

MAYER BROWN LLP

Donald M. Falk (SBN 150256)
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2112
Telephone: (650) 331-2000
Facsimile: (650) 331-4000

Andrew J. Pincus (*pro hac vice to be filed*)
Archis A. Parasharami (SBN 321661)
1999 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300

*Attorneys for Plaintiffs Chamber of Commerce
Of the United States of America and California
Chamber of Commerce*

LITTLER MENDELSON, P.C.

Bruce J. Sarchet (SBN 121042)
Maurice Baskin (*pro hac vice to be filed*)
500 Capitol Mall, Suite 200
Sacramento, CA 95814
Telephone: (916) 830-7200
Facsimile: (916) 561-0828

*Attorneys for Plaintiffs National Retail
Federation, California Retailers Association
National Association of Security Companies
Home Care Association of America, and
California Association for Health Services
at Home*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
CALIFORNIA CHAMBER OF COMMERCE,
NATIONAL RETAIL FEDERATION,
CALIFORNIA RETAILERS ASSOCIATION,
NATIONAL ASSOCIATION OF SECURITY
COMPANIES, HOME CARE ASSOCIATION
OF AMERICA, and CALIFORNIA
ASSOCIATION FOR HEALTH SERVICES
AT HOME,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as
the Attorney General of the State of California,
LILIA GARCIA BROWER,
in her official capacity as the Labor
Commissioner of the State of California, JULIE
A. SU, in her official capacity as the Secretary
of the California Labor and Workforce
Development Agency, and KEVIN KISH, in his
official capacity as Director of the
California Department of Fair Employment and
Housing of the State of California,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1
2 Plaintiffs the Chamber of Commerce of the United States of America (“U.S. Chamber”),
3 the California Chamber of Commerce (“CalChamber”), the National Retail Federation (“NRF”),
4 the California Retailers Association (“CRA”), the National Association of Security Companies
5 (“NASCO”), the Home Care Association of America (“HCAOA”), and the California Association
6 For Health Services At Home (“CAHSAH”) (collectively, “Plaintiffs”) bring this action against
7 Xavier Becerra, in his official capacity as the Attorney General of the State of California, Lilia
8 Garcia Brower, in her official capacity as the Labor Commissioner of the State of California, Julia
9 A. Su, in her official capacity as the Secretary of the California Labor and Workforce Development
10 Agency, and Kevin Kish, in his official capacity as Director of the California Department of Fair
11 Employment and Housing (collectively, “Defendants”), alleging as follows:

12 **INTRODUCTION**

13 1. Plaintiffs file this action to enforce their members’ rights under federal law,
14 including the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”), to enter into new arbitration
15 agreements with workers without the threat of state-law restrictions that disfavor arbitration
16 agreements and carry criminal penalties.

17 2. Businesses routinely enter into arbitration agreements with workers, either as a
18 condition of employment or on an opt-out basis, so that both parties can make use of alternative
19 dispute resolution procedures. As the Supreme Court of the United States has observed, “there are
20 real benefits to the enforcement of arbitration provisions. . . . Arbitration agreements allow parties
21 to avoid the costs of litigation, a benefit that may be of particular importance in employment
22 litigation, which often involves smaller sums of money than disputes concerning commercial
23 contracts.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

24 3. The Federal Arbitration Act “reflects an emphatic federal policy in favor of arbitral
25 dispute resolution.” *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per
26 curiam) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam)) (in turn quoting
27 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

28 4. Arbitration ensures that the rights of individual employees under federal and state

1 anti-discrimination laws remain protected. “The [U.S. Supreme] Court has been quite specific in
2 holding that arbitration agreements can be enforced under the [Federal Arbitration Act] without
3 contravening . . . policies . . . giving employees specific protection against discrimination[.]” *Id.*

4 5. Arbitration provides workers with a fair and effective means of resolving their
5 disputes:

- 6 • Arbitration procedures are fair—the vast majority of agreements and the leading
7 arbitration providers require fair procedures. And if an arbitration agreement
8 prescribes unfair procedures, courts can and will refuse to enforce the agreement.
- 9 • Arbitration offers workers simple procedures that they can navigate even without a
10 lawyer.
- 11 • That simplicity matters because many workers who have disputes are unable to
12 secure legal representation, and their inability to obtain a lawyer creates
13 insurmountable obstacles to bringing claims in court.
- 14 • Workers who brave the court system on their own find that their cases are long
15 delayed by overcrowded dockets.
- 16 • Without arbitration, many workers will have no meaningful remedy at all.
- 17 • Studies show that workers who arbitrate are more likely to succeed on their claims
18 than those who proceed in court, and to recover at least as much (if not more)
19 money.

20 6. Arbitration is faster than litigation in court. As a recent study released by the U.S.
21 Chamber’s Institute for Legal Reform found, arbitration cases in which the employee brought the
22 claim and prevailed took, on average, 569 days to complete, while cases in court required an
23 average of 665 days. Moreover, employees did better in arbitration than in court—in cases decided
24 by an arbitrator or court (rather than settled), employees who filed claims won three times as often
25 in arbitration—32% compared to 11%—and recovered an average award of \$520,630 in arbitration
26 compared to \$269,885 in court. *See* NDP Analytics, *Fairer, Faster, Better: An Empirical*
27 *Assessment of Employment Arbitration* 5-10 (May 2019), available at [https://www.institutefor](https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf)
28 [legalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf).

1 7. Arbitration also lowers the costs of dispute resolution, which creates savings that
2 in part can be passed on to workers through higher wages and consumers through lower prices.

3 8. The California Legislature nonetheless enacted Assembly Bill 51 (“AB 51”),
4 which forbids parties from agreeing to arbitrate a broad range of labor and employment
5 discrimination claims as a condition of employment—and makes it a *crime* for businesses to do
6 so.

