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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

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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

Hon. Kimberly J. Mueller

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INTRODUCTION

Defendants raise two jurisdictional challenges, but neither holds water.

First, Defendants argue that there is no federal subject matter jurisdiction. That is plainly wrong: The complaint expressly invokes the power of federal courts of equity to enjoin unlawful actions by state officials. Compl. ¶¶ 105-109. The Supreme Court has recognized this basis for federal subject-matter jurisdiction repeatedly, including where (as here) the state action is alleged to be preempted by federal law. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645-46 (2002) (preemption); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (same); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (same); *Ex parte Young*, 209 U.S. 123 (1908). And nothing in the Federal Arbitration Act, 9 U.S.C. §§ 1-16, limits the scope of this Court's equitable powers. Indeed, another court in this District relied on this body of authority in enjoining a California law that restricted access to arbitration in the nursing home context on the ground that it interfered with "federal rights created under the FAA." *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1031 (E.D. Cal. 2014).

This Court independently has jurisdiction under 28 U.S.C. § 1331 to entertain Plaintiffs' cause of action under Section 1983, because the FAA confers a federal right to enter into arbitration agreements on the same terms as other contracts, and AB 51 infringes on that right by imposing criminal and civil penalties on businesses that enter into workplace contracts that include arbitration as a condition of employment. The State argues that the FAA creates a federal right that applies only after an arbitration agreement is formed. That interpretation of the FAA is squarely foreclosed by *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). It is "beyond dispute" that Section 2 of "the FAA was designed to promote arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011); that design would be meaningless if States could impose criminal and civil sanctions against the formation of arbitration agreements. Section 2 may not be interpreted so that it is "helpless to prevent even the most blatant discrimination against arbitration" of this kind. *Kindred*, 137 S. Ct. at 1429.

Second, Defendants challenge Plaintiffs' Article III standing by asserting that Plaintiffs

have not come forward with sufficient evidence at this stage that any of their members enter into workplace contracts that include arbitration as a condition of employment. That challenge is impossible to square with the California Legislature's own finding that "*67.4% of all California employers mandate arbitration of employment disputes*." California AB 51 (Employment Discrimination: enforcement), 2019-2020 Reg. Sess., Senate Rules Committee Analysis 5 (as amended March 26, 2019) (Third Reading – Prepared on September 1, 2019), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51.

Furthermore, Ninth Circuit precedent establishes that, so long as "it is relatively clear" that "one or more members" of an association "have been or will be adversely affected by a defendant's action," there is "no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Under that standard, the Declaration of Brian Maas alone establishes standing. But Plaintiffs have submitted additional declarations that reinforce their standing. As those declarations make clear, Plaintiffs have members who include an agreement to arbitrate as one of the many conditions on the offer of employment—just like the amount of compensation, the duties of the working relationship, and the benefits provided to the worker. These members will not hire new workers (or will decline to retain existing workers presented with new agreements) who refuse to agree to arbitration, just as they will not hire or retain anyone who refuses to agree to the other conditions of the working relationship. The declarations further confirm that some members intend to continue entering into agreements with their workers that include arbitration as a condition or the working relationship (or on an opt-out basis, which AB 51 treats as mandatory), based on the belief that AB 51 is preempted by federal law, while others have made or intend to make changes to their contracting processes in an effort to comply with AB 51, incurring administrative and other costs that they would not have otherwise incurred. Either way, the members would suffer irreparable harm if AB 51 is not enjoined. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009).

Third, on the question of severability, the parties agree that any injunction should preclude enforcement of AB 51 only in connection with arbitration agreements governed by the

FAA. The sole area of disagreement is whether the injunction should encompass Section 432.6(b), which prohibits declining to hire applicants for work or terminating existing workers for refusing to agree to arbitration as a condition of employment. The answer is yes, both because Section 432.6(b) overlaps with Section 432.6(a) and because its restrictions on making arbitration a term of a *continued* employment relationship are preempted just as much as Section 432.6(a)'s restrictions on making arbitration a term of a *new* employment relationship. Plaintiffs have submitted a proposed order that reflects the precise scope of the requested injunction.

