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Circuit Split Analysis: Involuntary Arbitration Agreements

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CIRCUIT SPLIT ANALYSIS: INVOLUNTARY ARBITRATION AGREEMENTS

Tyler Blackington[*]

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INTRODUCTION

The #MeToo movement of 2017 and various workers movements spurred an increased awareness of protectionist legal devices preventing victims from acquiring just relief through the legal system. Many viewed involuntary contractual arbitration clauses as a source of injustice. In response to these social movements and the Supreme Court's decision in *Epic Systems v. Lewis*, federal lawmakers reintroduced the *Restoring Justice for Workers Act*.[1] The Act aims to end involuntary arbitration clauses and protect employees' right to pursue claims in court.[2] Lawmakers sought to provide recourse unavailable through arbitration for victims of wage theft, discrimination, and harassment.[3]

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[1] Press Release, Bobby Scott, Representative, House of Representatives, SCOTT & NADLER REINTRODUCE THE RESTORING JUSTICE FOR WORKERS ACT (July 29, 2021), https://bobbyscott.house.gov/media-center/press-releases/scott-nadler-reintroduce-the-restoring-justice-for-workers-act.

[2] *Id.*

[3] *Id.*

The usage of compulsory arbitration clauses proliferated in the mid-1990s. Only two percent of employees operating within the United States were subject to mandatory arbitration clauses in 1992.[4] In 2017, fifty-five percent of these employees were subjected to mandatory arbitration clauses.[5] Today, many nonunion American companies include involuntary arbitration clauses in their employment contracts.[6] Although 60 million working Americans are subject to mandatory arbitration clauses, only 1 in 10,400 of these employees file claims per year.[7] In 2020, plaintiffs won a recovery in only 1.6 percent of cases arbitrated subject to a compulsory arbitration clause.[8] This Comment argues that the laws surrounding "forced" mandatory arbitration clauses need significant reform. Specifically, this Comment focuses on a recently decided Ninth Circuit case, *Chamber of Commerce v. Bonta*, which created a circuit split among the First and Fourth Circuits' interpretations of the validity of nonconsensual arbitration clauses in the Federal Arbitration Act (FAA).

This Comment examines a circuit split regarding the application of Section (§) 2 of the FAA. This Comment features four parts. Part I provides background information on arbitration and the FAA. Part II introduces *Kindred Nursing v. Clark*, a landmark Supreme Court case discussing arbitration clauses. This part continues with a discussion on the First and Fourth Circuit cases discussing arbitration clauses, *Securities Industry Association v. Connolly* and *Saturn Distribution Corporation v. Williams*, and *Chamber of Commerce v. Berecca* and *Chamber of Commerce v. Bonta*, the cases creating a circuit split, respectively. Part III argues the Ninth Circuit improperly decided the issue before its Court and runs afoul of the FAA. This analysis includes an examination of the statute's language, congressional intent, and various theories proposed by legal researchers. Part IV concludes the Comment. The Part regards California's new bill unconstitutional as written but proper public policy. Thus, the Supreme Court should enjoin AB 51 as written. I argue Congress should enact a bill similar to AB 51 in the interest of public policy.

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[4] Alexander J. S. Colvin, ECON. POLICY INST., *The Growing Use of Mandatory Arbitration: Access to the courts is now barred for more than 60 million American Workers* (2017), https://www.epi.org/files/pdf/135056.pdf.

[5] *Id.*

[6] Abha Bhattarai, WASH. POST, *As closed-door arbitration soared last year, workers won cases against employers just 1.6 percent of the time,* (Oct. 27, 2021, 7:00 AM), https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/.

[7] Eliza Jones, Note, *Nail in the Coffin: The Mandatory Arbitration Epidemic on Employee Sexual Harassment Claims*, 50 U. Mem. L. Rev. 799, 803 (2020).

[8] Bhattarai, *supra* note 6.

I. BACKGROUND

A. Catalysts for the Federal Arbitration Act

The necessity for a federal arbitration law stemmed from English Common Law tradition. Specifically, the common law doctrines of ouster and revocability allowed state and federal courts to invalidate any arbitration clause and compel parties to adjudication.[9] As stated by the House of Representatives in 1924:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.[10]

The federal government, commercial organizations, and the American Bar Association (ABA) cited three additional reasons for a national arbitration law. These bodies believed the public demanded a new system and the contemporary system operated too slowly for commercial organizations.[11] Lastly, arbitration proponents believed arbitration provides "more just conclusions."[12]

In *Home Insurance Corporation of New York v. Morse*, the United States Supreme Court considered the validity of a Wisconsin statute requiring a nonresident domestic company to file particular paperwork with Wisconsin's government to conduct intrastate business operations.[13] The statute required the corporation to appoint an agent under a form containing the following: "[a]nd said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or

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[9] David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1219 (2013).

[10] H.R.Rep. No. 96, 68th Cong., 1st Sess., 1–2 (1924).

[11] Proceedings of the Fourth Annual Meeting of the American Bar Association, 4 ANNU. REP. A.B.A. 5, 77 (1881).

[12] Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and If So, by What Means, 8 ANNU. REP. A.B.A. 323, 357 (1885).

[13] Home Ins. Co. of N.Y. v. Morse, 87 U.S. 445, 445 (1874).

Federal courts."[14] The Plaintiff corporation sold an insurance policy to the Defendant, who subsequently sued Plaintiff for losses sustained under the policy.[15] Upon the Plaintiff's petition to remove the case to a federal circuit court, Wisconsin's state court blocked removal and ordered the action to proceed in Wisconsin's courts.[16]

The Supreme Court discussed the state's power over corporations. When a state allows a corporation to conduct activities within its borders, it may impose any legitimate term or condition it sees fit.[17] However, the state does not have absolute power to impose any term it sees fit. The Court held each United States citizen possesses an inherent right to "all the courts of the country" and to invoke the protections those courts allow.[18] The Supreme Court underscored an important legal distinction regarding binding contracts that provide for court selection, including arbitration contracts. A citizen may waive his right to the courts under any valid agreement.[19] However, he may not "bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."[20] A corporation has the same right to the protection of laws and the same right to appeal as a natural citizen.[21] Therefore, the Court declared the agreement illegal and void for ousting the courts of their legal jurisdiction and allowed the corporation to remove the case to a federal court.[22]

In *McKenna v. Lyle*, the Supreme Court of Pennsylvania assessed an arbitration clause created after a partnership dissolution.[23] On February 15, 1890, partners filed a bill to dissolve their partnership and settle partnership accounts.[24] The partners later agreed to refer all matters under dispute to binding arbitration.[25] After months, the arbitrators notified the partners of their final

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[14] *Id.* at 446.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 448.

[18] *Id.* at 451.

[19] *Id.*

[20] *Id.* at 452.

[21] *Id.* at 455.

[22] *Id.*, *see also id.* ("And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced.").

[23] McKenna v. Lyle, 26 A. 777 (Pa. 1893).

[24] *Id.*

[25] *Id.*

decision before their official declaration shortly thereafter.[26] The Defendant notified the arbitrators of his revocation of their authority and of his intention to contest their decision.[27] The Plaintiff's executrix filed a complaint with the Pennsylvania courts.