7 9. AB 51 is one of the Legislature’s latest statutes seeking to prevent businesses and
8 workers from entering into agreements to use arbitration to resolve disputes that may arise in the
9 course of work-related relationships.

10 10. The Governor of California signed AB 51 into law on October 10, 2019. Effective
11 January 1, 2020, AB 51 will forbid employers from offering and entering into arbitration
12 agreements with their workers, even if the workers may opt out of arbitration. *See* Cal. Labor
13 Code § 432.6(a), (c) (added by Stats. 2019, ch. 711, § 3) (employer may not require employees or
14 applicants “to waive any right, forum, or procedure” of the California Fair Housing and
15 Employment Act (“FEHA”) or California Labor Code as a “condition of employment” even if
16 individual can “opt out”); Cal. Gov’t Code § 12953 (added by Stats. 2019, ch. 711, § 3) (violation
17 of Labor Code § 432.6 also violates FEHA).

18 11. These restrictions are backed by criminal penalties. Section 433 of the California
19 Labor Code provides that it is a misdemeanor to violate the provisions of the article of the Labor
20 Code governing contracts and applications for employment. Because Section 432.6, added by
21 AB 51, is part of that article, any violation of AB 51’s restrictions will be a misdemeanor as well.

22 12. In addition, because FEHA and the Labor Code provide for investigation and
23 enforcement actions by California state departments and for lawsuits by individuals, AB 51’s
24 restrictions on arbitration are backed by substantial civil enforcement mechanisms.

25 13. AB 51 thus places special restrictions—including the extraordinary burden of
26 potential criminal liability—on businesses’ ability to enter arbitration agreements with their
27 workers.

28 14. As a result, AB 51 will generate more litigation, impose significant delays in

1 California’s justice system, and increase costs for businesses and workers alike.

2 15. As explained in detail below, AB 51’s limits on arbitration agreements conflict with
3 federal law. Those limits are therefore preempted and invalid under the Supremacy Clause of the
4 Constitution of the United States. Accordingly, Plaintiffs respectfully request that the Court (1)
5 grant a declaratory judgment that AB 51 is invalid with respect to all arbitration agreements
6 governed by the FAA and (2) issue an order permanently enjoining Defendants from enforcing it
7 with respect to such arbitration agreements.

8 **PARTIES**

9 16. Plaintiff the Chamber of Commerce of the United States of America (“U.S.
10 Chamber”) is the world’s largest business federation, representing approximately 300,000 direct
11 members and indirectly representing an underlying membership of more than three million U.S.
12 businesses and professional organizations of every size and in every economic sector and
13 geographic region of the country. The U.S. Chamber routinely advocates in federal and state courts
14 on matters of federal arbitration law, including by the filing of lawsuits challenging anti-business
15 laws and regulatory actions that restrict businesses from entering into and enforcing arbitration
16 agreements protected by federal law. Many of the U.S. Chamber’s members are employers of all
17 sizes—businesses and professional organizations—either headquartered or located in California
18 that enter into arbitration agreements with their workers as a condition of employment or require
19 workers who do not wish to arbitrate potential disputes to affirmatively opt out of arbitration. In
20 bringing this lawsuit, the U.S. Chamber seeks to vindicate its own interests as well as the interests
21 of these members, who will be irreparably harmed by implementation of AB 51 and would
22 therefore have standing to sue in their own right. It also more broadly seeks to vindicate the
23 interests of the entire business community that would be irreparably harmed if California were
24 permitted to bar pre-dispute employment arbitration agreements. This suit is germane to the U.S.
25 Chamber’s mission to foster economic growth throughout the country, including in California.
26 The U.S. Chamber seeks only declaratory and injunctive relief, and the individual members of the
27 U.S. Chamber are not indispensable to the proper resolution of the case.

28 17. The California Chamber of Commerce (“CalChamber”) is a not-for-profit

1 organization that seeks to transform California's business landscape through advocacy. Its
2 members consist of more than 14,000 California private-sector employers, who together employ
3 more than one-fourth of the private sector workforce in California. On behalf of its members,
4 CalChamber advocates on behalf of California businesses before the California Legislature and
5 California courts for pro-business measures that will foster economic growth. CalChamber's
6 mission is to enhance the California economy and make California a better place to live, work, and
7 do business. Many of CalChamber's members regularly rely on arbitration as a condition of
8 employment or require workers who do not wish to arbitrate potential disputes to affirmatively opt
9 out of arbitration. In bringing this lawsuit, CalChamber seeks to vindicate its own interests as well
10 as the interests of these members, who will be irreparably harmed by implementation of AB 51
11 and would therefore have standing to sue in their own right. This suit is germane to CalChamber's
12 mission to foster economic growth and a thriving business community in California. CalChamber
13 seeks only declaratory and injunctive relief, and the individual members of CalChamber are not
14 indispensable to the proper resolution of the case.

15 18. The NRF is the world's largest retail trade association, representing all aspects of
16 the retail industry. NRF's membership includes discount and department stores, home goods and
17 specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet
18 retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—
19 42 million working Americans and contributing \$2.6 trillion to annual GDP. Many NRF members
20 are either headquartered or located in California, and they regularly rely on arbitration as a
21 condition of employment or require workers who do not wish to arbitrate potential disputes to
22 affirmatively opt out of arbitration. In bringing this lawsuit, NRF seeks to vindicate its own
23 interests as well as the interests of these members, who will be irreparably harmed by
24 implementation of AB 51 and would therefore have standing to sue in their own right. This suit is
25 germane to NRF's purpose of protecting its mission to foster economic growth and a thriving retail
26 business community in California. NRF seeks only declaratory and injunctive relief, and neither
27 the claims asserted nor relief requested requires the participation of individual NRF members.