ARGUMENT

A. This Court Has Subject-Matter Jurisdiction Over Plaintiffs' Claims.

This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 over each of Plaintiffs' two causes of action. First, Plaintiffs rely on settled authority regarding the equitable powers of federal courts, which place it "beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*, 209 U.S. at 160-62). Second, Plaintiffs and their members have an enforceable federal right under the FAA to form arbitration agreements in the same manner as they enter into other types of contracts, and Plaintiffs are entitled to enforce that right under 42 U.S.C. § 1983.

1. Plaintiffs Assert A Cognizable Claim In Equity.

a. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 575 U.S. at 327. The Supreme Court has "long recognized" that, "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Id.* at 326 (citing *Ex parte Young*, 209 U.S. at 155-56). And it is equally clear that the *Ex parte Young* doctrine is itself a source of federal subject matter jurisdiction under 28 U.S.C. § 1331: "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw*, 463 U.S. at 96 n.14.

Shaw is directly on point. The Supreme Court held that the federal courts had jurisdiction to hear a claim that New York state statutes were preempted by the federal Employee Retirement Income Security Act of 1974—and affirmed in part an injunction against enforcing the state laws. *Id.* at 92-93 & n.9. Similarly, in *Morales*, the Court held that *Ex parte* "*Young* establishes that injunctive relief was available" to prevent state attorneys general from enforcing state deceptive practices laws against advertising protected by the federal Airline Deregulation Act. 504 U.S. at 381. And in *Verizon Maryland*, when a local exchange carrier sought injunctive relief against a State public utilities commission for issuing an order that was allegedly preempted by the federal Telecommunications Act of 1996, the Court expressed "no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit." 535 U.S. at 642. Tellingly, the State's brief does not mention *Shaw*, *Morales*, or *Verizon Maryland*—or even *Ex parte Young*.

Consistent with this uniform Supreme Court authority, one court in this District has held that it had jurisdiction to hear a claim seeking to enjoin California officials from enforcing a state law that the FAA allegedly preempted. *Valley View*, 992 F. Supp. 2d at 1032. In *Valley View*, a trade association and several skilled nursing facilities sued to enjoin the director of the California Department of Public Health from enforcing provisions that would have voided agreements waiving the right to sue under the California Patient's Bill of Rights and required arbitration clauses both to be "in a form separate from the rest of the admission contract" and to "clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission." *Id.* at 1027. Citing *Shaw* and *Ex parte Young*, the court held that it had jurisdiction to hear the plaintiffs' "challenge [to] the Department's interference of federal rights created under the FAA." *Id.* at 1031. The same is true here.

b. Defendants recognize this Court's equitable powers, but argue that this is not "'a proper case' for the Court to exercise its equitable discretion." Supp. Br. 4-5 (quoting *Armstrong*, 575 U.S. at 327). They are wrong.

To begin with, Defendants' observation that neither the FAA nor the Supremacy Clause confers subject matter jurisdiction (Supp. Br. 2, 4) is a red herring, because those are not the

asserted bases for jurisdiction here. Instead, Plaintiffs rely on this Court's equitable power under *Armstrong* and *Ex parte Young* and 28 U.S.C. § 1331. As Judge O'Neill put it in rejecting the virtually identical argument advanced in *Valley View*, "[t]his Court does not view plaintiffs to use the FAA or Supremacy Clause as the toe hold for subject matter jurisdiction. * * * [P]laintiffs challenge the Department's interference of federal rights created under the FAA and which conflict with state law. Such an attempt to enforce federal rights *opens this Court's doors to plaintiffs*." 992 F. Supp. 2d at 1031 (emphasis added). Indeed, with rare exceptions not relevant here, federal courts have an "unflagging" obligation to exercise the jurisdiction Congress granted them. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

The question under *Armstrong* is not whether the federal law at issue provides a private cause of action or confers subject matter jurisdiction on its own, but rather whether Congress has constrained "[t]he power of federal courts of equity to enjoin unlawful executive action" through "express and implied statutory limitations." 575 U.S. at 327. Defendants' failure to acknowledge the relevant standard speaks volumes, because nothing in the FAA imposes "limitations" on federal courts' equitable powers to enjoin unlawful executive action.