The Court invalidated the arbitrator's award because it found the Defendant successfully revoked the arbitration clause before the arbitrator officially declared the award.[28] The Court held the arbitration agreement valid because it appeared in a properly executed contract.[29] However, the common law doctrine of revocability permitted a party to revoke the clause by refusing to proceed or by the vacancy of an arbitrator.[30] The doctrine allowed a party to revoke at any time before the arbitrator enters his final decision.[31] Notably, this Court determined that the defendant properly revoked although he collected and deposited proceeds from the arbitrator's decision into his bank account before revoking the arbitrator's decision.[32] After allowing the revocation of the arbitration clause, the Court charted the proper channel to hear a dispute after arbitration terminates. The Court held it was the court's duty to decide the controversy on the merits upon the revocation of an arbitration clause.[33]

Lastly, another major impetus to the enactment of a federal arbitration law stemmed from businesses' hopes for quicker resolutions to corporate controversies. At the Fourth Annual Meeting of the ABA, corporations lobbied the ABA to write a uniform arbitration law.[34] A member discussed his locality's cotton market. Cotton producers and buyers created a "Cotton Exchange" for the purpose of quickly resolving disputes via arbitration among its members.[35] Before the Exchange, cotton traders brought claims before the local courts. The claim resolution process took three to four years.[36] The ABA speaker did not

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 779.

[29] *Id.* at 778.

[30] McKenna v. Lyle, 26 A. 778 (Pa. 1893)*., see also* Jones v. Harris, 59 Miss. 214, 220 ("Either party to a submission may, at any time before an award made, revoke the authority of the arbitrators.").

[31] McKenna v. Lyle, 26 A. 778 (Pa. 1893)., *see also* Samuel Willison, A Treatise on the Law of Contracts § 1927 (1920) ("It follows from the revocability of the submission that a revocation by either party to the arbitration of the authority given by him to the arbitrators will invalidate any award made thereafter" *and* "The only redress for breach of an agreement to refer is an action for damages, and in such an action if arbitration has not been begun and no expenses incurred, only nominal damages can be recovered.").

[32] *Id*.

[33] *Id.*

[34] Proceedings of the Fourth Annual Meeting of the American Bar Association, 4 ANNU. REP. A.B.A. 5, 77 (1881).

[35] *Id.*

[36] *Id.*

provide statistics regarding the speed the Exchange arbitrated disputes but ensured the arbitration process resolved claims significantly quicker.[37] Thus, the ABA tasked itself with writing a federal arbitration law to overturn judicial hostility to arbitration and to ensure speedy trials for corporations.

B. The Federal Arbitration Act

The ABA was tasked with drafting a federal arbitration act,[38] so a proper understanding of the FAA's original scope must include the ABA's considerations while constructing the FAA. Notably, the ABA indicated that the scope of the final act should extend only to commercial and maritime transactions. The ABA hoped to "induce merchants to make use" of arbitration as a way to dispose of controversies amongst themselves without court involvement.[39] The ABA noted the "advantages of *commercial arbitration* in a great number of *commercial transactions* is so great" that courts must "carefully safeguard" the validity of arbitration agreements in commercial contexts.[40] Further, the ABA noted "any well informed lawyer would agree" that "arbitration has a valuable contribution to make to the settlement of *commercial disputes*."[41] The ABA did not consider the validity of arbitration clauses within employment contracts or other contracts. The record only discusses arbitration as it relates to commercial and maritime contracts. This conclusion seems bolstered by the ABA's discussion on the potential growth of arbitration clauses if their proposed act passes. The ABA stated that the organization should maintain a sympathetic attitude toward more extended uses of arbitration, but the ABA will "always bear in mind, however, that its appropriate field in respect to future disputes is somewhat qualified and limited."[42]

Congressional interpretation and discussion of the ABA's template leading to the FAA's enactment proves consistent with the ABA's discussion and construction. The House of Representatives' debates expressly limits the scope of arbitration to commercial disputes.[43] Further, the Committee on Commerce, Trade, and Commercial Law indicated the act only encompasses maritime transactions, transactions involving commerce, or transactions involving

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[37] *Id.*

[38] Report of the Committee on Commerce, Trade and Commercial Law, 44 ANNU. REP. A.B.A. 309, 355 (1921).

[39] Report of the Committee on Uniform State Laws, 48 ANNU. REP. A.B.A. 560, 585 (1925).

[40] *Id.* (emphasis added).

[41] *Id.* (emphasis added).

[42] *Id.* at 584.

[43] *Proceedings of the Forty-Eighth Annual Meeting of the American Bar Association Held at Detroit Michigan*, 48 ANNU. REP. A.B.A. 29, 146 (1925).

commerce among the states.[44] Governmental bodies believed "commerce" referred to trade "among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation."[45] Therefore, the act seems to only contemplate interstate commerce.

In 1924, while Congress tinkered with various iterations of the Act, the Supreme Court considered whether a dispute arising from a maritime contract may be arbitrated under a New York statute, and if so, whether the state law conflicts with the Constitution.[46] Prior to the statute at issue's passage, the state's common and case law held the specific performance of arbitration within the court's discretion, and those seeking to enforce an arbitration clause could not use a motion to stay.[47] The statute required the specific performance of arbitration contracts, but did not provide for maritime contracts.[48] The New York Supreme Court and Appellate Division ordered the parties to proceed under arbitration as provided under their agreement.[49] However, New York's Court of Appeals reversed. It found that the admiralty courts hold exclusive jurisdiction over controversies relating to admiralty and the state had no power to compel arbitration.[50]

The Supreme Court overturned the Court of Appeals' holding. It decided New York had concurrent, in personam jurisdiction with the admiralty courts and possessed the power to compel the specific performance of a maritime contract's arbitration clause.[51] The ABA's arbitration committee realized this decision strengthened their proposed bill and sent a letter to the Senate and House Judiciary Committees containing the following:

> The decision goes a long way toward reversing the ancient error of revocability in arbitration agreements and would seem to remove the last vestige of doubt concerning the value of the public policy of making such agreements valid and enforceable. It gives added point to the necessity of putting all the federal courts on a parity of jurisdiction and furnishing a ready and inexpensive method of securing relief. I

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44 *Id.*
45 *Id.*
46 Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 119 (1924).
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Red Cross Line*, 264 U.S. at 124.

> urge on behalf of the Committee on Commerce Trade and Commercial Law of the American Bar Association that you read the opinion.[52]

Shortly thereafter, Congress passed the FAA to ensure the validity and enforcement of arbitration agreements and to ensure arbitration agreements "stood on equal footing" with other contractual provisions.[53]

The Federal Arbitration Act governs arbitration agreements involving interstate commerce or maritime transactions.[54] The FAA explicitly excludes "contracts of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce."[55] The FAA did not apply to arbitration contracts involving an employee transporting goods interstate.[56] This exclusion does not apply to those transporting services or people interstate.

