

No. S284498

**IN THE
SUPREME COURT OF CALIFORNIA**

DANA HOHENSHELT,
Plaintiff-Petitioner,

v.

SUPERIOR COURT,
Respondent.

and

GOLDEN STATE FOODS CORP.
Defendant and Real Party in Interest

Court of Appeal, Second Appellate District, Case No. B327524
Superior Court, County of Los Angeles
No. 20PSCV00827, Hon. Thomas Falls

**BRIEF OF *AMICI CURIAE* UC BERKELEY CENTER FOR
CONSUMER LAW AND ECONOMIC JUSTICE,
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, AND
PUBLIC JUSTICE IN SUPPORT OF PETITIONER**

Seth E. Mermin (SBN: 189194)
David S. Nahmias (SBN: 324097)
MacKenna Alvarez
UC BERKELEY CENTER FOR
CONSUMER LAW &
ECONOMIC JUSTICE
305 Berkeley Law
Berkeley, CA 94720-7200
tmermin@law.berkeley.edu
dnahmias@law.berkeley.edu
(510) 643-3519

Hannah M. Kieschnick (SBN: 319011)
Counsel of Record
PUBLIC JUSTICE
475 14th St., Ste. 610
Oakland, CA 94612-1946
hkieschnick@publicjustice.net
(510) 622-8150

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

Amici curiae are nonprofit organizations that represent and advocate on behalf of low-income California consumers and workers. Each year, many thousands of disputes are channeled from the California court system into private arbitral fora, where the due process, appellate oversight, and public scrutiny characteristic of the judicial system are exchanged for the efficiency, speed, and confidentiality promised by the arbitral process. Given the cost of the exchange, the benefit of the arbitration bargain is lost if the arbitral process is made inefficient, slow, or ultimately fruitless by the nonpayment of fees. That is what happens when the business defendants that insisted on arbitration in the first place then fail to pay the fees they are contractually obligated to pay.

Recognizing these dangers—and faced with evidence of their prevalence—the California Legislature enacted two laws, SB 707 in 2019 and SB 762 in 2021, that together require payment of arbitral fees within a set reasonable time and impose consequences for the failure to do so.

The Defendant in this case, Golden State Foods Corp. (“Golden State”), challenges these requirements as preempted by the Federal Arbitration Act. As *amici curiae* explain, however, SB 707 and SB 762 are perfectly consistent with the Federal Arbitration Act. If the laws are struck down, California consumers and workers—the tens of millions of

individuals on whose behalf *amici curiae* work—will lose an essential guardrail against abuse of the arbitration process.

Statements of interest of individual *amici curiae* are available in the accompanying application. (Cal. Rules of Court, rule 8.520(f).)

INTRODUCTION AND SUMMARY OF ARGUMENT

Proponents of arbitration claim it offers “streamlined proceedings and expeditious results.” (*AT&T Mobility, Inc. v. Concepcion* (2011) 563 U.S. 333, 348.) So, to direct claims away from the courtroom and into private dispute resolution, businesses as the drafters of arbitration clauses frequently promise to pay the costs of arbitration. That way, they say, all parties can benefit from “the simplicity, informality, and expedition of arbitration.” (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628.)

Recent practice tells a different story. Large companies, especially those in the tech and gig economies, have devised a perverse scheme that enables them to avoid dealing with legal claims altogether: They simply refuse to pay the arbitrator’s bill. Non-payment immediately stops an otherwise expeditious process and can result in the arbitrator suspending or terminating the case. Individual workers and consumers have little leverage in a private proceeding to enforce large defendants’ promise to pay the fees. Instead, they and their claims just get stuck. This insidious innovation stands arbitration’s efficiency and economy goals on their head by

needlessly stymieing arbitration proceedings, generating protracted litigation, and increasing the overall burden for plaintiffs.

