
5 NDP Analytics, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10
6 (May 2019), available at [https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-](https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf)
7 [Assessment-Employment-Arbitration.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf).

8 Yet if allowed to go into effect, AB 51 will make it a *crime* for businesses to require binding
9 pre-dispute arbitration with their workers—prohibiting businesses in California from exercising
10 their federally protected rights under the Federal Arbitration Act (“FAA”).

11 Plaintiffs have already moved for a preliminary injunction against the enforcement of
12 AB 51. *See* Mot. for a Preliminary Injunction (“P.I. Mot.”), Dkt. 5. But the earliest possible
13 hearing date for that motion under the local rules is January 10, 2020—nine days after AB 51 goes
14 into effect. *Id.* To avoid incurring irreparable harms should AB 51 be enforced during that gap,
15 Plaintiffs have asked Defendants to agree to halt their enforcement of AB 51 until this Court
16 resolves the pending motion for a preliminary injunction. Plaintiffs hope that the parties will be
17 able to reach an agreement, avoiding the need for this Court’s intervention. But in the absence of
18 such an agreement—and especially given the effect of the intervening holidays on the Court’s
19 schedule—Plaintiffs now seek this temporary restraining order preserve the status quo pending the
20 resolution of their preliminary injunction motion.

21 BACKGROUND

22 A. AB 51 Restricts The Ability Of Businesses To Agree To Arbitrate Disputes With 23 Their Workers.

24 AB 51 “applies to contracts for employment entered into, modified, or extended on or after
25 January 1, 2020.” Cal. Lab. Code § 432.6(h). AB 51 will amend both California’s Labor Code,
26 which creates a sweeping array of employment-related claims, and California’s Fair Housing and
27 Employment Act (“FEHA”), which creates various workplace-discrimination protections (Cal.
28 Gov’t Code § 1900 *et seq.*). The California Labor Commissioner, through the Division of Labor

1 Standards Enforcement, enforces the California Labor Code, while the Department of Fair
2 Employment and Housing enforces FEHA. *See* Cal. Lab. Code. §§ 98.7, 203, 1194, 2698-2699.6;
3 Cal. Bus. & Prof. Code § 17200 *et seq.*; Cal. Gov’t Code §§ 12960-12965.

4 AB 51 will add Section 432.6 to the Labor Code. That section will prohibit employers
5 from requiring any employee or applicant to “waive any right, forum or procedure for a violation
6 of any provision” of FEHA or the entire Labor Code, including “the right to file and pursue a civil
7 action” in “any court,” “as a condition of employment, continued employment, or the receipt of
8 any employment-related benefit.” Cal. Lab. Code § 432.6(a). Section 432.6 deems agreements
9 that allow employees to “opt out of a waiver or take any affirmative action in order to preserve
10 their rights” to impose a condition of employment. *See id.* § 432.6(c). That is, voluntary opt-out
11 procedures are treated (contrary to fact) as if they provided no option at all.

12 AB 51 imposes draconian criminal and civil penalties. Under the Labor Code, businesses
13 that violate the restrictions imposed by AB 51 are guilty of a misdemeanor (Cal. Lab. Code § 433),
14 which is punishable by imprisonment not exceeding six months or a fine not exceeding \$1,000, or
15 both (*id.* § 23). AB 51 also amends FEHA by adding Section 12953, which provides that any
16 violation of Section 432.6 in the Labor Code will be an “unlawful employment practice” under
17 FEHA, Cal. Gov’t Code § 12953, providing an additional administrative remedy (and a distinct
18 private right of action) for any violation of Labor Code section 432.6.

19 **B. Businesses Face A Genuine Threat Of Government Enforcement Of AB 51.**

20 Businesses that do not comply with AB 51 risk several types of enforcement actions by
21 Defendants:

- 22 • Because violations of Section 432.6 are misdemeanors, businesses are subject to
23 prosecution by California’s Attorney General and the District Attorneys under his
24 direct supervision, who are charged with enforcing California’s criminal laws. Cal.
25 Gov’t Code §§ 12550, 26500; Compl. ¶ 49.
- 26 • The Labor Commissioner may enforce Labor Code section 432.6 directly.
- 27 • The Director of the Department of Fair Employment and Housing may enforce
28

1 violations of that provision as violations of FEHA under Government Code section
2 12953.

