UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al., Plaintiffs, v. XAVIER BECERRA, in his official capacity as the Attorney General of the State of California, et al., Defendants.	No. 2:19-cv-02456-KJM-DB ORDER

The Federal Arbitration Act ("FAA") provides that arbitration agreements are "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. The U.S. Supreme Court has interpreted this provision expansively, observing that it reflects "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This case raises the question whether the FAA preempts a new law passed by the California Legislature and signed into law by the Governor in late 2019.

Specifically, on October 10, 2019, California Governor Gavin Newsom signed into law California Assembly Bill 51 ("AB 51"), which prohibits California employers from requiring

prospective and current employees to "waive any right, forum, or procedure" for a violation of the California Fair Employment and Housing Act ("FEHA") or the California Labor Code. Cal. Lab. Code § 432.6(a). AB 51 was set to take effect January 1, 2020; however, on December 29, 2019, this court temporarily restrained state officials from enforcing the law pending a full preliminary injunction hearing. Temporary Restraining Order ("TRO"), ECF No. 24. In so doing, the court explained that AB 51 "raise[s] serious questions regarding whether the challenged statute is preempted by the [FAA] as construed by the United States Supreme Court." *Id.* at 1.

On January 10, 2020, the court heard oral argument on plaintiffs' motion to preliminarily enjoin AB 51 from taking effect. Mot. for Prelim. Inj. ("MPI"), ECF No. 5. During argument, the defendants raised for the first time a question regarding the court's jurisdiction to issue an injunction, and the court then allowed supplemental briefing on jurisdiction. *See* Defs.' Supp. Br., ECF No. 37; Pls.' Supp. Br., ECF No. 40.

Having carefully considered all of the parties' briefs, the arguments at hearing and the applicable law, the court finds it has jurisdiction over this case and GRANTS plaintiffs' motion for a preliminary injunction for the reasons set forth below.

I. BACKGROUND

A. Parties

The plaintiffs in this action are the Chamber of Commerce of the United States of America ("U.S. Chamber"), California Chamber of Commerce ("CalChamber"), National Retail Federation ("NRF"), California Retailers Association ("CRA"), National Association of Security Companies ("NASCO"), Home Care Association of America ("HCAOA") and the California Association for Health Services At Home ("CAHSAH"). Compl., ECF No. 1, at 1.

The U.S. Chamber "is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations" across the United States. *Id.* ¶ 16. Many U.S. Chamber members are California businesses that require arbitration agreements as a condition of employment or require those who wish to avoid arbitration to affirmatively opt out. *Id.* The U.S. Chamber asserts standing in this matter because it "seeks to

vindicate its own interests as well as the interests of [its] members . . . ." *Id.* The U.S. Chamber alleges this action aligns with their mission, which is "to foster economic growth throughout the country, including in California." *Id.*

The CalChamber is a not-for-profit organization, consisting of more than 14,000 California private sector employees, "that seeks to transform California's business landscape through advocacy." *Id.* ¶ 17. Its members rely on arbitration agreements as a condition of employment or require their employees to affirmatively opt out of arbitration if they wish to do so. *Id.* The CalChamber asserts standing in this matter through the vindication of its interests and the interests of its members and because this suit is "germane to [its] mission to foster economic growth and a thriving business community in California." *Id.*

The NRF is the world's largest retail trade association consisting of discount and department stores, home goods and specialty stores, grocers, wholesalers, chain restaurants and internet retailers, with many of its members either headquartered or located in California. *Id.* ¶ 18. The CRA "works on behalf of California's retail industry" and "is the only statewide trade association representing all segments of the retail industry[.]" *Id.* ¶ 19. NASCO is the largest contract security association in the county and represents tens of thousands of "highly trained security officers servicing the public and private sector" in California. *Id.* ¶ 20. HCAOA is the leading trade association in the home care industry and "advocate[s] for its members, for caregivers, and for seniors in California and across America." *Id.* ¶ 21. Finally, "CAHSAH is a California non-profit mutual benefit corporation whose mission is to promote quality home care and enhance the effectiveness of its members." *Id.* ¶ 22. Each of these remaining plaintiffs asserts standing in this action on grounds that each respective organization seeks to vindicate its interests and the interests of its members, as all rely on arbitration agreements as a condition of employment and seek to protect and foster economic growth in California related to their field of interest.

The defendants in this action are Xavier Becerra, Attorney General of California, Lilia Garcia Brower, California Labor Commissioner, Julie A. Su, Secretary of the California

Labor and Workforce Development Agency, and Kevin Kish, Director of the California Department of Fair Employment and Housing. All are sued in their official capacity only. *Id.* ¶¶ 23–26.

B. Procedural History

On December 9, 2019, plaintiffs filed a complaint asking the court to declare AB 51 preempted by the FAA, to preliminarily and permanently enjoin defendants from enforcing AB 51 and to enter judgment in plaintiffs' favor and award plaintiffs' attorneys' fees and costs. Compl. at 22 (prayer for relief). That same day, plaintiffs also filed the motion for preliminary injunction at issue here, seeking to preliminarily enjoin defendants from enforcing AB 51 pending final determination of the merits of plaintiffs' claims. *See generally* MPI. In compliance with the Local Rules of this court, plaintiffs noticed the motion for January 10, 2020.

One week later, on December 16, 2019, having not obtained defendants' agreement to voluntarily refrain from enforcing AB 51 for even a short period of time, plaintiffs moved the court to temporarily restrain AB 51 from taking effect on January 1, 2020, pending resolution of the preliminary injunction motion. *See* Mot. for TRO, ECF No. 8. Defendants opposed the TRO motion, ECF No. 14, and, on December 23, 2019, the court held a telephonic hearing on that motion, ECF No. 22. *See also* Dec. 23 Hr'g Tr., ECF No. 28. On December 30, 2019, the court granted plaintiffs' motion for a temporary restraining order and found that despite plaintiffs' delay in seeking immediate intervention, plaintiffs nonetheless had carried their burden at this early stage of the litigation by raising serious questions going to the merits of the dispute and showing the balance of hardship tipped in their favor. TRO at 1.

On December 27, 2019, in accordance with the parties' stipulated briefing schedule, defendants lodged their opposition to plaintiffs' motion for preliminary injunction. Opp'n, ECF No. 23. On January 3, 2020, plaintiffs replied. Reply, ECF No. 29.

On January 10, 2020, the court heard oral argument on the motion. Counsel Donald Falk, Archis Parasharami and Bruce Sarchet appeared on behalf of plaintiffs; counsel Chad Stegeman appeared on behalf of defendants. The court submitted the matter and then

granted the motion by minute order issued on January 31, 2020. *See* ECF No. 44. This order confirms the minute order, with explanation.

II. FEDERAL ARBITRATION ACT ("FAA")

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The "primary substantive provision of the Act" is found in section 2. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24). That section provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. The Supreme Court has "described this provision as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Id.* (internal quotation marks and citations omitted); *see also Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 932 (9th Cir. 2013) ("[The FAA] reflects an 'emphatic federal policy' in favor of arbitration." (quoting *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012)).

III. ASSEMBLY BILL 51

A. Statutory Text

California Assembly Bill 51 aims to make two additions to California's statutory scheme, section 12953 to the Government Code and section 432.6 to the Labor Code. AB 51, *Labor and Employment—Discrimination—Waiver*, 2019–2020 Reg. Sess. (Cal. 2019). The primary provisions of AB 51 appear in Labor Code section 432.6. That statute, as set forth in the bill, provides:

> (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.
>
> (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.
>
> (c) 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.
>
> (d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees.
>
> (e) This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization.
>
> (f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).
>
> (g) This section does not apply to postdispute settlement agreements or negotiated severance agreements.
>
> (h) This section applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.
>
> (i) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Cal. Lab. Code § 432.6.