The California Legislature recognized that this behavior violated the fundamental tenets of arbitration and basic contract principles and responded directly and narrowly to the problem by amending the California Arbitration Act (“CAA”) in 2019 with Senate Bill 707 (“SB 707”) and, two years later, Senate Bill 762 (“SB 762”). (See Code Civ. Proc., §§ 1281.97-1281.99 [hereafter, “the Payment Law” or “Sections 1281.97 *et seq.*”].)¹ Together, these provisions seek to prevent the “heads I win, tails you lose” gamesmanship of compelling a case into arbitration and then refusing to pay for it. Having carefully considered the purpose of the Federal Arbitration Act (“FAA”) and the CAA, as well as bedrock principles of California contract law, the Legislature enacted a deterrence mechanism by which one party can elect to transfer the case to court and seek sanctions, among other remedies, should the other party withhold payment for more than 30 days.

The Payment Law thus advances the efficiency and economy goals embodied in the FAA and private arbitration. It also encourages the enforcement of arbitration agreements according to their terms—a second critical aim of the FAA—as parties must agree on how they will allocate the

¹ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

costs of using private dispute resolution. As a result, Sections 1281.97 *et seq.* co-exist harmoniously with, and are not preempted by, the FAA.

Moreover, in accordance with the FAA, the Payment Law does not subject arbitration agreements to disfavored treatment. Its provisions reflect bedrock California breach-of-contract principles and longstanding interpretations of the FAA by the U.S. Court of Appeals for the Ninth Circuit. That is, the Payment Law treats arbitration agreements as California treats “any contract” (9 U.S.C., § 2) with respect to the application of the common law principles of material breach, default, and waiver: A party’s failure to perform an essential term of an agreement—pay the requisite costs to continue in the arbitration, for example—constitutes a material breach of that agreement and a waiver of rights, and places the breaching party in default. And the Legislature’s choice of a 30-day period for payment represents the codification of a reasonable and common contract term that addresses an acute problem while providing clarity and predictability for all parties.

The judgment of the Court of Appeal should be affirmed.

BACKGROUND

The California Legislature enacted the Payment Law, codified at Section 1281.97 *et seq.*, to tackle a mounting problem that threatened to undermine the efficiency goals of arbitration. Recognizing the emergence and rapid spread of businesses’ insistence on arbitration and then failure—

as they initially promised—to pay for it, the Legislature determined that it was necessary to set up guardrails to prevent exploitation and abuse of the arbitration process. The Payment Law offers a fair and targeted solution to a well-documented problem, is premised on well-established principles of California contract law and longstanding federal caselaw, and is designed to restore arbitration in California to its promise of providing an expeditious method of resolving disputes consistent with the parties’ agreement.

I. PRIVATE ARBITRATION BECOMES UBIQUITOUS IN CONSUMER AND EMPLOYMENT CONTRACTS AS AN INFORMAL, EFFICIENT, AND EXPEDIENT FORM OF ALTERNATIVE DISPUTE RESOLUTION.

Buttressed by a line of U.S. Supreme Court decisions over the past several decades interpreting the FAA, arbitration has been transformed from a dispute resolution mechanism reserved largely for the domain of voluntary business-to-business transactions to a commonplace, non-negotiable obligation in consumer and employment contracts.² Today, these clauses are nearly universal in contract terms and conditions that touch every aspect of a person’s life and interaction with the U.S. economy.³

² Chandrasekher & Horton, *Arbitration Nation: Data from Four Providers* (2019) 107 Calif. L.Rev. 1, 12-13.

³ *Id.* at p. 10.

Unsurprisingly, then, arbitration proceedings have increased dramatically over the past few decades.⁴

As this Court and others have long recognized, private arbitration can be an effective, efficient, and informal means of dispute resolution. (See, e.g., *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221 [noting one goal of the FAA as the “encouragement of efficient and speedy dispute resolution”]; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247 [recognizing the parties’ preference for arbitration because of its “reduced expense and increased efficiency”].) Empirical studies substantiate the claimed advantages: Arbitrations regularly reach disposition faster than litigation, and plaintiffs generally do not have to bear the administrative costs.⁵

Yet research also demonstrates the downsides of a privatized system of justice. Arbitrators often have a financial incentive and institutional bias in favor of the fee-paying company that is more likely to be a repeat player.⁶ And sure enough, consumers, workers, and other plaintiffs fare far

⁴ *Id.* at pp. 12-13.