3 The threat to businesses operating in California is significant, real, and imminent.

4 **ARGUMENT**

5 “Temporary restraining orders are emergency measures, intended to preserve the status quo
6 pending a fuller hearing on the injunctive relief requested.” *FreshPoint Denver Inc. v. Trinity*
7 *Fresh Distribution LLC*, 2018 WL 6696676, at *2 (E.D. Cal. Dec. 20, 2018). “Requests for
8 temporary restraining orders are governed by the same general standards that govern the issuance
9 of a preliminary injunction.” *Rhorabough v. California Dep’t of Corr.*, 2006 WL 2401928, at *1
10 (E.D. Cal. Aug. 18, 2006). A party is entitled to a preliminary injunction if it shows that (1) it is
11 “likely to succeed on the merits”; (2) it is “likely to suffer irreparable harm in the absence of
12 preliminary relief”; (3) the balance of equities tips in [its] favor”; and (4) “an injunction is in the
13 public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). Here, all
14 four factors favor Plaintiffs. The Court should grant the temporary relief requested in order to
15 prevent immediate, severe, and irreparable harm to Plaintiffs and their members that would occur
16 if Defendants are permitted to enforce AB 51 before the Court has the opportunity to resolve
17 Plaintiffs’ motion for a preliminary injunction.

18 **A. Plaintiffs Are Likely To Succeed On The Merits.**

19 Plaintiffs’ motion for a preliminary injunction details why they are likely to succeed on the
20 merits of their claims. *See* P.I. Mot. 9-13. That is because AB 51 is preempted by the FAA.

21 The preemption question is not a close call. The Supremacy Clause directs that the “laws
22 of the United States * * * shall be the supreme law of the land; and the judges in every state shall
23 be bound thereby, anything in the Constitution or laws of any State to the contrary
24 notwithstanding.” U.S. Const. art. VI, cl. 2. As a consequence, any state law that “conflicts with
25 § 2 of the Federal Arbitration Act * * * violates the Supremacy Clause,” *Southland Corp. v.*
26 *Keating*, 465 U.S. 1, 10 (1984) (provision of California Corporations Code preempted), a principle
27 that was “well-established” by 2008. *Preston*, 552 U.S. at 353. Likewise, a state law that “stands
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1 as an obstacle to the accomplishment and execution of the full purposes and objectives of
2 Congress,” as expressed in federal law, is preempted and invalid. *AT&T Mobility LLC v.*
3 *Concepcion*, 563 U.S. 333, 352 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
4 AB 51 is preempted on both grounds.

5 Section 2 of the FAA specifies that a “written provision in * * * a contract evidencing a
6 transaction involving commerce to settle by arbitration a controversy thereafter arising out of such
7 contract or transaction, * * * shall be valid, irrevocable, and enforceable, save upon such grounds
8 as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Under Section 2,
9 “courts must place arbitration agreements on an equal footing with other contracts, and enforce
10 them according to their terms.” *Concepcion*, 563 U.S. at 339; accord *Lamps Plus, Inc. v. Varela*,
11 139 S. Ct. 1407, 1412 (2019). Accordingly, the Supreme Court has repeatedly held that state laws
12 disfavoring arbitration agreements are preempted.²

13 AB 51’s restrictions on the ability of businesses to enter into arbitration agreements with
14 their workers—especially coupled with the extraordinary sanction of criminal penalties—do not
15 apply to other types of contracts and therefore violate Section 2 of the FAA. Under California
16 law, nearly any contract term may be a condition of employment or a working relationship except
17 (under AB 51) a term that requires a substitute for litigation in court. That standard is designed
18 to make arbitration agreements harder to form than other types of contracts. A rule that “singl[es]
19 out arbitration provisions for suspect status” in this manner “directly conflicts with § 2 of the
20 FAA.” *Casarotto*, 517 U.S. at 688. As the Supreme Court recently explained in *Kindred*, the
21 FAA “[b]y its terms” ... cares not only about the ‘enforce[ment]’ of arbitration agreements, but
22 also about their initial ‘valid[ity]’—that is, about what it takes to enter into them. Or said
23 otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares

24
25 ² See, e.g., *Kindred*, 137 S. Ct. at 1426 (Kentucky state-law rule requiring specific express
26 authorization in power-of-attorney before an attorney-in-fact could agree to arbitration on behalf
27 of her principal); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (Montana
28 statute conditioning enforcement of arbitration agreements on special notice requirements); *Perry*
v. Thomas, 482 U.S. 483, 491 (1987) (California Labor Code provision requiring judicial forum
for wage collection actions); *Southland*, 465 U.S. at 10 (requirement that claims under California
Franchise Investment Law be decided in court).

