
RECENT CASES

EMPLOYMENT LAW — FEDERAL ARBITRATION ACT — NINTH CIRCUIT UPHOLDS STATUTE PROHIBITING FORCED ARBITRATION IN EMPLOYMENT. — *Chamber of Commerce v. Bonta*, 13 F.4th 766 (9th Cir. 2021).

For a contract to be valid and enforceable, parties must voluntarily assent to its terms.¹ This principle creates tension in employment contracts, which are prone to coercion given employers' steeply asymmetric bargaining power relative to that of typical employees.² Particularly in challenges to arbitration agreements, wherein employees waive the right to a judicial forum and agree to bring any legal claims in a private and often confidential proceeding,³ courts must navigate the perceived friction between commercial needs and workers' reality. In 2019, the California legislature sought to challenge forced arbitration by passing Assembly Bill 51⁴ (A.B. 51), which prohibits employers from mandating that employees consent to arbitration or else face termination.⁵ In *Chamber of Commerce v. Bonta*,⁶ the Ninth Circuit partially upheld A.B. 51 against business groups challenging the law as preempted by the Federal Arbitration Act⁷ (FAA). Although it rests on shaky doctrinal grounds, *Bonta* demonstrates how the judiciary can navigate the perceived tension between commercial needs and workers' rights to ensure arbitration agreements are in fact voluntary.

Congress, facing business-community pressure, passed the FAA in 1925 to quash "judicial hostility" toward enforcing arbitration agreements.⁸ Section 2 of the FAA states that an agreement to resolve disputes via arbitration "shall be valid, irrevocable, and enforceable."⁹ The Supreme Court has interpreted the FAA expansively: in the past thirty years, the Court has applied the FAA to employment contracts,¹⁰ upheld waivers of the right to class actions,¹¹ and sanctioned arbitration of civil

¹ RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981).

² See Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 412 (2020); Lisa J. Bernt, *Tailoring a Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31, 31–32 (2012).

³ See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018).

⁴ CAL. GOV'T CODE § 12953 (West 2022); CAL. LAB. CODE § 432.6 (West 2022).

⁵ *Id.*

⁶ 13 F.4th 766 (9th Cir. 2021).

⁷ 9 U.S.C. §§ 1–16.

⁸ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 268–69 (1988).

⁹ 9 U.S.C. § 2.

¹⁰ See *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

¹¹ See *Concepcion*, 563 U.S. at 340, 352.

rights disputes.¹² Today, more than half of nonunion, private-sector employers mandate arbitration, up from as low as two percent in the 1990s; low-wage workers, particularly women and Black people, disproportionately comprise the workforce of industries leveraging mandatory arbitration.¹³ Some state courts have responded to the Court's interpretations with outright hostility by undermining the FAA.¹⁴ However, the Supreme Court has broadly rejected their attempts at workarounds.¹⁵

In October 2019, the California legislature passed A.B. 51, which prohibits an employer from requiring applicants or employees "to waive any right, forum, or procedure" provided as a condition of employment under the California Labor Code.¹⁶ In other words, arbitration clauses may not be nonnegotiable, with violators subject to civil and criminal liability.¹⁷ While the statute's text does not reference arbitration, its legislative history focuses primarily on forced arbitration.¹⁸ Shortly after its passage, business lobbies filed suit in the United States District Court for the Eastern District of California, arguing A.B. 51 is preempted by the FAA.¹⁹ The district court granted a temporary restraining order against A.B. 51 three days before it was to take effect.²⁰

In February 2020, the same court issued a preliminary injunction, finding A.B. 51 was preempted by the FAA.²¹ The district court noted the California legislature's history of circumventing the Supreme Court's interpretations of the FAA: the Governor has twice vetoed similar bills as preempted, with a third rejected by a California appellate court.²² A.B. 51 fared no better. First, it violated the "equal-footing principle" set forth in Supreme Court precedent interpreting the FAA.²³ The principle derives from the FAA's "saving clause," which specifies that arbitration agreements may be invalidated only through general

¹² See *Cir. City*, 532 U.S. at 123 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)); *Gilmer*, 500 U.S. at 23.

¹³ ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2, 9 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/KL7E-SGU7>].

¹⁴ See Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–65 (2015).