⁵ See, e.g., Chandrasekher & Horton, *supra*, at pp. 51-52; American Arbitration Assn. (“AAA”), *Measuring the Costs of Delays in Dispute Resolution*, <https://perma.cc/EUP5-KM4P> (last accessed Feb. 20, 2025).

⁶ CFPB, *Arbitration Study* (2015) p. 57, <https://perma.cc/492T-T47V>.

worse in arbitration than litigation.⁷ Moreover, arbitration proceedings generally take place without public oversight or meaningful review, allowing sophisticated corporate players the opportunity to design a system that maximizes their advantage.⁸ Together, these factors create a set of circumstances that permit manipulation and abuse of process by the more powerful party.

II. BUSINESSES WITHHOLD ARBITRATION FEES THEY AGREED TO PAY, LEAVING CONSUMERS AND WORKERS WITH NO WAY TO VINDICATE THEIR RIGHTS.

The asymmetric and private nature of arbitration has enabled a particular form of abuse: non-payment of arbitration fees to delay or derail the arbitration. In traditional judicial forums, the government pays judges’

⁷ Kornblith, *FairShake Analysis Highlights Challenges Facing the Consumer Arbitration System*, FairShake (Oct. 25, 2023), <https://perma.cc/3NLB-2YGC>; Shierholz, *Correcting the Record: Consumers Fare Better under Class Actions Than Arbitration*, Economic Policy Institute (August 1, 2017), <https://perma.cc/2W5X-HG3X> (finding that only 9 percent of consumers who bring claims in arbitration obtain relief and that consumers are often ordered to pay the companies they are accusing of misconduct); see also Chandrasekher & Horton, *Arbitration Nation: Data from Four Providers*, *supra*, at pp. 55-57 (finding that “plaintiffs win less frequently in the private forum” while cautioning that that finding “could reflect differences in the nature or quality of claims that are subject to forced arbitration clauses”).

⁸ Chandrasekher & Horton, *Arbitration Nation: Data from Four Providers*, *supra*, at p. 58; Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law* (2016) 2016 U. Ill. L.Rev. 371, 406 (calling arbitration “a black box . . . where the proceedings are confidential and non-precedential.”); CFPB, *Arbitration Study*, *supra*, at pp. 21-22, 25.

salaries and court administration costs; “[i]n arbitration, by contrast, all the costs of arbitrating the dispute must be paid for privately.”⁹ While arbitration is indeed often cheaper than ordinary litigation in the long run, it does require certain unique upfront costs—filing fees, arbitrator’s fees, and other administrative costs—that can be significant.¹⁰ In accordance with the terms of the parties’ agreement, or the prevailing arbitration organization’s rules, or this Court’s precedent, these costs are regularly borne by business defendants as the drafter of the arbitration provisions. (See *Ramirez v. Charter Communications* (2024) 16 Cal.5th 478, 508 [explaining that, in employment contracts, “the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court” in order to “ensure that employees . . . will not be deterred by costs greater than the usual costs incurred during litigation,” quoting *Armendariz v. Psychcare Health Services* (2000) 24 Cal.4th 83, 110-111.)¹¹

⁹ See CFPB, *Arbitration Study*, *supra*, at p. 57.

¹⁰ AAA, *Costs of Arbitration* (2023) <https://perma.cc/D97Y-TD8V>; see Eviston & Bales, *Capping the Costs of Consumer and Employment Arbitration* (2011) 42 U. Toledo L.Rev. 903, 907-921.

¹¹ See also AAA, *Employment/Workplace Fee Schedule, Costs of Arbitration* (Jan. 1, 2023) <https://perma.cc/3BLZ-48UV> (providing current filing, administrative, case management, and other fees, and setting forth arbitrator compensation fee policy); AAA, *Consumer Arbitration Rules, Costs of Arbitration* (Jan. 15, 2024) <https://perma.cc/5NC2-AGZB> (same);