The bill also adds Government Code section 12953, which reads: "It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code." Cal. Gov't Code § 12953.

Additionally, as pertinent here, existing Labor Code section 433 provides that "[a]ny person violating this article is guilty of a misdemeanor." Under other existing provisions of the Labor Code, a misdemeanor offense is "punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both." Cal. Lab. Code § 23.

B. Legislative History[1]

1. Purpose

AB 51's stated purpose "is to ensure that individuals are not retaliated against for refusing to consent to waive their rights and the procedures under FEHA and the Labor Code as well as to ensure that any contract relating to those rights and procedures be executed as a matter of voluntary consent." Senate Floor Analysis, Third Reading ("S. Floor Analysis"), at 2–3. The bill's author states that AB 51 aims to address the issue of "[f]orced arbitration" because it "is among the most harmful practices that have enabled widespread abuse to go undetected for decades." *Id.* at 3. The author also takes the position that "[t]he real impact of forced arbitration is not alternative dispute resolution, but claim suppression." *Id.* at 4.

2. Prior Legislative Attempts

In the years before AB 51's enactment, two prior assembly bills sought to address the issues raised by employees subject to mandatory waivers of rights: AB 2617 (Weber, Ch. 910, Stats. 2014) and AB 465 (Hernandez, 2016). Senate Judiciary Committee Analysis ("S. Judiciary Analysis") at 8. AB 2617 prohibited a required waiver of rights under the Ralph Civil Rights Act,

[1] The court takes judicial notice of the various legislative materials related to AB 51 located on the Official California Legislative Information Website, as publicly available government documents whose contents cannot reasonably be questioned. *See* Fed. R. Evid. 201 (governing judicial notice); *see also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (taking judicial notice of information on government-administered website whose accuracy was undisputed); *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) ("Under Rule 201, the court can take judicial notice of '[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." (citation omitted and alteration in original)). This information is located at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51. The court cites to each legislative material by referencing its listing title and corresponding page number.

Cal. Civ. Code § 51.7, and the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1, while AB 465 proposed a similar law with respect to employee rights under the Labor Code. *Id.* Former California Governor Jerry Brown vetoed AB 465 to allow courts to resolve then-pending FAA preemption challenges to AB 2617, which the Governor said would ultimately affect the proposal embodied in AB 465. *Id.*

In *Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 323, *review denied* (2018), California's Second District Court of Appeal resolved the question this way: "The Ralph Act and Bane Act, as amended by Assembly Bill 2617, unquestionably discriminate against arbitration by placing special restrictions on waivers of judicial forums and procedures in connection with claims brought under those acts." The court found AB 2617's two key provisions led to its demise because the bill made arbitration agreements presumptively unenforceable unless the party seeking enforcement proves "(1) the other party knowingly and voluntarily agreed to arbitration, and (2) the arbitration agreement was not made a condition of a contract for goods or services or of providing or receiving goods or services." *Id.* These "special requirements," the court explained, subjected the act to FAA preemption because they did "not apply to contracts generally." *Id.*

In 2018, the Legislature considered and passed AB 3080 (Gonzalez, 2018), a bill that, "in many respects," is "identical" to AB 51. S. Judiciary Analysis at 9. Then-Governor Brown vetoed this bill as well, comparing AB 3080 to the two prior bills, AB 465 and 2617, and finding the bill violated the FAA as construed by the U.S. Supreme Court. *Id.* In his veto message, Governor Brown explained:

> This bill is based on a theory that the Act only governs the enforcement and not the initial formation of arbitration agreements and therefore California is free to prevent mandatory arbitration agreements from being formed at the outset. The Supreme Court has made it explicit this approach is impermissible. In 2017 Justice Kagan, an appointee of President Obama, writing on behalf of a near-unanimous Supreme Court, clearly rejected the assertion that the Federal Arbitration Act has no application to contract formation issues:
>
> "By its terms, . . . the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"- that is, about what it takes to enter into 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. Precedent confirms that point." *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428 (2017).
>
> Since this bill plainly violates federal law, I cannot sign this measure.

Id. at 8–9 (alterations in original).

AB 51's proponents believe their bill cures the infirmities of the prior legislation reviewed above and thus avoids FAA preemption. As to AB 2167, proponents assert the two provisions the *Saheli* court found fatal to the law's survival—waiver unenforceability and an assignment of burden of proof—are absent from AB 51; therefore, they say, AB 51 avoids preemption on these grounds. S. Judiciary Analysis at 9. Regarding AB 3080, in response to Governor Brown's veto comments, proponents note that "AB 51 would not selectively invalidate arbitration contracts because improperly formed. . . . AB 51 simply gives the worker the option of whether or not to form the contract in the first place." *Id.* at 10. As for disparate treatment, they say, "nothing in AB 51 selectively calls out arbitration contracts as such; the bill applies to contracts requiring waiver of any forum." *Id.*

3. Constitutional Preemption

Given AB 51's legislative genealogy, the potential for the bill to conflict with the FAA was addressed during the Legislature's consideration of the bill's provisions. The Senate floor analysis expressly observed that "AB 51 seeks to sidestep the preemption issue by not prohibiting, discouraging, or restricting the use of arbitration agreements by employers or workers, but rather requiring applying prior case law that stressed the need for consent in arbitration agreements." S. Floor Analysis at 5. Similarly, an Assembly analysis makes clear that consent is the animating force behind AB 51 as the basis for avoiding FAA preemption: "this bill would not frustrate the purpose of the FAA because that purpose follows the basic precept, emphasized numerous times by the Supreme Court, that arbitration 'is a matter of consent, not coercion.'" Assembly Committee on Labor and Employment ("A. L&E Analysis") at 4 (citation omitted). For these reasons, proponents of the bill believe "[i]t is a mischaracterization of AB 51

to say that it *prohibits* arbitration agreements," as the bill merely "sets ground rules to ensure that such an agreement is truly voluntary." S. Judiciary Analysis at 6 (emphasis in original).

Nonetheless, the legislative analyses of AB 51 presciently recognized that, given the Supreme Court's jurisprudence on FAA preemption, "there is little doubt that, if enacted, [AB 51] would be challenged in court and there is some chance . . . that it would be found preempted." *Id.* at 7.

IV. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right[,]" *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion[,]" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original)). In determining whether to issue a preliminary injunction, federal courts must consider whether the moving party "[1] is likely to succeed on the merits, . . . [2] is likely to suffer irreparable harm in the absence of preliminary relief, . . . [3] the balance of equities tips in [the movant's] favor, and . . . [4] an injunction is in the public interest." *Winter*, 555 U.S. at 20.

The Ninth Circuit has "also articulated an alternate formulation of the *Winter* test[.]" *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). That formulation is referred to as the "serious questions" or the "sliding scale" approach: "'serious questions' going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) ("the 'serious questions' approach survives *Winter* when applied as part of the four-element *Winter* test," *id.* at 1132). "In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132. Under the "serious questions" approach to a preliminary injunction, "[t]he elements of the preliminary injunction test must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680 F.3d at 1072.

Moreover, in each case and irrespective of the approach to a preliminary injunction, a court must balance the competing alleged harms while considering the effects on the parties of the granting or withholding of the injunctive relief. *Winter*, 555 U.S. at 24. In exercising that discretion, a court must also consider the public consequences of the extraordinary remedy. *Id.*

V. DISCUSSION

The court first addresses jurisdiction and then, finding it has jurisdiction, proceeds to explain why plaintiffs satisfy their burden under the *Winter* test to obtain the preliminary injunctive relief they seek.