¹⁵ See, e.g., *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1426–28 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–71 (2015); *Concepcion*, 563 U.S. at 344–47; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

¹⁶ CAL. LAB. CODE § 432.6(a) (West 2022).

¹⁷ *Id.* §§ 432.6(a)–(b), 433; see *Chamber of Com. v. Becerra*, 438 F. Supp. 3d 1078, 1099–100 (E.D. Cal. 2020), *aff'd in part, rev'd in part, and remanded*, 13 F.4th 766 (9th Cir. 2021).

¹⁸ See S. RULES COMM., SENATE FLOOR ANALYSIS: THIRD READING, Assemb. B. 51, 2019–2020 Reg. Sess. (Cal. 2019).

¹⁹ *Becerra*, 438 F. Supp. 3d at 1085–86.

²⁰ *Id.* at 1085.

²¹ *Id.* at 1108.

²² *Id.* at 1089–90.

²³ *Id.* at 1096, 1099. The court noted that even if the statute affects other forms of employment provisions, "the law's clear target is arbitration agreements." *Id.* at 1098.

defenses that apply to all contracts, such as fraud.²⁴ As a corollary to the saving clause, the equal-footing principle prohibits laws that single out arbitration for disfavored treatment;²⁵ A.B. 51 was such a law. Second, A.B. 51 interfered with a “national policy favoring arbitration,”²⁶ as its sanctions may chill even consensual agreements.²⁷

The Ninth Circuit reversed in part. Writing for a divided panel, Judge Lucero²⁸ held that A.B. 51 was not in conflict with, and therefore not preempted by, the FAA.²⁹ Relying on FAA text and precedent, the court held that the FAA does not govern behavior in the absence of an executed arbitration agreement; accordingly, the provisions in A.B. 51 regulate employer conduct only before an arbitration agreement exists.³⁰ Anticipating preemption challenges, the legislators had specified that A.B. 51 was not “intended to invalidate a written arbitration agreement that is otherwise enforceable” under the FAA.³¹ Therefore, the majority found that once an agreement is executed, A.B. 51 protects, rather than undermines, the validity or enforceability of the agreement.³² Thus, by their terms, the FAA and A.B. 51 were not in conflict. The majority conceded that Supreme Court precedent regarding the FAA requires that arbitration agreements be placed on equal footing with other contract terms.³³ However, because the FAA does not apply when no agreement exists, the equal-footing principle was not relevant.³⁴

Judge Lucero then rejected the plaintiffs’ argument that A.B. 51 indirectly frustrated Congress’s objectives in enacting the FAA.³⁵ On the majority’s reading, A.B. 51 did not affect the validity or enforceability of consensual arbitration agreements.³⁶ Based on legislative history, the majority reasoned that Congress “did not intend to preempt state laws requiring that agreements to arbitrate be voluntary.”³⁷ Notably, the

²⁴ 9 U.S.C. § 2 (providing that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

²⁵ *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1424–25 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

²⁶ *Becerra*, 438 F. Supp. 3d at 1099 (quoting *Concepcion*, 563 U.S. at 345–46); see also *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²⁷ See *Becerra*, 438 F. Supp. 3d at 1099.

²⁸ Judge Lucero was sitting by designation from the Tenth Circuit and was joined by Judge Fletcher.

²⁹ *Bonta*, 13 F.4th at 771.

³⁰ See *id.*

³¹ CAL. LAB. CODE § 432.6(f) (West 2022).

³² *Bonta*, 13 F.4th at 776.

³³ *Id.* at 774–75.

³⁴ *Id.* at 775.

³⁵ *Id.* at 779.

³⁶ *Id.*

³⁷ *Id.* at 778.

court reserved the question of whether a defense of involuntariness may be used to void an arbitration agreement once executed.³⁸

However, Judge Lucero held that the civil and criminal sanctions for violating the statute were preempted when applied to executed arbitration agreements.³⁹ For example, an employee might initially refuse, but ultimately consent, to arbitration as a condition of employment; to hold an employer liable in such instance would necessarily punish the employer for entering into an arbitration agreement in contradiction of the FAA's policy.⁴⁰ Since the plaintiffs failed to establish that A.B. 51 was likely preempted by the FAA aside from this postagreement exception, the Ninth Circuit vacated the preliminary injunction and remanded for further proceedings.⁴¹