The Court in *Armstrong* held that the provision of the Medicaid Act at issue demonstrated an intent to preclude traditional equitable relief from courts for two reasons, neither of which are present here. First, the provision was "judicially unadministrable" because it required State Medicaid plans to set reimbursement rates at levels that both "'may be necessary to safeguard against unnecessary utilization of such care'" and "'are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.'" 575 U.S. at 323, 328 (quoting 42 U.S.C. § 1396a(a)(30)(A)). As the Court elaborated, "[i]t is difficult to imagine a requirement broader and less specific" than the mandate to "provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of * * * care and services.'" *Id.* at 328 (alterations in original). The Court concluded that "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, * * * shows that the Medicaid Act precludes

private enforcement of § 30(A) in the courts." *Id.* at 329.

In contrast, courts routinely can and do enforce the provisions of the FAA, including Section 2. The Supreme Court has never suggested that courts are unable to administer the standards under the FAA. To the contrary, the Court has repeatedly interpreted and applied the FAA. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621-23 (2018); *Southland Corp. v. Keating*, 465 U.S. 1, 11-16 (1984).

Second, Congress conferred exclusive enforcement of the "judgment-laden standard" at issue in *Armstrong* on the Secretary of Health and Human Services by expressly providing for an administrative rather than judicial remedy. *Id.* at 328.[1] Yet no federal agency is tasked with administering the FAA.

Defendants invoke Sections 3 and 4 of the FAA, which establish procedures for parties to an arbitration agreement to seek enforcement of that agreement in court, but those provisions support, rather than refute, the availability of equitable judicial relief to enforce plaintiffs' federal rights under the FAA. Defendants suggest (Supp. Br. 4) that Sections 3 and 4 implicitly cabin this Court's authority to enforce the substantive rights created by Section 2 of the FAA. But Section 2 and its equal-footing principle apply not only to the enforcement of arbitration agreements once formed, but also to laws involving the *formation* of arbitration agreements. *Kindred*, 137 S. Ct. at 1427-28. Consistent with that distinction, and anticipating *Kindred*, Judge O'Neill rejected California's contention that "FAA rights 'are conferred and limited to only contracting parties who have an existing dispute involving an arbitration contract governed by the FAA.'" *Valley View*, 992 F. Supp. 2d at 1031.

Finally, Defendants rehash their false dichotomy between regulating "employer

[1] The other cases Defendants cite (at Supp. Br. 4) share similar distinctions. In *Seminole Tribe of Florida*, 517 U.S. 44 (1996), Congress enacted an "intricate scheme" for enforcing the Indian Gaming Regulatory Act against States that would impose liability "that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*," demonstrating that Congress "had no wish to create the latter." *Id.* at 75-76. And in both *Smith v. Hickenlooper*, 2016 WL 759163, at *1 (D. Colo. Feb. 26, 2016) and *Friends of East Hampton Airport, Inc. v. Town of East Hampton*, 2015 WL 3936346, at *9 (E.D.N.Y. June 26, 2015), *aff'd in part and vacated in part on other grounds*, 841 F.3d 133 (2d Cir. 2016), Congress delegated enforcement of the laws at issue *exclusively* to federal officers—the Attorney General and the Secretary of Transportation, respectively.

behavior" and the formation of arbitration agreements. Supp. Br. 4-5. Plaintiffs have refuted this point, explaining that 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; *see* Mot. 12; Reply 5-6.

Plaintiffs further explained that the Supreme Court has rejected California's similar attempts at too-clever-by-half line-drawing outside of the arbitration context. Reply 6 (discussing *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012)). And Defendants are not helped by the fact that AB 51 forges a "new path," Supp. Br. 5 (citing Tr. 36:7-8), by criminalizing the act of entering into an arbitration agreement rather than refusing to enforce such an agreement once formed. That "new path" shows only that States have never before been so brazen as to attempt to circumvent FAA preemption by imposing criminal and civil sanctions for entering (or trying to enter) into arbitration agreements in the first place. As the Supreme Court has warned, just as "antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,'" courts "must be alert to new devices and formulas that would achieve much the same result today." *Epic*, 138 S. Ct. at 1623 (quoting *Concepcion*, 563 U.S. at 342). AB 51 is just such a device.

