Case No. B308417

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 2

INTUIT INC. and INTUIT CONSUMER GROUP LLC,
Plaintiffs and Appellants,

v.

9,933 INDIVIDUALS,
Defendants and Respondents.

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

On Appeal from Los Angeles Superior Court, No. 20STCV22761
Hon. Terry A. Green, Dept. 14, tel.: (213) 633-0514

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CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that no known persons or entities have an ownership interest of 10 percent or more in the Chamber of Commerce of the United States of America. Other than the *amicus curiae* and the named parties, no known person or entity has a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves. (Cal. R. Ct. 8.208(e)(2.))

Dated: March 19, 2021

Respectfully submitted.
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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

To the Honorable Justices of the California Court of Appeal:

The Chamber of Commerce of the United States of America (Chamber) respectfully seeks leave to file a brief as *amicus curiae* in support of plaintiffs and appellants Intuit Inc. and Intuit Consumer Group LLC.[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus*

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[1] No party or counsel for a party in this matter authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. And no person or entity made a monetary contribution intended to fund the preparation or submission of such brief, other than the *amicus curiae*, its members, and its counsel. (See Cal. Rules of Court, rule 8.200(c)(3).)

curiae briefs in cases that raise issues of concern to the nation's business community, including cases involving the interpretation of the Federal Arbitration Act (the "Act"), 9 U.S.C. §§ 1-16.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Based on the policy reflected in the Act, the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

The Chamber's members and the broader business community have a strong interest in a judicial determination that the Federal Arbitration Act preempts California's Senate Bill 707, which is therefore unconstitutional under the Supremacy Clause of the Constitution. Indeed, the Chamber sought and was granted leave by this Court to file an amicus brief in support of the petition for a stay or writ of supersedeas pending this appeal. In addition, the Chamber is one of the plaintiffs in a federal-court preemption challenge to a sister anti-arbitration law passed during the same session, Assembly Bill 51. In that case, Chief Judge Mueller of the United States District Court for the Eastern District of California issued a preliminary injunction against California's enforcement of AB 51 as applied to arbitration

agreements governed by the Federal Arbitration Act. (See *Chamber of Commerce v. Becerra* (E.D. Cal. 2020) 438 F. Supp. 3d 1078, *appeal pending*, No. 20-15291 (9th Cir.).)

SB 707 is just as clearly preempted as AB 51. It unlawfully singles out arbitration agreements for disfavored treatment by subjecting their drafters to unique and one-sided sanctions if they do not pay arbitration fees in full within 30 days of the due date, regardless of the reason for non-payment or the amount not paid. And the consequent deterrent effect of those sanctions on the use and enforcement of arbitration agreements—an *explicitly stated* purpose of the California Legislature in passing SB 707—stands as an obstacle to the Federal Arbitration Act's pro-arbitration objectives, threatening to deprive businesses, workers, and consumers alike of the benefits of the national policy favoring arbitration. The Chamber therefore has a strong interest in participating in this case and expressing its perspective on why the Federal Arbitration Act preempts SB 707, just as it preempts AB 51.

CONCLUSION

The Chamber respectfully requests that the Court grant its application to file the *amicus curiae* brief.

Dated: March 19, 2021

Respectfully submitted.

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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Federal Arbitration Act to "promote arbitration." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 345.) The Act's "'liberal federal policy favoring arbitration agreements'" applies "'notwithstanding any state substantive or procedural policies to the contrary.'" (*Id.* at 346 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24).)

Nonetheless, the California Legislature and some courts applying California law have sought to restrict arbitration as a matter of state public policy, particularly in the employment and consumer contexts, and the U.S. Supreme Court has repeatedly held that the Federal Arbitration Act preempts those efforts.[1] SB 707, which applies to consumer and workplace arbitration

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[1] See, e.g., *Lamps Plus, Inc. v. Varela* (2019) 139 S. Ct. 1407, 1417-18 [use of California "public policy" rule interpreting ambiguities against the drafter to impose class procedures on the parties where the contract did not expressly authorize class arbitration]; *Concepcion*, *supra*, 563 U.S. at p.352 [California judicial rule declaring class-action waivers unconscionable]; *Preston v. Ferrer* (2008) 552 U.S. 346, 353 [California Labor Code provision requiring an agency to hear certain disputes before arbitration]; *Perry v. Thomas* (1987) 482 U.S. 483, 491 [California Labor Code provision requiring judicial forum for wage collection actions].

agreements, represents more of the same unlawful treatment of arbitration. It violates the Federal Arbitration Act for two independent reasons.

