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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 Department of Fair Employment and Housing of the State of California.

Defendants.

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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: January 10, 2020
Time: 10:00 a.m.
Courtroom: 3, 15th Floor

Hon. Kimberly J. Mueller

ORAL ARGUMENT REQUESTED

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The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), "was designed to promote arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011), by protecting both the "formation" and the "enforcement" of arbitration agreements, *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 1428 (2017). But AB 51 improperly treats arbitration agreements as a harmful form of contract from which employees need special protection.

Defendants' Opposition confirms that AB 51 is tailored to the "defining trait" of arbitration agreements, "a waiver of the right to go to court." *Id.* at 1427. And Defendants do not dispute that, if allowed to go into effect, AB 51 will impose criminal and civil sanctions on employers that enter into workplace contracts that include arbitration as a condition of employment. That blatant effort to subject arbitration agreements to "disfavored treatment" is antithetical to the FAA. *Id.*

This Court should enter a preliminary injunction to ensure that businesses seeking to enter into federally protected arbitration agreements are not irreparably harmed by civil and criminal enforcement of this unconstitutional statute.

ARGUMENT

A. Plaintiffs Are Likely To Succeed On The Merits Because AB 51 Is Preempted.

The Motion explained (at 9-13) that the FAA preempts AB 51 for two independently sufficient reasons. First, by imposing restrictions on the formation of arbitration agreements that do not apply to contracts generally, AB 51 violates Section 2 of the FAA, which requires courts and state legislatures to "place arbitration agreements 'on equal footing with all other contracts.'" *Kindred*, 137 S. Ct. at 1424. Second, by imposing criminal and civil penalties on the exercise of a federally protected right to include arbitration agreements as a required term of the relationship between businesses and their workers, AB 51 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" expressed in the FAA. *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

1. AB 51 Violates Section 2 Of The FAA Because It Treats Arbitration Agreements Differently From Other Contracts.

Defendants principally rely on the California Legislature's rationales for why AB 51 purportedly survives federal preemption—rationales that Plaintiffs have refuted. Mot. 9-13.

To begin with, Defendants misconstrue the Supreme Court's recognition that arbitration "is a matter of consent, not coercion." Opp. 6 (quoting *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 681 (2010), and citing *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415-16 (2019)). The Court's reference to "consent" means entering into arbitration agreements valid under generally applicable rules of contract formation (including any applicable federal rules). By contrast, the Court's reference to "coercion" means actions by courts or legislatures that subject contractual parties to obligations different from those grounded in a valid contract. "Coercion" does *not* mean requiring a contract term as a condition of entering into an employment relationship.

Lamps Plus makes this distinction crystal clear. The plaintiff signed the arbitration agreement at issue "as a condition of his employment." *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 671 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407. Yet the Supreme Court did not suggest that there was anything coercive or improper about agreeing to arbitration as a required condition of employment. Rather, the "coercion" in *Lamps Plus* was the Ninth Circuit's improper reliance on California "public policy" to impose class procedures on the parties where the contract did not expressly authorize class arbitration. 139 S. Ct. at 1415, 1417. As the Court explained, "class arbitration, to the extent it is manufactured by state law rather than consent, is inconsistent with the FAA." *Id.* at 1417-18 (quoting *Concepcion*, 563 U.S. at 348) (alterations omitted). The "consent" referenced by the Court was the obligations resulting from the valid agreement to arbitrate; the "coercion" was the imposition of state public policy different from the parties' agreement. And the same is true of *Stolt-Nielsen*, in which the Court vacated an arbitrator's decision imposing class arbitration "as a matter of public policy," not based on an agreement by the parties. 559 U.S. at 672.[1]

Most fundamentally, Defendants' argument conflicts with Section 2 of the FAA by treating arbitration agreements differently from other contracts. Businesses can and do include a wide variety of non-negotiable conditions in form contracts in a variety of contexts—and those conditions generally are permissible and enforceable.