1 no better under the Act than a rule selectively refusing to enforce those agreements once properly
2 made.” *Kindred*, 137 S. Ct. at 1428 (holding rule of Kentucky law preempted and rejecting
3 argument that “the FAA has ‘no application’ to ‘contract formation issues’”). Indeed, the Supreme
4 Court has specifically recognized that California Labor Code provisions that disfavor arbitration
5 are preempted. *See Preston*, 552 U.S. 346; *Perry v. Thomas*, 482 U.S. 483, 484 (1987).

6 In short, Plaintiffs are likely to prevail on their claim that AB 51 violates federal law. *See*
7 P.I. Mot. 9-13.

8 **B. Plaintiffs Will Suffer Imminent Irreparable Harm In The Absence Of A**
9 **Temporary Restraining Order.**

10 If AB 51 were allowed to go into effect as scheduled on January 1, 2020, Plaintiffs and
11 their members would suffer irreparable harm before this Court could resolve their motion for a
12 preliminary injunction, set for hearing ten days later.

13 As Plaintiffs explained in their motion for a preliminary injunction, many of Plaintiffs’
14 members currently enter into arbitration agreements with workers. *See* P.I. Mot. 13. They do so
15 as a requirement for entering into a working relationship. These standard practices allow
16 businesses and workers to obtain the benefits of an arbitral forum to resolve workplace-related
17 disputes expeditiously and fairly. And businesses operating in California (and elsewhere) expect
18 that they will be able to enter into enforceable arbitration agreements—because of the FAA’s
19 protection of the enforceability of those agreements—and therefore anticipate lower legal costs
20 and more efficient dispute resolution procedures. *See* Decl. of Brian Maas ¶¶ 6-7, 21-22.

21 Unless this Court provides temporary relief now—while it considers Plaintiffs’ motion for
22 a preliminary injunction—Plaintiffs’ members will suffer significant harms that cannot be
23 corrected once inflicted, no matter how they respond to AB 51.

24 Plaintiffs’ members who refuse to comply with AB 51 in the good-faith belief that it is
25 preempted and unconstitutional face the following immediate risks that constitute irreparable
26 harm:

- 27 • Labor Code section 433 exposes businesses to an immediate risk of criminal
28 prosecution beginning on January 1, 2020. *See Ga. Latino Alliance for Human*

1 *Rights v. Governor of Ga*, 691 F.3d 1250, 1269 (11th Cir. 2012) (“[T]he threat of
2 state prosecution for crimes that conflict with federal law” amounts to irreparable
3 harm); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (affirming
4 that the “threat of prosecution under the [challenged] statute” establishes
5 irreparable harm); *see also* Maas Dec. ¶¶ 23-25.

6 • Businesses also face a serious risk of civil investigations and enforcement actions
7 under the Labor Code and FEHA. Defendants robustly enforce both statutes. *See*
8 P.I. Mot. 14.

9 On the other hand, if California businesses are coerced into compliance by the threat of
10 criminal and civil penalties, they will suffer other immediate, irreparable injuries.

11 • Businesses who comply will have to forgo their federally protected rights to enter
12 into predispute arbitration agreements with their workers, beginning on January 1,
13 2020. *Id.* at 15.

14 • Compliance will require businesses to incur immediate administrative costs to
15 redraft their contracts to omit arbitration provisions. Maas Dec. ¶¶ 17-30.

16 • These changes will result in fewer arbitration agreements being formed, and more
17 disputes being channeled into slower judicial and administrative, rather than
18 arbitral, forums. As a consequence, Plaintiffs’ members would be deprived of the
19 benefits and cost savings of arbitration. Maas Dec. ¶ 32.

20 • Were AB 51 to be invalidated later, Plaintiffs’ members could not undo the
21 consequences of changes they had made in an effort to comply with AB 51. *See*
22 Maas Dec. ¶ 34.

