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-Appellees.

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)

AMICI CURIAE BRIEF IN SUPPORT OF THE PETITION FOR REHEARING BY RESTAURANT LAW CENTER AND CALIFORNIA RESTAURANT ASSOCIATION

ALL PARTIES HAVE CONSENTED TO THIS BRIEF'S FILING UNDER NINTH CIRCUIT RULE 29-2(a)

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DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Amici Curiae Restaurant Law Center and California Restaurant Association certify that they have no parent corporations and there is no publicly held corporation that owns 10% or more of their stock.

Dated: November 1, 2021

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae Restaurant Law Center and California Restaurant Association respectfully submit this Amici Curiae Brief in support of the Petition for Rehearing En Banc. The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The foodservice industry is a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing approximately 15.3 million people across the Nation – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, with 47% of the industry's employees being minorities, compared to 36% across the rest of the economy. Further, 40% of restaurant businesses are primarily owned by minorities, compared to 29% of businesses across the rest of the United States economy. Supporting these businesses is the Law Center's primary purpose.

The California Restaurant Association is one of the largest and longest-serving nonprofit trade associations in the nation. Representing the restaurant and hospitality industries since 1906, the California Restaurant Association is made up of nearly 22,000 establishments in California. The restaurant industry is one of the largest private employers in California, representing approximately 1.4 million jobs.

Many companies in the foodservice industry in California include mandatory arbitration agreements in their employment contracts because arbitration is an efficient means for parties to settle disputes promptly while avoiding the higher costs of traditional litigation. Relying on the Federal Arbitration Act (FAA), many California foodservice establishments, particularly those with large workforces, have structured employment relationships based on agreements that call for individual arbitration. If the Ninth Circuit panel majority's opinion in this matter stands, it would effectively prevent future mandatory arbitration agreements. Hence, the Law Center and California Restaurant Association and their members have a vital interest in these proceedings.

Under Circuit Rule 29-2(a) the Law Center and California Restaurant Association requested and received permission from all parties to submit a brief in this matter. No party's counsel authored this brief. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the Law Center and the California Restaurant Association's members or their counsel, contributed money that was intended to fund preparing or submitting this brief.

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II. ARGUMENT

A. The question is of exceptional importance because the panel majority opinion imposes criminal and civil penalties based on an artificial dividing line, one that violates the FAA and Supreme Court precedent.

The panel majority opinion creates a "tortuous" regime whereby criminal and civil penalties may not be imposed on an employer that violates AB 51 but ultimately executes an arbitration agreement governed by the FAA, but are otherwise fair game if the parties fall short – for whatever reason – of executing the agreement. Op. 48 (dissent). In other words, an employer that manages to leap the crocodile pit created by AB 51's enforcement regime is safe from prosecution, but anything short, and the employer is condemned to be devoured by AB 51's criminal and civil penalties. Such a "bizarre," twisted sanctions regime runs contrary to the FAA and Supreme Court precedent. *Id.*

The crocodile pit endorsed by the panel majority's opinion is premised on an artificial dividing line between the "formation" of an arbitration agreement and its "enforcement." According to the panel majority opinion, the FAA is concerned only with the latter: enforcement. *See id.* at 25-26 ("The *only* 'federally protected right' conferred by the FAA is the right to have consensual agreements to arbitrate *enforced* according to their terms.") (emphasis added). The panel majority opinion goes on to argue that because the FAA is concerned only with the enforcement of

arbitration agreements, obstacle preemption comes into play only after a party has executed an arbitration agreement. *Id.* at 26.

This reasoning collides headfirst into the FAA and Supreme Court precedent. In *Kindred Nursing Centers. Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Supreme Court rejected – in no uncertain words – the artificial dividing line the panel majority opinion endorses between the formation of an arbitration agreement and its enforcement for the purposes of the FAA and obstacle preemption:

> [I]n [respondents'] view, the FAA has no application to contract formation issues . . . [T]he respondents claim, States have free rein to decide – irrespective of the FAA's equal-footing principle – whether such contracts are validly created in the first instance.
>
> But the FAA's text and our case law interpreting it say otherwise. The Act's key provision, once again, states that an arbitration agreement must ordinarily be treated as 'valid, irrevocable, and enforceable.' By its terms, then, the Act cared not only about the 'enforcement' of arbitration agreements, but also about their 'initial validity' – that is, about what it takes to enter them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.

Id. at 1428 (citations and brackets omitted).

