No. 20-15291

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees.

v.

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

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

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

Defendants' effort to obscure the clear circuit conflict here is based on a misreading of decisions from other circuits. Those decisions make clear that the Federal Arbitration Act (FAA) preempts barriers to the formation of arbitration agreements. As the petition and *amici* explain, AB51 creates such a barrier; indeed, allowing AB51 to take effect will eliminate workplace arbitration in California. *See* Pet. 21-23; Restaurant Law Center Br. 5-9; California Employment Law Council Br. 24-29; Employers Group Br. 3-4; California Civil Justice Ass'n Br. 2-3. That result cannot be squared with other circuit decisions, Supreme Court precedent, or the purposes of the FAA. The amicus brief filed in support of Defendants by the California Employment Lawyers' Association (whose members represent employee-plaintiffs in litigation), while wrong on the merits, serves only to underscore the enormous importance of the issue.

Put simply, en banc review is necessary to ensure that California does not render the Federal Arbitration Act a dead letter.

ARGUMENT

A. The Panel Majority's Decision Squarely Conflicts With Decisions From Two Other Circuits.

Defendants mischaracterize the conflicting decisions from the First and Fourth Circuits. *See Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722-24 (4th Cir. 1990); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1122-24 (1st Cir. 1989).

The very passage from *Saturn* that Defendants cite (at Opp. 16) makes clear that the flaw in the Virginia statute was that the law imposed unique barriers to the *formation* of arbitration agreements. The Fourth Circuit explained that the statute "conflicts with the FAA because Virginia law generally permits contracting parties to *make terms nonnegotiable*, and singles out arbitration provisions as an exception to that rule." 905 F.2d at 724 (emphasis added).

Virginia argued, just like Defendants here, that "the scope of FAA preemption is limited to laws covering existing arbitration agreements, and does not extend to laws that prohibit or regulate the *formation* of arbitration agreements." *Id.* at 723. Unlike the panel majority, however, the Fourth Circuit "disagree[d]," explaining that "[a]lthough most cases have arisen in the context of existing arbitration

agreements, that circumstance *does not limit* the scope of FAA preemption." *Id.* (emphasis added). The court went on to say: "The FAA does not allow a state legislature to circumvent Congressional intent by enacting special rules to discourage or prohibit the *formation* of agreements to arbitrate. … We hold today that § 2 does preempt state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements." *Id.* (emphasis added). That holding defeats Defendants' attempt to deny a conflict.

As for *Connolly*, Defendants concede that the enforceability of completed arbitration agreements was not implicated by the Massachusetts regulations allowing state officials to revoke the licenses of broker-dealers who required customers to sign pre-dispute arbitration agreements. Instead, Defendants suggest that the First Circuit did not consider FAA preemption as to those regulations standing alone because the court had a broader package of regulations before it. Opp. 16-17.

But the First Circuit's obstacle preemption analysis made clear that the regulations penalizing the act of offering an arbitration

agreement independently ran afoul of the FAA. The court held that regulations depriving broker-dealers of their licenses for offering arbitration agreements presented "an obstacle of greater proportions" to the policies underlying the FAA than the possibility that "an arbitration agreement might be declared void." 883 F.2d at 1124. And the court rejected as "too clever by half" the argument made by Massachusetts officials, indistinguishable from California's here, that the regulations were beyond the reach of the FAA because they regulated the conduct of the broker-dealers rather than the enforceability of the resulting contracts. *Id.* at 1122. As the court explained, conditions on arbitration agreements that "inhibit a party's willingness to create an arbitration contract" "go too far" under the FAA. *Id.* at 1123.

Allowing the panel's decision to stand will leave in place a stark conflict with the decisions of the First and Fourth Circuits. En banc review is warranted for that reason alone.

B. The Panel Majority's Decision Is Irreconcilable With The Supreme Court's FAA Precedents.

The decisions of the First and Fourth Circuits were compelled by Supreme Court precedent. Defendants' attempt to defend the panel majority's ruling fails.