23 • None of these costs can be recovered with monetary damages at the conclusion of
24 the suit, because they would be barred by sovereign immunity. *See, e.g., Cal.*
25 *Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated*
26 *on other grounds by Douglas v. Indep. Living Ctr. of S. Cal, Inc.*, 565 U.S. 606
27 (2012). *See* P.I. Mot. 16.

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1 Because Plaintiffs’ members must choose between risking enforcement actions or
2 complying with an invalid law that requires them to alter their relationships with their workers and
3 incur significant costs, “a very real penalty attaches” regardless of how the members proceed. *Am.*
4 *Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009); *see also*
5 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (recognizing irreparable harm
6 where Plaintiffs’ faced a “Hobson’s choice”). In either case, the irreparable harm is clear, and can
7 be avoided only if enforcement of AB 51 is enjoined. Thus, Plaintiffs require temporary relief for
8 the brief period of time between the date AB 51 takes effect and the date this Court can resolve
9 Plaintiffs’ pending motion for a preliminary injunction.

10 **C. The Balance Of Hardships And The Public Interest Weigh Sharply In Plaintiffs’**
11 **Favor.**

12 The inquiries into the balance of the hardships and the public interest merge where the
13 government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both factors strongly support
14 issuing a temporary restraining order for the short time needed to protect Plaintiffs and their
15 members against irreparable harms prior to the Court’s resolution of the pending motion for a
16 preliminary injunction.

17 As Plaintiffs described in their motion for a preliminary injunction, allowing AB 51 to go
18 into effect would deprive businesses and their workers alike of the many benefits of arbitration.
19 P.I. Mot. 17-18. Arbitration yields benefits including “lower costs, greater efficiency and speed,
20 and the ability to choose expert adjudicators to resolve specialized disputes,” *Lamps Plus*, 139 S.
21 Ct. at 1416 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010));
22 *accord Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (one of arbitration’s
23 “advantages” is that it is “cheaper and faster than litigation”) (quotation marks omitted). It is also
24 procedurally simpler, which reduces the burdens on both parties and often allow individuals to
25 proceed without a lawyer. These benefits give the public a powerful interest in preventing
26 businesses and their workers from being deprived of the benefits of arbitration—all the more
27 because those benefits are protected under federal law.

28 In stark contrast to the irreparable injury that Plaintiffs’ members would suffer without

1 temporary relief, Defendants will suffer *no* harm from halting enforcement of AB 51 for the short
2 time period until the Court can resolve Plaintiffs’ motion for a preliminary injunction. There is no
3 urgent reason that AB 51 needs to be enforced for that period of a couple of weeks. Moreover, the
4 public interest is always served by enjoining the enforcement of invalid provisions of a state law.
5 *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Chamber of Commerce of*
6 *U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010); *Utah Licensed Beverage Ass’n v. Leavitt*,
7 256 F.3d 1061, 1076 (10th Cir. 2001).

8 **D. Plaintiffs Have Timely Brought This Motion And Their Motion For A**
9 **Preliminary Injunction.**

10 In addition to satisfying the traditional factors warranting a preliminary injunction,
11 Plaintiffs have timely brought this motion under Local Civil Rule 231(b) because they have not
12 “unduly delayed in seeking injunctive relief.”

13 Plaintiffs brought this lawsuit on Friday, December 6, 2019, within a matter of weeks after
14 AB 51 was signed into law on October 10, 2019. Dkt. 1. On Monday, December 9, 2019 (one
15 business day later and the same day that the Clerk of Court provided a judicial assignment),
16 Defendants filed their motion for a preliminary injunction. Dkt. 5. Under Local Civil Rule 230(b),
17 the earliest possible hearing date on the motion is January 10, 2020, which Plaintiffs noticed as the
18 hearing date. *See id.*

19 Plaintiffs hoped to avoid seeking interim temporary relief from the Court by reaching a
20 stipulation with Defendants. But as detailed in the accompanying declaration of Donald M. Falk,
21 counsel for Plaintiffs was unable to reach an attorney handling this matter for Defendants until the
22 afternoon of Friday, December 13. *See* Decl. of Donald M. Falk ¶¶ ___-___. Defendants have not
23 yet agreed to stay enforcement of AB 51 pending the resolution of the motion for a preliminary
24 injunction (*id.* ¶ ___)—necessitating the filing of this motion for temporary relief.