In a bid to dodge *Kindred*'s plain import, the panel majority's opinion doubles down on its enforcement-exclusive view of the FAA and insists that invalidation of an arbitration agreement is the only type of obstacle with which the FAA and the Supreme Court's decision are concerned. But this is an overly

cramped view of the FAA and *Kindred*. Invalidation or non-enforcement is only *one* way a state law may obstruct the FAA's purposes. *See Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 828 (9th Cir. 2019) ("*One* objective of the FAA is to enforce arbitration agreements according to their terms[.]") (emphasis added). The Supreme Court has been clear that the FAA's preemptive reach is much broader, preempting any state law that "stands as an obstacle *to the accomplishment* and execution of the full purposes and objectives of Congress." *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). To hold anything less "would make it trivially easy for States to undermine the [FAA] – indeed, to wholly defeat it," as the State of California has done here with its sanctions regime. *Kindred Nursing*, 137 S. Ct. at 1428.

The panel majority opinion must be reversed. It imposes criminal and civil penalties based on an artificial dividing line that has no basis under the FAA and has been squarely rejected by the Supreme Court.

B. The question is of exceptional importance because the panel majority's opinion would effectively end the California restaurant and other industries' ability to condition employment on the agreement to arbitrate disputes.

If permitted to stand, the panel majority's holding will effectively end entire industries' ability to condition employment in California on the agreement to arbitrate disputes, including the restaurant industry in particular. Indeed, the

District Court found, and Defendants do not dispute, that AB 51's enforcement will cause irreparable harm to California businesses that rely on arbitration agreements as a condition of employment. *Chamber of Commerce of the United States v. Becerra*, 438 F. Supp.3d 1078, 1103-05 (E.D. Cal. 2020). Such businesses "will be forced to choose between risking criminal or civil penalties" and "foregoing the use of arbitration agreements altogether to avoid penalties." *Id*. at 1103-04. "California business that rely on standard form arbitration agreements as a condition of employment will incur immediate costs of redrafting their employment agreements to omit arbitration provisions and be unable to realize the cost and efficiency benefits they say arbitration provides." *Id*. at 1104. "[I]f California employers continue to rely on the mandatory arbitration agreements they have reasonably understood were allowable under the FAA as construed by the Supreme Court, they face the risk of potential criminal and civil penalties if they are found to have violated the new law." *Id*. at 1105.

Moreover, as Petitioners note, 67.4% of all California employers mandate arbitration of workplace disputes. (Pet. at 21). And 54.0% of workplaces throughout the country in the leisure and hospitality industry in particular mandate

arbitration of workplace disputes.[1] Thus, many of Amici's members in California currently enter into arbitration agreements with workers as a requirement for entering into a working relationship, allowing the businesses to obtain the benefits of an arbitral forum to resolve workplace-related disputes expeditiously and fairly.

Yet if AB 51 goes into effect as envisioned by the panel majority's opinion, Amici's members who continue their practice of conditioning employment on agreement to arbitrate disputes risk criminal and civil penalties and lawsuits. And civil investigations and enforcement actions under AB 51 are especially likely. Both the Labor Code and California Fair Employment and Housing Act (FEHA) authorize employees to file complaints with the pertinent enforcement agency. The California Department of Fair Employment and Housing, charged with enforcing the FEHA, recorded 43,208 filed cases related to employment actions in 2010 alone.[2] The California Labor Commissioner, charged with enforcing the Labor Code, regularly takes enforcement actions against employers. And the likely main result of AB 51 being enforced as envisioned by the panel opinion is a cascade of lawsuits filed under the California Labor Code Private Attorneys General Act

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[1] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/
[2] https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CY_01-12_Cases_Filed_by_Act-Emp.pdf

(PAGA). Prior to the enactment of AB 51, the California Labor and Workforce Development Agency, to whom all PAGA plaintiffs must provide notice before filing a lawsuit, had projected nearly 7,000 PAGA notices filed in 2021 and complained of gross understaffing.[3]

If AB 51 is enforced as envisioned by the panel majority opinion, Amici's California members will thus have to forgo what until now has been their federally protected right to enter into mandatory pre-dispute arbitration agreements with their workers. This will require them to incur immediate administrative costs to redraft their contracts to omit arbitration provisions. More critically, it will result in fewer arbitration agreements being formed, and more disputes being channeled into judicial and administrative, rather than arbitral, fora. Amici's California members would thus be deprived of the benefits and cost savings of arbitration whenever disputes arise, and must instead resolve their employment disputes in the slower and more expensive court system, sometimes with a protracted administrative proceeding as a prelude. Yet for many claims, the most appropriate forum is "the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative."

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[3] https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 Univ. of Mich. J. of Law Reform 783, 810 (2008).

Finally, Amici's California members are likely to experience a spike in the filing of meritless lawsuits, as some members of the plaintiffs' bar may try to leverage the sudden increase in employers' defense costs to obtain windfall settlements for baseless claims that would never have been filed in arbitration.

III. CONCLUSION

The question raised by the Petition is of exceptional importance. The Court should grant the Petition for rehearing en banc.

Dated: November 1, 2021

Respectfully submitted,

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Certificate of Compliance for Briefs

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This brief contains 1,815 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/Dylan B. Carp **Date** November 1, 2021

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