The FAA appears anomalous in the arena of federal court jurisdiction. It does not create independent federal question jurisdiction despite creating a national substantive law regulating arbitration agreements.[57] After the FAA's adoption, federal courts split regarding whether to apply federal law when assessing the enforceability of an arbitration clause in diversity jurisdiction cases. The Supreme Court determined the FAA created a foundation for federal substantive law under the Commerce Clause.[58] Although federal courts began applying the FAA to arbitration cases brought under diversity jurisdiction, state courts could apply their own substantive law to arbitration controversies. However, the Supreme Court later extended the scope of FAA substantive law to the state courts.[59]

FAA Section 2 ensures arbitration agreements are valid and enforceable to the extent of contract law grounds at law or in equity.[60] Section 2 requires the parties place their arbitration agreement in writing.[61] From Congress' mandate,

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[52] *Report of the Special Committee on Change of Date of Presidential Inauguration*, 47 ANNU. REP. A.B.A. 276, 282 (1924).

[53] Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 473 (1989).

[54] 9 U.S.C.A. § 1

[55] *Id.*

[56] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2011).

[57] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983).

[58] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S. Ct. 1801, 1806–07 (1967).

[59] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[60] 9 U.S.C.A. § 2 ("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.").

[61] 9 U.S.C.A. § 2.

the Supreme Court held the FAA represents a liberal policy favoring arbitration agreements.[62] Therefore, any doubt concerning the scope or validity of arbitration agreements must be resolved favoring arbitration.[63] The FAA applies to disputes involving a "contract evidencing a transaction involving commerce."[64] The Supreme Court held the FAA's applicability for any contract involving commerce includes anything considered "commerce" under the Commerce Clause.[65]

Section 3 of the FAA allows the non-resisting party to request a stay of litigation if the party resisting arbitration files litigation.[66] The court must compel the parties to honor the agreement if it determines the parties properly consented to arbitration.[67] Sections 9 and 10 establish procedures for a prevailing party to enforce an arbitrated award and for an unsuccessful party to vacate the arbitrated award.[68] Section 11 allows a court to modify or correct an arbitrated award.[69] The court holds exclusive power to confirm and enter judgment on arbitration awards.[70] Its judgment possesses the same effect and legitimacy as a court judgment.[71]

The FAA preempts a state law inconsistent with the FAA's objectives and purposes. However, the FAA does not include a section providing this information. Federal and state courts routinely identify three possible objectives and purposes of the FAA. A court may find an objective and/or purpose to be: (1) strictly enforcing arbitration contracts and clauses by its express terms; (2) promoting arbitration; or (3) ensuring arbitration clauses and contracts are treated as any other contract.[72]

Congress did not intend the FAA to occupy the entire field of arbitration.[73] Federal courts may apply state law to interpret arbitration agreements, and often

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62 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991).

63 *Moses H. Cone Mem'l Hosp.* 460 U.S. at 8 (1983).

64 9 U.S.C.A. §§ 1, 2.

65 Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003).

66 9 U.S.C.A. § 3.

67 9 U.S.C.A. §§ 3, 4.

68 9 U.S.C.A. §§ 9, 10.

69 9 U.S.C.A. § 11 ("Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; Where the award is imperfect in matter of form not affecting the merits of the controversy.").

70 9 U.S.C.A. §§ 13, 208, 307.

71 9 U.S.C.A § 208.

72 D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 346–50 (5th Cir. 2013).

73 Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 473 (1989).

apply state contract law to issues regarding formation, validity, and enforcement of arbitration clauses.[74]

II. CASE LAW

A. Kindred Nursing Centers Limited Partnership v. Clark

The Supreme Court's landmark case discussing mandatory arbitration clauses provides judicial support for the First and Fourth Circuit Courts' holdings and runs contrary to *Bonta*. In *Kindred,* the Court consolidated two separate wrongful death claims against a nursing home.[75] The Plaintiffs held powers of attorney (POA) providing broad authority to manage each Ward's affairs.[76] Plaintiffs, as part of their agreement to enroll each's respective Ward into Kindred Nursing Centers, were required to sign a contract providing, "all claims or controversies arising out of or in any way relating to . . . the Resident's stay . . . would be resolved through binding arbitration rather than a lawsuit."[77]

Plaintiffs brought individual suits against Kindred Nursing Centers in a Kentucky state court.[78] The Defendant requested dismissal on grounds that both Plaintiffs signed binding agreements prohibiting them from bringing the actions to court.[79] Both the trial and appellate courts denied the Defendant's request.[80] Upon review, the Kentucky Supreme Court affirmed the lower courts' holding.[81] This Court invalidated the mandatory arbitration clauses because the power-of-attorney (POA) did not specifically provide Plaintiffs power to enter into an arbitration agreement on its principal's behalf.[82] It noted the state constitution protects one's "sacred and inviolate" right of access to court.[83] Because of this sacred right, agents could only bind their principal if the POA expressly authorized an agent to enter arbitration agreements.[84] The Kentucky Supreme Court recognized the FAA precludes specific discrimination against arbitration,

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[74] Perry v. Thomas, 482 U.S. 483, 488 (1987); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967); Great Earth Companies, Inc. v. Simons, 288 F.3d 878, 883 (6th Cir. 2002); Ticknor v. Choice Hotels Int'l., Inc., 265 F.3d 931, 935 (9th Cir. 2001).

[75] Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017).

[76] *Id.*

[77] *Id.* at 1425–26 (quotations added) (quotations omitted).

[78] *Id.* at 1425.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* (quotations added).

[84] *Id.*

but believed its statute applicable to agreements other than arbitration.[85] It argued its holding applied to all contracts implicating fundamental constitutional rights.[86] The Court's dissent expounded on the FAA's preclusion of rules which "single out arbitration agreements."[87] It argued the state's ruling discriminately disfavored arbitration agreements by creating a legal rule applicable only to involuntary arbitration clauses.[88]

The Supreme Court rejected the state's justification for requiring a clear statement in a POA for an agent to bind the principal when signing contracts affecting the principal's sacred legal rights.[89] The Court found no record of a Kentucky court requiring a POA to expressly authorize an agent to execute contracts affecting other constitutional rights.[90] The state's constitution protects rights to one's property.[91] If the state's justification proved consistent, an agent would require authority before selling his principal's household items.

The Supreme Court overturned the Kentucky Supreme Court's holding by focusing on equal treatment principles.[92] The FAA holds arbitration agreements valid "upon such grounds as exist at law or in equity for the revocation of any contract."[93] In *AT&T Mobility LLC v. Concepcion*, the Court held that the judiciary cannot invalidate arbitration agreements based on legal rules applicable "only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[94] There, the Defendant required its customers to bring all disputes and potential causes of action before an arbitrator.[95] The clause also prevented class-wide arbitration.[96] That Court determined the FAA's purpose of ensuring the adequate enforcement of valid arbitration agreements and the existence of a valid agreement ensured the arbitration clause's provisions be followed.[97]

The Court followed precedent in holding Kindred's arbitration agreement valid. It found the state's decision adopted a legal rule hinging on the "primary

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85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.* at 1427.
90 *Id.*
91 *Id.*
92 *Id.* at 1426.
93 9 U.S.C. § 2.
94 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).
95 *Id.* at 1742.
96 *Id.*
97 *Id.* at 1479.

characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial."[98] Therefore, the state's decision directly conflicted with the FAA's objective of barring the creation of different classes of rules for arbitration contracts.