For example, California law still allows an employer to offer on a take-it-or-leave-it basis

[1] The Ninth Circuit judgment reversed in *Epic* also involved arbitration agreements signed "[a]s a condition of employment." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *rev'd*, 138 S. Ct. 1612.

payment of, say, $15 an hour for 40 hours a week, or 20 days a year of paid vacation. But under AB 51, if the employer offers to resolve disputes by arbitration on the same basis, it is subject to criminal prosecution or civil enforcement actions. Greater differential treatment of arbitration is hard to imagine. As the Supreme Court has put it, States may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

To be sure, California may apply its general principles of unconscionability to determine whether a form contract is enforceable. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (per curiam). But the FAA invalidates a rule that singles out arbitration agreements for discriminatory treatment.

Defendants cannot argue that the conduct prohibited by AB 51 is illegal under California law—and that invalidating illegal contracts and punishing illegal conduct is a general state-law principle unaffected by Section 2. The Supreme Court rejected that precise argument in *Epic*, where the employees seeking to avoid arbitration argued that the arbitration agreements violated federal labor law and were therefore unenforceable under the general rule barring "illegal" contracts. The Court squarely rejected that contention, holding that "an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration" even if "it sounds in illegality." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). "Placing arbitration agreements within [a] class" of objectionable terms "reveals the kind of 'hostility to arbitration' that led Congress to enact the FAA," and "only makes clear the arbitration-specific character of the rule." *Kindred*, 137 S. Ct. at 1428.

Defendants' basic contention is that California may prohibit take-it-or-leave-it agreements for certain contract terms addressing the fundamental attributes of arbitration such as waivers of court proceedings and jury trials, while permitting a take-it-or-leave it approach for many other terms of employment—and for many other types of contracts. But the Supreme Court rejected that argument nearly 25 years ago in *Casarotto*.

That case involved a Montana statute requiring contracts containing an arbitration clause to include a notice of the clause in underlined capital letters on the first page of the contract. 517 U.S. at 683. The Montana Supreme Court had held that the law was not preempted by the FAA, on the ground—nearly identical to Defendants' argument here—that the law "simply prescribed" that arbitration agreements "be entered knowingly." *Id.* at 685 (quotation marks omitted). The U.S. Supreme Court reversed. As Justice Ginsburg explained for the Court, the state statute "directly conflicts with § 2 of the FAA" because it imposes "a special notice requirement not applicable to contracts generally." *Id.* at 687. The Court embraced the language of a treatise concluding that "'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted.'" *Id.* (quoting 2 I. Macneil et al., Federal Arbitration Law § 19.1.1 (1995)). That holding confirms that AB 51 is preempted.

Next, Defendants repeat the same exercise in semantics that the Court rejected in *Kindred* when they maintain that AB 51 does not target arbitration agreements because it prevents the waiver of the right to a judicial or administrative forum (and to "pursue class actions"). Opp. 2 & n.3, 7, 9. But "a waiver of the right to go to court" is the "primary characteristic of an arbitration agreement," and the FAA forbids States from "subjecting [such agreements], by virtue of their defining trait, to uncommon barriers." *Kindred*, 137 S. Ct. at 1427. As Justice Kagan explained, any such rule, even if it "avoid[s] referring to arbitration by name," "covertly accomplishes" the impermissible objective of disfavoring arbitration agreements by instead "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426; *see also Epic*, 138 S. Ct. at 1622 (Section 2's "savings clause does not save defenses that target arbitration either by name *or by more subtle methods*") (emphasis added).

Defendants' attempt to salvage AB 51 as a purportedly neutral rule cannot be squared with these holdings. For example, their assertion that offering to resolve disputes outside a judicial or administrative forum as a condition of employment is "coerc[ive]" (Opp. 8) treats mandatory arbitration as a form of duress that requires special protective rules. But state law would not find duress when other routine employment terms are presented on a take-it-or-leave-it basis, so AB 51 at best applies the doctrine of "duress * * * in a fashion that disfavors arbitration," and is

preempted. *Concepcion*, 563 U.S. at 341; *see also Kindred*, 137 S. Ct. at 1428.