28 19. The CRA works on behalf of California's retail industry, which currently operates

1 over 418,840 retail establishments with a gross domestic product of \$330 billion annually and
2 employs more than 3 million people – one fourth of California’s total employment. CRA is the
3 only statewide trade association representing all segments of the retail industry, many of whose
4 members regularly rely on arbitration as a condition of employment or require workers who do not
5 wish to arbitrate potential disputes to affirmatively opt out of arbitration. In bringing this lawsuit,
6 CRA seeks to vindicate its own interests as well as the interests of these members, who will be
7 irreparably harmed by implementation of AB 51 and would therefore have standing to sue in their
8 own right. This suit is germane to CRA’s purpose of protecting its mission to foster economic
9 growth and a thriving retail business community in California. CRA seeks only declaratory and
10 injunctive relief, and neither the claims asserted nor relief requested requires the participation of
11 the individual CRA members.

12 20. NASCO is the nation’s largest contract security association, representing private
13 security companies that employ more than 450,000 of the nation’s most highly trained security
14 officers servicing the public and private sector throughout the United States, and tens of thousands
15 in California. On behalf of its members, NASCO monitors and participates in activities affecting
16 private security companies and officers at the federal, state and local levels. A number of
17 NASCO’s members are either headquartered or located in California, and they regularly rely on
18 arbitration as a condition of employment or require workers who do not wish to arbitrate potential
19 disputes to affirmatively opt out of arbitration. In bringing this lawsuit, NASCO seeks to vindicate
20 its own interests as well as the interests of these members, who will be irreparably harmed by
21 implementation of AB 51 and would therefore have standing to sue in their own right. This suit is
22 germane to NASCO’s purpose of protecting its mission to foster economic growth and the security
23 industry in California. NASCO seeks only declaratory and injunctive relief, and neither the claims
24 asserted nor relief requested requires the participation of the individual NASCO members.

25 21. The HCAOA is the home care industry’s leading trade association – currently
26 representing nearly 3,000 companies that employ more than 500,000 caregivers across the United
27 States, many of whom are based in California. HCAOA protects industry interests, promotes
28 industry values, tackles barriers to growth and takes on industry-wide issues. HCAOA is a

1 champion and advocate for its members, for caregivers, and for seniors in California and across
2 America. Many HCAOA members are either headquartered or located in California, and they
3 regularly rely on arbitration as a condition of employment or require workers who do not wish to
4 arbitrate potential disputes to affirmatively opt out of arbitration. In bringing this lawsuit, HCAOA
5 seeks to vindicate its own interests as well as the interests of these members, who will be
6 irreparably harmed by implementation of AB 51 and would therefore have standing to sue in their
7 own right. This suit is germane to HCAOA's purpose of protecting its mission to foster economic
8 growth and the private home care community in California. HCAOA seeks only declaratory and
9 injunctive relief, and neither the claims asserted nor relief requested requires the participation of
10 the individual HCAOA members.

11 22. CAHSAH is a California non-profit mutual benefit corporation whose mission is to
12 promote quality home care and enhance the effectiveness of its members. CAHSAH comprises
13 and represents hundreds of members located throughout the State, as well as dozens of affiliates
14 providing health and supportive services and products in the home. Many of CAHSAH's members
15 regularly rely on arbitration as a condition of employment or require workers who do not wish to
16 arbitrate potential disputes to affirmatively opt out of arbitration. In bringing this lawsuit,
17 CAHSAH seeks to vindicate its own interests as well as the interests of these members, who will
18 be irreparably harmed by implementation of AB 51 and would therefore have standing to sue in
19 their own right. This suit is germane to CAHSAH's purpose of protecting its mission to foster
20 economic growth in the home care and hospice community in California. CAHSAH seeks only
21 declaratory and injunctive relief, and neither the claims asserted nor relief requested requires the
22 participation of the individual CAHSAH members.

23 23. Defendant Xavier Becerra is the Attorney General of California. The Attorney
24 General is charged with enforcing California's criminal laws. Mr. Becerra is sued in his official
25 capacity only. The main office of the California Attorney General is located in Sacramento,
26 California, within the Eastern District of California.

27 24. Defendant Lilia Garcia Brower is the California Labor Commissioner. The Labor
28 Commissioner's Office, also known as the Division of Labor Standards Enforcement ("DLSE"),

1 is charged with enforcing California’s labor laws. Ms. Brower is sued in her official capacity only.
2 The main office of the California Labor Commissioner is located in Oakland, California, within
3 the Northern District of California.

4 25. Defendant Julie A. Su is the Secretary of the California Labor and Workforce
5 Development Agency. The Labor and Workforce Development Agency oversees all California
6 state departments and boards that enforce California labor laws, including the DLSE. Ms. Su is
7 sued in her official capacity only. The main office of the California Labor and Workforce
8 Development Agency is located in Sacramento, California, within the Eastern District of
9 California.

10 26. Defendant Kevin Kish is the Director of the California Department of Fair
11 Employment and Housing. The California Department of Fair Employment and Housing is
12 charged with enforcing California’s civil rights laws. Mr. Kish is sued in his official capacity only.
13 The main office of the California Department of Fair Employment and Housing is located in Elk
14 Grove, California, within the Eastern District of California.

15 **JURISDICTION AND VENUE**

16 27. This Court has jurisdiction over this action under 28 U.S.C. § 1331, because one of
17 Plaintiffs’ claims arises under 42 U.S.C. § 1983, which provides that “[e]very person who, under
18 color of any statute . . . of any State . . . , subjects, or causes to be subjected, any citizen of the
19 United States or other person within the jurisdiction thereof to the deprivation of any rights,
20 privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured
21 in an action at law, suit in equity, or other proper proceeding for redress.”