First, SB 707 singles out arbitration agreements by name and imposes on the drafters of arbitration agreements mandatory, one-sided penalties and sanctions that do not apply to contracts outside of the arbitration context. SB 707 thus violates Section 2 of the Federal Arbitration Act, which requires courts and state legislatures to "place arbitration agreements 'on equal footing with all other contracts.'" (*Kindred Nursing Centers Ltd. P'ship v. Clark* (2017) 137 S. Ct. 1421, 1424.)

SB 707 treats *any* non-payment of arbitral fees by the drafting party—no matter the amount and regardless of the reasons for non-payment—as a per se "material breach of the arbitration agreement" that "waives [that party's] right to compel arbitration." (Cal. Civ. Proc. Code § 1281.97(a).)

Moreover, if the non-drafting party elects to proceed in court notwithstanding his or her agreement to arbitrate, SB 707 purports to require a "sanction against the drafting party" in the form of an order "to pay the reasonable expenses" of the non-drafting party, "including attorney's fees and costs." (*Id.*

§ 1281.99(a).) And SB 707 further authorizes the court to impose a panoply of non-monetary and potentially case-dispositive sanctions as well, including orders "prohibiting the drafting party from conducting discovery in court"; "striking out the pleadings or parts of the pleadings of the drafting party"; "rendering a judgment by default against the drafting party"; or "treating the drafting party as in contempt of court." (*Id.* § 1281.99(b).) If the non-drafting party elects arbitration instead, SB 707 mandates that the arbitrator order fee shifting and authorizes the arbitrator to impose numerous other sanctions. (*Id.* §§ 1281.97(b)(2), 1281.98(d).)

The differential treatment is clear. SB 707 not only creates a unique rule of contract law that applies solely to arbitration agreements, but also treats such agreements as a specific type of contract from which non-drafting parties need heightened protection in the event of non-performance (however slight or justified). In the context of other contracts, California law treats the question whether a material breach has occurred as a case-specific question of fact and does not distinguish between the drafting and non-drafting parties. SB 707's singling out of

arbitration is the very unequal treatment that the Federal Arbitration Act forbids.

Second, and for similar reasons, the Federal Arbitration Act also preempts SB 707 because the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the Act. (*Concepcion*, *supra*, 563 U.S. at p.352 (quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67).) The stated goal of the California Legislature in imposing harsh and "unforgiving" sanctions on businesses through SB 707 was to deter businesses from the "liberal use of binding arbitration provisions in contracts." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) as amended May 20, 2019, p. 10.) That goal is directly contrary to the longstanding "liberal federal policy favoring arbitration agreements." (*Epic Sys. Corp. v. Lewis* (2018) 138 S. Ct. 1612, 1621 (quoting *Moses H. Cone*, *supra*, 460 U.S. at p.24).)

The anti-arbitration sentiment behind SB 707 not only violates the Federal Arbitration Act, but also is bad policy. SB 707 harms businesses, workers, and consumers by deterring the

use of arbitration agreements and thereby preventing all parties from obtaining the benefits of arbitration secured by the Act.

Finally, as Intuit's brief persuasively details, the constitutionality of SB 707 is ripe for decision. The very purpose of a declaratory judgment action is to adjudicate whether the threatened enforcement of legislation is lawful—*before* the enforcement of an invalid law takes place. The trial court's conclusion that Intuit was required to incur the substantial penalties imposed by SB 707 before challenging the constitutionality of that statute defies that settled principle, and yields the untenable result that a company must incur the pain of sanctions under SB 707 before challenging its legality.

