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. XAVIER BECERRA, in his official capacity as the Attorney General of the State of California, *et al*. Defendants-Appellants.	No. 20-15291 No. 2:19-cv-02456-KJM-DB E. Dist. Cal., Sacramento Hon. Kimberly J. Mueller presiding

On Appeal from an Order of the United States District Court
for the Northern District of California
The Honorable Kimberly J. Mueller, Chief Judge Presiding
Case No. 2:19-cv-02456-KJM-DB

BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c)(1), counsel for *amicus curiae* discloses as follows: the California Employment Lawyers Association has no parent corporation, has no stock, and hence, no public company owns 10% or more of its stock.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The California Employment Lawyers Association ("CELA") is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions arising under the California Fair Employment and Housing Act ("FEHA") and California Labor Code, the statutes governed by Assembly Bill 51 ("AB 51"). CELA has a substantial interest in protecting the statutory rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting *amicus* briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the U.S. Court of Appeals for the Ninth Circuit.[1]

[1] Pursuant to Federal Rule of Appellate Procedure ("FRAP") 29(a)(4)(E), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress cannot by statute strip individuals of their Right to Petition under the First Amendment. It cannot enact a law that eliminates Fifth Amendment due process protections. It cannot deprive litigants of their Seventh Amendment right to a trial by a jury in civil cases. Because the U.S. Constitution is the supreme law of the land, no statute, whether state or federal, even the Federal Arbitration Act ("FAA"), can be interpreted to contradict or prohibit the exercise of those fundamental constitutional guarantees. For that reason, this Court's analysis of the issues raised on this appeal should not begin with the preemptive force of the FAA (if any, in this context), but must begin with the supremacy of the U.S. Constitution.

To be sure, certain constitutional rights can be waived under appropriate circumstances. But any such waiver must be knowing and voluntary. It cannot be involuntary or coerced. And a state statute like AB 51 that codifies these fundamental constitutional principles by stating that no employee may be coercively and involuntarily compelled to waive constitutional rights prospectively, and may not be retaliated against for refusing to waive such constitutional rights, cannot be invalidated as preempted by the FAA.

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monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The U.S. Supreme Court and this Circuit have consistently held that arbitration under the FAA is a "matter of consent and not coercion." The case law keeps reiterating that core principle because it must: truly voluntary and informed consent is necessarily the linchpin of any binding contractual agreement to waive constitutional rights. To the extent the FAA or any other federal statute purports to condone the involuntary, coerced waiver of an employee's First Amendment right of petition, Fifth and Fourteenth Amendment rights to due process, and the Seventh Amendment right to a civil jury trial, it unduly interferes with that employee's constitutional rights. Recognizing that fundamental principle, the California Legislature in enacting AB 51 did nothing more than ensure the constitutionally required level of consent required *before* any covered employee is compelled to waive his or her constitutional rights or substantive statutory rights. The manner in which the Legislature achieved that goal is entirely consistent with the U.S. Constitution, as well as with the U.S. Supreme Court's pronouncements regarding arbitration under the FAA.

AB 51 was carefully drafted to be consistent with the U.S. Supreme Court's decisions on the limits of a state's power to protect its citizens and to compel compliance with its own laws and the substantive rights they guarantee. AB 51 does not prohibit pre-dispute arbitration agreements or the enforcement of those agreements. It does not prohibit post-dispute arbitration agreements either.

Indeed, AB 51 expressly states that it does not invalidate any arbitration agreement that is otherwise enforceable under the FAA. Rather, it applies *before* any written arbitration agreement comes into existence. Before the FAA applies.

Moreover, AB 51 is not arbitration-specific. To the contrary, it broadly prohibits the coerced waiver of any substantive rights, or procedures including the statute of limitations, and the right to certain penalties arising from California's workplace discrimination and wage-and hour laws.

AB 51 is actually quite limited in scope, even though that is not clear from the district court's ruling. The statute only applies to rights guaranteed by California's statutory employment discrimination and wage-and-hour laws—rights that the California Legislature, and California Supreme Court, have repeatedly emphasized are fundamental, non-waivable, and protected by public policy. AB 51 has no application to common law rights such as breach of contract, wrongful termination, fraud, or defamation. It applies only to employees who may seek to exercise a category of statutory rights that the State has elevated to a special level, as to which the Legislature has created an elaborate administrative mechanism to protect and enforce. California has a compelling interest and a 10th Amendment right to ensure that employees retain their right to access those administrative forums, free from any compelled waiver.