And generally, fees in particular must be “paid ahead of time.”¹²

Because business defendants hold the purse strings, they are empowered to dictate the timing of the arbitration. When they neglect to pay fees, they can prevent a swift resolution of the dispute with very little recourse. “[D]efendant businesses have little incentive to actually respond to claims brought by consumers and employees, because arbitration providers do not have adequate safeguards in place to compel or even incentivize such a response.”¹³ By contrast, a plaintiff in civil court may seek sanctions to address a dilatory or altogether non-responsive defendant (§ 128.5, subd. (a)), and may even be awarded a default judgment against an absent opponent (§ 585). Under the rules of the dominant arbitration providers, if full payment is not received in advance, the arbitrator will

Pfeffer-Gillett, *Unfair By Default: Arbitration’s Reverse Default Judgment Problem* (2023) 171 U. Pa. L.Rev. 459, 486 (examining JAMS and AAA fees in consumer and employment cases); Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes* (2011) 8 J. Empirical Legal Studies 1, 9 (examining AAA employment arbitration data and finding that employers paid all fees 97 percent of the time, with an average fee amount at the time of \$11,070).

¹² AAA, *Costs of Arbitration*, *supra*; JAMS, *Comprehensive Arbitration Rules & Procedures*, rules 6(a), 31 (June 1, 2021), <https://perma.cc/PLQ3-DLLH> (hereafter “JAMS Rules”) (“Each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration,” italics added); see also CFPB, *Arbitration Study*, *supra*, at p. 57.

¹³ Pfeffer-Gillett, *Unfair By Default*, *supra*, at pp. 481-482.

generally suspend or eventually terminate the arbitration.¹⁴ And, unlike in civil court, default judgment and the finality it affords are unavailable in arbitration.¹⁵

The upshot is that when a defendant chooses to delay paying arbitration fees, the case remains in arbitration purgatory and the plaintiff is denied the opportunity to resolve her claim. That circumstance undermines the promise of an efficient and informal resolution—the *raison d’etre* of arbitration. (See *Concepcion, supra*, 563 U.S. at p. 348 [decrying a procedure that “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”].)

This paradox is neither hypothetical nor new. For years, legal practice guides have warned of the impact that non-payment of fees may have on arbitration proceedings.¹⁶ As a 2005 article explained, “The ability

¹⁴ See AAA, *Employment Arbitration Rules and Mediation Procedures*, rule 47 (Jan. 1, 2023) <https://perma.cc/QL27-WHXY> (hereafter “AAA Employment Rules”); AAA, *Consumer Arbitration Rules*, rule R-54 (Sept. 1, 2014), <https://perma.cc/W5D7-DTUL> (hereafter “AAA Consumer Rules”); JAMS Rules, rules 6(c), 31.

¹⁵ See Pfeffer-Gillett, *Unfair By Default, supra*, at p. 482 (arguing that “[t]he absence of meaningful default rules [in arbitration] operates as a de facto ‘Reverse Default Judgment Rule,’ which can dictate and warp the outcome of claims regardless of the merits”).

¹⁶ See, e.g., Bennett, *What To Do When A Party Fails To Pay Its Share Of Arbitration Fees* (2013) 59 *Practical Lawyer* 57 (recommending different

of a party to stymie arbitration through nonpayment has the potential to discourage the use of arbitration to resolve commercial disputes.”¹⁷

Indeed, the U.S. Court of Appeals for the Ninth Circuit had occasion to address the issue twenty years ago. In two employment cases, the Ninth Circuit ruled that a defendant’s failure to pay arbitration fees frustrates the ability of plaintiffs to seek justice. (See *Brown v. Dillard’s, Inc.* (9th Cir. 2005) 430 F.3d 1004, 1012; *Sink v. Aden Enterprises, Inc.* (9th Cir. 2003) 352 F.3d 1197, 1201.) In the first case, after the employer failed to pay its invoice despite multiple notices, the plaintiff returned to the district court, which found the employer in default under both the FAA and California contract law and ordered the case to continue in a judicial forum. (*Sink, supra*, at pp. 1198-1199, 1201.) In the second case, the plaintiff filed her demand directly in arbitration. (*Brown, supra*, at p. 1008.) After the employer ignored both letters from AAA and repeated entreaties from the plaintiff for over two months to discuss the case, the plaintiff brought her case in court. The employer finally responded by, ironically, trying to compel arbitration. (*Id.* at pp. 1008-09.) As the Ninth Circuit put it,

options including litigating the entire case in court); Marinello & Schwartz, *What To Do When a Party Refuses Its Share of Arbitration Costs* (2012) 18 Dispute Resolution Magazine.