2. Plaintiffs Can Enforce The Federal Rights Conferred By The FAA Under Section 1983.

In the alternative, Plaintiffs may enforce their and their members' rights under Section 1983. "Section 1983 imposes liability on anyone, who under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws.'" *Blessing v. Firestone*, 520 U.S. 329, 340 (1997). The Supreme Court has recognized that Section 1983 "safeguards certain rights conferred by federal statutes," *id.*, and has "set forth a three-factor test to guide this inquiry: (1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the plaintiff has demonstrated that the asserted right 'is not so vague and amorphous that its enforcement would strain judicial competence'; and (3) whether the provision giving rise to the right is 'couched in mandatory, rather than precatory, terms.'" *Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004) (quoting *Blessing*, 520 U.S. at 340-41). Section 2

of the FAA satisfies all three factors.

First, the "text and structure of the statute" demonstrate the requisite "focus on individual entitlement to benefits rather than the aggregate or systemwide policies and practices of a regulated entity." *Price*, 390 F.3d at 1109-10 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002)) (quotation marks omitted). Section 2 of the FAA protects each party that enters into an arbitration agreement covered by the statute by mandating that the agreement "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. And as Defendants point out (Supp. Br. 3), Sections 3 and 4 of the FAA provide specific procedural mechanisms for parties to stay litigation and compel arbitration in order to give effect to their arbitration agreements—making crystal clear that the provisions of the FAA are intended to benefit those parties.

Defendants again insist that Section 2 of the FAA confers a right only once an "actual [arbitration] agreement" comes into being (Supp. Br. 2; *see also id.* at 4), but *Kindred* squarely forecloses that flawed dichotomy between the formation of arbitration agreements and their enforcement (*see* Mot. 12; Reply 5-6). If—as established law provides—a State cannot declare employment-related claims "off limits" to arbitration (*Epic*, 138 S. Ct. at 1623), it cannot secure the same result by declaring form employment arbitration agreements categorically unlawful. Accordingly, Section 2 protects the right to enter into arbitration agreements under the same rules as other contract terms, not just to enforce arbitration agreements once made.

The second and third factors of the *Blessing* framework are easily satisfied. There is nothing "vague and amorphous" about the FAA's protection of arbitration agreements that "would strain judicial competence." *Blessing*, 520 U.S. at 340. On the contrary, cases interpreting and applying Section 2 are legion. *See, e.g.*, Mot. 10 & n.2 (collecting Supreme Court cases holding that state laws disfavoring arbitration are preempted under Section 2). And Section 2 is undeniably "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341; *see also, e.g.*, *Henry A. v. Willden*, 678 F.3d 991, 1006-07 (9th Cir. 2012) (section of the Child Welfare Act created right enforceable under Section 1983 when it "expresses a clear mandate by using the term 'shall'").

Finally, for the same reasons that nothing in the FAA diminishes this Court's equitable powers under *Ex parte Young*, nothing in the FAA "specifically foreclose[s] a remedy under § 1983" either. *Blessing*, 520 U.S. at 341; *see* pages 5-7, *supra*.

B. Plaintiffs Have Established Standing.

It is well settled that an association may seek declaratory, injunctive or other form of prospective relief on behalf of its members. *See Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000) (citation omitted).

Defendants challenge only the first of these points, but Plaintiffs have demonstrated at this stage that their members would have standing in their own right for the same reasons that they have demonstrated irreparable harm without an injunction under the second *Winter* factor. *See* Mot. 13-17; Reply 7-9; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). And Plaintiffs need only show that a single *one* of their members would have standing to sue in its own right. *See Fleck & Assocs., Inc. v. City of Phoenix*, 417 F.3d 1100, 1105-06 (9th Cir. 2006).

Defendants' objection to standing boils down to the argument that Plaintiffs have not "presented an actual policy or practice that violates AB 51" and cannot "establish an imminent threat of harm from AB 51" unless they do. Supp. Br. 6-9. That objection misstates both the evidentiary record and the law.