The FAA does not allow States to make it more onerous to propose or enter into an arbitration agreement than to propose or agree to other contract terms. The Court in *Kindred* rejected the argument that "the FAA has 'no application' to 'contract formation issues.'" 137 S. Ct. at 1428. Dismissing the argument that "States have free rein to decide—irrespective of the FAA's equal footing principle—whether such contracts are validly created in the first instance," Justice Kagan explained that "the FAA's text and our case law interpreting it say otherwise." *Id.*

Defendants now appear to concede (*see* Opp. 8) that *Kindred* applies the FAA's "equal-footing principle" not only to the enforcement of arbitration agreements, but also to "what it takes to enter into them." *Kindred*, 137 S. Ct. at 1428. Shifting position, they point to language in AB 51 stating that the statute is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Opp. 8 (quoting Cal. Labor Code § 432.6(f)). Rather, they say (Opp. 9), AB 51 simply imposes criminal and civil sanctions on a business's "behavior" in forming an arbitration agreement as a condition of employment. .

That proposition—that a state law may penalize parties for entering into arbitration agreements so long as the law does not address the agreements' enforceability—cannot be squared with *Kindred*. Interpreting the FAA to permit a State to impose criminal sanctions on the making of an arbitration agreement would "make it trivially easy for States to undermine the Act—indeed, to wholly defeat it." *Kindred*, 137 S. Ct. at 1428. States could effectively halt the formation of arbitration agreements altogether under the fig leaf of regulating "employer behavior" (Opp. 7) by making it a felony to enter to such agreements or imposing civil penalties in the millions of dollars.[2]

Defendants' position that States may outlaw the exercise of federally protected rights so long as they subsequently honor the results of that exercise would lead to equally absurd results outside the arbitration context—which confirms that AB 51 violates Section 2's equal-footing principle. For example, a state barred by federal law from imposing product labeling mandates that differed from federal standards could not evade preemption by allowing the product to be sold

[2] Defendants' discussion of restrictions on other employment practices (Opp. 7-8) is a red herring for preemption purposes, because those regulations do not involve the *federally protected* right to agree to resolve disputes by arbitration.

but fining companies whose labels did not comply with the state standard. AB 51 is no different.

Indeed, the Supreme Court rejected as too clever by half California's similar line-drawing when the State imposed meat-processing standards despite a prohibition on state standards "in addition to, or different than" federal standards. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 458 (2012) (quoting 21 U.S.C. § 678). California prohibited the processors from buying or selling meat from certain pigs whose processing was permitted and regulated under federal law, and argued that these prohibitions did not regulate the conduct of the processing plants. *See id.* at 462-467. But the Supreme Court recognized that regulating the input and output of meat processing conflicted with the federal statute, and rejected California's attempt to circumvent the conflict. *Id.*

The circumvention effort here is equally invalid, and would "render[]" the FAA "helpless to prevent even the most blatant discrimination against arbitration." *Kindred*, 137 S. Ct. at 1429.

2. AB 51 Conflicts With The Purposes And Objectives Of The FAA.

For many of the same reasons, AB 51 is also preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA. *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

What could more forcefully impede the FAA's purpose "to promote arbitration" (*Concepcion*, 563 U.S. at 346) than criminalizing the formation of an arbitration agreement? Defendants' fanciful insistence that AB 51 does not "discourage arbitration" (Opp. 1) makes no sense and rests on the false dichotomy between regulating the behavior of businesses in forming arbitration agreements and regulating the agreements' enforcement. The improper purpose of the California Legislature was to discourage the formation of arbitration agreements by making businesses criminally and civilly liable for doing so as a condition of employment.

If allowed to go into effect, AB 51 likely will interfere with arbitration far more substantially than the California law, held preempted in *Preston*, that required exhaustion of administrative remedies before arbitration. That rule, the Court explained, was preempted because requiring an agency to hear a dispute before arbitration would frustrate the "prime objective of an agreement to arbitrate * * * to achieve streamlined proceedings and expeditious results," and would, "at the least, hinder speedy resolution of the controversy." 552 U.S. at 357-58 (quotation

marks omitted); *accord Concepcion*, 563 U.S. at 346. Here, AB 51 will prevent many arbitration agreements from being made—even agreements indisputably enforceable under the FAA.