¹⁷ DeWitt & DeWitt, *No Pay No Play: How to Solve the Nonpaying Party Problem in Arbitration* (2005) 60 Dispute. Resolution J. 27, 28.

allowing a defendant to compel arbitration after it deliberately repudiated that process would establish a “perverse incentive scheme,” wherein defendants “refuse to arbitrate claims brought by employees in the hope that the frustrated employees would simply abandon them.” (*Id.* at p. 1012.)

III. NUMEROUS EXAMPLES OF BUSINESSES WITHHOLDING ARBITRATION FEES RAISE AWARENESS OF THE ISSUE.

As mandatory arbitration has grown ubiquitous in employment and consumer contracts, so too has the practice of obstructing access to justice by withholding arbitration fees. Examples abound.

As recounted to the California Senate Judiciary Committee, an employer in an individual contract dispute deliberately avoided paying certain arbitration fees to JAMS to prevent the employee from obtaining any discovery before a pre-scheduled mediation.¹⁸ Because the arbitrator then cancelled the hearing, the employee filed a motion for default, which cost \$9,000.¹⁹ That motion was denied because the CAA does not provide any means to seek default judgment.²⁰

The bait-and-switch of defendants refusing to pay arbitration fees is

¹⁸ Hearings before Sen. Com. on Judiciary (2019-2020 Reg. Sess.) Apr. 23, 2019, at 6:03:40 (statement of Noah Leibowitz) (hereafter “*Hearings*”) <https://tinyurl.com/3wmz55ct>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

especially pronounced among companies in the fast food, tech, and gig sectors. Those businesses have repeatedly and successfully forced large-volume cases—which would ordinarily be well-suited for treatment as class actions in civil court—into individual bilateral arbitrations, and then balked at the price tag. (*Abernathy v. DoorDash, Inc.* (N.D.Cal. 2020) 438 F.Supp.3d 1062, 1067-1068 [denouncing the “irony” of workers “enforc[ing] the very provisions forced on them” and the employer “blanch[ing] at the cost of the filing fees it agreed to pay”].) For example, after the fast-food restaurant Chipotle successfully compelled arbitration of a long-running wage-theft collective action, several hundred employees filed individual arbitrations with JAMS. But having got what it asked for, Chipotle then refused to pay the associated fees and sought a judicial stay of the arbitrations. (See *Turner v. Chipotle Mexican Grill, Inc.* (D. Colo. Nov. 20, 2018, No. 14-CV-02612) 2018 WL 11314702, at *p. 1.) The district court denied Chipotle’s motion because the “requested stay would further delay and obstruct [employees’] efforts to seek justice in the arbitral forum.” (*Id.* at *p. 3.) The court chastised the company: “Chipotle’s attempts to delay and obfuscate the claims of the Arbitration Plaintiffs in both the courts and in arbitration (the forum to which it required these employees to submit) are unseemly.” (*Ibid.*)

In another case, after the Ninth Circuit decertified a high-profile class action against Uber and sent the individual plaintiffs’ cases to

arbitration (*O'Connor v. Uber* (9th Cir. 2018) 904 F.3d 1087, 1095), more than 12,000 individuals filed arbitration demands. Although Uber had agreed to pay the initial filing fees required by the very the arbitration clauses it sought to enforce, the company paid the fees in just 296 cases. The workers then had to return to court to seek an order compelling Uber to honor its agreement—and its expressed preference for arbitration. (Mot. to Compel Arbitration, *Abadilla v. Uber Technologies, Inc.* (N.D. Cal. No. 18-cv-07343, Jan. 14, 2019) (ECF No. 53).)²¹ Lyft, Postmates, Doordash, and Corelogic have similarly refused to pay arbitration fees in large-volume individual arbitrations.²² In all of the resulting cases, the courts ordered the companies to uphold their end of the bargain.²³

²¹ Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created A Brand New Private Enforcement Regime in the Gig Economy* (2022) 69 UCLA L.Rev. 372, 388-392.