A. Jurisdiction

Defendants challenge the court's jurisdiction on two grounds: subject matter jurisdiction and standing. Defs.' Supp. Br. at 2–9. If either is lacking the court may not decide this case, and must dismiss this matter for lack of jurisdiction.

1. Subject Matter Jurisdiction

Regarding subject matter jurisdiction, defendants argue plaintiffs state no cognizable claim because 42 U.S.C. § 1983, the federal statute under which plaintiffs assert their preemption claim, requires violation of a federal right; because the Constitution's Supremacy Clause confers no such right, the court lacks subject matter jurisdiction. *Id.* at 2–5. They also argue the FAA does not create such a federal right. *Id.* Plaintiffs counter that 28 U.S.C. § 1331 undergirds federal jurisdiction given the court's power to grant equitable relief. Pls.' Supp. Br. at 3–7. Alternatively, plaintiffs argue the FAA confers rights cognizable under § 1983. *Id.* at 7–9.

The court has subject matter jurisdiction under 28 U.S.C. § 1331. As plaintiffs correctly note, the Supreme Court effectively resolved the question of subject matter jurisdiction over preemption claims in *Shaw v. Delta Air Lines, Inc.*, when it held:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160–162, 28 S.Ct. 441, 454–455, 52 L.Ed. 714 (1908). 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.

463 U.S. 85, 96 n.14 (1983). Circuit courts have consistently affirmed this principle in exercising jurisdiction over preemption challenges to state law. *See Indep. Living Ctr. of S. California, Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008) ("The Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met."); *see also Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005) ("It is well-established that the federal courts have jurisdiction under 28 U.S.C. § 1331 over a preemption claim seeking injunctive and declaratory relief."); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1264 (10th Cir. 2004) ("Relying on *Shaw* . . . , this court has concluded that federal district courts have jurisdiction over actions seeking to enjoin the enforcement of a state regulation."); *Local Union No. 12004, United Steelworkers Of Am. v. Massachusetts*, 377 F.3d 64, 74 (1st Cir. 2004) ("[A] claim of preemption . . . *does* constitute a federal question under § 1331." (emphasis in original)); *Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002) (same); *St. Thomas–St. John Hotel & Tourism Ass'n, Inc. v. Govt. of the United States Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000) (same).

Plaintiffs' first claim invokes the Supremacy Clause and makes clear their request for equitable and declaratory relief is predicated on the preemptive force of the FAA, relying on the court's power to act under § 1983. Compl. ¶¶ 97–104. Their second claim, titled "Equitable Relief," appeals to the court sitting in equity and seeks the court's "exercise [of] its equitable power to enter an injunction precluding the Defendants from enforcing AB 51." *Id.* ¶ 109. Their third claim seeks declaratory relief under the federal Declaratory Judgment Act, 28 U.S.C. § 2201. *Id.* ¶¶ 110-113. Given the nature of plaintiffs' claims, the court has no doubt regarding its jurisdiction to resolve plaintiffs' preemption claims. The Supreme Court's decision in *Shaw* makes clear that jurisdiction adheres. In *Shaw*, the court considered claims by several large employers against the Acting Commissioner of the New York State Division of Human Rights, who argued the federal Employee Retirement Income Security Act ("ERISA") preempted New

York's human rights and disability benefits laws. 463 U.S. at 92. Although ERISA provides no express cause of action for employers seeking to challenge state benefit laws in federal court, "the Court . . . reached the merits of the preemption claims anyway, holding that the state legislation was preempted only insofar as it prohibited practices that were otherwise lawful under ERISA." *Shewry*, 543 F.3d at 1056 (citing *Shaw*, 463 U.S. at 108–09). In so doing, the Court "merely reaffirmed the traditional rule that injunctive relief is presumptively available in federal court to enjoin state officers from implementing a law allegedly preempted under the Supremacy Clause." *Id.* at 1057. Here, the court's equitable power is sufficient to establish jurisdiction over plaintiffs' federal preemption claims.

2. Standing

Defendants also argue plaintiffs lack standing because, as organizational plaintiffs, they "have not demonstrated a credible threat of harm to their members or themselves that is actual or imminent." Defs.' Supp. Br. at 6. Plaintiffs counter that under the organizational standing test, they "need only show that a single *one* of their members would have standing to sue in its own right," and plaintiffs have done so here. Pls.' Supp. Br. at 9 (emphasis in original). Here too plaintiffs are correct.

Because defendants primarily challenge standing based on a lack of harm, there is significant overlap between the discussion here and that set forth below regarding likelihood of irreparable harm as applicable to the court's preliminary injunction analysis. Because the likelihood of irreparable harm analysis itself provides significant support for a finding of the kind of harm required for standing, the court only briefly addresses standing here to the extent not covered below.

As noted, plaintiffs are various organizations representing the interests of their members across a range of industry sectors. *See* Compl. ¶¶ 16–22. To sue on behalf of their members, plaintiffs must meet the constitutional minimum of Article III standing by showing: "(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek[] to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Defendants' challenge relies only on the first prong. Defs.' Supp. Br. at 5–9; Pls.' Supp. Br. at 9. "To have standing in their own right, an association's members must have 'suffered an injury in fact,' that injury must be 'fairly traceable to the challenged conduct of the defendant,' and the injury must be 'likely to be redressed' by a decision in their favor." *Airline Serv. Providers Ass'n v. Los Angeles World Airports*, 873 F.3d 1074, 1078 (9th Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, *as revised* (2016)). In applying this prong, the court must "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (internal quotation marks and citation omitted).

The allegations in the complaint, construed in plaintiffs' favor as required, satisfy Article III standing. In listing the organizational parties, the complaint alleges members of each organization enter into arbitration agreements or require affirmative opt-outs as a condition of employment, and those members would be irreparably harmed if AB 51 goes into effect. *See* Compl. ¶¶ 16–22 (describing each plaintiff organization, its reliance on arbitration agreements and the harm faced if AB 51 takes effect). The complaint also alleges organization members "intend to continue to enter into arbitration agreements with workers . . . in reliance on the FAA and U.S. Supreme Court decisions interpreting that statute[,]" these members will "subject themselves to investigations and enforcement actions" if they fail to comply with AB 51 while relying on FAA protections, or, alternatively, may "choose to comply with AB 51 out of fear of lawsuits and civil and criminal enforcement actions." *Id.* ¶¶ 85–88. If they ultimately choose to forego utilizing arbitration agreements altogether, the organization members will be immediately deprived of the benefits of arbitration and will incur immediate costs redrafting standard employment agreements and employee manuals, along with additional ancillary expenses related to the reformulation of employment practices. *Id.* ¶¶ 88–90. No matter which course of action organization members choose, "AB 51 makes it more difficult for employers to access the benefits of arbitration." *Id.* ¶ 91. These allegations of plaintiffs describe "far more than simply a setback to the organization[s'] abstract social interests," they plead a "concrete and demonstrable

injury to the organization[s'] activities—with the consequent drain on the organization[s'] resources," particularly in light of the alleged deterrent effect it will have on members' ability to freely enter into arbitration agreements without fear of consequence. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Plaintiffs need not establish at this point that each of their individual members have capacity to sue in their own right in order to meet the constitutional minimum. While such a requirement would set up a virtually impossible logistical hurdle for organizations of significant size, *see, e.g.*, Spencer Decl. ¶ 3, ECF No. 40-2 (U.S. Chamber represents approximately 300,000 direct members); Barrera Decl. ¶ 3, ECF No. 40-3 (CalChamber consists of more than 14,000 private-sector employers); Chalios Decl. ¶ 1, ECF No. 40-7 ("CAHSAH comprises and represents hundreds of members located throughout the State."), such a requirement also would severely impair an organization's ability to bring suit on its members' behalf. There is no precedent for setting up such a hurdle. As the Ninth Circuit explained in *Nat'l Council of La Raza v. Cegavske*,

> Where 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.