22 28. As discussed below, AB 51, which the Defendants are responsible for enforcing,
23 violates the Federal Arbitration Act, and thereby deprives Plaintiffs and their members of
24 enforceable “rights” secured by that federal law.

25 29. In addition, this Court has jurisdiction under 28 U.S.C. § 1331 because AB 51 is
26 preempted by the Federal Arbitration Act, so that enforcement of AB 51 by the Defendants would
27 violate the Supremacy Clause, and thus may be enjoined under established principles of equity.
28 *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015).

1 “discriminates on its face against arbitration” along with any rule “that covertly accomplishes the
2 same objective by disfavoring contracts that . . . have the defining features of arbitration
3 agreements.” *Kindred*, 137 S. Ct. at 1426.

4 36. The FAA similarly preempts any state law “lodging primary jurisdiction in another
5 forum, whether judicial or administrative.” *Preston*, 552 U.S. at 350 (holding that FAA preempted
6 law requiring submission of certain disputes to the California Labor Commissioner).

7 37. Further, the U.S. Supreme Court has held that the FAA preempts state law rules
8 that disfavor arbitration in connection with the formation of a contract as well as rules that disfavor
9 the enforcement of arbitration agreements. *Kindred*, 137 S. Ct. at 1428. Restrictions that single
10 out arbitration agreements or derive their meaning from that fact that an agreement to arbitrate is
11 at issue “flout the FAA’s command to place those agreements on equal footing with other
12 contracts” and are therefore preempted. *Id.*

13 **AB 51 Restricts the Ability of Businesses and Workers to Enter Arbitration Agreements**

14 38. AB 51 purports to ban agreements to resolve disputes through arbitration as a
15 condition of employment or the receipt of employment benefits. But employers may include in
16 employment contracts a wide variety of other types of provisions governing the employer-
17 employee relationship.

18 39. AB 51 represents California Legislature’s most recent attempt to restrict
19 employment arbitration. Last year, the Legislature passed AB 3080, which had provisions almost
20 identical to those in AB 51 that prohibit arbitration as a condition of employment. *See* California
21 AB 3080 (Employment Discrimination: enforcement), 2017-2018 Reg. Sess. (September 30,
22 2018). Governor Jerry Brown vetoed AB 3080, however, explaining that it “plainly violates
23 federal law.” Governor’s Veto Message, AB 3080 (Sept. 30, 2018), available at
24 http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080.

25 Governor Brown’s veto message explained that AB 3080 was “based on a theory that the Act only
26 governs the enforcement and not the initial formation of arbitration agreements and therefore
27 California is free to prevent . . . arbitration agreements from being formed at the outset. The
28 Supreme Court has made it explicit this approach is impermissible.” *Id.* (citing *Kindred*, 137 S.

1 Ct. at 1428).

2 40. One year later, the Legislature nonetheless passed AB 51. The current Governor
3 of California signed AB 51 into law on October 10, 2019. *See* California AB 51 (Employment
4 Discrimination: enforcement), 2019-2020 Reg. Sess. (October 10, 2019), Stats. 2019, §§ 2-3 (to
5 be codified at Sec. 12953 of the California Government Code and Sec. 432.6 of the California
6 Labor Code). This Complaint cites the new sections as they will be codified.

7 41. AB 51 will amend both the Labor Code, which governs workplace rights, and
8 FEHA (Cal. Gov't Code § 1900 et seq.), which includes protections against workplace
9 discrimination.

10 42. AB 51 applies to contracts for employment entered into, modified, or extended on
11 or after January 1, 2020. Cal. Lab. Code § 432.6(h).

12 43. The Senate and Assembly Floor analyses for AB 51 underscore that AB 51 is
13 specifically targeted to preclude the use of arbitration agreements as a condition of employment.

- 14 • The author of AB 51 stated that the bill is needed to address what the author calls
15 “forced arbitration.” California AB 51 (Employment Discrimination: enforcement),
16 2019-2020 Reg. Sess., Senate Rules Committee Analysis 3-4 (as amended March 26,
17 2019) (Third Reading – Prepared on September 1, 2019), available at
18 [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51)
19 [201920200AB51](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB51).
- 20 • The Senate analysis states that the law is designed to combat “the specter of mandatory
21 labor law arbitration serving [as an] employer-funded extrajudicial system that
22 undermines California’s labor law protections and places the aggrieved worker at a
23 fundamental and inherent disadvantage.” *Id.* at 5.
- 24 • The Assembly analysis likewise acknowledges that the law targets “[t]he use of
25 mandatory arbitration agreements in the employment context.” California AB 51
26 (Employment Discrimination: enforcement), 2019-2020 Reg. Sess., Assembly Floor
27 Analysis 1 (as amended March 26, 2019) (Third Reading – Prepared on May 21, 2019),
28 available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=

1 201920200AB51.

2 44. AB 51 will amend the California Labor Code by adding Section 432.6 to the article
3 governing Contracts and Applications for Employment. *See* Cal. Lab. Code, Div. 2, Pt. 1, Ch. 3,
4 Art. 3.

5 45. Section 432.6 will prohibit employers from requiring any employee or applicant to
6 “waive any right, forum or procedure for a violation of any provision” of FEHA or the Labor Code
7 “as a condition of employment, continued employment, or the receipt of any employment-related
8 benefit.” Cal. Lab. Code § 432.6(a).

9 46. Section 432.6 expressly provides that employers cannot require employees to waive
10 “*the right to file and pursue a civil action* or a complaint with, or otherwise notify any state agency,
11 other public prosecutor, law enforcement agency, or any *court* or governmental agency” for any
12 alleged violation of FEHA or the Labor Code. *Id.* (emphasis added).