1. Defendants do not deny that AB51 makes it a crime to condition an employment offer on the employee's agreement to arbitrate, even though California "tolerates" adhesion contracts in other circumstances (Opp. 13)—including numerous other take-it-or-leave-it conditions of employment.

There is thus no doubt that AB51 places offers to enter into arbitration agreements on a different footing from offers to enter into other contracts—exactly what Section 2 of the FAA forbids. Defendants' sole response is that the FAA says nothing about the formation or attempted formation of arbitration agreements. But the FAA's "equal-footing principle" applies to both the "enforcement" and the "*formation*" of arbitration agreements. *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (emphasis added); *see* Pet. 10-14; Op. 35-39 (dissent).

2. Defendants' *amicus* is just as wrong in invoking the Supreme Court's repeated pronouncements "that arbitration under the FAA 'is a matter of consent, not coercion.'" California Employment Lawyers Ass'n Br. 9. That is because, as the *amicus* admits, AB51 does *not* apply a generally-applicable standard of consent, but instead creates a "special" standard of consent for arbitration agreements in the employment context. *Id.* at 14-16. One of *amicus'* principal authorities recognizes—in the employment context—that under California's usual rules "contracts of adhesion … are a fact of modern life" and "are generally enforced." *Gentry v. Superior Court*, 42 Cal. 4th 443, 469 (2007). Indeed, there would have been no need to enact AB51 if it were intended to repeat already-applicable general rules of contract formation. AB51's heightened standard plainly violates the FAA's equal footing rule. *See* Op. 42-46 (dissent).*

* This Court has already rejected *amicus*'s contention that arbitration agreements may be subject to a heightened consent standard because they involve waivers of federal constitutional rights. *See Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013); *cf. Kindred*, 137 S. Ct. at 1427 (recognizing that "a waiver of the right to go to court and receive a jury trial" is "the primary characteristic of an arbitration agreement").

3. Moreover, Defendants do not meaningfully address the distinct question whether obstacle preemption applies here. The entire purpose of the FAA was to "promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011); *see* Pet. 14-16. That purpose requires preemption of state laws that prevent parties from effectively contracting to arbitrate. Thus, the California rule requiring class arbitration at issue in *Concepcion* was preempted "because it interfered with a fundamental attribute of arbitration"—its "individualized, informal nature." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). AB51's criminalization of attempts to form arbitration agreements poses at least as great an obstacle to Congress' objective of encouraging arbitration as the state-law rules previously rejected by the Court.

Defendants' response is that the FAA promotes arbitration only in one "particular way: by giving parties who agree to arbitration security that those agreements would be enforced." Opp. 12; *see also id.* at 15 n.4. Under Defendants' theory, States could single out and penalize all attempts to form arbitration agreements—even if that means there would be no more arbitration agreements, and thus

nothing to enforce under the FAA at all. That cramped view of preemption finds no support in the Supreme Court's precedents, which make clear that state efforts to abolish arbitration agreements run headlong into the purposes of the FAA. Indeed, even if the FAA's purpose were simply to ensure that arbitration agreements are treated in the same way as the State treats contracts generally, that purpose also would be obstructed by AB51.

Congress enacted the FAA to counter widespread "judicial antagonism toward arbitration," *Epic*, 138 S. Ct. at 1623, which "had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy," *Concepcion*, 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Courts "must be alert to new devices and formulas that would achieve much the same result today." *Epic*, 138 S. Ct. at 1623. AB51 is just such a "device": it is difficult to imagine anything that could more directly and dramatically obstruct accomplishment of the FAA's purposes than a law targeting criminal penalties on attempts to form arbitration agreements.

CONCLUSION

The petition for rehearing en banc should be granted.

December 21, 2021

Respectfully submitted,

/s/ Andrew J. Pincus

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing reply complies with the word limit of Ninth Circuit Rule 40-1(a) because there are 1,420 words in the reply, excluding the parts of the reply exempted by Fed. R. App. P. 32(f).

I further certify that the reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the reply has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

December 21, 2021

MAYER BROWN LLP

/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that on this 21st day of December, 2021, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

December 21, 2021

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