To begin with, Defendants defy the legislative history of AB 51 (and common sense) when they assert that there is no evidence that employers in California enter into agreements with workers that require arbitration as a condition of employment. The Legislature enacted AB 51 precisely *because* businesses and workers in California were entering into arbitration

agreements on that basis. The Senate's analysis accompanying AB 51 stated that "67.4%" of all California employers "mandate arbitration of employment disputes." Senate Rules Committee Analysis, *supra*, at 5 (emphasis omitted). And AB 51's sponsor, Assemblywoman Gonzalez, similarly "estimated the new law will affect more than 67 percent of California workplaces." Mallory Moench, *California has a new law against mandatory arbitration—but it doesn't cover everyone*, San Francisco Chronicle (Oct. 11, 2019). As this Court rhetorically observed at the hearing, "I can't ignore that legislative history, can I?" Tr. 14:5-6.

Moreover, the Declaration of Brian Maas, president of the California New Car Dealers Association (CNCDA), a member of plaintiff California Chamber of Commerce, demonstrates that at least one of Plaintiffs' members has standing. As Defendants acknowledge, CNCDA *itself* includes an arbitration provision "as part of its employee handbook" that "each employee is required to sign." Supp. Br. 7 (quoting Maas Decl. ¶ 8). Defendants' speculation that "required" might not mean what it says is unfounded; in all events, Mr. Maas has confirmed that CNCDA includes arbitration as a condition of employment. Supp. Decl. of Brian Maas ¶ 6 & Ex. A (copy of CNCDA's arbitration agreement); *see also* Maas Decl. ¶ 22 ("In the absence of AB 51, CNCDA and its members would continue to rely on arbitration agreements as part of their overall employment agreements.").

Mr. Maas's declaration also states that "[a]lmost all" of CNCDA's members "enter into arbitration agreements with their workers as a condition of employment or allow workers to opt out of arbitration by taking some affirmative step." Maas Decl. ¶ 21. Defendants insist that Mr. Maas is required to identify by name a "single company," but that is not necessary. CNCDA is itself a business, is itself subject to AB 51, and is a member of one of the Plaintiffs. Plaintiffs have identified CNCDA by name, and that is enough to satisfy Defendants' demand.

But in any event, Defendants are wrong on the law. Controlling Ninth Circuit precedent does not require Plaintiffs, which collectively represent tens of thousands of employers in California, from naming particular companies. As the Ninth Circuit has put it in holding that two NAACP chapters could establish standing on behalf of their members without specifically identifying those chapters' members, "[w]here it is relatively clear, rather than merely

speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza*, 800 F.3d at 1041.

Just last week, a district court held, based on *La Raza*, that an association had standing to obtain a preliminary injunction based on "predominantly legal claims" against the California Attorney General "without the identification of a particular * * * member." *Cal. Trucking Ass'n v. Becerra*, 2020 WL 248993, at *5 (S.D. Cal. Jan. 16, 2020). The same is true here.

Nevertheless, to avoid any doubt, Plaintiffs have submitted additional declarations with this brief confirming that they have members with significant numbers of employees in California (and that are representative of numerous other companies in the same situation) that face the harms posed by AB 51. Supp. Maas Decl.; Decls. of Glenn Spencer, Jennifer Barrera, Stephanie Martz, Rachel Michelin, Steve Amitay, Dean Chalios, and Vicki Hoak. In particular:

- Plaintiffs have members that are currently entering into agreements with their workers that include arbitration as a condition of the working relationship or on an opt-out basis. Supp. Maas Decl. ¶¶ 6, 12(a); Spencer Decl. ¶ 5; Barrera Decl. ¶ 5(a); Martz Decl. ¶¶ 2-4; Michelin Decl. ¶¶ 2-3; Amitay Decl. ¶¶ 2-3; Chalios Decl. ¶ 2; Hoak Decl. ¶ 2. In other words, these members will not hire anyone who refuses to agree to arbitration (except for someone who opts out in accordance with any opt-out process in the arbitration agreement), just as they will not hire anyone who refuses to agree to the other conditions of the working relationship. *E.g.*, Supp. Maas Decl. ¶¶ 6-7; Spencer Decl. ¶ 5; Martz Decl. ¶ 3; Michelin Decl. ¶ 3; Amitay Decl. ¶ 3.
- These members would be subject to enforcement actions under AB 51 if they continue (unless the law is enjoined) to include such arbitration provisions in agreements with new employees or include new or revised arbitration provisions in new agreements with existing employees or refuse to hire or retain new employees who do not agree to such provisions. *E.g.*, Supp. Maas Decl. ¶¶ 6, 12(b); Spencer

Decl. ¶ 6; Barrera Decl. ¶ 5(b).