Judge Ikuta responded with a spirited dissent, decrying the majority's approach as "bifurcated, half-hearted, and circuit-splitting," as she would have held A.B. 51 to be preempted.⁴² Judge Ikuta, echoing the district court, criticized A.B. 51 as the California legislature's fourth attempt to circumvent the FAA: "Like a classic clown bop bag," California has "bounce[d] back with even more creative methods to sidestep the FAA."⁴³ Judge Ikuta would have found the FAA preempted A.B. 51 because it covertly discriminates against, and has a disproportionate impact on, arbitration.⁴⁴ She rejected the majority's argument that the FAA concerns only enforcement rather than preagreement conduct, pointing to Supreme Court precedent preempting state laws, such as disclosure requirements, that directly burden how arbitration agreements are formed.⁴⁵ To Judge Ikuta, the majority overstated the importance of consent in employment contracts, given that courts typically enforce such contracts despite unequal bargaining power.⁴⁶ Absent unconscionability, economic pressure or disadvantageous terms typically do not render an arbitration agreement nonconsensual.⁴⁷ Finally, Judge Ikuta identified the Ninth Circuit's ruling as creating a split with the First and Fourth Circuits, which have struck down similar prohibitions on nonnegotiable arbitration agreements.⁴⁸

Bonta is a remarkably prolabor decision, but it is susceptible to reversal by the Supreme Court given its shaky doctrinal grounds. The panel misrepresented the equal-footing principle: the Court has directly

³⁸ See *id.* at 779.

³⁹ *Id.* at 771.

⁴⁰ See *id.* at 781.

⁴¹ *Id.*

⁴² *Id.* at 791 (Ikuta, J., dissenting). The bifurcation arose because an employer is liable only if its efforts to mandate arbitration fail, rather than if they succeed. *Id.* at 790.

⁴³ *Id.* at 782.

⁴⁴ *Id.* at 785.

⁴⁵ See *id.* at 785–86.

⁴⁶ See *id.* at 789 (quoting *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981)).

⁴⁷ See *id.*

⁴⁸ *Id.* at 782.

rejected bifurcating preagreement behavior and postagreement enforcement of arbitration agreements and has strongly scrutinized work-arounds, like A.B. 51, that target the FAA. Nonetheless, the majority's decision is supported by strong policy considerations and brings a welcome shift toward realism in analyzing arbitration agreements in employment contracts. *Bonta* demonstrates how the judiciary can balance commercial needs against workers' rights and ensure arbitration agreements are voluntary, rather than merely nominally consensual.

The majority's argument that A.B. 51 is not subject to the equal-footing principle because the statute applies in the absence of an executed agreement, while the FAA applies only when a mutual arbitration agreement exists, contradicts Supreme Court precedent. As Judge Ikuta aptly noted, the Supreme Court has held the FAA is concerned with not only the enforcement of an arbitration agreement but also "what it takes to enter into them."⁴⁹ In *Kindred Nursing Centers Ltd. v. Clark*,⁵⁰ the Court established that both the text of the FAA and case law reject the argument that the FAA applies only if a valid arbitration agreement has been formed.⁵¹ Else, the Court hypothesized, states could easily skirt the FAA by establishing statutes that specifically prohibit the formation of arbitration agreements altogether.⁵² The majority's reliance on an ex ante / ex post bifurcation within the FAA runs directly counter to *Kindred Nursing*; A.B. 51's application to only preagreement behavior does not insulate it from having to satisfy the FAA's saving clause and the equal-footing principle.

While the sterile lens of an injunction obscures A.B. 51's impact, an as-applied hypothetical demonstrates how the law fails the equal-footing principle by creating a higher bar for consent in arbitration agreements as compared to other contractual terms. Imagine a job applicant who refuses to sign an employment contract unless its arbitration provision is removed. Because of this refusal, the employer declines to hire the applicant. A.B. 51, pursuant to the Ninth Circuit's decision, would subject the employer to civil or criminal liability.⁵³ Thus, the majority's assertion that A.B. 51 does nothing more than "assure that entry into an arbitration agreement . . . is mutually consensual"⁵⁴ presumes an arbitration clause is consensual only if an employee can reject it without fear of their application or employment being terminated. But A.B. 51 ob-

⁴⁹ *Id.* at 786.

⁵⁰ 137 S. Ct. 1421 (2017).

⁵¹ *Id.* at 1428.