ARGUMENT

A. The Federal Arbitration Act Preempts SB 707.

The United States Supreme Court has identified at least two ways in which a state-law rule may run afoul of the Federal Arbitration Act.

First, any state-law rule that "conflicts with § 2 of the Federal Arbitration Act . . . violates the Supremacy Clause." (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; see *Preston*, *supra*, 552 U.S. at p.353 ["The FAA's displacement of conflicting

state law is 'now well-established.'"].) Section 2 of the Act specifies that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation *of any contract*." (9 U.S.C. § 2 (emphasis added).) Under Section 2, "courts must place arbitration agreements on an equal footing with other contracts." (*Concepcion*, *supra*, 563 U.S. at p.339; accord *Lamps Plus*, *supra*, 139 S. Ct. at p.1412.)

Second, the Federal Arbitration Act preempts any state-law rule that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the Act. (*Concepcion*, *supra*, 563 U.S. at p.352 (quoting *Hines*, *supra*, 312 U.S. at p.67).) Such preempted state laws are void and unenforceable.

The Federal Arbitration Act preempts SB 707 for these two reasons—each of which is independently sufficient to render the state statute unconstitutional under the Supremacy Clause.

1. SB 707 violates Section 2 of the Federal Arbitration Act

Under Section 2's "equal footing" principle, the Federal Arbitration Act preempts state-law rules that "single out" arbitration agreements for disfavored treatment. (*Kindred*, *supra*, 137 S. Ct. at p.1428.) Moreover, as Justice Kagan explained for the *Kindred* Court, Section 2 not only prohibits States from facially discriminating against arbitration, but also prohibits States from achieving the same result "covertly," by "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." (*Id.* at 1426.) The U.S. Supreme Court recently reiterated that Section 2's "savings clause does not save defenses that target arbitration either by name or by more subtle methods." (*Epic*, *supra*, 138 S. Ct. at p.1622.)

Here, the preemption analysis is even simpler than in *Kindred* or *Epic*. There is nothing "covert[]" or "subtle" about SB 707: It targets arbitration agreements by name. It therefore more closely resembles the Montana statute that the U.S. Supreme Court held preempted in *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, which required contracts

containing an arbitration clause to include a notice of the clause in underlined capital letters on the first page of the contract. (*Id.* at 683.) As Justice Ginsburg explained for the Court, that state statute "directly conflicts with § 2 of the FAA" because it imposes "a special notice requirement not applicable to contracts generally," and instead governs "specifically and solely contracts 'subject to arbitration.'" (*Id.* at 687.)

1. As Intuit's brief explains (at 33-36), Section 2's savings clause does not save SB 707 because SB 707 does not reflect generally applicable contract doctrine, but instead represents a stark departure from ordinary California contract principles.

First, California ordinarily treats "the question of whether a breach of an obligation is a material breach . . . [as] a question of fact." (*Brown v. Grimes* (2011) 192 Cal. App. 4th 265, 277 [collecting cases].) That reflects the common-sense point that the materiality of a breach is a case-specific determination, focusing on "the specific obligations undertaken by" the parties and the nature and "timing of a breach." (*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 601-02.) SB 707, by contrast, treats *any* failure by the drafting party to pay arbitration fees in full as an automatic material breach, as a matter of law—

regardless of the underlying factual circumstances or whether the amount not paid is nominal or substantial.

Second, California ordinarily treats contracting parties equally in the context of a material breach by the other party: *either* party's "material breach" discharges "the other party" from "its duty to perform." (*Brown*, *supra*, 192 Cal. App. 4th at p.277 (citing 1 Witkin, Summary of Cal. Law, Contracts (10th ed. 2005) §§ 813, 814).) SB 707, by contrast, applies only to breaches by the drafting party, and in fact obligates the drafting party to perform under the contract by paying arbitration fees regardless of whether the consumer or worker breached the contract first. It also applies if the drafting party has a good-faith basis to dispute the arbitrability of the claims asserted against it, so that its non-payment of the arbitration fees associated with those claims would be justified until a court resolves the arbitrability issue.