- Many of the Plaintiffs' members, notwithstanding AB 51, are continuing to enter into agreements with their workers that include arbitration as a condition of the working relationship or on an opt-out basis, based on this Court's Temporary Restraining Order and the belief that the statute is preempted by federal law, but they are greatly concerned about the potential adverse consequences to their businesses from state civil and criminal enforcement action. *E.g.*, Spencer Decl. ¶ 7; Martz Decl. ¶ 6; Michelin Decl. ¶ 5; Amitay Decl. ¶ 5; Chalios Decl. ¶ 5; Hoak Decl. ¶ 5.
- Finally, other members of the Plaintiffs have made or intend to make changes to their contracting processes to comply with AB 51 and avoid the risk of criminal and civil penalties under the statute in the event that state enforcement of AB 51 is not enjoined. *E.g.*, Supp. Maas Decl. ¶ 12(d). These members have incurred or will incur administrative costs *that they would not have otherwise incurred* in changing their employment contracts to eliminate arbitration as a condition of the working relationship (*id.*)), contradicting Defendants' speculation (Supp. Br. 8) that companies face no incremental costs from complying with the preempted provisions of AB 51.

Defendants further miss the mark in trying to downplay the "credible threat" that AB 51 will be invoked against Plaintiffs' members. Supp. Br. 9. Tellingly, Defendants have refused to disclaim either their ability or their intent to seek criminal and civil penalties for violations of the statute. *See* Tr. 34:4-5 (acknowledging that "criminal penalties are available" to the State).

Indeed, Defendants refused to do so even on a temporary basis. *See* Reply Decl. of Donald M. Falk, Dkt. No. 18-1, ¶¶ 5-18. That itself establishes standing. *See Valley View*, 992 F. Supp. 2d at 1032-33 (citing, *inter alia*, *Mobil Oil Corp. v. Att'y Gen.*, 940 F.2d 73, 76 (4th Cir. 1991) (plaintiff has standing where "the Attorney General has not * * * disclaimed any intention of exercising her enforcement authority); *KVUE, Inc. v. Moore*, 709 F.2d 922, 930 (5th Cir. 1983) (same where "[t]he state has not disavowed enforcement"), *aff'd*, 465 U.S. 1092 (1984)).

On the contrary, every indication is that Defendants will actively enforce AB 51. The complaint here points out that both the Department of Fair Employment and Housing and the

Labor Commissioner robustly enforce California's labor laws; DFEH recorded over 43,000 filed cases in 2010 alone (the most recent year available). *See* Compl. ¶¶ 81-82. The threat of criminal and civil enforcement is "real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).[2]

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*, 559 F.3d at 1058 (cited at Mot. 16; Reply 9); *see also* Spencer Decl. ¶ 8. Those harms confer Article III standing to seek injunctive relief and can be avoided only if enforcement of AB 51 is preliminarily enjoined.

C. All Agree That The Injunction Should Be Limited To Application Of AB 51 To Arbitration Agreements Governed By The FAA.

Finally, on the issue of severability, Plaintiffs have requested an injunction against enforcement of AB 51 only with respect to arbitration agreements governed by the FAA. Defendants agree with that limitation. *See* Supp. Br. 9-11.[3] The parties appear to disagree only on the severability of Section 432.6(b): Defendants maintain that it can be severed in its entirety (*id.* at 11), but in fact Section 432.6(b) is preempted to the same extent as Section 432.6(a).

AB 51 has two main substantive prohibitions, Section 432.6(a) and Section 432.6(b), which are written in parallel terms. They provide in full:

> **Section 432.6(a)** A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

[2] The threat of criminal and civil penalties suffices to establish injury, but enforcement of AB 51 also can result in collateral harms. For example, California may deny professional licenses to individuals or entities "convicted of a crime." Cal. Bus. & Prof. Code § 480.