25 **CONCLUSION**

26 The Court should enter a temporary restraining order prohibiting Defendants from
27 enforcing AB 51 pending the resolution of Plaintiffs’ motion for a preliminary injunction.
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Dated: December 16, 2019

Respectfully submitted,

By: /s/ Donald M. Falk
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** Motion for Admission Pro Hac Vice To Be Filed*

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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 CALIFORNIA
ASSOCIATION FOR HEALTH SERVICES
AT HOME,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
the Attorney General of the State of California,
LILIA GARCIA BROWER,
in her official capacity as the Labor
Commissioner of the State of California, JULIE
A. SU, in her official capacity as the Secretary
of the California Labor and Workforce
Development Agency, and KEVIN KISH, in his
official capacity as Director of the
California Department of Fair Employment and
Housing of the State of California,

Defendants.

Case No. 2:19-cv-02456-KJM-DB

**DECLARATION OF DONALD M. FALK
IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER**

Proposed Hearing Date: December 19, 2019
Proposed Hearing Time: 2:00 p.m.
Courtroom: 3, 15th Floor

Hon. Kimberly J. Mueller

ORAL ARGUMENT REQUESTED

1 I, Donald M. Falk, hereby declare that:

2 1. I submit this declaration in support of Plaintiffs' Motion for a Temporary
3 Restraining Order. I have personal knowledge of the statements in this declaration and, if called
4 as a witness, I could and would testify to their truth.

5 2. I am a partner in the law firm of Mayer Brown LLP, counsel for plaintiffs Chamber
6 of Commerce of the United States of America and California Chamber of Commerce, and have
7 been an active member of the California Bar since 1990.

8 3. The Complaint in this action challenges the constitutionality of AB 51, which takes
9 effect on January 1, 2020.

10 4. The Complaint was filed on December 6, 2019. A summons was issued December
11 9 and was served with the Complaint and Plaintiffs' Motion for a Preliminary Injunction on
12 December 10 and 11.

13 5. No Defendant has appeared in this case.

14 6. I first succeeded in making contact with any of Defendants' counsel on Friday,
15 December 13, when I spoke and corresponded with Deputy Attorney General Chad Stegeman of
16 the Government Law Section and with Paula Pearlman, Assistant Chief Counsel of the Department
17 of Fair Employment and Housing.

18 7. In my communications with Mr. Stegeman and Ms. Pearlman I raised the
19 possibility that, if the Defendants would commit not to enforce AB 51 until the Motion for a
20 Preliminary Injunction was heard and decided, Plaintiffs would not need to file a motion for
21 temporary restraining order and also would be willing to set the hearing for a later date.

22 8. Because the Office of the Attorney General identifies the function of the
23 Government Law Section as including the defense of constitutional challenges to California
24 statutes, I expect that Mr. Stegeman will represent all Defendants in this case. I understood Mr.
25 Stegeman and Ms. Pearlman to express the same expectation.

26 9. I spoke with Mr. Stegeman again at approximately 5:30 p.m. on Monday,
27 December 16. At that time he informed me that he had not yet received a formal request from
28 Defendants Brower, Su, or Kish to represent them in this matter. As a consequence, he was not

1 yet able to discuss the proposal in paragraph 7 above.

2 10. Mr. Stegeman did say that he had communicated informally with Marc Pilotin,
3 General Counsel of the Labor and Workforce Development Agency, and agreed to forward a
4 courtesy copy of these TRO papers to Mr. Pilotin, who presumably represents Secretary Su.

5 11. I searched and asked others to search the Internet to try to find the current Chief
6 Counsel of the Division of Labor Standards Enforcement, the agency that Labor Commissioner
7 Brower heads. None of us were successful.

8 12. I made several telephone calls on December 16 in an effort to identify counsel for
9 Labor Commissioner Brower. Eventually I reached an unidentified person in the Labor
10 Commissioner's office, who stated that—notwithstanding the proof of service indicating that
11 service on the Commissioner had been accepted by one “F. Yeh” on the 10th floor, 455 Golden
12 Gate Avenue, San Francisco—the Commissioner was on the 9th floor and had not been properly
13 served.