Third, and relatedly, California ordinarily requires a plaintiff seeking to recover for a breach of contract to demonstrate that he or she has properly performed under the contract. (See 1 Witkin, Summary of Cal. Law, Contracts (11th ed. 2020) § 873 (citing, *inter alia*, *Pry Corp. of Am. v. Leach* (1960) 177 Cal. App. 2d 632, 639).) Yet SB 707 allows even a consumer

or worker who has breached an arbitration agreement to demand the drafting party's continued performance in the form of paying arbitration fees—and authorizes sanctions on a business that declines to perform in light of non-performance on the worker's or consumer's part. For example, a consumer who breaches the arbitration agreement by filing a single arbitration claim that purports to be on behalf of hundreds of customers—conduct that is often expressly barred under the governing arbitration provision—could obtain enforcement of the arbitration agreement, notwithstanding such an express prohibition, if the targeted defendant fails to pay the full arbitration fees for the improper group arbitration.

Moreover, the problems posed by SB 707's departure from ordinary contract principles are real, not hypothetical. A business may have a good-faith basis to challenge either "whether the parties are bound by a given arbitration agreement" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," both issues that, unless the arbitration agreement provides otherwise, are "for a court to decide." (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84.) Indeed, as Intuit notes in its brief (at 17),

respondents' counsel withdrew nearly *one-fifth* of the claims asserted against Intuit prior to any judicial (or arbitral) determination whether those claims were proper—but the withdrawal occurred only after Intuit had already paid AAA fees with respect to many of those claims. As this case thus illustrates, SB 707 does not allow the business time to resolve such questions of arbitrability before paying arbitration fees.

Other examples of the problems posed by SB 707 are not hard to imagine. A consumer or worker—perhaps at the encouragement of counsel seeking to maximize leverage through the imposition of arbitral fees—may fail to comply with an arbitration agreement's standard pre-arbitration notice and dispute resolution procedures designed to encourage the informal and amicable resolution of claims without the need for an adversarial proceeding. Or a consumer or worker may initiate an improper class or representative arbitration—the types of arbitrations that courts have repeatedly enjoined when they are prohibited by an arbitration agreement.[2]

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[2] For example, one law firm filed copycat arbitrations on behalf of over 1,000 claimants seeking to block or impose conditions on a merger. Every court to consider the issue held that the arbitrations were improper class or representative arbitrations

Yet in all of these scenarios, SB 707 obligates the business to pay the arbitration fees in full, on pain of massive sanctions, and with no guarantee of recouping the fees that it pays for even illegitimately filed arbitrations.

2. A federal district court recently concluded that the FAA does not preempt SB 707. (See *Postmates Inc. v. 10,356 Individuals* (C.D. Cal. Jan. 19, 2021) 2021 WL 540155, *appeal pending*, No. 21-55052 (9th Cir.).) (The Chamber participated as an *amicus* in that case as well.) But that court failed to meaningfully address any of the authorities just discussed. Instead, the court's principal rationale was that Section 2 of the FAA has no role to play so long as a state-law rule does not invalidate arbitration agreements. (*Id.* at *7-8.)

That rationale is wrong. To begin with, SB 707 does render the arbitration agreement unenforceable by the drafting party, providing that non-payment of arbitration fees "waives [that

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that violated the arbitration agreement. (See, e.g., *AT&T Mobility LLC v. Princi* (D. Mass. Dec. 2, 2011) 2011 WL 6012945, at *1; *AT&T Mobility LLC v. Bernardi* (N.D. Cal. Oct. 26, 2011) 2011 WL 5079549, at *13; *AT&T Mobility LLC v. Smith* (E.D. Pa. Oct. 7, 2011) 2011 WL 5924460, at *8; *AT&T Mobility LLC v. Gonnello* (S.D.N.Y. Oct. 7, 2011) 2011 WL 4716617, at *4; *AT&T Mobility LLC v. Bushman* (S.D. Fla. Sept. 23, 2011) 2011 WL 5924666, at *2.)

party's] right to compel arbitration" (Cal. Civ. Proc. Code § 1281.97(a)), even if the drafting party would otherwise be entitled to enforce the contract under general principles of California contract law.