800 F.3d at 1041. The allegations in the complaint sufficiently plead that many, if not all, members of the plaintiff organizations that routinely utilize arbitration agreements will face harm if AB 51 takes effect.

Declarations attached to plaintiffs' supplemental briefing in response to defendants' standing challenge bolster this conclusion.[2] Specifically, plaintiffs provide the

[2] On January 31, 2020, defendants lodged objections to certain portions of the declarations attached to plaintiffs' supplemental brief. *See* ECF No. 43. The objections are generally based on hearsay, lack of personal knowledge and speculation. *Id.* at 3–8. Defendants do not contend the declarations are prejudicial because they are untimely. The court overrules the objections generally and relies on these declarations as (1) merely confirming its prior finding that standing exists, and (2) as providing basic information about each organization's operational focus and its members' use of arbitration agreements. The court gives weight to the declarations only to the extent they provide support for the broader proposition that each plaintiff organization and its members are actively involved in the California employment market and generally engage in the

declarations of Glenn Spencer, the U.S. Chamber's Senior Vice President of the Employment Policy Division, Jennifer Barrera, the CalChamber's Executive Vice President, Stephanie Martz, NRF's Chief Administrative Officer, Senior Vice President, and General Counsel, ECF No. 40-4, Rachel Michelin, CRA's President and CEO, ECF No. 40-5, Steve Amitay, NASCO's Executive Director, ECF No. 40-6, Dean Chalios, President and CEO of CAHSAH, and Vicki Hoak, Executive Director of the HCAOA, ECF No. 40-8. Plaintiffs also provide a supplemental declaration from Brian Maas, ECF No. 40-1. In aggregate, these declarations confirm organizational standing exists here.

Each declarant avers that his or her respective organization advocates on behalf of its members, generally California businesses, and that those members share a unified goal, utilize arbitration agreements or opt-outs as a mandatory condition of employment, and will be subject to AB 51's criminal and civil penalties if they continue to utilize mandatory arbitration agreements or will face immediate and significant costs to avoid use of arbitration agreements altogether in order to protect themselves from potential penalties. For example, CalChamber Executive Vice President Jennifer Barrera asserts her organization's 14,000 California private-sector employers together employ more than one-forth of the private sector workforce in California. Barrera Decl. ¶ 3. Her members "utilize employment arbitration agreements and believe that they will be impacted if AB 51 goes into effect because they treat arbitration as one of many conditions of employment." *Id.* ¶ 5(a). Her members express substantial concerns regarding the choice they will face if AB 51 goes into effect: "whether to change their employment practices and form employment agreements, or to risk the criminal and civil penalties imposed by AB 51 by continuing to treat arbitration as a condition of employment." *Id.* ¶ 5(c). Other plaintiffs allege similar harm. *See, e.g.*, Spencer Decl. ¶¶ 5, 8 ("[M]embers make agreeing to arbitration one of many conditions on the offer of employment . . . . If AB 51 does not continue to be enjoined . . . members . . . will incur unrecoverable costs to comply."); Martz Decl. ¶ 6 ("NRF members who

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practice of utilizing arbitration agreements. The court notes plaintiffs have responded to defendants' objections; the response does not alter the court's conclusions summarized in this footnote.

continue to impose their arbitration policies in California will face irreparable harm, including imminent, credible threats of both criminal prosecution and civil penalties under the plain language of AB 51."); Michelin Decl. ¶¶ 3, 5 ("CRA members regularly refuse to hire or terminate employees who refuse to enter into arbitration agreements . . . . Absent further injunctive relief against AB 51 . . . members who continue to impose their arbitration policies in California will face irreparable harm."). These declarations supplement the allegations in the complaint and further support the court's conclusion that plaintiffs have met the constitutional threshold to establish organizational standing.

B. Likelihood of Success on the Merits

In resolving a preliminary injunction motion, "[t]he first factor under *Winter* is the most important . . . [b]ecause . . . when a plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider the remaining three [*Winter* elements]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (last alteration in original) (quotations marks and citations omitted).

Plaintiffs contend they are likely to succeed on the merits of their preemption claim for two reasons: (1) AB 51 violates § 2 of the FAA because it treats arbitration agreements differently from other contracts, and (2) AB 51 conflicts with the purposes and objectives of the FAA. Reply at 1–6. Defendants argue plaintiffs are unlikely to succeed on the merits because AB 51 merely regulates employer behavior, not arbitration agreements. Opp'n at 5–9. As explained below, the court finds plaintiffs satisfy their burden of showing AB 51 is likely preempted by the FAA and thus they are likely to succeed on the merits of their claims.

1. Preemption Generally

The Supremacy Clause of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land[.]" U.S. Const. art. VI, cl. 2. "Under this principle, Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Typically, preemption takes one of three forms. *See Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) (explaining doctrines of express, field and

conflict preemption). However, as explained below, whether the FAA preempts a state law is determined by considering discreet principles tailored to the FAA.

2. The FAA

As reviewed above, § 2 of the FAA expressly makes agreements to arbitrate '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. The Supreme Court has observed the FAA reflects "both a 'liberal federal policy favoring arbitration,' . . . and the 'fundamental principle that arbitration is a matter of contract.'" *Concepcion*, 563 U.S. at 339 (citations omitted). For this reason, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.* (citations omitted). This "equal-footing," or "equal treatment" principle reflects the notion that "the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements[.]" *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

In practical terms, equal treatment means "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339). Therefore, if any state rule "singles out arbitration," it is preempted by the FAA. *Id.* at 1425.

A state law's disparate treatment of arbitration can occur not only on its face, *id.* at 1426 (citing *Concepcion*, 563 U.S. at 341), but also by "covertly . . . disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements," *id.* The latter scenario arises where a law "'rel[ies] on the uniqueness of an agreement to arbitrate as [its] basis'—and thereby violates the FAA." *Id.* (second alteration in original) (quoting *Concepcion*, 563 U.S. at 341). This principle applies not only to the enforcement of arbitration agreements, but also to their creation. *Kindred*, 137 S. Ct. at 1428 ("By its terms, then, the Act cares not only

about the enforcement of arbitration agreements, but also about their initial validity—that is, about what it takes to enter into them." (internal quotations and alternations omitted)).

Furthermore, even when a state law puts arbitration agreements on equal footing, the law may nonetheless be subject to FAA preemption if it "interferes with fundamental attributes of arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). This kind of interference implicates conflict preemption principles because the state law, in essence, "stand[s] as an obstacle to the Federal Arbitration Act." *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 989 (9th Cir. 2007).

In sum, unequal footing and interference with the fundamental attributes of arbitration are two ways in which a "state-law rule can be preempted by the FAA." *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825 (9th Cir. 2019).

3. Unequal Footing

Plaintiffs contend they are likely to succeed on the merits of their claims because AB 51 places arbitration agreements on unequal footing with other contracts. Reply at 1. In opposition, defendants argue plaintiffs are unlikely to succeed on the merits because AB 51 does not regulate agreements; it only regulates employer attempts to "coerce agreements waiving employment and labor law rights." Opp'n at 5.