14 13. A page captioned “Contact the Labor Commissioner's Office” on the Labor
15 Commissioner's website, which I visited last week and tonight, lists the address of the San
16 Francisco office of the Commissioner as “455 Golden Gate Ave, 10th Floor, San Francisco.”

17 14. I am also informed and believe that my firm's docketing department reviewed
18 proofs of service on the Labor Commissioner in prior cases and saw the same 10th floor address.

19 15. Nonetheless, I instructed that the Complaint and Motion for Preliminary Injunction
20 should be served immediately on the Labor Commissioner on the 9th Floor of 455 Golden Gate
21 Avenue. I included a note asking counsel for the Labor Commissioner to contact me as soon as
22 possible regarding possible TRO proceedings. The process server reported that service was
23 accepted this afternoon at that address by Theresa Bichsel, who is an attorney with the Division of
24 Labor Standards Enforcement, which is headed by the Labor Commissioner. I presume that Ms.
25 Bichsel will represent the Labor Commissioner at least temporarily. I have not heard from any
26 counsel for the Labor Commissioner.

27 16. I have emailed courtesy copies of these TRO papers to Mr. Stegeman, Ms.
28 Pearlman, and Ms. Bichsel.

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17. I expect to have further discussions with Mr. Stegeman and hope that the parties can reach a stipulation that would make temporary relief unnecessary. If the parties reach an agreement, I will inform the Court immediately.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of December 2019, at San Francisco, California.



Donald Falk

**TEMPORARY RESTRAINING ORDER
(TRO)
CHECKLIST**

NOTE: When filing a Motion for a TRO with the court, you must choose Motion for TRO. You must complete this document and attach it to your motion as an attachment in CM/ECF. If you have questions, please call the CM/ECF Help Desk at 1-866-884-5525 (Sacramento) or 1-866-884-5444 (Fresno).

- (A) *Check one.* Filing party is represented by counsel
Filing party is acting in pro se

- (B) Has there been actual notice, or a sufficient showing of efforts to provide notice to the affected party?
See Local Rule 231 and FRCP 65(b).

Did applicant discuss alternatives to a TRO hearing?

Did applicant ask opponent to stipulate to a TRO?

Opposing Party:

Telephone No.:

- (C) Has there been undue delay in bringing a TRO?

Could this have been brought earlier?

Yes: No:

(D) What is the irreparable injury?

Why the need for an expedited hearing?

(E) Documents to be filed and (unless impossible) served on affected parties/counsel:

- (1) Complaint
- (2) Motion for TRO
- (3) Brief on all legal issues presented by the motion
- (4) Affidavit detailing notice, or efforts to effect notice, or showing why it should not be given
- (5) Affidavit in support of existence of irreparable harm
- (6) Proposed order with provision for bond
- (7) Proposed order with blanks for fixing:
 - Time and date of hearing for motion for preliminary injunction
 - Date for filing responsive papers
 - Amount of bond, if any
 - Date and hour of issuance
- (8) For TROs requested *ex parte*, proposed order shall notify affected parties they can apply to the court for modification/dissolution on 2 days notice or such shorter notice as the court may allow. See *Local Rule 231 and FRCP 65(b)*

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11 **IN THE UNITED STATES DISTRICT COURT**

12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 CHAMBER OF COMMERCE OF THE
14 UNITED STATES OF AMERICA,
15 CALIFORNIA CHAMBER OF COMMERCE,
16 NATIONAL RETAIL FEDERATION,
17 CALIFORNIA RETAILERS ASSOCIATION,
18 NATIONAL ASSOCIATION OF SECURITY
19 COMPANIES, HOME CARE ASSOCIATION
20 OF AMERICA, and CALIFORNIA
21 ASSOCIATION FOR HEALTH SERVICES
22 AT HOME,

23 Plaintiffs,

24 v.

25 XAVIER BECERRA, in his official capacity as
26 the Attorney General of the State of California,
27 LILIA GARCIA BROWER,
28 in her official capacity as the Labor
Commissioner of the State of California, JULIE
A. SU, in her official capacity as the Secretary
of the California Labor and Workforce
Development Agency, and KEVIN KISH, in his
official capacity as Director of the
Department of Fair Employment and Housing of
the State of California.

Defendants.