AB 51 is also limited to rights arising in the employment context, which Congress has declared are especially in need of protection. The employment relationship is different than the commercial relationship in several critical ways. Federal laws enacted after the FAA—such as the Norris-LaGuardia Act and the National Labor Relations Act ("NLRA")—expressly declare that the "public policy of the United States" recognizes that individual workers do not have the ability to freely negotiate the terms of their labor. California Labor Code § 923 says the same thing. The expressly stated public policy of this state and this country recognizes that the right to work is entitled to special protections and that conditioning employment on the waiver of protected rights is inherently coercive, given the critical psychological and economic importance of being able to work and to earn income. The recognition of the coercion inherent in the employment relationship has for over a century been the premise for the U.S. Congress and legislatures at every level to enact thousands of laws protecting workers.

The application of the FAA to the employment setting, as permitted by *Circuit City v. Adams*, 532 U.S. 105 (2001), is further limited by the text of § 1 of the FAA (as compared to the commercial context where the FAA's coverage is as broad as the Commerce Clause permits). The FAA does not apply to workers engaged in interstate transportation industries. 9 U.S.C. § 1. Nor does it apply to contracts, that by their terms are covered by state arbitration laws (such as the

California Arbitration Act, Cal. Code Civ. Proc. §§ 1280–1294.4). *Compare Hall St. Assoc., LLC v. Mattel*, 552 U.S. 576 (2008) *with Cable Connection, Inc. v. DirectTV, Inc.*, 44 Cal. 4th 1334 (2008). Thus, whatever preemptive effect the FAA may have on some worker's contracts, it plainly has no preemptive effect on the million or more Californians who engage in interstate transportation or who are either not subject to workplace arbitration or not subject to workplace arbitration under the FAA. Given the severability language in AB 51, *at a minimum* AB 51 must remain in full force and effect with respect to these *indisputably* non-FAA applications

This is a case of first impression. There has never been a preemption case under the FAA where there was *no arbitration agreement*. Logically, it makes sense that FAA preemption is limited to circumstances in which there is an actual FAA-covered arbitration agreement at issue, because the language in Section 2 of the FAA, which has been the basis for courts' finding of implied preemption under *Hines v. Davidovitz*, 312 U.S. 52 (1941), only applies where there is in fact an actual, written agreement to arbitrate. See 9 U.S.C. § 2. The district court cited *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), and other cases where the issue was whether a state statute could be used to invalidate an executed written arbitration agreement. None of those cases involved a challenge to a state law that applied solely and exclusively to the period *before* any such agreement

came into existence, or to the retaliatory conduct of an employer against an employee who *refused* to enter into such an agreement. Yet those are the only circumstances to which AB 51 applies.

While the FAA may require the enforcement of otherwise valid and consensual arbitration agreements, it does not authorize, and could not authorize, the coerced waiver of constitutional and substantive statutory rights. That would be unconstitutional state action. There is a material difference between the use of adhesion contracts to set routine commercial terms and the forced, involuntary waiver of constitutional and statutory rights imposed on an economically powerless worker. There is a big difference in agreeing to arbitrate claims arising from negotiated contracts where the terms are agreed upon by the contracting parties and the waiver of statutory rights that the legislature has established as minimum protections that every employee or other protected party has the right to enforce. Employees come to the workplace with those statutory rights. No employer can revoke them or require their forfeiture as a mandatory condition of entering into the employment relationship. Nor can any "implied" policy in favor of enforcement of consensual arbitration agreements preempt the ability of the states to ensure that their residents' labor and civil rights laws are not being subjected to improper and coerced waivers and that employees can have access to the administrative agencies set up to protect them.

Neither the purpose nor the effect of AB 51 is to prohibit arbitration. The statute simply ensures a minimal level of consent, as the U.S. Constitution and state and federal law require, for any valid waiver of critical constitutional and statutory rights or of the ability to access the administrative forums created by the state. Nothing in this statute is inconsistent with the Constitution or the FAA.