13 47. Also under Section 432.6, “an agreement that requires an employee to opt out of
14 [such] a waiver or take any affirmative action in order to preserve their rights [described in Section
15 432.6(a)] is deemed a condition of employment,” as if the ability to opt out gave the workers no
16 choice. *Id.* § 432.6(c).

17 48. Under an existing provision of the Labor Code, employers who violate these
18 restrictions are guilty of a criminal misdemeanor (Cal. Lab. Code § 433), which is punishable by
19 imprisonment not exceeding six months, a fine not exceeding \$1,000, or both (*id.* § 23).

20 49. The California Attorney General is responsible for enforcing California’s criminal
21 laws. Cal. Gov’t Code §§ 12550, 26500.

22 50. In addition, as with most employment provisions of the Labor Code, the provisions
23 of Section 432.6 are enforced by the Labor Commissioner, who acts through the Division of Labor
24 Standards Enforcement (“DLSE”). *See* Cal. Lab. Code § 95 (“The division may enforce the
25 provisions of this code and all labor laws of the state the enforcement of which is not specifically
26 vested in any other officer, board or commission”); *id.* § 98 (the Labor Commissioner may
27 investigate employee complaints).

28 51. Many provisions of the Labor Code also may be enforced by private plaintiffs

1 through ordinary civil litigation or under the Private Attorneys General Act, Cal. Labor Code
2 § 2698 *et seq.*

3 52. Workers who win claims against employers under Section 432.6(d) will be entitled
4 to injunctive relief and reasonable attorney fees. Cal. Lab. Code § 432.6(d).

5 53. AB 51 also amends the FEHA by adding Section 12953. Section 12953 provides
6 that any violation of Section 432.6 in the Labor Code will be an “unlawful employment practice”
7 under FEHA. Cal. Gov’t Code § 12593.

8 54. Section 12953 creates an independent route to enforcement for any violation of
9 Section 432.6 by both the California Department of Fair Employment and Housing and private
10 parties. Specifically, FEHA provides procedures for individuals claiming to be “aggrieved by an
11 alleged unlawful practice” to file complaints with the California Department of Fair Employment
12 and Housing. Cal. Gov’t Code § 12960. If the Department does not bring a civil action within
13 150 days after the filing of a complaint, the Department will issue a right-to-sue notice to the
14 complainant, who can then bring a civil action against the employer. *Id.* § 12965.

15 55. AB 51 restricts employers’ ability to enter into arbitration agreements with workers
16 for a sweeping number of claims.

17 56. FEHA creates rights with respect to a variety of employment practices. *See, e.g.*,
18 Cal. Gov’t Code § 12945.6 (parental leave); *id.* § 12945 (employee rights related to pregnancy,
19 childbirth, and medical conditions); *id.* § 12948 (denial of civil rights as an unlawful practice).

20 57. And the Labor Code covers a broad range of wage, hour, and other employment-
21 related claims. *See, e.g.*, Cal. Lab. Code § 210 (civil penalties against employers for failure to pay
22 employee wages); *id.* § 246.5(c) (employee right to sick leave); *id.* § 98.6 (employee whistleblower
23 protections).

24 58. The statutes also provide workers a mechanism to pursue certain civil actions
25 against employers in court. *See, e.g.*, Cal. Gov’t Code § 12965; Cal. Labor Code § 98.2; § 226;
26 §§ 2698-2699.6.

27 59. Effective January 1, 2020, AB 51 will prevent employers and workers from
28 agreeing in advance to arbitrate **any** of these claims, even if the workers have the ability to opt out

1 of arbitration.

2 60. AB 51 thereby selects a defining feature of arbitration agreements—“a waiver of
3 the right to go to court”—and on the basis of that feature “impede[s] the ability” of employers to
4 enter arbitration agreements. *Kindred*, 137 S. Ct. at 1427, 1429; *see also Preston*, 552 U.S. at 349-
5 50, 354-56 (same principles apply to right to an administrative adjudication).

6 61. In an effort to salvage the statute from federal preemption, the California
7 Legislature included language in AB 51 stating that the statute is not “intended to invalidate a
8 written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act.”
9 Cal. Labor Code § 432.6(f); *see also* Senate Floor Analysis, *supra*, at 4-5 (arguing that “AB 51
10 seeks to sidestep the preemption issue” and “falls outside the purview of the FAA” because it
11 “regulates employer behavior prior to an agreement being reached,” rather than invalidating an
12 agreement once formed).

13 62. That language does not lessen the conflict between AB 51 and the FAA. Regardless
14 of the status of an arbitration agreement once formed, AB 51 outlaws their formation by penalizing
15 employers—including exposing them to potential criminal liability—for entering into such an
16 agreement. Yet, as the U.S. Supreme Court has explained, the FAA protects against not only
17 discriminatory rules regarding the enforcement of arbitration agreements, but also rules
18 “governing what it takes to enter into them.” *Kindred*, 137 S. Ct. at 1428. The California
19 Legislature has thus done exactly what binding precedent forbids: it has attempted “to undermine
20 the [FAA]—indeed, to wholly defeat it,” by subjecting arbitration agreements, “by virtue of their
21 defining trait, to uncommon barriers” governing their formation. *Id.* at 1427-28.

22 63. In the alternative, this language on its own terms precludes application of the statute
23 to any arbitration agreement governed by the FAA. Section 432.6(f) purports not to “invalidate”
24 arbitration agreements governed by the FAA. But again, as the U.S. Supreme Court explained in
25 *Kindred*, the “validity” of arbitration agreements includes “their initial validity—that is, . . . what
26 it takes to enter into them.” 137 S. Ct. at 1428 (quotation marks and alterations omitted).
27 Accordingly, 432.6(f) precludes enforcing the other provisions of AB 51 against an employer that
28 enters into arbitration agreements governed by the FAA, because declaring it unlawful to enter

1 into such agreements—subjecting the employer to liability and potential criminal and civil
2 penalties—“invalidates” those agreements by foreclosing a previously permissible means of
3 “what it takes to enter into them.”