The Plaintiffs argued Kentucky's rule only affects contract formation, as it bars those without specific authority from executing arbitration contracts. Plaintiffs believed the FAA inapplicable to contract formation controversies because the FAA provides states the authority to assess the validity of contract formation.[99] Plaintiffs interpreted the FAA as governing only contract enforcement.[100] The Supreme Court rejected this argument, stating "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."[101] Further, adopting Plaintiff's reasoning would allow the states to impermissibly burden the formation of arbitration contracts.[102] Therefore, the Court reaffirmed the FAA's scope as inclusive of contract formation and contract enforcement.[103] In a short dissent, Justice Thomas stated the FAA has no applicability in state court proceedings.[104] Justice Thomas wholly supported Kentucky's interpretation of the FAA.[105]

B. Securities Industry Association v. Connolly

In *Connolly,* the First Circuit assessed whether the FAA preempted a Massachusetts' law, §§ 12.204(G)(1)(a)-(c).[106] Part of the Massachusetts law provided the following:

> (i) bar(red) firms from requiring individuals to enter PDAAs as a nonnegotiable condition precedent to account relationships, § 12.204(G)(1)(a); (ii) order(ed) the prohibition brought "conspicuously" to the attention of prospective customers, § 12.204(G)(1)(b); and (iii) demand(ed) full written disclosure of "the legal effect of the pre-dispute arbitration contract or clause"[107]

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98 Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1427 (2017).
99 *Id.* at 1428.
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 1429 (Thomas, J., dissenting).
105 *Id.*
106 Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989).
107 *Id.* at 1117 (parentheses added).

Significantly, the regulations did not govern mandatory arbitration on their face. Rather, they govern agreements which require customers to sign an involuntary arbitration provision.[108]

The First Circuit assessed whether the arbitration agreements in question implicated the FAA. The Court determined the laws implicated interstate and international commerce and fell within the FAA's authority.[109] It determined that Congress did not intend the FAA to occupy the entire field of arbitration law.[110] Therefore, the FAA does not operate to the entire exclusion of state law.[111] However, the FAA preempts any state law conflicting with its operation or purpose.[112] Because Congress failed to "explicitly detail the dimensions of displacement," the Court had to determine whether this state law interfered with congressional intent under the FAA.[113] The First Circuit analyzed the Massachusetts law under the framework that any state regulation serving as an obstacle to Congress' purposes and ends cannot exist.[114]

Congress intended the FAA to serve as a liberal policy favoring arbitration agreements.[115] States cannot authorize rules and regulations governing arbitration that differ from rules and regulations governing other contractual devices.[116] The Court found the regulations "inhospitable" to arbitration by forbidding brokers from requiring customers to sign compulsory arbitration clauses in exchange for representation and ordering brokers to fully disclose the effects of pre-dispute arbitration clauses.[117]

The First Circuit discussed methods in which a state may remedy the perceived problems associated with arbitration contracts. States may create laws governing issues "concerning the validity, revocability, and enforceability of contracts generally."[118] It could declare as presumptively unenforceable

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[108] *Id.* at 1122.

[109] *Id.*

[110] *Id.* at 1117 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989); New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 4 (1st Cir.1988), *cert. denied*, 489 U.S. 1077 (1989)).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* (citing Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145, 1151 (1988); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 592 (1987); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 1121 (citing Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).

adhesion contracts, which include those containing mandatory arbitration and other forms of adhesion.[119] However, the Court rejected the state's justification for the law's sole applicability to arbitration contracts.[120] The state argued it treated arbitration agreements like other contracts by regulating them as extensively as necessary "for the public weal."[121] The Court determined the state's law and argument represented the anti-arbitration sentiment Congress hoped to cure by passing the FAA.[122]

Massachusetts case law required a party to voluntarily enter a contract and requires unconscionability to disprove the voluntary element of a contract formation.[123] The regulations created a more stringent standard to validly execute an arbitration clause by requiring certain negotiations, disclosures, and explanations.[124] By doing so, the law dissuaded parties from creating mandatory arbitration clauses and/or undermined the clause's enforceability.[125] Therefore, the First Circuit held the regulations invalid for creating a tougher standard for arbitration agreements than other contractual devices.[126]

Congress decreed that courts should resolve all doubts in favor of arbitration when FAA issues arise.[127] Therefore, the First Circuit Court held the state's law actually conflicted with the FAA and federal policy.[128] The state specifically limited the law's scope by regulating only contracts to arbitrate.[129] The state's decision to extend penalties to parties attempting to enforce an arbitration contract wholly eroded the FAA's policy objectives.[130] Further, "even if no penalty were attached to their use," the regulation still stands at odds with the FAA's policy of endorsing mandatory and nonmandatory arbitration agreements.[131]

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119 *Id.*
120 *Id.* at 1120 (the state conceded its regulation applied only to arbitration agreements).
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 1124.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*

C. Saturn Distribution Corporation v. Williams

In *Saturn,* the Fourth Circuit assessed the validity of a Virginia law prohibiting automobile manufacturers and dealers from executing contracts including mandatory alternative dispute resolution clauses.[132] Further, it required a manufacturer to submit its standard franchise agreements to a state representative for approval.[133] The Plaintiff included a mandatory arbitration clause in its franchise agreements.[134] Upon submission of an agreement to the state, the state notified Plaintiff that the agreement was invalid under Virginia law unless the Plaintiff's agreement contained an arbitration opt out provision.[135] The district court held the FAA did not preempt the state's law and allowed the state to prevent the formation of involuntary arbitration agreements among dealers and manufacturers.[136]

The Fourth Circuit analyzed the purposes of the FAA. It concluded that Congress enacted the FAA to promote arbitration agreements and make arbitration a viable option to parties wishing to mitigate the delays and costs of formal litigation.[137] Therefore, any state law creating an exclusive class for arbitration provisions and/or limiting their enforceability cannot be valid.[138]

Defendants offered a similar argument as those in *Connolly.* It argued Virginia law regulated the formation of arbitration agreements, while the FAA's scope only covered laws regulating existing arbitration agreements.[139] The Court rejected this argument.[140] It stated that a regulation cannot refuse to enforce and/or revoke existing arbitration agreements on the basis that the contract did not "comply with the rules of contract formation applicable only to arbitration provisions."[141] The Congress enacting the FAA intended it to block any state's attempt to lessen the enforceability of arbitration agreements.[142]

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132 Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 721 (4th Cir. 1990).

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* at 722.

137 *Id. (*citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)).

138 *Id*. at 723.

139 *Id.*

140 *Id.*

141 *Id.*; *see also* Webb v. R. Rowland & Co., Inc., 800 F.2d 803, 806–07 (8th Cir. 1986) (holding that a statute cannot make an otherwise valid arbitration agreement invalid because the clause did not follow state law requiring the clause to be accompanied by notice in ten-point type write that the contract includes a mandatory arbitration clause).

142 *Id.*

Therefore, the FAA's scope necessarily includes both prospective and existing arbitration agreements.[143] Because the FAA applied, the Court assessed whether the FAA preempted the Virginia Statute.