Although plaintiffs overreach in arguing that AB 51 prevents employers from even offering arbitration agreements to employees, *see, e.g.*, MPI at 14, on balance, plaintiffs have the better argument here. In pertinent part, AB 51 prohibits a person's requiring as a condition of employment, the waiver of "any right, forum, or procedure" for a violation of the FEHA or the Labor Code. Cal. Lab. Code § 432.6(a). A violation of this provision is subject to civil or criminal penalties. *See* Cal. Gov't Code § 12965; Cal. Lab. Code § 433. Waivers of a "right, forum, or procedure" include, even if they are not limited to, agreements to arbitrate instead of litigate in court. As AB 51's legislative history acknowledges, the primary target of the bill is agreements to arbitrate. S. Floor Analysis at 3–4. As a result, AB 51 penalizes employers who include, as a take-it-or-leave-it proposition, a mandatory arbitration clause that operates as a "right, forum, or procedure" waiver in their employment contracts. While defendants technically

are correct that AB 51 is written to proscribe a certain type of action by a "person" or "employer," Cal. Lab. Code § 432.6(a), (b), the proscribed action is primarily that of requiring an arbitration clause as a condition of employment. The distinction defendants attempt to draw is one without a difference relevant here.[3] In its expressed purpose, and its operation, AB 51 singles out the requirement of entering into arbitration agreements and thus subjects these kind of agreements to unequal treatment.

Defendants also argue that AB 51 merely codifies a central tenet of the FAA, that "arbitration is strictly a matter of consent." Opp'n at 5–9 (alteration and quotation marks omitted) (quoting *Lamps Plus*, 139 S. Ct. 1407 (2019)). They suggest the bill furthers the principle of consent by "mitigat[ing] hiring policies that 'foist' waivers on employees." *Id.* Consent is a tenet foundational to agreements covered by the FAA. In this respect, the concept of consent and the equal-footing principle are entirely consistent. "Arbitration is a matter of contract," *Concepcion*, 563 U.S. at 351, and the FAA "command[s] that arbitration agreements be treated like all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). To the extent the California Legislature's goal in adopting AB 51 was to ensure employment-related arbitration agreements are born of consent and free of coercive influence, Opp'n at 6, that goal is consistent with the FAA. When the goal translates into a state-derived rule affecting arbitration specifically, however, the rule runs afoul of the federal law by contravening the equal footing principle.

As noted above, the equal-footing principle provides the foundation for determining whether a state law discriminates against arbitration agreements in some way. In *Kindred*, the Court found a Kentucky Supreme Court "clear-statement" rule preempted by the

[3] Defendants note that California has successfully enacted numerous laws that regulate employer behavior, including with respect to waivers of certain employee rights. *See* Opp'n at 7–8 (listing SB 358 (2015 Cal. Stats. Ch. 546 (S.B. 358)) (prohibiting retaliation for wage discussion), SB 820 (2019 Cal. Stats. Ch. 953 (S.B. 820)) (prohibition on certain nondisclosure agreements), SB 1300 (2019 Cal. Stats. Ch. 955 (S.B. 1300)) (prohibiting release of FEHA or workplace claims absent certain requirements), AB 3109 (2019 Cal. Stats. Ch. 9949 (A.B. 3109)) (voiding contract provisions that prohibit party from testifying about criminal conduct or sexual harassment)). These examples, however, are not laws that singled out contracts that bear the defining features, either in name or effect, of arbitration agreements, as prohibited by the FAA.

FAA because it failed to "put arbitration agreements on an equal plane with other contracts." 137 S. Ct. at 1427. The Kentucky rule, in essence, created an additional procedural safeguard before a party's representative, an attorney-in-fact, could contractually waive that party's right to resolve a dispute in court. *Id.* But the Court struck the rule down, saying this is "exactly what *Concepcion* barred: adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* Such a rule, "tailor-made to arbitration agreements," violates the equal footing principle and is incompatible with the FAA. *Id.* Similarly, in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996), the Court struck down a Montana law as preempted by the FAA because it required that any contract subject to arbitration provide notice, prominently displayed on the first page of the contract at issue. This "first-page notice requirement" was antithetical to FAA objectives because it "place[d] arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Id.* at 688. The Court reiterated that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]." *Id.* at 685 (alteration in original) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

It is AB 51's embodiment of a "legal rule hinging on the primary characteristic of an arbitration agreement," *Kindred*, 137 S. Ct. at 1427, and placing "arbitration agreements in a class apart from 'any contract,'" *Casarotto*, 517 U.S. at 688, that is the law's fatal flaw. AB 51's prohibition on California employers' use of "right, forum, or procedure" waivers as a condition of employment, Cal. Lab. Code § 432.6(a), "oh so coincidentally" disfavors contracts with the "defining features" of arbitration. *Kindred*, 137 S. Ct. at 1426. As in *Kindred*, defendants' attempt here to paint AB 51 in broader terms is unavailing. Defendants, again, argue AB 51 does not single out arbitration agreements; "[r]ather, for both arbitration and other types of employment agreements, it simply provides that employees cannot be forced to waive the rights and protections afforded them under the law." Opp'n at 7 (quotation omitted). "But what other rights, really," as the Court in *Kindred* asked, is AB 51 designed to target? *Kindred*, 137 S. Ct. at 1427. When pressed at hearing on this question, defendants responded that AB 51 applies equally to employment terms such as non-disclosure agreements, forum selection clauses, choice-of-law

provisions and administrative exhaustion requirements. Jan. 10 Hr'g Tr. at 6:8–21, ECF No. 36. In response, plaintiffs argued that envisioning possible alternative applications cannot save an otherwise unlawfully crafted statute designed to inhibit arbitration agreements in particular. *Id.* at 6:24–8:17. Plaintiffs are correct. Other types of employment provisions may tangentially fall within AB 51's ambit, but the law's clear target is arbitration agreements, given the sponsors' concern regarding an overabundance of arbitration agreements in the California employment market. *See* S. Floor Analysis at 2–3 ("67.4% of all California employers mandate arbitration of employment disputes" (emphasis omitted)). Indeed, the very purpose of the bill is to "address[] negotiations between employers and employees . . . over what forums and procedures will be available to them in the event that the employee later alleges a violation of either the employee's workplace civil rights or the Labor Code." S. Judiciary Analysis at 4. As one bill analysis reported, "proponents of th[e] bill hope [it] . . . will reduce the number of California workers who are forced into arbitration against their will." *Id.*; *see also* S. Floor Analysis at 1 (summarizing bill as "prohibit[ing] applicants for employment or employees to waive their right to a judicial forum as a condition of employment . . . ."). As noted above, even if the law itself is artfully crafted to support the argument that it only regulates the behavior of employers, it cannot avoid being construed as law that in effect discriminates against arbitration agreements.

Defendants' counter to this conclusion makes an additional point: they point out that AB 51 "does not render invalid any arbitration agreement that would otherwise be enforceable under the FAA . . . ." Opp'n at 5; *see also* Cal. Lab. Code § 432.6(f) ("Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."). In other words, "even where the employer violates AB 51" by, for example, requiring an employee to accept a mandatory arbitration clause, if and when the arbitration agreement is formed it is fully enforceable. *Id.* It is the employer alone who may face the civil or criminal sanctions available for violating the law. But because the employer may be sanctioned specifically for requiring an arbitration agreement as a condition of employment, with a likely deterrent effect on the use of such agreements, *see Preston v. Ferrer*, 552 U.S. 346, 358

(2008), AB 51's design does not comport with the equal footing principle and its effort to avoid FAA preemption fails.

The court finds, therefore, that AB 51 is preempted by the FAA because it singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration.

4. Interference with Arbitration

AB 51 also interferes with the FAA's goal as interpreted by the Supreme Court and is subject to preemption on this basis as well. *Blair*, 928 F.3d at 828 ("'[A] doctrine normally thought to be generally applicable' is nonetheless preempted by the FAA if it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.'" (alterations in original) (quoting *Concepcion*, 563 U.S. at 341, 343)).