ARGUMENT

I. The Express Public Policy of this Nation is to Recognize that the Employment Relationship is Inherently Coercive as Distinguished from Commercial Relationships

The "free market" paradigm as applied to the employment relationship (if you don't like the terms, don't take the job, even if those terms would strip you of non-waivable rights) has been consistently rejected by more than a century of Supreme Court and lower court case law. Every employment statute enacted since the New Deal has reflected Congress's recognition that traditional market forces are inadequate to protect workers from the deprivation of their public law rights. Whether the statutes focus on child labor, minimum wage laws, discrimination, or whistleblower retaliation, one thing is clear: employers may not condition employment on the compelled waiver of those critical statutory protections.[2] The

[2] *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 100-01 (2000) ("It is indisputable that an employment contract that required employees to waive their rights under the FEHA to redress sexual harassment or discrimination would be contrary to public policy and unlawful."); *Gentry v. Superior Ct.*, 42 Cal.4th 443, 455 (2007) ("By its terms, the rights to the legal

reason the employment relationship is the most regulated relationship in this country is because it needs to be.

In the Norris-LaGuardia Act, the U.S. Congress explicitly declared as the "public policy of the United States," that the "individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102. The National Labor Relations Act similarly recognized the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151; *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753 (1985). Those are the express public policies of this nation. No implied policy emanating from the FAA can supersede or preempt those expressly stated public policies or the constitutional mandate that the right to a jury trial be preserved.

The California Legislature has similarly predicated the enactment of labor laws on the need to protect individual workers from the overwhelming inequality

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minimum wage and legal overtime compensation conferred by the [Cal. Lab. Code § 1194] are unwaivable."); *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1077 (2003) (A claim for wrongful termination in violation of public policy "is designed to protect a public interest and therefore 'cannot be contravened by a private agreement.'" (quoting *Armendariz* at 100)).

in bargaining power between them and employers. In California Labor Code § 923—one of the sections of the California Code to which AB 51 would apply—the California Legislature declared as "the public policy of this State" that "[n]egotiation of terms and conditions of labor should result from voluntary agreement between employer and employees," based on their recognition that "[i]n dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."

For decades, the U.S. Supreme Court has upheld regulations on employers based in part on the recognition that special protections—often non-waivable protections—are necessary to ensure the preservation of core guarantees that Congress has declared are fundamental and that belong to every working man and woman, no matter how much economic power their employers or prospective employers might wield. For example, in a case involving the validity of a state minimum wage law, the Supreme Court stated in *West Coast Hotel Co. v. Parrish*, that "[t]he legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality . . . the proprietors lay down the rules and the laborers are practically constrained to obey

them." 300 U.S. 379, 393-94 (1937) (quoting *Holden v. Hardy*, 169 U.S. 366, 397 (1898)).

The U.S. Supreme Court also has recognized that the FAA itself recognizes this fundamental disparity in bargaining power between employers and employees. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the [Federal] Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1."). The legislative history of the FAA also reflects that recognition. As Senator Walsh explained, in comparing insurance and employment contracts to the types of commercial contracts that were the focus of the FAA's drafters:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Sub-comm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923).

II. Arbitration Imposed as a Condition of Employment is Not a "Matter of Consent" As Required by the FAA

Plaintiffs-Appellees nonetheless argued below, and indeed base their assertion of federal jurisdiction on the false notion that the FAA confers a federal statutory "right" to impose arbitration on workers as a condition of employment, and by implication, to retaliate against any employee who does not consent to arbitration. Pls.' Supp. Br., ECF No. 40, at 1. They cited no authority for the existence of this particular right, though, because none exists. Neither the U.S. Supreme Court, nor any other court, has recognized any such "right."

What the U.S. Supreme Court has affirmed, on no fewer than nine occasions, is that arbitration under the FAA "is a matter of consent, not coercion." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 299 (2010); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., Concurring); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 472-73 (2015) (Ginsburg, J., Dissenting); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

This Circuit, as well, has repeatedly reaffirmed this central principal of FAA jurisprudence. *Munro v. Univ. of South Calif.*, 896 F.3d 1088, 1092 (9th Cir. 2018)

("[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" (quoting *Volt* at 479) (internal citations omitted)); *Sanchez v. Elizondo*, 878 F.3d 1216, 1221 (9th Cir. 2018) ("'The FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" (internal citations omitted); *U.S. ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017) ("'the FAA imposes certain rules of fundamental importance' that must also guide our interpretation 'including the basic precept that arbitration is a matter of consent, not coercion . . .'") (internal citations omitted); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 757 (9th Cir. 2003) (Pregerson, J., dissenting) ("The Court has clearly reiterated that 'arbitration under the [FAA] is a matter of consent, not coercion.'" (quoting *Volt* at 479)); *Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165, 1179 (9th Cir. 2003) ("[A]rbitration under the FAA is a matter of 'consent, not coercion.'" (quoting *Mastrobuono* at 57), overruled on other grounds, *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Lapine Tech. Corp. v. Kyocera Corp*., 130 F.3d 884, 888 (9th Cir. 1997) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.") vacated on other grounds, *Kyocera Corp. v. Prudential-Bache T Servs*., 341 F.3d 987 (9th Cir. 2003).