Moreover, and more fundamentally, the district court's narrow reading of Section 2 would leave the FAA's "provisions rendered helpless to prevent even the most blatant discrimination against arbitration." (*Kindred*, *supra*, 137 S. Ct. at pp.1428-29.) The California Legislature sought to avoid FAA preemption of AB 51 based on a similar rationale, by structuring AB 51 to impose criminal and civil sanctions on the act of entering into an arbitration agreement but not to preclude enforcement of the agreement once formed. (See Cal. Labor Code § 432.6(f).) That effort to avoid preemption failed, Chief Judge Mueller explained, because "even if the law is artfully crafted to support the argument that it regulates only the behavior of employers, it cannot avoid being construed as a law that *in effect* discriminates against arbitration agreements." (*Chamber of Commerce*, *supra*, 438 F. Supp. 3d at p.1099 (emphasis added).) The sanctions imposed by AB 51 for entering into arbitration agreements, combined with the "likely deterrent effect on the use

of such agreements," means that "AB 51's design does not comport with the equal footing principle and its effort to avoid FAA preemption fails." (*Id.* (citing *Preston*, *supra*, 552 U.S. at p.358)).

The U.S. Supreme Court's decision in *Preston* further confirms that the FAA is concerned with more than just the enforceability of arbitration agreements. In *Preston*, the California state statute allowed enforcement of arbitration agreements and "merely postpone[d]" arbitration until after an administrative adjudication. (552 U.S. at 357-58.) Nonetheless, the statute impermissibly conflicted with the FAA. (*Id.*)

Equally unavailing was the second rationale offered by the federal district court for why SB 707 does not impermissibly impose one-sided sanctions on businesses. The district court thought that claimant workers "cannot 'abuse' arbitration agreements the way drafters of arbitration agreements" can. (*Postmates*, *supra*, 2021 WL 540155, at p.*9.) But for the reasons detailed above, that assertion is wrong. Indeed, this very case confirms the error in that district court's reasoning. Nearly one-fifth of the claims asserted against Intuit were withdrawn, but only after Intuit was forced to pay arbitration fees for many of

those claims because of the risk of sanctions under SB 707.

In short, because California law does not subject non-arbitration contracts to the harsh and one-sided types of sanctions contained in SB 707, SB 707 reflects a rule of state contract law designed "in a fashion that disfavors arbitration," and is preempted. (*Concepcion*, *supra*, 563 U.S. at p.341; see also *Kindred*, *supra*, 137 S. Ct. at p.1428.)

2. SB 707 interferes with the purposes and objectives of the Federal Arbitration Act

The preceding discussion also explains why the Federal Arbitration Act preempts SB 707 for the additional reason that the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" expressed in the Act. (*Concepcion*, *supra*, 563 U.S. at p.352 (quoting *Hines*, *supra*, 312 U.S. at p.67).)

Congress enacted the Federal Arbitration Act in 1925 to "reverse the longstanding judicial hostility to arbitration agreements." (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 289 (quotation marks omitted); see *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 272 [the Act "seeks broadly to overcome judicial hostility to arbitration agreements"].) The

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

By imposing unique and enormous penalties on the drafters of arbitration agreements, SB 707 forcefully impedes the Act's purpose "to promote arbitration." (*Concepcion*, *supra*, 563 U.S. at p.345.) The United States Court of Appeals for the First Circuit has held, for example, that "[a] policy designed to prevent one party from enforcing an arbitration contract or provision by visiting a penalty on that party is, without much question, contrary to the policies of the FAA." (*Securities Indus. Ass'n v. Connolly* (1st Cir. 1989) 883 F.2d 1114, 1122-24 [holding that the Act preempted Massachusetts state-law allowing state officials to revoke the licenses of broker-dealers who required customers to sign pre-dispute arbitration agreements].) And the U.S. Court of Appeals for the Fourth Circuit has expressly endorsed *Connolly*, agreeing that the Act bars state-law rules that "discourage" arbitration, not just those that "prohibit" it outright. (*Saturn Distrib. Corp. v. Williams* (4th Cir. 1990) 905 F.2d 719, 722-24.)