Case No. 2:19-cv-02456-KJM-DB

**[PROPOSED] ORDER REGARDING
HEARING ON MOTION FOR A
PRELIMINARY INJUNCTION**

1 The Court, having issued a temporary restraining order enjoining Defendant Xavier
2 Becerra, in his official capacity as the Attorney General of the State of California, Lilia Garcia
3 Brower, in her official capacity as the Labor Commissioner of the State of California, Julia A. Su,
4 in her official capacity as the Secretary of the California Labor and Workforce Development
5 Agency, and Kevin Kish, in his official capacity as Director of the California Department of Fair
6 Employment and Housing from enforcing Assembly Bill 51 (“AB 51”), pending this Court’s
7 resolution of Plaintiffs’ motion for a preliminary injunction,
8

9 **IT IS HEREBY ORDERED THAT:**

- 10 1. The hearing on Plaintiffs’ motion for a preliminary injunction is set for January 10, 2020,
11 at 10:00 a.m. in Courtroom 3, 15th Floor before the Honorable Kimberly J. Mueller.
12
13 2. Defendants’ opposition to Plaintiff’s motion for preliminary injunction shall be filed and
14 served by December 27, 2019.
15
16 3. Plaintiff’s reply to Defendants’ opposition shall be filed and served by January 3, 2020.
17
18 4. There is no realistic likelihood of harm to Defendants from temporarily enjoining
19 enforcement of AB 51, so no security bond is required.

18 **IT IS SO ORDERED.**

20 Dated: _____

21 Hon. Kimberly J. Mueller
22 U.S. District Court Judge
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11 **IN THE UNITED STATES DISTRICT COURT**

12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 CHAMBER OF COMMERCE OF THE
14 UNITED STATES OF AMERICA,
15 CALIFORNIA CHAMBER OF COMMERCE,
16 NATIONAL RETAIL FEDERATION,
17 CALIFORNIA RETAILERS ASSOCIATION,
18 NATIONAL ASSOCIATION OF SECURITY
19 COMPANIES, HOME CARE ASSOCIATION
20 OF AMERICA, and CALIFORNIA
21 ASSOCIATION FOR HEALTH SERVICES
22 AT HOME,

23 Plaintiffs,

24 v.

25 XAVIER BECERRA, in his official capacity as
26 the Attorney General of the State of California,
27 LILIA GARCIA BROWER,
28 in her official capacity as the Labor
Commissioner of the State of California, JULIE
A. SU, in her official capacity as the Secretary
of the California Labor and Workforce
Development Agency, and KEVIN KISH, in his
official capacity as Director of the
Department of Fair Employment and Housing of
the State of California.

Defendants.

Case No. 2:19-cv-02456-KJM-DB

**[PROPOSED] ORDER REGARDING
TEMPORARY RESTRAINING ORDER**

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This matter is before the Court on Plaintiffs’ motion for temporary restraining order. All Parties were given notice and an opportunity to be heard by their counsel of record. Having considered the papers filed in support of Plaintiffs’ motion for a temporary restraining order, and any opposition thereto, for good cause shown, the Court hereby enters the following Order:

The Court finds that a temporary restraining order is warranted pursuant to Federal Rule of Civil Procedure 65 and Civil Local Rule 231. Plaintiffs have carried their burden of demonstrating that they are likely to succeed on the merits, that they would be irreparably harmed in the absence of a temporary restraining order, that the equities weigh in favor of granting the requested temporary restraining order, and that the temporary restraining order would not be against the public interest. The Court also finds that Plaintiffs have no other adequate legal remedy to preserve the status quo.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs’ motion for a temporary restraining order is GRANTED.

The Court orders as follows:

1. Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California, Lilia Garcia Brower, in her official capacity as the Labor Commissioner of the State of California, Julia A. Su, in her official capacity as the Secretary of the California Labor and Workforce Development Agency, and Kevin Kish, in his official capacity as Director of the California Department of Fair Employment and Housing are temporarily enjoined from enforcing AB 51, pending this Court’s resolution of Plaintiffs’ motion for a preliminary injunction.

2. There is no realistic likelihood of harm to Defendants from temporarily enjoining enforcement of AB 51, so no security bond is required.

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IT IS SO ORDERED.

Dated: _____

Hon. Kimberly J. Mueller
U.S. District Court Judge