Another Fourth Circuit case involved a motion to stay proceedings pending an arbitration decision pursuant to the FAA.[144] In *Supak & Sons Manufacturing Company, Inc. v. Pervel Industries, Inc.*, the Court determined general contract formation rules applied equally to all contracts, including contracts with mandatory arbitration clauses.[145] The Court included dicta indicating the FAA "would preempt a state rule of contract formation which applied only to arbitration clauses and which placed an unreasonable burden on the parties' ability to commit themselves to arbitration."[146] This Court made that dicta binding and determined that the Virginia law placed an unreasonable burden on the Plaintiff's right to negotiate an arbitration agreement in its contracts.[147]

The Court held the law preempted by the FAA because it placed greater restrictions on arbitration clauses than other contractual clauses.[148] Notably, the Court concluded that the state law forbid only nonnegotiable arbitration provisions while leaving the law regarding negotiable arbitration agreements unchanged.[149] However, the law violated the FAA because Virginia law permits contracting parties to include nonnegotiable terms. This created a separate class for arbitration agreements.[150] The Fourth Circuit found the reasoning of *Connolly* persuasive because the Massachusetts law's effect of creating a distinct class for arbitration agreements while leaving the state's other contractual provision laws unchanged created the same discriminatory effect on arbitration as the Virginia law.[151]

Additionally, the Court rejected the state's argument the law applied to any contract provision denying dealers access to Virginia's courts. The state argued the law does not solely exclude nonnegotiable arbitration provisions because nonnegotiable forum-selection provisions could be voided under the statute.[152] The Court rejected this argument because the FAA instructs courts to focus on

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143 *Id.*
144 Supak & Sons Mfg. Co. v. Pervel Indus. Inc., 593 F.2d 135 (4th Cir. 1979).
145 *Id.* at 137.
146 *Id.*
147 *Id.* at 136.
148 Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 724 (4th Cir. 1990).
149 *Id.* at 725.
150 *Id.*
151 *Id.*
152 *Id.*

whether the statute burdens arbitration in methods inapplicable to general contracts.[153] It found the law specifically burdened arbitration agreements in methods inapplicable to general contracts.

The Court expanded on the analysis in *Connolly* by discussing a test to determine whether a regulation creates a rule specifically enforceable against a limited class of contractual provisions or whether the rule has broad applicability, and is thus valid, within the state's body of contract law.[154] To determine whether a rule is tailored too narrowly to a class of contractual provisions, the courts must assess the state's general body of common and statutory contract law.[155] Here, FAA preempts the state law because it only invalidated arbitration agreements included as a mandatory clause.[156] In general, Virginia's statutory law did not prevent parties from making certain contractual provisions nonnegotiable.[157] Specifically, Virginia had no law requiring a mandatory clause in a standardized agreement to include an opt out provision.[158] Moreover, Virginia case law provided that clauses within standardized agreements involving parties of unequal bargaining power are valid if executed properly and not otherwise unconscionable.[159] The Court determined Virginia had no preexisting general contract law or doctrine limiting involuntary provisions in standard contracts.[160] Therefore, the Court determined the regulation created a rule only enforceable against arbitration provisions and violated the FAA's pro-arbitration policy and objective.[161] Ultimately, the state cannot unreasonably burden the formation and existence of mandatory arbitration clauses without extending its ban on mandatory provisions to all contracts.[162]

Notably, this Court rejected the Defendant's argument that the Virginia statute does not conflict with the FAA because the regulation merely ensures "consensual, rather than forced arbitration."[163] The Defendant cited dicta in *Volt,* which stated arbitration "under the Act is a matter of consent, not coercion" to argue the FAA's pro-arbitration policy does not extend to mandatory arbitration

153 *Id.*
154 *Id.* at 725.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.* at 726; Webb v. R. Rowland & Co., Inc., 800 F.2d 803, 805 (8th Cir. 1986).
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*

provisions in standardized agreements.[164] This Court rejected the Defendant's argument, although this argument was similar to the Defendant's victorious argument in *Bonta*. This Court held that the Supreme Court in *Volt* issued no ruling or dicta on the use of mandatory arbitration clauses within standardized agreements under the FAA.[165] The discussion of "consent" in *Volt* only indicates that the Act cannot impose arbitration on parties to a contract without mutual consent.[166] Mutual consent is not defeated by a party requiring the other to execute an arbitration clause as a condition precedent to execution of the contract.[167]

The Fourth Circuit rejected a public policy argument advanced by the state. The Defendant argued its statute aimed at preventing coercive agreements arising from asymmetry in bargaining power between automobile manufacturers and dealers.[168] The Court held the FAA's objective of "plac[ing] arbitration agreements on equal footing with other contracts" outweighs the state's legitimate concern.[169] Further, requiring another party to agree to an arbitration clause as a condition for the offering party's acceptance does not render a contract nonconsensual.[170] This decision parallels other Supreme Court decisions.[171] The dissent argued to uphold the state law because of his belief the FAA does not preempt state rules of contract formation.[172]

D. Chamber of Commerce v. Bonta

1. Background

California's Governor signed Assembly Bill 51 ("AB 51") in October 2019. AB 51 prohibits California employers from conditioning employment and/or the continuation of employment and the receipt of employee benefits on the

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164 *Id.*; Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

165 *Id.*

166 *Id.* at 727.

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.* (noting the offeree could forgo the agreement if it did not wish to arbitrate).

171 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 478, 484 (1989) (holding a predispute agreement between investors and brokerage firm mandating arbitration enforceable); Perry v. Thomas, 482 U.S. 483, 491 (1987) (holding mandatory arbitration agreement between investment brokerage and its employees valid although statute designed to advance state's policy to ensure employees' constitutional right to the court system); Southland Corp. v. Keating, 465 U.S. 1, 8 (1984) (holding that the FAA's scope applied to the states and invalidated a California law making arbitration agreements under the FAA unenforceable in California state courts).

172 Saturn Dist. Corp v. Williams, 905 F.2d 719, 730 (4th Cir. 1990).

employee waiving any "right, forum, or procedure."[173] Further, the bill prohibits employers from discriminating, retaliating, threatening, or withholding employment from employees and applicants who refuse to agree to mandatory arbitration clauses.[174] Employers violating AB 51 become subject to damages for unlawful employment practices under Fair Employment and Housing Act (FEHA) and pay the plaintiff's legal fees.[175] AB 51 also provides criminal sanctions against employers violating the Bill, including six months' imprisonment or a $1,000 fine.[176]

Prior to the passage of AB 51, the California Assembly sought to pass two similar bills addressing involuntary waivers of right.[177] These two bills, AB 2616 and AB 3080, prohibited the mandatory waiver of an individual's rights to court.[178] A California Court of Appeal held AB 2617 discriminated against arbitration by creating presumptions against arbitration not applicable to contracts generally.[179] In 2018, the Governor vetoed AB 3080 because of his belief that it violated the FAA.[180] Citing *Kindred,* the Governor criticized AB 3080 because the Bill's advocates based its legal legitimacy on an invalid theory that the FAA governs only the enforcement of arbitration agreements.[181]

AB 51's advocates expected the Bill to become effective in January 2020.[182] However, the U.S. Chamber of Commerce and other business groups filed suit seeking an injunction against the Bill's enforcement and judgment that the FAA preempted AB 51.[183]

2. Chamber of Commerce v. Becerra

The United States District Court for the Eastern District of California granted Plaintiff's suit requesting a preliminary injunction hearing on the issue of

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173 2019 California Assembly Bill No. 51, California 2019–2020 Regular Session.