⁵² For example, the Court envisioned a state law that declares everyone incompetent to sign arbitration agreements as designed to circumvent the FAA. *Id.*

⁵³ CAL. LAB. CODE §§ 432.6(b), 433 (West 2022).

⁵⁴ *Bonta*, 13 F.4th at 771.

viously would not protect the same individual if, for example, they rejected the contract because they sought higher wages, more robust healthcare benefits, or sustainable working hours. Thus, A.B. 51 disfavors arbitration clauses relative to other contract terms within employment contracts.

A.B. 51 contravenes the equal-footing principle when viewed against the Court's increasing deference toward arbitration as reinforced in *AT&T Mobility LLC v. Concepcion*⁵⁵ and *Epic Systems Corp. v. Lewis*.⁵⁶ In *Concepcion*, the Court invalidated a California judicial interpretation that deemed unconscionable any contract waiving the right to class actions, as the rule would invariably and disproportionately impact arbitration agreements.⁵⁷ The holding demonstrated the power of the equal-footing principle and the hollowness of claims that the saving clause effectively prevents unconscionable agreements from being enforced, contrary to Judge Ikuta's assertions.⁵⁸ Similarly, *Epic Systems* held that even if the National Labor Relations Act⁵⁹ rendered waivers of the right to class actions illegal, a defense of illegality against an arbitration agreement waiving this right would violate the equal-footing principle.⁶⁰ Putting *Concepcion* and *Epic Systems* together, neither illegality nor unconscionability, both of which are general defenses that apply to all contracts, is sufficient to invalidate an arbitration agreement in the face of the equal-footing principle. A.B. 51 arguably goes beyond either case by directly disadvantaging arbitration through a more stringent standard for consent; it is hard to imagine why the law should fare any better under the Court's precedent. Indeed, *Epic Systems* explicitly warned against clever workarounds like A.B. 51, stating the equal-footing principle "does not save defenses that target arbitration either by name or by more subtle methods."⁶¹ *Bonta* may have offered the Supreme Court one more opportunity to buttress the equal-footing principle.⁶²

Nonetheless, the majority's ruling is an admirable step toward substantive justice. The Ninth Circuit treated arbitration clauses differently from other contract terms because they *are* different from other

⁵⁵ 563 U.S. 333 (2011).

⁵⁶ 138 S. Ct. 1612 (2018).

⁵⁷ *Concepcion*, 563 U.S. at 342, 344.

⁵⁸ See *Bonta*, 13 F.4th at 789 (Ikuta, J., dissenting).

⁵⁹ 29 U.S.C. §§ 151–169.

⁶⁰ *Epic Sys.*, 138 S. Ct. at 1622.

⁶¹ *Id.*

⁶² The majority may have set the Court up for a three-peat, as both *Concepcion* and *Epic Systems* were reversals of Ninth Circuit opinions. Moreover, in *Epic Systems*, the Supreme Court repeatedly cited from Judge Ikuta's appellate dissent — a harbinger of what is to come if *Bonta* reaches the Court. *Id.* at 1620.

contract terms. Scholars have condemned the Supreme Court's jurisprudence on arbitration not only because it "outsources" the preservation of public rights to unregulated, opaque, private arbitrators,⁶³ but also because it results in a near-total loss of rights altogether: parties rarely pursue arbitration.⁶⁴ The aggregate effects of arbitration also hinder corporate accountability; the private setting of arbitration enables powerful firms to hide both alleged and actual wrongdoing from the public eye, and, unlike litigation, arbitration does not create binding legal precedent.⁶⁵ Arbitration agreements, therefore, present an existential threat to employment law, from minimum wage mandates to antidiscrimination statutes. Although other aspects of employment contracts are also potentially coercive, arbitration agreements are especially concerning and should be subject to a meaningful standard of consent. A.B. 51 attempts to equalize bargaining power, particularly in low-wage employment, by enabling an employee to negotiate or even negate proposed arbitration clauses.⁶⁶ Facing congressional inaction,⁶⁷ the state legislatures have little choice but to attempt ever more clever circumventions to ensure arbitration agreements are consented to voluntarily, without fear of reprisal.