4 **The California Labor Commissioner and Director of the Department of Fair Employment
5 and Housing Will Actively Enforce AB 51 Against California Employers**

6 64. California employers face a real and imminent threat that AB 51 will be vigorously
7 enforced.

8 65. First, the policy agenda of the Legislature and Governor includes impeding the
9 formation and enforcement of arbitration agreements.

10 66. At the same time the Legislature passed AB 51, it also passed SB 707, which the
11 Governor signed into law on October 13, 2019. *See* California SB 707 (Arbitration Agreements:
12 enforcement), 2019-2020 Reg. Sess. (October 13, 2019) (to be codified at Cal. Code Civ. Proc.
13 §§ 1280, 1281.96-.99).

14 67. SB 707 amends the California Code of Civil Procedure to hold employers in default
15 and in material breach of employment and consumer arbitration agreements if they fail to pay
16 arbitration fees necessary to commence or continue an arbitration within 30 days after such fees
17 are due. Cal. Code Civ. Proc. §§ 1281.97; 1281.98.

18 68. Under California contract law generally, in contrast, the materiality of any given
19 breach is determined through a fact-specific analysis based on “[t]he circumstances of each case,”
20 rather than an automatic rule. *See, e.g., Coughlin v. Blair*, 41 Cal. 2d 587, 599 (1953) (Traynor,
21 J.); *Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (1967) (listing factors); *see also* Witkin,
22 Summary of California Law, Contracts §§ 877, 883 (11th ed. 2019) (explaining fact-specific
23 analysis under California law for determining whether a party is in material breach).

24 69. Drafting parties found in violation of SB 707 will be subject to mandatory monetary
25 sanctions, as well as discretionary evidentiary and contempt sanctions. Cal. Code Civ. Proc.
26 §§ 1281.99(a), (b).

27 70. In addition, the statute declares that, by failing to pay fees within 30 days, the
28 employer waives its right to compel arbitration. Cal. Code Civ. Proc. §§ 1281.97; 1281.98.

1 71. These penalties can be imposed even if the employer failed to pay only a small
2 portion of the required fees, and will significantly deter employers from entering arbitration
3 agreements or compelling arbitration.

4 72. The contemporaneous passage of multiple pieces of legislation singling out
5 arbitration for adverse treatment shows that deterring the use of arbitration agreements is a key
6 goal for the current California Legislature and government.

7 73. Based on the legislative activity described above, and the Governor's decision to
8 approve both AB 51 and SB 707, it is highly likely that the pertinent enforcement agencies will
9 vigorously enforce AB 51.

10 74. The California government enforces criminal violations through the Office of the
11 Attorney General and the numerous District Attorneys acting under his direct supervision. Cal.
12 Gov't Code §§ 12550, 26500.

13 75. The Department of Fair Employment and Housing is responsible for enforcing
14 FEHA, and is tasked with investigating employment discrimination complaints and enforcing
15 employment discrimination laws by prosecuting alleged violations in civil court.

16 76. FEHA requires the Department to "make prompt investigation" into employee
17 complaints alleging violations of FEHA. Cal. Gov't Code § 12963. If the Director determines
18 that a Complaint is valid, it must "immediately endeavor to eliminate the unlawful employment
19 practice complained of by conference, conciliation, and persuasion." *Id.* § 12963.7. If these
20 measures fail, the Director is empowered to bring a civil action on behalf of the person aggrieved.
21 *Id.* § 12965.

22 77. Employees alleging violations of FEHA may also bring civil suits in the superior
23 courts of California, either 150 days after filing a complaint with the Department or if the
24 Department determines not to bring a civil action before the 150-day period has run. Cal. Gov't
25 Code § 12965(b).

26 78. The California Labor Commissioner through the Division of Labor Standards
27 Enforcement within the California Labor and Workforce Development Agency generally enforces
28 the provisions of the California Labor Code.

1 79. Employees may file complaints alleging violations of the Labor Code with the
2 DLSE, which investigates employee complaints and issues orders and awards related to violations
3 of the Labor Code. *See* Cal. Labor Code § 98.1. Either party can appeal DLSE orders and awards
4 to superior courts. *Id.* § 98.2.

5 80. The Labor Code also contains provisions for employees to directly bring suits in
6 court for certain violations of the Labor Code. *Id.* §§ 2698-2699.6.

7 81. The Department of Fair Employment and Housing regularly and vigorously
8 enforces the FEHA. In 2010 alone, the Department of Fair Employment and Housing recorded
9 43,208 filed cases related to employment actions. California Department of Fair Employment and
10 Housing: Employment Filed Cases: Count of Alleged Acts (December 22, 2011),
11 [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CY_01-12_Cases_Filed_by_Act-](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CY_01-12_Cases_Filed_by_Act-Emp.pdf)
12 [Emp.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/CY_01-12_Cases_Filed_by_Act-Emp.pdf).

13 82. The California Labor Commissioner's Office also engages in robust enforcement
14 of California's labor laws and regularly takes enforcement actions against employers. *See, e.g.,*
15 Press Release Number: 2019-83, State of California Department of Industrial Relations, *California*
16 *Labor Commissioner's Office Cites Inventory Company, Grocers More than \$1.6 Million for Wage*
17 *Theft Violations*.

18 83. The Attorney General, DLSE, and Department of Fair Employment and Housing
19 are highly likely to enforce AB 51 against Plaintiffs' members.