174 *Id.*

175 *Id.*

176 *Id.*

177 Chamber of Com. of U.S. v. Becerra, 438 F. Supp. 3d 1078, 1089 (E.D. Cal. 2020), *aff'd in part, vacated in part, rev'd in part sub nom.* Chamber of Com. of U.S. v. Bonta, 13 F.4th 766 (9th Cir. 2021).

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 Natalie C. Kreeger, Roxanne M. Wilson, and John Zaimes, *Ninth Circuit Upholds Portions of California Law Prohibiting the Use of Mandatory Employment Arbitration Agreements* (Sept. 29, 2021), https://www.arentfox.com/perspectives/alerts/ninth-circuit-upholds-portions-california-law-prohibiting-the-use-mandatory.

183 *Id.*

whether the FAA preempted AB 51.[184] Plaintiff represented numerous California businesses requiring arbitration as a condition for employment.[185]

AB 51 purports to ensure individuals are not retaliated against for refusing to consent to arbitration and if consenting, enter the arbitration agreement voluntarily.[186] The Bill's author claimed the Bill seeks to prevent forced arbitration, believing forced arbitration to be "among the most harmful practices that have enabled widespread abuse."[187] The State Senate floor analysis indicates the legislators did not wish to suppress the use of arbitration agreements, but to ensure voluntary consent as a prerequisite to the validity of arbitration agreements.[188] At court, Defendants argued AB 51 does not treat arbitration agreements differently than other contracts or conflict with the purposes of the FAA, it merely regulates employer behavior.[189]

The District Court rejected the Defendant's argument. The Court focused on AB 51's civil and criminal penalty provisions. The bill penalizes employers who include mandatory arbitration clauses in employment contracts.[190] Notably, the regulation targets only adhesion clauses requiring a waiver of forum, procedure, or right.[191] Although waivers of right, forum, and procedure include clauses of no relation to arbitration, the Court found the legislative history clearly indicates the bill targets arbitration agreements.[192] Therefore, the Court concluded the purpose and operation of AB 51 subjects mandatory arbitration clauses to unequal treatment and is preempted by the FAA.[193]

The Court did not find the Defendant's argument that AB 51 codified the FAA's "central tenet" that arbitration is wholly a matter of consent persuasive.[194] Defendant argued AB 51 furthered the FAA's guarantee of consent by preventing predatory practices that cause one to "consent" in take-it-or-leave-it employment situations.[195] The Court found the argument persuasive to the extent that policies ensuring consent and mitigating coercive influences

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184 *Becerra*, 438 F. Supp. 3d at 1085.

185 *Id.*

186 *Id.* at 1088.

187 *Id.*

188 *Id.* at 1090; *see also S. Judiciary Analysis at 6* ("AB 51 does not seek to prevent arbitration agreements, it seeks to "set[] ground rules to ensure that such an agreement is truly voluntary.").

189 *Id.* at 1095.

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* at 1097.

195 *Id.* (quotations added).

are consistent with the FAA's general provisions.[196] However, the Court held the rule's application affected arbitration specifically.[197] Similar to the statute in *Kindred*, the Court determined AB 51 created additional procedural safeguards unique to arbitration contracts. Further, it disfavored contracts with the defining features of arbitration. Therefore, it placed arbitration clauses on unequal footing with other contracts and ran afoul of the FAA's equal footing principle.[198] The Court recognized various employment clauses "may tangentially fall within AB 51's ambit," but AB 51's effect specifically targets arbitration agreements.[199]

The Court rejected the Defendant's argument that AB 51 does not conflict with the purposes and objectives of the FAA because it merely regulates behavior prior to the execution of an arbitration agreement.[200] Further, by requiring consent as a precondition, the state did not create a new contract defense intended to invalidate otherwise valid arbitration agreements.[201] The Court found AB 51 invalid because it interfered with the FAA's clear goal to promote the formation and enforceability of arbitration agreements.[202] Only the employer faces civil or criminal sanctions for violation of the law, even if both voluntarily consent to a mandatory arbitration clause.[203] Fatally, the Court noted AB 51 includes a provision that the law is not "intended to invalidate a written arbitration agreement that is otherwise enforceable under the" FAA but does not absolve employers requiring arbitration.[204] Thus, the Court concluded the FAA preempts AB 51 because it interferes with the FAA objectives and purposes.

3. Chamber of Commerce v. Bonta

The Ninth Circuit granted the Defendant's appeal from the district court's decision in *Becerra* enjoining the state from enforcing arbitration agreement

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196 *Id.*

197 *Id.*

198 *Id.*; *see also id.* at 1098 ("It is AB 51's embodiment of a legal rule hinging on the primary characteristic of an arbitration agreement' and placing arbitration agreements in a class apart from any contract that is the law's fatal flaw." (internal quotation marks and citations omitted)).

199 *Id.*; *see also id.* (describing other employment clauses that may fall within AB 51's ambit: non-disclosure agreements, forum selection clauses, choice-of-law provisions and administrative exhaustion requirements); and (another factor indicating AB 51 specifically targets arbitration provisions is the "sponsors' concern regarding an overabundance of arbitration agreements in the California employment market").

200 *Id.*

201 *Id.*

202 *Id.* at 1099; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (any law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . is pre-empted by the FAA").

203 *Id.*

204 *Id.* at 1100.

regulations under § 432.6(a)—(c).[205] The Appellate Court discussed three types of federal preemption under the Supremacy Clause.[206] Two types of preemption, express and field, are not relevant under this FAA analysis.[207] Therefore, the Court analyzed AB 51 under conflict preemption principles. The Court highlighted the two versions of conflict preemption, impossibility preemption and obstacle preemption.[208] Impossibility preemption occurs when compliance with the application of a state and federal law are impossible.[209] Obstacle preemption occurs when a state law impedes the execution of a federal law's objective and purpose.[210]

The Ninth Circuit's opinion commences with a discussion of FAA's history. The Court discussed the FAA's mandate of ensuring arbitration contracts "are placed upon the same footing as other contracts" and enforcing arbitration contracts according to their terms.[211] Notably, the Court pulls a quotation from *Volt* that seems to pervade its analysis. The Court noted the FAA does "not require parties to arbitrate when they have not agreed to do so."[212] The sentence preceding and following this Court's quote selection proves revealing. In the preceding sentence, the *Volt* court noted the FAA's "passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."[213] In the line following this Court's selected quote, the *Volt* court stated the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[214] The Ninth Circuit Court then characterized Supreme Court holdings surrounding the FAA's scope as "ruling on the enforceability or validity of executed agreements to arbitrate, explaining the FAA does not preempt the field of arbitration.[215] The Court concluded the FAA enactors purported to ensure parties enter arbitration agreements voluntarily and consensually.[216] From this conclusion, the Court described involuntary arbitration clauses as contrary to the

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205 Chamber of Com. of U.S. v. Bonta, 13 F.4th 766, 773 (9th Cir. 2021).

206 *Id.* at 774 (conflict preemption, express preemption, and field preemption).

207 *Id.*; *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) ("The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

208 *Bonta*, 13 F.4th at 774.

209 *Id.*

210 *Id.*

211 *Id.* at 771.

212 *Id.*

213 Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (internal quotation marks omitted).

214 *Id.*

215 *Bonta*, 13 F.4th at 771.