Plaintiffs argue AB 51 conflicts with the purposes and objectives of the FAA because it will, among other things, "forcefully impede the FAA's purpose 'to promote arbitration'" by sanctioning employer behavior attendant to formation of legally permissible arbitration agreements. Reply at 6 (quoting *Concepcion*, 563 U.S. at 346). Defendants contend AB 51 does not inhibit the FAA's objectives because the bill only regulates employer behavior "prior to entry into any agreement" and it respects the FAA's objectives by ensuring "that any waiver of rights and remedies in the employment context is consensual." Opp'n at 6. Defendants also note AB 51 does not invalidate otherwise enforceable arbitration agreements through the creation of a new contract defense, *id.* at 5, thus respecting that "Congress plainly . . . intend[ed] to preempt . . . only those [state contract defenses] that 'interfere[ ] with arbitration.'" *Blair*, 928 F.3d at 828 (alterations in original) (quoting *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015)).

The Supreme Court has declared as a bedrock principle "that the FAA was designed to promote arbitration," as it reflects a "national policy favoring arbitration." *Concepcion*, 563 U.S. at 345–46. Any law, therefore, that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . is pre-empted by the FAA." *Id.* at 352 (citations omitted). As noted above, AB 51 will likely have a deterrent

effect on employers' use of arbitration agreements given the civil and criminal sanctions associated with violating the law. While AB 51 did not create new civil sanctions, existing Government Code sections provide for such sanctions. *See, e.g.*, Cal. Gov't Code § 12953 (declaring Labor Code section 432.6 a violation under the FEHA); *id.* §§ 12963.7, 12965 (providing enforcement procedures for FEHA Director to follow and private right-to-sue options attendant thereto). While AB 51 did not create a new criminal sanction, existing Labor Code section 433 provides that "[a]ny person violating this article is guilty of a misdemeanor," with exposure to up to six months' imprisonment or a fine up to $1,000, *id.* § 23. "This article" referenced in section 433 includes the new Labor Code section included in AB 51, section 432.6. Plaintiffs represent that the exposure to penalties will cause uncertainty in hiring market such that employers are likely to alter their employment contacts to exclude arbitration agreements. *See* Maas Decl. ¶ 17[4] ("Because what a court will view as 'voluntary' is especially uncertain in the context where an employer presents an agreement to its employees . . . [employers will] consider[] the risk of criminal and civil liability too high . . . to safely rely on the voluntariness of the process."); *see also* Spencer Decl. ¶ 8 ("[M]embers of the Chamber . . . will either have to make changes to their contracting practices . . . or they will face criminal and civil penalties if they do not eliminate arbitration as a requirement of the employment relationship."); Barrera Decl. ¶ 5(c) ("[M]embers also expressed substantial concerns about the choices they would have to make if AB 51 goes into effect, such as . . . risk [of] criminal and civil penalties."); Martz Decl. ¶ 8 ("NRF . . . has further been compelled to spend time and resources counseling its members on the harms threatened by AB 51.").

As noted above, while AB 51 includes a provision that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the

[4] Defendants' move to strike portions of Mr. Maas's testimony for lack of foundation, speculation, improper opinion, false and misleading statements and because they fail to meet fundamental evidentiary standards of admissibility. *See* Obj. to Maas Decl., ECF No. 15. Defendants' motion covers paragraphs 7, 26–28, 32–35 and 37 of the declaration. *See generally id.* Because the court relies only on paragraph 17 of the Maas declaration here, and not the paragraphs identified in defendants' motion, it need not reach the merits of defendants' motion here. The court addresses defendants' evidentiary objections below.

[FAA]," Cal. Lab. Code § 432.6(f), the provision does not exonerate employers who require the agreement in the first place.

Given the penalties imposed on employers found to violate AB 51, the court finds that the law also interferes with the FAA and for this reason as well is preempted.

5. Conclusion

For the reasons discussed above, plaintiffs meet their burden of showing they are likely to succeed on the merits of their claim that AB 51 is preempted by the FAA because it discriminates against arbitration and interferes with the FAA's objectives.

C. Likelihood of Irreparable Harm in the Absence of Preliminary Relief

Plaintiffs must also show that absent a preliminary injunction they are likely to suffer irreparable harm, for even a showing of possible harm is "too lenient." *Winter*, 555 U.S. at 22. To meet this burden, plaintiffs submit the declaration of Brian Maas, President of the California New Car Dealers Association ("CNCDA"). Although the question of irreparable harm does not hinge on the wholesale admissibility of Mr. Maas's declaration, the court must nonetheless address certain of defendants' objections to the declaration before proceeding to evaluate irreparable harm.

1. Objections to Maas Declaration

Defendants object to paragraphs 7, 26–28, 32–35 and 37 of Mr. Maas's declaration. The court addresses the objections to paragraphs 27, 34 and 35, as these are the only paragraphs challenged that are relevant to the court's findings below.

Because defendants' objections to paragraphs 27, 34 and 35 largely overlap, the court's analysis applies to each of these paragraphs unless otherwise indicated. In paragraph 27, Mr. Maas avers that if AB 51 goes into effect, the CNCDA and its members will face immediate and irreparable harm because they will be deprived of the benefits of predispute arbitration agreements and the attendant cost savings. Maas Decl. ¶ 27. In paragraph 34, Maas testifies that the harms imposed by AB 51 cannot be remedied by later damages awards because sunken costs from redrafting employment agreements, abandoning arbitration and product cost reallocation cannot be recovered. *Id.* ¶ 34. And, in paragraph 35, Maas states that cost increases associated

with otherwise arbitrable disputes are likewise also unrecoverable as those disputes would have been diverted into the judicial system by the time this case concludes. *Id.* ¶ 35.

Defendants object to paragraph 27 under Federal Rule of Evidence 403 as false, misleading, deceptive and confusing. Obj. to Maas Decl. at 4. They also argue under Rule of Evidence 602 that Maas's statements in all three paragraphs are speculative, lack foundation and lack personal knowledge. *Id.* at 4–6. Finally, defendants argue Maas offers improper expert testimony under Rule 701 and 702. *Id.* These objections are overruled.

As to defendants' Rule 403 objections to paragraph 27, that rule provides "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Fed. R. Evid. 403. Mr. Maas's declaration directly supports plaintiffs' contention that AB 51 hinders arbitration agreements through the imposition of criminal and civil penalties. These statements are relevant and speak directly to the plaintiffs' primary arguments supporting preemption. Sustaining the objections would require the court to accept defendants' proposition that AB 51 in no way hinders or deprives employers from utilizing arbitration agreements. *See* Obj. to Maas Decl. at 4. For the same reasons discussed above with respect to defendants' motion to strike, *see* Likelihood of Success on the Merits, *supra*, the court declines to so rule. The probative value of Mr. Maas's statements at paragraph 27 are not substantially outweighed by the danger of unfair prejudice, confusing the issues or their potential to mislead.

Likewise, Mr. Maas's statements in paragraphs 27, 34 and 35 should not be excluded under Rule 602. Testimony is admissible under Rule 602 "only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A witness's own testimony can provide the evidence necessary to establish personal knowledge. *Id.* Defendants argue it is speculative whether CNCDA or its members will experience an immediate and irreparable increase in the costs of dispute resolution. Obj. to Maas Decl. at 4. But, as plaintiffs highlight, the unchallenged portions of Maas's declaration aver that CNCDA members will avoid using arbitration agreements due to uncertainty and fear of criminal and civil penalties. Opp'n to Def.'s Obj. to Maas Decl., ECF No. 19, at 2 (citing Maas

Decl. ¶¶ 16–18, 29–30). Given his position, Mr. Maas is competent to say that avoiding arbitration will immediately deprive CNCDA members of cost and efficiency benefits. Moreover, his observation informed by his professional role is consistent with generalized propositions regarding arbitration articulated by the Supreme Court. *Concepcion*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *see also Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009) ("[T]he twin goals of arbitration . . . [are] settling disputes efficiently and avoiding long and expensive litigation." (citation omitted)).