The Ninth Circuit's approach to A.B. 51 also appropriately balances the perceived needs of commerce and workers' rights by applying a more robust approach to consent only for arbitration clauses. Consent is mere platitude in employment agreements. As Judge Ikuta notes, "the 'basic precept that arbitration 'is a matter of consent, not coercion,'" means only that courts must 'ensure that "private arbitration agreements are enforced according to their terms.'"⁶⁸ The dissent spoke to a freedom of contract paradigm in which employment contracts are

⁶³ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809, 2811, 2816 (2015).

⁶⁴ *Id.* at 2814–15.

⁶⁵ See Estlund, *supra* note 3, at 680–81.

⁶⁶ See Defendants-Appellants' Opening Brief at 20–21, *Bonta*, 13 F.4th 766 (No. 20-15291).

⁶⁷ See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., BRIEFING PAPER NO. 414, THE ARBITRATION EPIDEMIC 25 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/N5NU-TYK6>] (noting the Arbitration Fairness Act has repeatedly been introduced in Congress but not received a vote); Mark Kantor, *Congress Continues to Debate the Proper Role of Arbitration*, AM. BAR ASS'N (Apr. 22, 2021), <https://americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2021/congress-continues-to-debate-the-proper-role-of-arbitration> [<https://perma.cc/5PM3-SM6W>]. In a move that could signal a broader shift against arbitration, in February 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2022), to invalidate arbitration agreements that preclude a party from filing a lawsuit in court alleging sexual assault or sexual harassment.

⁶⁸ See *Bonta*, 13 F.4th at 789 (Ikuta, J., dissenting) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681–82 (2010)).

treated like any other bargain.⁶⁹ Realists critique the freedom of contract view as nonsensical,⁷⁰ given that strong economic and social factors often render employment contracts coercive.⁷¹ The response to the realist critique, however, is the perception that commerce would grind to a halt unless employment contracts are upheld.⁷² The slippery slope looms: If consent is invalid in arbitration agreements absent negotiability, then what makes consent valid with respect to other conditions in employment contracts, such as wages or benefits? *Bonta* carefully navigates this slippery slope. A.B. 51 creates a more stringent standard of consent only for arbitration agreements but leaves the freedom of contract framework intact with respect to other terms.

The paradigm shift in *Bonta*, although lacking doctrinal underpinning, is reminiscent of historical precedent that fundamentally changed employment law. In *West Coast Hotel Co. v. Parrish*,⁷³ facing popular and executive pressure,⁷⁴ the Court in 1937 deferred to the Washington legislature's power to enact minimum wage laws, overturning decades of precedent finding employment laws violated freedom of contract rights.⁷⁵ The parallels to *Bonta* are striking; both cases arose out of state hostility against judicially created rules with questionable textual basis,⁷⁶ and both involved a shift in approach defensible on policy grounds. The Great Depression-era ruling and the Ninth Circuit's decision are also tied together by intense socioeconomic inequity. As California's brief to the Ninth Circuit argued, it would constitute "injustice" to uphold arbitration agreements that are the result of grossly unequal bargaining in the face of a global pandemic.⁷⁷ The "most unequal recession in modern U.S. history"⁷⁸ demands a national reckoning with arbitration agreements that threaten to undo all of employment law. *Bonta* shows us a jurisprudential shift is possible.

⁶⁹ See Bagenstos, *supra* note 2, at 415.

⁷⁰ See *id.* at 411 n.7, 422–29; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 470 (1923).

⁷¹ James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1554–56 (2010); see also Bagenstos, *supra* note 2, at 423 (arguing that individual workers not only lack the power to resist arbitration agreements but also may be unaware that they have agreed to such terms).

⁷² See Bagenstos, *supra* note 2, at 426 (summarizing Justice Pitney's argument that unequal bargaining power "cannot count as coercion . . . lest the entire system of property and contract unravel" (citing *Coppage v. Kansas*, 236 U.S. 1, 16 (1915))).

⁷³ 300 U.S. 379 (1937).

⁷⁴ See 1 BRUCE ACKERMAN, *WE THE PEOPLE* 154–55 (1991).

⁷⁵ See *West Coast Hotel*, 300 U.S. at 398–99.

⁷⁶ See, e.g., David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1251–55 (2013).

⁷⁷ See Defendants-Appellants' Opening Brief, *supra* note 66, at 14–15, 33.

⁷⁸ Heather Long et al., *The COVID-19 Recession Is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/> [https://perma.cc/HA87-JAJC].