216 *Id.*

FAA because mandatory arbitration clauses compel parties to arbitrate when only one desires arbitration.[217]

The Court began its analysis by assessing the relationship between the FAA's savings clause and impossibility preemption. The savings clause provides an arbitration agreement is valid "upon such grounds as exist at law or in equity for the revocation of any contract."[218] The savings clause allows generally applicable contract defenses to invalidate arbitration contracts but disallows defenses specifically applicable to arbitration.[219] Thus, the equal footing principal guides impossibility preemption as it relates to the FAA.[220]

The Court noted that if AB 51 passes the impossibility preemption analysis, obstacle preemption may bar its validity. If AB 51 obstructs the execution of the FAA's purposes and objectives, the bill is preempted and invalid. Notably, the Court continued its argument that the FAA does not govern arbitration contract formation. It stated rules that "selectively interfere with the enforcement of arbitration agreements are therefore" preempted.[221]

The Court held the FAA and § 432.6 do not conflict.[222] It found the law does not facially discriminate against the "*enforcement* of arbitration agreements."[223] Nor does the California law create a contract defense providing the "invalidation or nonenforcement of an agreement to arbitrate."[224] The Court reasoned that the section does not invalidate or revoke any arbitration agreement, so the law falls under the savings clause exception to FAA § 2. Thus, because the law does not include a rule specifically invalidating arbitration agreements nor outright prohibit arbitration agreements, the FAA does not preempt § 432.6.[225] The Court distinguished *Kindred* because it believed *Kindred* did not stand for the proposition that the FAA preempts the state's regulation of pre-agreement conduct.[226] It limited the FAA's scope to the enforcement of arbitration agreements executed and in existence.[227] § 432.6 does not make any arbitration agreement invalid or unenforceable, even if created in violation of the statute.[228]

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217 *Id.*
218 9 U.S.C.A. § 2.
219 *Bonta*, 13 F.4th at 772.
220 *Id.*
221 *Id.* at 775.
222 *Id.*
223 *Id.*
224 *Id.*
225 *Id.* at 776.
226 *Id.*
227 *Id.*
228 *Id.*

The Court determined that the statute cannot violate the FAA because its state statute only regulates conduct prior to the existence of arbitration agreements. Therefore, the Court held § 432.6 does not fail for impossibility preemption.

The Court proceeded to analyze *Kindred* in its broader context. The Court analyzed FAA § 2's language that written agreements to arbitrate "shall be valid, irrevocable, and enforceable."[229] It reasoned that the FAA could only contemplate arbitration agreements presently in effect. In this case, the court found the rule applies only in the absence of arbitration agreements while providing for the validity and enforceability of arbitration agreements. Thus, the Court believed its District Court read *Kindred* too broadly in that *Kindred* cannot possibly recognize FAA preemption when no arbitration agreement exists.[230] Doing so would impermissibly broaden the scope of the FAA and encroach on an area historically reserved to the states.[231] Further, it would contradict the principle that the FAA should not occupy the entire field of arbitration.

The Court next discussed whether § 432.6 conflicts with the purpose and objectives of the FAA. The Court's analysis of legislative history and the historical context of the FAA "demonstrates that Congress was focused on the enforcement and validity of consensual written agreements to arbitrate and did not intend to preempt state laws requiring that agreements to arbitrate be voluntary."[232] The Court traced the case law history of the FAA and determined the primary goal of the FAA is to ensure the enforceability and validity of consensual, written agreements to arbitrate disputes. Here, the Court determined § 432.6 does not affect the validity and enforceability of written consensual arbitration agreements. Further, the only right provided by the FAA is a right to enter and enforce consensual arbitration agreements.[233] Notably, the court stated:

> Irrespective of AB 51's enforcement mechanisms, an employee may attempt to void an arbitration agreement that he was compelled to enter as a condition of employment on the basis that it was not voluntary. If a court were to find that such a lack of voluntariness is a generally applicable contract defense that does not specifically target agreements to arbitrate, the arbitration agreement may be voided in

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229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.* at 778.
233 *Id.* at 779.

> accordance with saving clause jurisprudence. This specific question is not before us, and we do not answer it.[234]

These statements prove incredibly head-scratching. The Court determined the FAA governed the proceedings. Therefore, the savings clause should only allow AB 51 to stand if voluntariness *is* a generally applicable contract defense that does not specifically target agreements to arbitrate in California. If not, then the voluntariness standard as applied to arbitration contracts *is* preempted by the FAA. By punting the question of the general applicability of the voluntariness defense, the Court provides an easy route for Supreme Court reversal.

Although the Court ruled generally that § 432.6's regulation of pre-agreement behavior does not violate the FAA, the civil and criminal penalties violate the FAA by presenting an obstacle to its purposes and objectives.[235] The Court noted the incongruity of promoting arbitration agreements under federal law while punishing those using contractual mandatory arbitration clauses under state law. Therefore, the Court held all statutes providing criminal or civil sanctions for violation of AB 51 preempted to "the extent that they apply to executed arbitration agreements covered by the FAA."[236]

The dissent took issue with the law's disproportionate impact on arbitration contracts, specifically in regard to the penalties imposed on employers requiring arbitration clauses in their contracts.[237] The dissenting judge noted the Supreme Court's clear guidance that any state rule presenting an obstacle to the FAA's objectives and purposes cannot remain valid.[238] The judge's assessment of AB 51's legislative history indicated the California legislature's express intent and desire to forbid employers from requiring arbitration agreements as an employment requirement.[239] The judge strengthened this argument by listing various California laws, similar in nature, preempted by the FAA as adjudicated by the Supreme Court or other courts in California.[240] The judge also noted similarities between AB 51 and AB 3080, which prevented employers from compelling employees to waive the judicial arena as a precondition of employment.[241] The Governor vetoed the bill for plainly violating federal law and Supreme Court precedent.

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234 *Id.* at 778.
235 *Id.* at 780.
236 *Id.* at 781.
237 *Id.* at 782.
238 *Id.*
239 *Id.*
240 *Id.* at 783.
241 *Id.*

The Supreme Court holds that the FAA invalidates any state law "covertly" discriminating against arbitration.[242] Here, the legislative history clearly indicates the California Legislature wrote the bill to covertly discriminate against arbitration. A California Senate Judiciary Committee report on AB 51 indicated the bill would "be found preempted" if challenged in the Supreme Court.[243] This same report bragged, "AB 51 seeks to sidestep the preemption issue" and assured lawmakers the bill "successfully navigates around" Supreme Court precedent and "avoids preemption by applying only to the condition in which an arbitration agreement is made, as opposed to banning arbitration itself."[244]

The judge believed the *Kindred* holding clearly indicated the FAA invalidates any state law impeding formation of arbitration contracts.[245] The rule in *Kindred* specifically impeded an agent to enter an arbitration agreement and did not place arbitration on an equal footing.[246] Therefore, the *Kindred* holding plainly rules a state cannot place special limits on arbitration agreements at formation inapplicable to other contracts. The judge concluded by stating the decision clearly stands as an obstacle to the FAA.

III. ANALYSIS

If the United States Supreme Court grants certiorari, it should find the California statute invalid for creating a new arbitration contract defense inapplicable to contracts generally and for standing as an obstacle to the purposes and objectives of the FAA.