Likewise, outside the arbitration context, the Supreme Court has rejected attempts by States to impose liability on conduct that is permitted by federal law. For example, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court held that the federal National Traffic and Motor Vehicle Safety Act of 1966 and subsequent regulations preempted a state-law tort action seeking to impose liability on an automobile manufacturer for failing to include airbags in a certain model of automobile. The attempted use of state law to achieve that result, the Court explained, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought," given that the federal standard permitted the use of a variety of "passive restraint systems" other than airbags. *Id.* at 881. Put simply, federal law granted the auto manufacturer a right—protected under federal law and thus the Constitution's Supremacy Clause—to manufacture cars without airbags. Because a state tort claim would interfere with that right, the claim was preempted. A state statute imposing criminal or civil liability on manufacturers that built the same cars without airbags would be preempted for the same reasons.

Moreover, by treating arbitration as a term "foist[ed]" on workers (Opp. 6), Defendants' justifications for AB 51 rest on "the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). As the Court put it in the employment context, attacks on arbitration that "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quotation marks omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

B. Plaintiffs Will Suffer Irreparable Harm Without A Preliminary Injunction.

In entering a temporary restraining order, this Court found "persuasive" Plaintiffs' showing that allowing AB 51 "to take effect even briefly, if it is preempted, will cause disruption in the making of employment contracts," and therefore concluded that Plaintiffs "have shown a

likelihood of irreparable injury," "particularly given the criminal penalties to which violators of the law may be exposed." TRO Order 1-2. The same reasons support a preliminary injunction.

To begin with, Defendants concede that their arguments on this factor rest on the "absence of FAA preemption." Opp. 10. Because AB 51 is preempted for all of the reasons set forth above, there is no meaningful dispute that Plaintiffs will suffer irreparable injury.

Defendants try to obscure the significance of the criminal penalties imposed by AB 51 They observe that "AB 51 itself does not mention criminal penalties," but agree that those penalties "are applicable because Labor Code section 432.6 falls within the article subject to criminal penalties under Labor Code section 433." Opp. 11. As with their avoidance of the word "arbitration," the authors of AB 51 chose to add its substantive provisions to a part of the Labor Code that made their violation a misdemeanor without having to mention criminal penalties in "AB 51 itself." And at the hearing on the TRO motion, Defendants' counsel conceded that AB51 imposes criminal penalties on businesses that enter into arbitration agreements—including agreements that are fully enforceable under the FAA. Tr. 19:13-25.

Defendants maintain that "criminal penalties can be avoided by compliance" (Opp. 11), but that is true of *any* unconstitutional criminal law. The Ninth Circuit has made clear that the "threat of prosecution under the [challenged] statute" establishes irreparable harm. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). Defendants try to distinguish *Valle del Sol* by pointing out that the plaintiff in that case was engaged in the conduct that would be subject to prosecution under the challenged state statute (Opp. 12), but the same is true here. Plaintiffs have shown, and Defendants do not dispute, that many businesses operating in California currently use arbitration agreements with their workers as a condition of employment or on an opt-out basis (Maas Decl. ¶¶ 6-15; Compl. ¶¶ 16-22)—precisely what AB 51 criminalizes.

Defendants have little to say about the irreparable harms that would be suffered by businesses that are forced to comply with AB 51 by its threat of criminal and civil penalties, including, as a practical matter, forgoing their federally protected rights to enter into predispute arbitration agreements; incurring immediate administrative costs to redraft and promulgate new employment contracts; and incurring increased dispute resolution costs for disputes that are

channeled into the judicial or administrative forums rather than resolved in arbitration. *See* Mot. 14-17. Defendants note that some employers in California elect not to enter into arbitration agreements with their workers as a condition of employment. Opp. 10-11. But the whole point of the FAA is to ensure that whether to resolve disputes by arbitration is up to the contracting parties, *not* state courts or legislatures. And many other businesses operating in California indisputably *do* choose to include arbitration as a routine term of employment.