20 **AB 51 Will Harm California Businesses And Their Workers**

21 84. Plaintiffs' members and other California businesses as well as workers throughout
22 the State will suffer irreparable harm if AB 51 is allowed to stand.

23 85. Many companies that are members of the Plaintiff associations regularly contract
24 with workers to enter into arbitration agreements as a condition of employment or receipt of
25 employment-related benefits. Many also use contractual provisions in employment contracts that
26 offer employees the choice to affirmatively opt out of arbitration agreements, but set arbitration as
27 the default method for dispute resolution of workplace-related claims.

28 86. Many of these members intend to continue to enter into arbitration agreements with

1 workers after January 1, 2020, in reliance on the FAA and U.S. Supreme Court decisions
2 interpreting that statute.

3 87. If these members fail to comply with AB 51 because they believe it is preempted
4 under federal law, they will subject themselves to investigations and enforcement actions by the
5 Division of Labor Standards Enforcement and the Department of Fair Employment and Housing.
6 In addition, members that violate AB 51 are subject to criminal prosecution, facing the risk of
7 imprisonment of up to six months and a \$1,000 fine. Cal. Gov't Code §§ 23, 433.

8 88. On the other hand, employers that choose to comply with AB 51 out of fear of
9 lawsuits and civil and criminal enforcement actions will have to forgo their rights under the Federal
10 Arbitration Act to enter into arbitration agreements with their employees.

11 89. These members will be required to change their current employment practices.
12 They will no longer be able to enter into arbitration agreements with workers as a condition of
13 employment. And they will no longer be able to rely on voluntary arbitration by providing workers
14 with the opportunity to opt out of arbitration agreements. This will require them to change their
15 standard employment agreements and incur the immediate expense of drafting and printing.

16 90. In addition, the only practical approach for employers to ensure compliance with
17 AB 51 is to cease entering into arbitration agreements with their employees altogether. While the
18 California Legislature declared that AB 51 purports not to affect “voluntary” arbitration
19 agreements (AB 51 § 1(b)), the statute does not define the term or what it means to be a “condition
20 of employment, continued employment, or receipt of any employment-related benefit” (Cal. Labor
21 Code § 432.6(a))—except to *exclude* voluntary opt-outs and treat them as if they were not
22 voluntary. Accordingly, the risk that a court or other decisionmaker will conclude that a contract
23 formation process is not sufficiently “voluntary”—subjecting the employer to potential criminal
24 and civil penalties—will lead employers simply to stop offering arbitration agreements to their
25 employees.

26 91. Under any course employers select, AB 51 makes it more difficult for employers
27 to access the benefits of arbitration. That result will push more cases into the slower and more
28 expensive court system, resulting in increased delays in accessing justice.

1 92. This diversion to the court system harms businesses and their workers alike,
2 because arbitration is a fair and more convenient and efficient mechanism for resolving workplace
3 disputes.

4 93. Arbitration is also procedurally simpler, which reduces the burden on both parties.
5 Indeed, arbitration’s simplified procedures often allow individuals to proceed without a lawyer.
6 *See, e.g.,* Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau’s*
7 *Arbitration Study: A Summary and Critique* 25-26, Mercatus Working Paper, Mercatus Center at
8 George Mason University, Arlington, VA (Aug. 2015) (“hiring an attorney . . . is often
9 unnecessary [in arbitration]”). This aspect of arbitration is particularly beneficial to workers with
10 smaller claims, such as a dispute over a small amount of unpaid overtime. It may not be cost-
11 effective to pay a lawyer on an hourly or flat-fee basis to pursue these claims in court. And the
12 small stakes would make lawyers unwilling to take the case for a contingency fee. Yet the
13 complexities of judicial litigation make pursuit of these claims on a *pro se* basis impossible.

14 94. Plaintiffs’ members in California will also face increased legal costs if AB 51 goes
15 into effect. Arbitration is a cheaper and more efficient means of resolving disputes than litigation
16 in court. Thus, if businesses cannot use arbitration to resolve employee disputes, their legal costs
17 will increase as those disputes are moved into the court system.

18 95. Finally, the increased cost of administering and responding to workplace disputes
19 will reduce businesses’ ability to provide workers with higher compensation and to reduce costs
20 to consumers. This predictable consequence may impose a financial burden on workers across
21 California. And because AB 51 also prohibits businesses from paying higher compensation or any
22 other benefit to workers as an incentive to agree to arbitrate (Cal. Labor Code § 432.6(a)), AB 51
23 will reduce competition for compensation, thus depressing compensation for workers generally.

24 96. The burdens that AB 51 will impose are not necessary to protect workers from
25 discrimination. Arbitration has been repeatedly shown to be fair to both sides and preferable to
26 court proceedings. As noted above, a recent study demonstrated that in cases decided on the
27 merits, employees recovered *more* on average in arbitration—and did so in less time—than in
28 court litigation.

1 CAUSES OF ACTION

2 COUNT I: Preemption
3 42 U.S.C. § 1983

4 97. Plaintiffs repeat and re-allege paragraphs 1-96 as if set forth fully herein.

5 98. Under the Supremacy Clause of the Constitution, the “laws of the United States . . .
6 shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything
7 in the Constitution or laws of any State to the contrary notwithstanding.” U.S. Const. art. VI, cl.
8 2. As a consequence, any state law that “conflicts with § 2 of the Federal Arbitration Act ...
9 violates the Supremacy Clause.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (provision of
10 California Corporations Code preempted); *see Preston*, 552 U.S. at 353 (“The FAA’s displacement
11 of conflicting state law is ‘now well-established.’”). In addition, any state laws that “stan[d] as an
12 obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” as
13 expressed in federal law, are preempted and invalid. *See, e.g., Barnett Bank of Marion Cty., N.A.*
14 *v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

15 99. As Supreme Court precedent makes clear, state laws that purport to render
16 arbitration agreements covered by the FAA unlawful because improperly formed conflict with the
17 FAA and are preempted, except to the extent that such laws fall within the Act’s savings clause.