The Ninth Circuit misinterpreted *Kindred*. In *Bonta*, the Appellate Court read *Kindred* narrowly by finding its holding inapplicable to the stages predating the creation of an arbitration agreement. However, *Kindred* expressly notes otherwise. The Supreme Court rejected the Defendant's argument the FAA does not apply to contract formation issues.[247]

The California statute stands as an obstacle to the purposes and objectives of the FAA. The FAA purports to enforce arbitration agreements according to its

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242 *Id.* at 786.

243 *Id.* at 784.

244 *Id.*

245 *Id.*

246 *Id.*

247 Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1428 (2017)., *see also* Id., ("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").

terms. Congress intended a party to "live up to his agreement."[248] The dissenting judge in *Bonta* listed the California legislature's anti-arbitration discussions and plans to prove the intent of AB 51 to obstruct purposes and objectives of the FAA.[249] This anti-arbitration fervor is the same fervor the Congress enacting the FAA sought to cure. Further, the Section 432.6(a) expressly disallows employers from requiring prospective employees to submit for arbitration as a condition of employment.[250] Therefore, AB 51 clearly stands as an obstacle to the purposes and objectives of the FAA.

AB 51's proves most repugnant to the FAA because it creates a contract defense only applicable to arbitration contracts. California law requires mutual, voluntary consent to form a contract.[251] Parties consent to all contract terms, whether an adhesive contract or a nonadhesive contract, even if the weaker party does not read the contract.[252] California law regards adhesion contracts as an "inevitable fact of life" for individuals despite not fitting the perfect model of free contracting by parties of equal bargaining position.[253] Thus, California allows an employee to consent to arbitration by agreeing to a contract not invalid by generally applicable contract defenses.

Once the contract becomes formed, acceptance cannot be revoked.[254] Parties making and accepting the offer have a right to rely and understand the contract according to its terms.[255] California law regards adhesion contracts as "a standardized contract that, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."[256] Notably, the "freedom of the adhering party to choose not to contract at all is irrelevant."[257] Although the states apply federal substantive law when litigating issues relating to the FAA, states may apply their procedural law to interpret an arbitration clause, Under California precedent, an

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[248] H.R. Rep. No. 68-96, at 1H.R. Rep. No. 68-96, at 1 (1924)

[249] *Bonta* at 784. ("The reports assured legislators that AB 51 'successfully navigates around' Supreme Court precedent and 'avoids preemption by applying only to the condition in which an arbitration agreement is made, as opposed to banning arbitration itself.')

[250] Cal. Lab. Code § 432.6(a).

[251] Cal. Civ. Code §§ 1565, 1567.

[252] *See* Marin Storage & Trucking Inc. v. Benco Contracting & Eng'g, Inc., 107 Cal.Rptr.2d 645 (2001) *and* Greve v. Taft Realty Co., 101 Cal. App. 343, 351–52, 281 P. 641 (1929).

[253] Graham v. Scissor-Tail, Inc., 171 Cal.Rptr. 604, 623 P.2d 165 (1981)

[254] 14 Cal. Jur. 3d Contracts § 88.

[255] *Id.*

[256] 14 Cal. Jur. 3d Contracts § 10., *see also* Poublon v. C.H. Robinson Company, 846 F.3d 1251 (9th Cir. 2017).

[257] *Id.*

adhesion contract is "essentially a finding of procedural unconscionability."[258] Courts assess the unconscionability of an arbitration contract under an unduly burdensome standard.[259]

In *Donaldson v. Salem Comm,* a California court assessed the conscionability of an arbitration agreement. The issue did not implicate the FAA. The Defendant's arbitration clause required all employment claims submitted to arbitration.[260] The Plaintiff claimed the clause procedurally unconscionable because the Defendant offered it on a "take it or leave it" contingency.[261] The Court rejected the Plaintiff's assertion.

The Court began by discussing unconscionability. The element focuses on oppression or surprise afforded to the stronger party due to unequal bargaining power.[262] If unconscionable or outside the reasonable expectations of the weaker party, the arbitration clause cannot remain valid.[263] The Plaintiff believed the clause unconscionable because it was offered as a condition of employment.[264] The Court rejected this argument while citing many cases holding a lack of voluntariness does not cause the invalidation of a compulsory predispute arbitration agreement.[265] The Plaintiff also argued the clause unconscionable because it did not explain the rules of arbitration or the arbitration forum. The Court suggested the clause's failure to explain arbitration may strengthen an unconscionability claim but stated the clause's failure to explain arbitration insufficient to reach the unconscionability threshold.[266] Therefore, the Court held the clause not unconscionable and compelled arbitration.[267]

By disallowing compulsory arbitration clauses, AB 51 and the Ninth Circuit created new contract law only applicable to arbitration clauses. *Donaldson* and other California case law regard compulsory arbitration clauses as valid. The

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[258] Dougherty v. Roseville Heritage Partners, 47 Cal. App. 5th 93, 260 Cal. Rptr. 3d 580 (3d Dist. 2020)

[259] 14 Cal. Jur. 3d Contracts § 10., *see also* Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267 (1st Dist. 2003).

[260] Donaldson v. Salem Comm, No. 56-2015-00466632-CU-WT-VTA, 2015 WL 10435136, at *1, 1 (Cal.Super. July 16, 2015).

[261] *Id.* at *2.

[262] *Id.* at *2.

[263] *Id.*

[264] *Id.*

[265] *Id., see* Legatree v. Luce, Forward, Hamilton & Scripps [88 Cal.Rptr.2d 664] (1999) (that an "arbitration agreement is an adhesion contract does not render it automatically unenforceable as unconscionable. Courts have consistently held that the requirement to enter into an arbitration agreement is not a bar to its enforcement"); *and Id.* (discussing that arbitration agreements offered involuntarily do not render the agreement invalid unenforceable on grounds of coercion or for lack of voluntariness).

[266] *Id.*

[267] *Id.* at * 1.

Ninth Circuit stated that an employee may attempt to void a compulsory arbitration agreement on the basis that it was not voluntary. California law does not allow the invalidation of all compulsory agreements based on involuntariness. California law did not require the invalidation of compulsory arbitration agreements based on involuntariness. Accordingly, the Bill and decision places arbitration agreements on unequal footing and must not stand.

The Ninth Circuit plainly created a contract law applicable only to arbitration provisions by upholding AB 51. The Supreme Court never intended to bar, or even remotely considered barring, involuntary arbitration clauses because of unequal bargaining power between parties. By holding arbitration contracts on unequal footing with other contracts, the Ninth Circuit violated Supreme Court precedent and the Supremacy Clause. AB 51 conflicts with the purposes and objectives of the FAA

CONCLUSION

Compulsory arbitration clauses seem to harm individuals. Only 1.6 percent of plaintiffs won recovery in 2020 when subject to a compulsory arbitration provision. AB 51 represents good public policy and would aid many people. However, it conflicts with the purposes and objectives of the FAA and creates new contract law only applicable to arbitration contracts.

Public policy arguments cannot save AB 51 if the Supreme Court grants certiorari. AB 51 cannot exist harmoniously with the FAA. The Supreme Court must enjoin AB 51 and reverse *Bonta*. However, Congress has the power to amend the FAA to disallow compulsory arbitration clauses. Congress must follow the guide of the California legislature and forbid compulsory arbitration clauses for the public's interest.