²² See Gilles, *Arbitration's Unraveling* (2024) U.Penn L.Rev. 1063, 1100-1105 (describing cases of defendants refusing to pay fees in mass arbitrations); Masselot & Ceballos, *Mass Arbitration Trumps Waiver of Class Action: Is Arbitration Good Business for Businesses?* (2021) 68 Loyola L.Rev. 1, 67-69, 71 (same).

²³ Gilles, *Arbitration's Unraveling*, *supra*, at pp. 1063, 1100-1105; Masselot & Ceballos, *supra*, at pp. 67-69, 71; Wilson, *supra*, at pp. 394-396.

IV. THE LEGISLATURE ENACTS SB 707 AND SB 762 TO ENSURE THAT PARTIES IN ARBITRATION CAN EXPEDITIOUSLY RESOLVE THEIR DISPUTES.

Confronted with the growing trend of intentional nonpayment of arbitral fees, the California Legislature in 2019 took action to stem the tide. Senate Bill 707 amends the CAA with a “narrowly tailored response” intended to “stop behavior that would undermine the intent of Congress” as expressed in the FAA.²⁴ The law authorizes a party to an arbitration to elect to pursue their claims in court when the drafting party fails to pay its allocation of the fees for more than 30 days. (See § 1281.97 [applying to fees incurred during the beginning of the arbitration]; § 1281.98 [applying to fees incurred during the pendency of the arbitration].) It also imposes sanctions on the non-paying party. (§ 1281.99.) The procedures laid out in SB 707 thus mimic those in civil litigation that deter or penalize a party’s failure to diligently pursue their case—for example, sanctions and default judgment.

These procedures reflect an effort to codify the Ninth Circuit’s holdings in *Brown* and *Sink* to discourage drafting parties from refusing to

²⁴ Sen. Judiciary Comm., Analysis of S.B. No. 707, 2019-2020 Reg. Sess. (2019) pp. 8-9.

pay their allocated arbitration fees. (Sen. Bill No. 707, § 1(f).)²⁵

Specifically, the law adopted the logic of *Brown* to clarify that failure to pay arbitration fees is a form of material breach of contract. (§ 1281.97, subd. (a) [commencement of arbitration]; § 1281.98, subd. (b) [pendency of arbitration]; see *Brown, supra*, 430 F.3d at p. 1012.) The Legislature also acknowledged the concerns raised in *Sink* that allowing parties to “indefinitely postpone litigation was ‘inconsistent with the structure and purpose of the FAA.’”²⁶

Indeed, the Legislature carefully crafted SB 707 to address what it determined was a “concerning and troubling trend” of defendants’ “strategically withholding the payment of arbitration fees.”²⁷ As Senator Bob Wieckowski, the author of SB 707, observed at the Senate Judiciary Committee’s hearing on the bill: “[Defendants] shouldn’t have it both ways.”²⁸ The Legislature therefore acted to “move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as

²⁵ Sen. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at p. 6; Assem. Judiciary Comm., Analysis of S.B. No. 707, 2019-2020 Reg. Sess. (2019) p. 9.

²⁶ Sen. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at p. 6, quoting *Sink, supra*, 352 F.3d at p. 1200.

²⁷ *Id.* at pp. 8-9.

²⁸ Hearings, *supra*, at 6:18.

possible,”²⁹ and to “narrowly target those who are most at risk from predatory arbitration delays.”³⁰ California’s lawmakers took stock of some of the examples described above, all of which involved business defendants refusing to pay arbitration fees and forcing cases to languish.³¹ To expedite the arbitration process, the law includes an option for consumers and workers to pay any outstanding arbitration fees themselves or to seek a court order compelling the drafting party to pay its outstanding fees.³²

Two years later, the Legislature amended Sections 1281.97 *et seq.* to create “timelines whereby an arbitration provider must provide parties with an invoice for arbitration services, thereby clarifying when a business is in material breach of an arbitration agreement.”³³ That bill, SB 762, sought to close “loopholes” in the earlier legislation that businesses had exploited regarding when their payments were due.³⁴ SB 762 clarified that arbitrators must remit invoices immediately once an employee or consumer files a

²⁹ Sen. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at pp. 9-10, quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1985) 460 U.S. 1, 22.