There can be no serious dispute that SB 707 embodies an improper attempt by the California Legislature to discourage businesses from forming and enforcing arbitration agreements with their customers and workers. Indeed, there is no need to speculate about that point, because the California Legislature admitted as much. The Assembly Committee on the Judiciary stated that the statute's "unforgiving" sanctions are "justified" to make "drafting parties reconsider their liberal use of binding arbitration agreements in contracts." (Analysis of Sen. Bill No. 707, *supra*, at p. 10.)

The Committee made plain its dislike of arbitration by characterizing it as a "controversial form of dispute resolution" (*id.*)—but that view is "far out of step" with Congress's endorsement of arbitration agreements. (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30 (quotation marks omitted).) Courts routinely look to California legislative history of this kind as confirmatory evidence of the effect of the statutory text. (See, e.g., *Gonzales v. CarMax Auto Superstores, LLC* (9th Cir. 2016), 840 F.3d 644, 652 & n.8; *In re Findley* (9th Cir. 2010) 593 F.3d 1048, 1053; *Chamber of Commerce*, *supra*, 438 F. Supp. 3d at p.1097.)

Moreover, as explained above (at 15-25), SB 707 penalizes any business that fails to pay arbitration fees in full, regardless of whether the business has a good-faith basis to challenge the arbitrability of the claims or to challenge whether the consumer or worker has complied with his or her own obligations under the contract. The statute therefore increases the costs to businesses of enforcing arbitration agreements and invites misuse of the arbitration process by enterprising plaintiffs' lawyers who know that businesses will feel obligated to pay fees even if they have reason to believe that the claimant may not actually be a customer, is not asserting an arbitrable claim, or has failed to comply with any necessary prerequisites to initiating an arbitration.

As Chief Judge Mueller determined in the context of Assembly Bill 51, this "deterrent effect on [the] use of arbitration agreements" means that the California statute "interferes with the FAA and for this reason as well is preempted." (*Chamber of Commerce*, *supra*, 438 F. Supp. 3d at p.1100.) The same is true of SB 707 here.

The district court that recently upheld SB 707 thought that it did not interfere with the purposes and objectives of the FAA

because it "*encourages* arbitration." (*Postmates*, *supra*, 2021 WL 540155, at p.*7; see *id.* at *9-10.) That myopic conclusion ignores the impact of SB 707 on whether parties enter into arbitration agreements in the first place. By definition, the *drafting* party is the party that decides whether to include an arbitration provision in its contracts. And by imposing harsh, one-sided sanctions on drafting parties, SB 707 plainly has a deterrent effect on the use of arbitration agreements in California—the very purpose of the California Legislature in enacting the statute.

Moreover, to the extent SB 707 encourages anything it is not legitimately-filed arbitrations on behalf of consumers and workers with genuine grievances, but rather improper arbitrations filed by lawyers who fail to vet their clients—as the unceremonious dismissal by respondents' counsel of almost 20 percent of their clients' claims underscores. The statute's failure to allow the drafting parties to withhold payment of fees without sanctions while they reasonably investigate the legitimacy of the arbitration confirms the Legislature's expressed goal of creating a disincentive for entering into arbitration agreements.

B. The Constitutionality Of SB 707 Is Ripe For Decision

Finally, as Intuit's brief details (at 38-41), its preemption challenge to SB 707 is ripe for judicial resolution. The "dispute is sufficiently concrete" and "the withholding of judicial consideration will result in a hardship"—and therefore the case satisfies the two-pronged test for whether a declaratory judgment action is ripe. (*Farm Sanctuary, Inc. v. Dep't of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502.)

Not only is the preemption issue a pure question of law, but there is also no legitimate dispute regarding the coercive effect of SB 707 on Intuit and other businesses in California. Because of the severity of the sanctions imposed by SB 707, such businesses will be coerced into paying purportedly non-refundable arbitration fees in full to avoid facing sanctions under the statute—even if the arbitration is an improper group arbitration or the business has meritorious objections to the validity of the arbitration proceeding.