[3] Defendants assert that "[m]ore than 1.16 million transportation workers in California are not covered as a result of the FAA exemption under 9 U.S.C. § 1." Supp. Br. 10 n.3. The scope of the Section 1 exemption is not at issue here, but Defendants are vastly inflating the number of workers who fall within it. *See, e.g.*, Dkt. No. 80, at 8-15, *Heller v. Rasier, LLC*, No. 17-cv-8545 (C.D. Cal. Jan. 7, 2020) (granting a motion to compel arbitration by Uber and concluding that the plaintiff driver on Uber's platform "does not fit within the residual clause of the Section 1 exemption as a 'transportation worker' who is 'engaged in interstate commerce'").

> **Section 432.6(b)** An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

In addition, Section 432.6(c) specifies that the use of an opt-out provision is deemed a "condition of employment" and therefore prohibited. Accordingly, consistent with this Court's statement at the hearing that " (a) and (c) need to be read together," Tr. 23:12-13, all agree that if Section 432.6(a) is enjoined, Section 432.6(c) must be enjoined as well. *See* Supp. Br. 10-11.

Defendants are wrong in asserting that "Section 432.6(b) stands independently on its own," even if Sections 432.6(a) and (c) are enjoined as preempted. Supp. Br. 11.

Portions of Section 432.6(b) have a practical effect virtually identical to the preempted portions of Section 432.6(a). For example, Section 432.6(b)'s prohibition on "retaliat[ing]" against or "terminat[ing]" any "applicant for employment" who is unwilling to agree to arbitration is just another way of saying that an employer may not include arbitration as one among many standard contract terms offered on a non-negotiable basis "as a condition of employment" under Section 432.6(a). The same is true of Section 432.6(b)'s prohibition on terminating existing employees who decline to agree to arbitration; that is no different than Section 432.6(a)'s prohibition on including arbitration as a condition "of continued employment." In either scenario, Sections 432.6(a) and (b) prohibit mirror images of the same methods of contract formation.

Moreover, Section 432.6(b) applies to an "applicant for employment," not only to "a long-term employee," as Defendants suggest. Supp. Br. 11. But even as applied to existing employees, Section 432.6(b) is preempted. Just as the State may not prohibit businesses from including arbitration among the contract terms presented as conditions of employment to new employees, the State may not prohibit businesses from discharging existing employees who refuse to agree to such provisions in revised agreements. For example, subject only to general principles of unconscionability or duress, a business may require an existing employee to accept different compensation, benefits, or work responsibilities as a condition of continued

employment. Under the FAA, a business has the federal right to include arbitration among the terms offered on the same basis—a right that Section 432.6(b) squarely impedes.

Finally, although Defendants do not raise the point in their brief, Plaintiffs want to make clear that they are *not* challenging Defendants' ability to enforce the language in Sections 432.6(a) and (b) that are based on waivers of the right to "*notify* any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added). Unlike the waiver of the right to go to court or to pursue a civil action in court or with an agency, waiver of the right to notify law enforcement officials of alleged misconduct is not a fundamental characteristic of arbitration agreements. On the contrary, the Supreme Court has long recognized that employees may notify enforcement authorities of alleged violations of law, and those authorities may, if the law allows, pursue remedies for the alleged violation on their own behalf. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290-96 (2002).

Accordingly, Plaintiffs seek a preliminary injunction (1) prohibiting Defendants from enforcing Sections 432.6 (a), (b), and (c) of the California Labor Code where the alleged "waiver of any right, forum, or procedure" is the entry into an arbitration agreement covered by the FAA; and (2) prohibiting Defendants from enforcing Section 12953 of the California Government Code where the alleged violation of "Section 432.6 of the Labor Code" is entering into an arbitration agreement covered by the FAA.[4]

CONCLUSION

The Court should enter a preliminary injunction, in the form of the proposed order accompanying this brief, prohibiting Defendants from enforcing certain provisions of AB 51 as applied to arbitration agreements protected by the FAA.

Dated: January 24, 2020

Respectfully submitted,

By: */s/ Donald M. Falk*
Donald M. Falk (SBN 150256)

[4] AB 51 adds Section 12953 to the California Government Code, which makes it "an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code."

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