Plaintiffs provide sufficient foundation for Mr. Maas's statements, as he has personal knowledge of the value of arbitration agreements within his organization and the auto-dealer industry; he represents a professional association that routinely counsels its members regarding the use and benefit of arbitration agreements and provides form and standalone agreements for members' use. Maas Decl. ¶¶ 1–12. Defendants' Rule 602 objections to paragraphs 27, 34 and 35 are overruled except that to the extent paragraph 35 includes an assertion that disputes are resolved more equitably in arbitration than in alternative forums, the court does not rely on this assertion.

Finally, defendants move to strike these portions of Maas's declaration as improper expert testimony of a non-expert under Rule of Evidence 701 and 702. Under Rule 701, non-expert opinion testimony is admissible if "rationally based on the witness's perception; helpful to clearly understand[] the witness's testimony . . . [and] not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. Plaintiffs do not designate Mr. Maas as an expert under Federal Rule of Civil Procedure 26, *see* Fed. R. Civ. P. 26(a)(2); therefore, his testimony must meet the requirements of Rule 701 to be admissible. In this regard, the advisory committee notes to the 2000 amendments to the rules of evidence are instructive:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.

Fed. R. Evid. 701, adv. comm. note to 2000 amendment; *see also Pet Food Exp. Ltd. v. Royal Canin USA, Inc.*, No. C-09-1483 EMC, 2011 WL 6140874, at *11 (N.D. Cal. Dec. 8, 2011) (collecting cases illustrating various ways courts have applied "business owners" exception under Rule 701).

Given this guidance, the court finds that Mr. Maas's statements qualify as lay opinion testimony under Rule of Evidence 701. Mr. Maas does not testify as an expert on the use of arbitration agreements in the marketplace broadly or purport to predict what widescale impact AB 51 will have on all California businesses; rather, he testifies that, based on his knowledge and experience as CNCDA president, its members rely on CNCDA's advice and counsel regarding arbitration agreements, the form and standalone agreements CNCDA provides, and regularly incorporate those agreements into their employment contracts as conditions of employment. As CNCDA president, Mr. Maas is aware of the benefits arbitration provides its members and has a basis for believing that if AB 51 goes into effect, its members will cease using arbitration agreements for fear of incurring criminal or civil penalties. All of Mr. Maas's positions are derived from his personal knowledge as CNCDA president, his interaction with its members and his understanding of its daily operations, and not from a position as a neutral expert on the benefits of arbitration more broadly. In other words, the particularized knowledge Mr. Maas conveys derives from his position within CNCDA. Moreover, defendants object only to portions of Mr. Maas's testimony, whereas other portions cover some of the same ground. *Compare, e.g.*, Maas Decl. ¶¶ 16–18, 22–24 (uncontested statements explaining AB 51's effect on CNCDA members), *with id.* ¶¶ 26–28 (contested statements regarding AB 51's impact on CNCDA

members' ability to rely on arbitration). For these reasons, Mr. Maas's testimony is not excluded as improper expert testimony under Rule 702.

The court overrules defendants' objections to paragraphs 27, 34 and 35 of Mr. Maas's declaration and finds those paragraphs admissible for purposes of the present motion.

2. Irreparable Harm

The court turns now to the merits of plaintiffs' contention they will be irreparably harmed absent a grant of injunctive relief. Plaintiffs argue they will suffer irreparable harm because AB 51 will cause immediate disruption in the employment market for the many California employers who rely on arbitration as a mechanism to "anticipate lower legal costs and more efficient dispute resolution procedures." MPI at 13. Plaintiffs argue the imminent harm will materialize in one of two ways. First, if employers choose not to comply with AB 51, they risk criminal prosecution and civil enforcement action. *Id.* at 13–14. Second, if "coerced into compliance" for fear of penalties, California businesses will inevitably "forego their federally protected rights to enter into predispute arbitration agreements," which will cause them to incur immediate administrative costs in order to redraft standard contracts, deprive them of the fiscal benefit of arbitration, subject them to costly litigation, and increase meritless claims against them with the hope of settlements, all without the ability to recoup costs. *Id.* at 14–16. In support of these assertions, plaintiffs rely on Mr. Maas's declaration as CNCDA president.

In opposition, defendants argue plaintiffs do not, and cannot, show a likelihood of irreparable harm because their assertions are overstated and ignore practical alternatives to outright avoidance of entering into arbitration agreements. Opp'n at 10. Defendants' contentions are based, primarily, on their objections to Mr. Maas's declaration, which the court has overruled above. *Id.*

The court finds plaintiffs meet their burden of showing a likelihood of irreparable harm. "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). If AB 51 takes effect, plaintiffs have provided sufficient evidence to show California businesses that rely on arbitration agreements as a condition of employment will be

forced to choose between risking criminal or civil penalties, or both, based on the uncertainties surrounding AB 51's implementation, and foregoing the use of arbitration agreements altogether to avoid penalties. *See* Reply at 7–9; Maas Decl. ¶¶ 16–17, 23–24, 29–30. 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. *See* MPI at 14–15; Reply at 8–9; Maas Decl. ¶¶ 20–25, 27. These costs likely cannot be recouped through traditional legal remedies, such as damages, because the State of California, the moving force behind AB 51's enactment, is immune from suit under sovereign immunity, as are the defendant state actors acting within their lawful capacity. *See* MPI at 16 (citing *Odebrech Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013)); *see also Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury."). Defendants do not dispute that sovereign immunity will bar later recovery. *See generally* Opp'n. The costs California businesses will incur are not merely conjectural; they are highly probable and not recoverable if AB 51 is found preempted by the FAA at the conclusion of the case.

The irreparable harm California employers will face if AB 51 is allowed to take effect is akin to the harm identified in the case of *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). In *American Trucking*, the Ninth Circuit considered a lower court's refusal to enter a preliminary injunction on behalf of American Trucking Associations, Inc. ("ATA"), a non-profit national trade association for the trucking industry that sought to enjoin implementation of mandatory concession agreements for drayage trucking services at the Ports of Los Angeles and Long Beach. The ATA sought to enjoin the agreements' implementation because the agreements were, ATA argued, preempted by the Federal Aviation Administration Authorization Act ("FAAA Act"). *Id.* at 1048. In finding likely preemption by the FAAA Act, the Circuit also reviewed the lower court's finding that ATA could not show a likelihood of irreparable harm. The Circuit described the harm created by the concession agreements as "a kind of Hobson's choice." *Id.* at 1057. If plaintiff motor carriers signed the

concession agreements, they would suffer monetary harm in the form of maintenance and administrative expenditures necessary to comply with those agreements. *Id.*; *see also Am. Trucking Associations, Inc. v. City of Los Angeles ("Am. Trucking I")*, 577 F. Supp. 2d 1110, 1126 (C.D. Cal. 2008) (lower court decision describing monetary costs in greater detail), *rev'd*, 559 F.3d 1046 (9th Cir. 2009). If, however, the motor carriers did not sign the agreements, they faced non-economic harm in the form of potential lost business and diminished goodwill. *Id.*; *Am. Trucking I*, 577 F. Supp. 2d at 1126.

The Circuit found that no matter the choice, motor carriers would be subjected to imminent harm. *Id.* at 1058. First, if a carrier signed a concession agreement, "it will have been forced to sign an agreement to conditions which are likely unconstitutional because they are preempted," and "forced to incur large costs which . . . will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone." *Id.* The impact of such costs on smaller companies "would likely be fatal." *Id.* Second, for carriers who chose not to sign "the likely unconstitutional Concession agreements," the potential loss of goodwill was hardly speculative because carriers would be foreclosed from accessing a customer's goods at the ports, which would lead to diminished customer satisfaction and loss of business. *Id.*

Here, the circumstances are sufficiently analogous to those in *American Trucking* to warrant a finding of irreparable harm. Plaintiffs have shown that if 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. Maas Decl. ¶ 17 ("Because what a court will view as 'voluntary' is especially uncertain . . . where an employer presents an agreement to its employees, CNDCA considers the risk of criminal and civil liability too high for members to safely rely on the voluntariness of the process.").