There is a critical difference between a typical commercial or consumer contract, such as a contract to purchase a cellphone from a particular carrier, and an employment agreement that determines whether one party has a job, an income, and critical health and other benefits. Federal law requires recognition of that distinction. Even under AB 51, employers are free to offer arbitration, to make it attractive, and to enter into arbitration agreements for any category of claim. What AB 51 forecloses is an employer's power to fire, refuse to hire, or otherwise retaliate against a worker who refuses to waive his or her constitutional and statutory rights.

III. By Ensuring that California Workers Cannot Be Coerced into Arbitration, AB 51 Aligns California Law with the Standards Generally Applicable to Waivers of Constitutional Rights

AB 51 has two principal provisions. The first, codified in Labor Code §432.6(a), prohibits employers from requiring their employees or applicants for employment to waive any "right, forum, or procedure" that would be available to remedy a violation of their rights under FEHA or the California Labor Code as a condition of employment. The second, codified in Labor Code §432.6(b), prohibits employers from threatening, discriminating or retaliating against, or terminating, any employee who declines to be coerced into entering into such a waiver agreement. Those provisions, like all provisions in AB 51 are severable, *see* Labor Code §432.6(i), but both are entirely valid.

Mandatory pre-dispute arbitration agreements, in most contexts, require workers to forfeit their rights under the First, Fifth, Seventh, and Fourteenth Amendments to the U.S. Constitution. An agreement to arbitrate often requires an agreement to forfeit the right to have the law enforced correctly,[3] the right to cross examination, the right to appeal,[4] the ability to conduct full discovery,[5] the right to a free forum, and the right to an Article III judge who is obligated to apply the law.[6]

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[3] *See e.g. PowerAgent Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004) (A court's power to review an arbitration award is "'both limited and highly deferential' and an arbitration award may be vacated only if it is 'completely irrational' or 'constitutes manifest disregard of the law.'") (quoting *Coutee v. Barington Capital Grp.*, 336 F.3d 1128, 1132-33 (9th Cir. 2003)).

[4] The FAA provides only the narrowest of grounds for vacating an arbitral award. Under 9 U.S.C. § 10, an arbitration award can be vacated "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[5] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (listing types of discovery requirements that would have a disproportionate impact on arbitration, and therefore could not be used to invalidate arbitration agreements under otherwise generally applicable contract defenses, such as unconscionability).

[6] The U.S. Supreme Court has held, in the context of bankruptcy proceedings, that a litigant's waiver of his right to proceed before an Article III decisionmaker regarding ancillary claims ordinarily not subject to the jurisdiction of bankruptcy

Courts in this Circuit and elsewhere have held that there is no state action, when a court merely compels arbitration pursuant to a voluntary agreement between private parties,[7] or when a court enforces an arbitral judgment and award.[8] But here, the Plaintiffs-Appellees argue that the FAA actually confers and is the source of a statutory right to coerce employees to waive their constitutional rights by imposing arbitration as a condition of acquiring or maintaining employment. That would be the purest form of state action. *Duffield*, 144 F.3d 1182, overruled on other grounds by, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

The Supreme Court has frequently emphasized that waiver of constitutional rights may only be found when exacting standards ensuring true consent have been satisfied. Where there has been no effective "affirmative consent," even an opt-out procedure cannot save an otherwise unconstitutional waiver. AB 51 commands the

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courts, must be knowing and voluntary. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015).5

[7] *Youssofi v. Credit One Fin.*, 717 Fed. Appx. 745 (9th Cir. 2018); *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 837 (9th Cir. 2017); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1201 (9th Cir. 1998), overruled on other grounds by, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

[8] *Davis v. Prudential Sec.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (citing *Federal Deposit Ins. Corp. v. Air Florida Sys.*, Inc., 822 F.2d 833, 842 n. 9 (9th Cir.1987)) (holding that neither a private arbitral proceeding nor the confirmation by a court of an arbitral award satisfied the state action element of a due process claim under the Fifth and Fourteenth Amendments).

same result. Because of the Supremacy Clause of the U.S. Constitution,[9] both the FAA and any newly discovered implied policies embodied in it must yield to express Constitutional and statutory requirements for the waiver of those rights.