Defendants do not meaningfully dispute our showing that, in light of the risk that their processes for forming arbitration agreements would be deemed insufficiently voluntary by a court or by one or more Defendants, businesses could ensure compliance with AB 51 only by ceasing to enter into predispute arbitration agreements with their workers. *See* Mot. 14-15. Defendants make the puzzling assertion that businesses could comply with AB 51 by "notify[ing] employees of the requirements of AB 51" and obtaining "a signed acknowledgment of that notification." Opp. 10. Yet AB 51 declares it unlawful under California state law to enter into arbitration agreements "as a condition of employment, continued employment, or the receipt of any employment-related benefit," Cal. Lab. Code § 432.6(a), no matter what notification the worker receives. In any event, Defendants' rewrite of the statute would be preempted as "a special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687; *see* pages 3-4, *supra*.

Finally, Defendants simply ignore the Ninth Circuit's holding that forcing businesses to choose between risking enforcement actions or complying with an invalid law subjects them to "a very real penalty" regardless of their choice. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (cited at Mot. 16). As that binding precedent makes clear, those irreparable harms can be avoided only if enforcement of AB 51 is preliminarily enjoined.

C. The Balance Of Hardships And The Public Interest Weigh In Plaintiffs' Favor.

In granting a temporary restraining order, this Court also concluded that Plaintiffs satisfied the third and fourth *Winter* factors by "showing that the balance of hardship tips decidedly in their favor." TRO Order 1 (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)). Again, Defendants offer nothing that should change that result.

Defendants largely rehash their incorrect arguments on the merits, asserting that

enforcement of AB 51 is in the public interest because, in their view, it is consistent with the FAA and the Supreme Court's holdings that arbitration is a matter of consent. Opp. 13. But Defendants are wrong on the merits, and they simply ignore the substantial body of authority holding that the public interest is always served by preliminarily enjoining the enforcement of state statutes that are likely to be held unconstitutional. *See* Mot. 18. Instead, they misleadingly cite to the Supreme Court's decision in *Abbott v. Perez* for the proposition that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Opp. 13 (actually quoting *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)). But Defendants fail to mention that, in assessing the Court's own jurisdiction to hear an interlocutory appeal, the Court in *Abbott* actually said that the State would be irreparably harmed by an injunction against "conducting this year's elections pursuant to a [state] statute" "*[u]nless that statute is unconstitutional*." 138 S. Ct. 2305, 2324 (2018) (emphasis added).

Defendants also reference a letter to Congress by state attorneys general asking Congress to prohibit arbitration of certain sexual harassment claims. Opp. 13. But that letter undercuts Defendants' position because the letter was directed to *Congress*, which "is of course always free to amend" or "displace" the FAA—so long as it does so "clearly and manifestly." *Epic*, 138 S. Ct. at 1624, 1632. By contrast, *state* legislatures are not free to wade into these policy debates. Instead, "*state* law, whether of *legislative* or judicial origin," is preempted by the FAA if it disfavors arbitration agreements. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis added). For the same reasons, Defendants' reference to the unenacted FAIR Act (Opp. 13-14) is a red herring. And when Defendants mention a provision of the NLRA concerning the bargaining power of employees (*id.* at 14), they overlook the U.S. Supreme Court's holding that "nothing" in the NLRA displaces the FAA. *Epic*, 138 S. Ct. at 1632.

Congress has not imposed anything like AB 51, and the Supremacy Clause forbids the California Legislature from overriding the congressional policy judgment embodied in the FAA.

CONCLUSION

The Court should enter a preliminary injunction prohibiting Defendants from enforcing AB 51 against arbitration agreements protected by the FAA until judicial review is complete.

Dated: January 3, 2020

Respectfully submitted,

By: */s/ Donald M. Falk*

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