Alternatively, employers are likely to be deterred from proposing arbitration agreements altogether, in a scenario that is factually inverse to that in *American Trucking*, but yielding the same constitutionally invasive results. In *American Trucking*, carriers choosing to

sign the concession agreements would have been forced to sign agreements, "which are likely unconstitutional because they are preempted." *Am. Trucking*, 559 F.3d at 1058. Here, employers will be deterred from participating in contractual behavior governed by the FAA and likely protected under the Supremacy Clause. *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd and remanded on other grounds*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."). While the Maas Declaration covers one business sector, defendants do not argue that sector is an outlier and not representative of other businesses. It is not speculation to conclude that AB 51's deterrent effect will be widely felt.

3. Conclusion

No matter the choice—continue to utilize arbitration agreements and risk criminal and civil sanctions or avoid arbitration agreements for fear of non-compliance with a statute that is likely preempted—the result is the same: California employers are faced with likely irreparable harm. Plaintiffs, therefore, satisfy their burden under this prong of the *Winter* test.

D. Balance of Equities and Public Interest

The remaining *Winter* factors also favor injunctive relief. The balance of equities and public interest factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "In assessing whether the plaintiffs have met this burden, the district court has a duty to balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotation marks and alternation omitted).

Without question the state has significant interests in advancing policies seeking to protect its citizens' rights through legislative action. Those interests are not unbounded, however. The Ninth Circuit has observed "it would not be equitable or in the public's interest to allow the state to continue to violate . . . federal law, especially when there are no adequate remedies available to compensate [plaintiffs] for the irreparable harm that would be caused by the continuing violation. In such circumstances, the interest of preserving the Supremacy Clause is paramount." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852–53 (9th Cir.

2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012); *see also Am. Trucking*, 559 F.3d at 1059–60 (recognizing that while concession agreements advance public interest in protecting ports, that interest cannot outweigh congressional intent nor the supremacy of federal law); *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 854 (E.D. Cal. 2018) ("California 'has no legitimate interest in enforcing an unconstitutional' law." (quoting *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

On balance, the equitable and public interest factors here weigh in favor of preliminary injunctive relief. Plaintiffs have satisfied their burden of showing AB 51 is incompatible with the FAA and they are likely to suffer irreparable harm if it takes effect. The likelihood of this harm outweighs defendants' interest in advancing a policy seeking to enhance employee rights with respect to mandatory arbitration because defendants do so at the expense of arbitration rights governed by the FAA. *See Maxwell-Jolly*, 563 F.3d at 852–53. In the unlikely event AB 51 is later found compatible with the FAA and not preempted, defendants will have suffered the minimal harm of delayed enforcement, whereas plaintiffs are likely to have suffered harm that cannot be remedied. As the Ninth Circuit has stressed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (internal quotation marks and citation omitted). All of these factors favor the granting of a preliminary injunction.

E. Conclusion

In sum, plaintiffs satisfy each of the four factors under the *Winter* test to justify preliminary injunctive relief. As a result, the Ninth Circuit's sliding scale approach is also satisfied. Plaintiffs' motion for a preliminary injunction is GRANTED.

VI. SEVERABILITY

The question remains whether preemption applies to some or all of AB 51's provisions. Section 432.6(i) provides, "If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." Cal. Lab. Code § 432.6(i). Defendants argue an

injunction based on FAA preemption "would have to focus on the statute's application in particular instances." Defs.' Supp. Br. at 9. Alternatively, defendants assert that if the court finds sections 432.6(a) and (c) enjoined in their entirety, section (b) is "completely independent . . . and would be enforceable along with the remainder of the statute.' *Id.* at 10. Plaintiffs agree that an injunction should apply "only with respect to arbitration agreements governed by the FAA." Pls.' Supp. Br. at 13. The only point of disagreement then is the extent to which an injunction should encompass section (b).

Section 432.6(b) provides:

> 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.

Cal. Lab. Code § 432.6(b). Plaintiffs argue section (b) has the same practical effect on arbitration as the preempted components of section (a); therefore, section (b) should not be spared from the FAA's preemptive hold. Defendants aver section (b) stands independently from sections (a) and (c); thus, preemption does not apply.

The court finds the preemptive effect of the FAA applies equally to provisions (a), (b) and (c) of section 432.6. While section (a) targets, as far as the FAA is concerned, conditional use of arbitration agreements, section (b) focuses on what actions an employer may take when an applicant or employee refuses to sign a right, forum or procedural waiver. As plaintiffs correctly highlight, the practical effect of this provision is that employers will be prohibited from responding in any way to an applicant or employee that refuses to sign a waiver. This prohibition is incompatible with the remainder of section (a) once FAA preemption is applied.

To illustrate, the parties agree preemption is limited to arbitration agreements governed by the FAA. *See* Pls.' Supp. Br. at 13; Defs.' Supp. Br. at 9–11. Therefore, given preemption, under section (a) an employer can, as a condition of employment, require an applicant or employee to enter into mandatory arbitration agreements. *See* Cal. Lab. Code

§ 432.6(a). However, if preemption does not then apply to section (b), an employer would be prohibited from refusing to hire a prospective employee, or terminate an existing employee, if that employee refused to sign the mandatory arbitration agreement. In other words, if preemption does not apply to section (b), conditional arbitration agreements will not be conditional at all, as employers will lose the ability to act on an employee's refusal to abide by the requirement of entering into an agreement.

For this reason the court finds FAA preemption applies equally to subsections 432.6(a), (b) and (c).

VII. CONCLUDING OBSERVATIONS

Notwithstanding its expansive interpretation of the FAA, the Supreme Court has observed that states are not foreclosed from crafting rules of general applicability. *Kindred* notes, 137 S. Ct. at 1428 n.2. When asked at hearing what kind of statute would pass muster, assuming the legitimacy of the Legislature's policy concerns, plaintiffs' counsel offered that a generalized statute could be permissible: "If a state wants to change the law of contract . . . , [] as long as they apply to the making . . . and formation of contracts, generally, the state's at liberty to do that." Jan. 10 Hr'g Tr. at 20:3–7. For example, the state might clarify that each and every provision of an employment contract must be consented to voluntarily. Until such a proposal or another generalized contract formation bill is attempted and tested, this suggestion may offer one path to a rule of general applicability that is not foreclosed.

In the meantime, as noted above, section 2 of the FAA makes arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[T]his saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Casarotto*, 517 U.S. 681, 687 (1996)). Given the federal statute's provisions, the assertion of standard contract defenses is a tool the court, on the current record and given binding precedent, must assume remains available to those who seek to challenge arbitration agreements, after those

agreements are made. In passing AB 51, the court notes, the Legislature did not rely on any data or analyses suggesting that the standard contract defenses are not available as a practical matter to employees who believe they have been coerced or misled into entering into arbitration agreements.

VIII. CONCLUSION

For the reasons set forth above, plaintiffs' motion for preliminary injunction, ECF No. 5, is GRANTED, confirming the court's minute order entered on January 31, 2020:

1. Defendant 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, Julia 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 California Department of Fair Employment and Housing are:

   a) Enjoined 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 Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"); and

   b) Enjoined 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.

2. There is no realistic likelihood of harm to defendants from preliminarily enjoining enforcement of AB 51, so no security bond is required.

IT IS SO ORDERED.

DATED: February 6, 2020.

CHIEF UNITED STATES DISTRICT JUDGE