For example, federal law permits pre-dispute jury trial waivers only when the waiver is made "knowingly and voluntarily." *Cnty. of Orange v. U.S. Dist. Court*, 784 F.3d 520, 526 (9th Cir. 2015) (citing *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977)). This Court has described the "knowingly and voluntarily" standard for jury trial waivers as the "federal constitutional minimum." *Cnty of Orange*, 784 F.3d at 531; *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body [in both civil and criminal cases] is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.") (citations omitted); *Hendrix*, 565 F.2d at 258 ("It is elementary that the Seventh Amendment right to a jury is

[9] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.")

fundamental and that its protections can only be relinquished knowingly and intentionally.")

Courts have demanded equally heightened standards when evaluating the validity of supposedly consensual waivers of constitutional rights in other contexts as well. *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (First Amendment rights may be waived "if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent"); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (applying "voluntary, knowing, and intelligently made" standard to evaluate validity of waiver of due process rights in the civil context). In deciding whether such fundamental rights have been waived, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937).

The recent case of *Janus v. AFSCME, Council 31*, 138 U.S. 2448 (2018), provides another example where the U.S. Supreme Court has framed the standard that must be satisfied to waive of certain constitutional rights in the workplace in terms of consent. In *Janus*, the Court held that the compulsory deduction of union "agency fees" from the wages of non-union members by a public employee union infringed on those non-members' First Amendment rights. As a result, the Court held that such fees could not be deducted unless the non-member "affirmatively

consents to pay." 138 S. Ct. 2448, 2486 (2018). Because agreeing to pay the fees constituted a waiver of those workers' First Amendment rights, the Court emphasized that such a waiver could not be presumed, had to be freely given, and must be shown by clear and compelling evidence. *Id*.

Of particular significance to the Court's analysis in *Janus* was the fact that a workplace-wide policy was at issue, a "blanket requirement" that the Court concluded improperly infringed on certain employees' First Amendment rights. *Id*. at 2472. Similarly, Plaintiffs-Appellees have asserted that their members will be irreparably harmed by AB 51 preventing them from imposing arbitration as a condition of employment, refusing to hire any new workers who do not agree, and also firing any existing workers who do not agree, as a matter of general practice. Pls.' Supp. Br. at 2. As such, Plaintiffs-Appellees seek to bring the preemptive force of the FAA to bear to perpetuate their power to apply a "blanket requirement" that also compels workers to waive their constitutional rights. AB 51 merely steps in where the Court did in *Janus*, to prevent such waivers from being made without the required "affirmative consent."

Relatedly, and of particular relevance to Section (c) of AB 51,[10] *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), addressed whether opt-out procedures can

[10] Section 3(c) states: "For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment."

save an otherwise impermissible waiver of constitutional rights. In *Knox*, a union levied a special fee assessment on both union members and non-members alike, for the purpose of funding certain political activities. The Court ruled that the union's procedures for protesting that levy provided insufficient protection for the First Amendment rights of non-members who might have objected to paying to support the political activities in question to merely be provided an opportunity to claw back those fees after the political activities already were conducted. Instead, the Court held that when levying the fees, the union "should have sent out a new notice allowing nonmembers to opt-in to accept the special fee rather than requiring them to opt out." 567 U.S. at 317.

IV. To the Extent the FAA Applies to the Circumstances AB 51 Governs, AB 51 Is Fully Consistent with the FAA and the U.S. Supreme Court's Jurisprudence Interpreting It

The FAA is not even implicated before an arbitration agreement comes into existence. The Constitution and workplace statutes are. The FAA does not create any substantive rights other than the right to enforce a valid arbitration agreement. The oft-asserted "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), is only "at bottom a policy guaranteeing the *enforcement* of private contractual arrangements." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (emphasis added). The first substantive provision only requires some

minimal level of consent prior to the written agreement being formed. The second substantive provision only applies when an employee expressly refuses to agree to arbitrate. The FAA cannot be deemed to apply in a situation where there is no arbitration agreement and where the employee expressly refuses to arbitrate. Moreover, once an agreement is formed and the FAA *does* begin to apply, Section 3(f) expressly states that nothing in AB 51 may be used to "invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."

Because the California Legislature disclaimed any intent to have AB 51 used to invalidate arbitration agreements within the FAA's coverage once formed, there is nothing left for the FAA to preempt. The U.S. Supreme Court has "recognized that the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478. As then-Judge Gorsuch counseled while a member of the 10th Circuit Court of Appeals:

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

Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 977 (10th Cir. 2014) (quoting *Concepcion*, 563 U.S. 333, 339 (2011)).