As Intuit points out, it was forced by threat of enforcement of SB 707 to pay millions of dollars in arbitral fees. Intuit Br. 19. It is hard to imagine a more coercive effect or concrete cost of

compliance with a statute that Intuit and other businesses have contended is unconstitutional. And therefore businesses like Intuit have a correspondingly concrete interest in removing the sword hanging over their heads.

For that reason alone, the trial court was incorrect in requiring Intuit to incur sanctions under SB 707 before challenging its validity.

Indeed, California courts routinely entertain pre-enforcement actions for declaratory relief. (See, e.g., *Communities for a Better Environment v. State Energy Resources Conservation & Development Commission* (2017) 19 Cal.App.5th 725, 738-39; *Baxter Health Care Corp. v. Denton* (2004) 120 Cal.App.4th 333, 362.) That is because equity does not require business to face the "Hobson's choice" of ignoring the unlawful legislation and exposing themselves to "potentially huge liability" or "violat[ing] the law once as a test case and suffer[ing] the injury of obeying the law during the pendency of the proceedings." (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 381; see also *Ex Parte Young* (1908) 209 U.S. 123, 145-46 ["officers and employees could not be expected to disobey" state law in order to test its validity].)

Indeed, the harm facing Intuit is irreparable. Chief Judge Mueller reached a similar conclusion when she issued a preliminary injunction against enforcement of AB 51: "No matter the choice—continue to utilize arbitration agreements and risk criminal and civil sanctions or avoid arbitration agreements for fear of non-compliance with a statute that is likely preempted—the result is the same: California employers are faced with likely irreparable harm." (*Chamber of Commerce*, *supra*, 438 F. Supp. 3d at 1105.) And here, the irreparable injury to Intuit is evident, because it may never be able to recover the fees it pays to avoid SB 707's sanctions.

In short, because businesses in California must choose between risking sanctions under SB 707 or paying non-refundable arbitration fees that they may never recover, a "very real penalty attaches" regardless of how they respond to the statute. (*Am. Trucking Associations, Inc. v. City of Los Angeles* (9th Cir. 2009) 559 F.3d 1046, 1058.) In either case, the irreparable harm is clear, and can be avoided only by a judicial declaration that SB 707 is unlawful. That very real harm, situated in the context of a concrete dispute, is plainly ripe for this Court's review.

CONCLUSION

The trial court's order should be reversed.

Dated: March 19, 2021

Respectfully submitted.

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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.204(c)(1))

According to the word count facility in Microsoft Word 2016, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.204(c)(3), contains 4,280 words, and therefore complies with the 14,000-word limit contained in Rule 8.204(c)(1).

Dated: March 19, 2021

/s/ Archis A. Parasharami
Archis A. Parasharami

PROOF OF SERVICE

I, Sarabi Ramirez, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: 350 South Grand Ave., 25th Floor, Los Angeles, California 90071. On March 19, 2021, I served the document(s) described as:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

☐ By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail.

☐ By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.

☐ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope, addressed as set forth below, to be delivered to an overnight service agent for delivery.

☒ By causing the document(s) listed above to be served electronically on the person(s) at the address(es) set forth below using the True Filing program.

Rodger Ryan Cole Fenwick & West 801 California Street Mountain View, CA 94041 Matthew Donald Benedetto Wilmer Hale 350 S Grand Ave, 21st Floor Los Angeles, CA 90071 Molly R. Melcher Fenwick & West LLP 555 California Street, 12th Floor San Francisco, CA 94104 *Attorneys for Plaintiffs and Appellants Intuit Inc. and Intuit Consumer Group LLC*	Served Electronically
Keith Andrew Custis Custis Law, P.C. 1999 Avenue of the Stars Suite 1100 Los Angeles, CA 90067 kcustis@custislawpc.com *Attorney for Defendants and Respondents*	Served Electronically
Hon. Terry A. Green Los Angeles Superior Court 111 North Hill St., Dept. 14 Los Angeles, CA 90012 Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012 *Respondent*	Served by U.S. mail

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

Executed on March 19, 2021, at Los Angeles, California.

/s/ *Sarabi Ramirez*
Sarabi Ramirez