18 100. The savings clause, contained in Section 2 of the FAA, permits arbitration
19 agreements to be invalidated only based upon generally applicable “grounds as exist at law or in
20 equity for the revocation of any contract.” 9 U.S.C. § 2.

21 101. In addition, state-law rules that interfere with a fundamental characteristic of
22 arbitration, such as waiver of the right to trial by jury, conflict with the FAA and are therefore
23 preempted. *Concepcion*, 563 U.S. at 341-44.

24 102. AB 51 singles out arbitration for disfavored treatment by imposing special
25 restrictions on the formation of arbitration agreements, which do not apply to other types of
26 contracts, and limit the ability of employers and workers to enter arbitration agreements. These
27 requirements are not generally imposed to enter other provisions in employment contracts. Indeed,
28 employers routinely condition employment on acceptance of other contractual terms.

1 103. AB 51 thus conflicts with—and also stands as an obstacle to—Congress’s
2 objectives in enacting the FAA. It is therefore preempted.

3 104. Under 42 U.S.C. § 1983, this Court has the power to enforce the rights of Plaintiffs’
4 members under the Federal Arbitration Act and to enter an injunction precluding Defendants from
5 enforcing AB 51.

6 **COUNT II: Equitable Relief**

7 105. Plaintiffs repeat and re-allege paragraphs 1-104 as if set forth fully herein.

8 106. For the reasons discussed above, AB 51 violates the Federal Arbitration Act, and
9 thereby deprives plaintiffs and their members of enforceable “rights” secured by that federal law.

10 107. Federal courts of equity have the power to enjoin unlawful actions by state officials.
11 Such equitable relief has traditionally been available in the federal courts to enforce federal law.

12 108. The California Attorney General, California Division of Labor Standards
13 Enforcement and California Department of Fair Employment and Housing are charged with
14 enforcing AB 51.

15 109. This Court can and should exercise its equitable power to enter an injunction
16 precluding the Defendants from enforcing AB 51.

17 **COUNT III: Declaratory Relief**

18 110. Plaintiffs repeat and re-allege paragraphs 1-109 as if set forth fully herein.

19 111. For the reasons discussed above, AB 51 violates the Federal Arbitration Act, and
20 thereby deprives plaintiffs and their members of enforceable “rights” secured by that federal law.

21 112. With exceptions not relevant here, in any “case of actual controversy within [their]
22 jurisdiction,” federal courts have the power to “declare the rights and other legal relations of any
23 interested party seeking such declaration.” 28 U.S.C. § 2201.

24 113. This Court can and should exercise its equitable power to enter a declaration stating
25 that the Federal Arbitration Act preempts AB 51 as applied to arbitration agreements within the
26 scope of the federal Act, or in the alternative, that the text of AB 51 itself precludes application of
27 the statute to the formation and enforcement of arbitration agreements that are covered by the
28 FAA.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Declare that AB 51 is preempted by the Federal Arbitration Act and therefore invalid as applied to arbitration agreements that are covered by the FAA, or in the alternative, that the text of AB 51 itself precludes application of the statute to formation and enforcement of arbitration agreements that are covered by the FAA;
- B. Preliminarily and permanently enjoin the California Attorney General, California Division of Labor Standards Enforcement and California Department of Fair Employment and Housing from enforcing AB 51 as applied to arbitration agreements that are covered by the FAA;
- C. Enter judgment in favor of Plaintiffs;
- D. Award Plaintiffs their costs and attorneys’ fees incurred in bringing this action; and
- E. Grant Plaintiffs such other relief as the Court deems just and proper.

1 Dated: December 6, 2019

Respectfully submitted,

2
3 By: /s/ Donald M. Falk
Donald M. Falk

4 Donald M. Falk (SBN 150256)
5 Two Palo Alto Square
6 3000 El Camino Real
7 Palo Alto, CA 94306-2112
(650) 331-2000
(650) 331-4000 (fax)
dfalk@mayerbrown.com

8 Andrew J. Pincus*
9 Archis A. Parasharami (SBN 321661)
MAYER BROWN LLP
10 1999 K Street NW
Washington, DC 20006
11 (202) 263-3000
(202) 263-3300 (fax)
12 apincus@mayerbrown.com
aparasharami@mayerbrown.com

13 *Counsel for Plaintiffs Chamber of Commerce of the*
14 *United States of America and California Chamber*
of Commerce

15 Erika C. Frank (SBN 221218)
16 CALIFORNIA CHAMBER OF COMMERCE
1215 K Street, Suite 1400
17 Sacramento, CA 95814
(916) 444-6670
18 (916) _____ (fax)
erika.frank@calchamber.com

19 *Counsel for Plaintiff California Chamber of*
20 *Commerce*

21 Steven P. Lehotsky*
Jonathan Urick*
22 U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
23 Washington, DC 20062
(202) 463-5337
24 (202) 463-5346 (fax)
slehotsky@uschamber.com

25 *Counsel for Plaintiff Chamber of Commerce of the*
26 *United States of America*

27 Bruce J. Sarchet (SBN 121042)
Maurice Baskin*
28 LITTLER MENDELSON, P.C.
500 Capitol Mall, Suite 2000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sacramento, CA 95814
(916) 830-7200
(916) 561 0828
bsarchet@littler.com
mbaskin@littler.com

*Counsel for Plaintiffs National Retail Federation,
California Retailers Association, National
Association of Security Companies, Home Care
Association of America, and California Association
for Health Services at Home*

** Motion for Admission Pro Hac Vice To Be Filed*