Further, and as indicated by the quote from *Prima Paint, supra* at 11 the FAA's application to the employment setting is itself limited by the FAA's own terms, in contrast to the commercial context, where its coverage is as broad as the Commerce Clause will permit. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).[11] Section 1 of the FAA excludes from the Act's reach "contracts of employment . . . of workers engaged in . . . interstate commerce." 9 U.S.C. § 1. The U.S. Supreme Court has held that the Section 1 exemption applies to both employees and independent contractors working in interstate transportation industries. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019). This exclusion applies to more than one million California workers engaged in interstate transportation industries.[12] Thus, no matter what preemptive effect the FAA may have, it inarguably has no application to numerous workers who AB 51 would protect.

To the extent the FAA applies to AB 51, it is critical to note that there has never been an FAA preemption case in the absence of a signed arbitration agreement, for the simple reason that the FAA's application is limited by its terms

[11] Section 2 of the FAA extends to "written provision in any maritime transaction or a contract evidencing a transaction involving commerce[.]" 9 U.S.C. § 2.

[12] U.S. Bureau of Labor Statistics, California May 2019 State Occupational Employment and Wage Estimates, available at https://www.bls.gov/oes/current/oes_ca.htm#53-0000 (last visited May 14, 2020).

to enforcing written arbitration provisions or contracts.[13] AB 51 does not prohibit workers from entering into pre-dispute or post-dispute arbitration agreements. It does not prevent the arbitration of any claim or category of claims. *Cf. Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012). It does not alter or affect anything that the U.S. Supreme Court has identified as an essential attribute of arbitration. *Cf. Concepcion*, 563 U.S. 333 (2011). It expressly states that it is not intended to invalidate any arbitration agreement that is otherwise enforceable under the FAA. There is simply no conflict with the FAA; and to the extent there is, the conflict was created by the U.S. Constitution and not AB 51.

Nor, finally, does AB 51 implicate the type of contract formation issues addressed by the U.S. Supreme Court in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017). In that case, and in every other U.S. Supreme Court decision addressing FAA preemption, the parties' dispute focused on the enforceability of an executed agreement. The state statute at issue in *Kindred* limited the authority of certain persons to execute binding arbitration agreements on behalf of another. As the Supreme Court explained, that statute could not be used to invalidate the agreement because it was preempted by the FAA because "[a] rule selectively finding arbitration contracts invalid because improperly

[13] 9 U.S.C. § 2 (The FAA states that "[a] written provision . . . or a *contract* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any *contract*.")*)* (emphasis added).

formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Id*. at 1429.

In contrast to the statute at issue in *Kindred,* Section 3(f) of AB 51 expressly disclaims any authority "to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act[.]" It does not prevent employers and employees from entering into pre-dispute arbitration agreements, if both sides consent to do so. And it could not be used, as was the case in *Kindred* to void or invalidate an arbitration agreement that otherwise has been properly executed.

Beyond the enforcement of valid agreements, any efforts to discern an "implied" public policy regarding a state's ability to ensure constitutionally required consent for the waiver of constitutional rights, or to otherwise regulate the employment relationship, are not based in language of the FAA, any part of its intent and legislative history, and certainly are not sufficient to preempt a valid and important exercise of the state of California's police powers.

CONCLUSION

AB 51 was carefully drafted to be faithful to the U.S. Constitution and the U.S. Supreme Court's decisions on FAA preemption. It is not the wholesale attack on arbitration the Plaintiffs-Appellees portray it to be. It is in fact a very limited

statute that is simply designed to ensure the minimal level of consent that is required for the waiver of critical constitutional and statutory rights in a context that federal law requires be recognized as inherently coercive. It also is designed to ensure that employers cannot prohibit employees from accessing the California Labor Commission and Department of Fair Employment and Housing as a mandatory condition of entering into the employment relationship. The FAA could never have contemplated or countenanced such a practice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(FRAP 29(a)(5) & 9th Cir. Rule 32-1)

This Brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this Brief contains 6,272 words, excluding the parts of the Brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This Brief 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 this Brief has been prepared in a proportionally spaced typeface using Word in Times New Roman in a 14-point font.

Dated: May 22, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF. I hereby certify that a review of the service list of this appeal on the Court's landing page revealed that all participants in the case are registered CM/ECF users and that their service will be accomplished by the appellate CM/ECF system.

Dated: May 22, 2020

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