³⁰ Assem. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at p. 9.

³¹ *Id.* at pp. 6-7 (examining the Chipotle and Uber cases).

³² *Id.* at p. 4.

³³ Assem. Judiciary Comm., Analysis of S.B. No. 762, 2021-2022 Reg. Sess. (2021) p. 3.

³⁴ *Id.* at p. 6.

claim in arbitration or if fees are due. (Sen. Bill No. 762, §§ 2, 3.)³⁵ Then, payment is due within 30 days of the invoice. (Sen. Bill No. 762, §§ 2, 3.) Notably, this fix did not garner any organized opposition.³⁶

SB 707 and SB 762 were the result of a well-documented history—which dates back decades but has accelerated in recent years—of businesses thwarting the goals of private arbitration. Lawmakers took care to ensure that the bills would “complement, and not contradict the FAA.”³⁷ And that is precisely what they do.³⁸

ARGUMENT

Congress passed the FAA to ensure that arbitration agreements are enforced according to their terms. (*Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 178; *Ramirez, supra*, 16 Cal.5th at p. 518.) Those terms often include an agreement on the allocation of the costs of using private dispute resolution, which are often the drafting party’s responsibility. By deterring dilatory parties from withholding payment and dragging out arbitration, the

³⁵ Assem. Judiciary Comm., Analysis of S.B. No. 762, *supra*, at pp. 5-6.

³⁶ See *id.* at p. 7.

³⁷ Assem. Judiciary Comm., Analysis of Sen. Bill No. 762, *supra*, at p. 6; see also Sen. Judiciary Comm., Analysis of Sen. Bill 707, *supra*, at p. 9 (averring that “this measure should not frustrate the purposes of the FAA”).

³⁸ Golden State spills much ink addressing the legislative history of *other* statutes dealing with arbitration that have nothing to do with the payment of fees. (Reply Br. at pp. 22-25.) Those statutes and their legislative history have no bearing on the question before this Court.

Payment Law advances the purpose of the FAA to enforce arbitration agreements according to their terms and promotes the fundamental characteristics of arbitration: efficiency and expediency.

Golden State insists the opposite, arguing that Sections 1281.97 *et seq.* are preempted because they undermine the goals of the FAA and arbitration more generally. Not so. The Legislature enacted the Payment Law so that parties can arbitrate their disputes efficiently, economically, and pursuant to their agreement, rather than getting bogged down in the procedural purgatory that results when a drafting party refuses to pay its share of the fees. Because that effect is consistent with the “accomplishment and execution” of the FAA’s goals, there is no preemption problem here. (See *Lamps Plus, supra*, 587 U.S. at p. 183.)

The Payment Law also does not offend the FAA’s requirement that arbitration agreements stand on equal footing with other types of contracts. (See *Morgan v. Sundance, Inc.* (2023) 596 U.S. 411, 418-419; *Quach v. Cal. Commerce Club, Inc.* (2024) 16 Cal.5th 562, 578-579.) Sections 1281.97 *et seq.* simply codify what has long been recognized in California as the law for any contract. In particular, they incorporate California’s bedrock contract law principles of material breach, default, and waiver in a clear and administrable way, drawing on precedent from the Ninth Circuit. Those provisions reflect a legislative determination of what constitutes material breach in the context of arbitration, where the benefit expected

under the agreement is the ability to arbitrate claims and where one party's failure to pay fees deprives the other party of that benefit. They also reflect a legislative determination, relevant to both material breach and waiver, that if the drafting party has not paid its allocation of the fees within the statutory 30-day period, that party can be understood to have neglected to perform its contractual obligation within a reasonable time.

I. THE PAYMENT LAW FURTHERS THE PURPOSE OF THE FAA BY PROMOTING THE EFFICIENT RESOLUTION OF DISPUTES PURSUANT TO THE TERMS OF THE PARTIES' AGREEMENT.

Sections 1281.97 *et seq.* promote expeditious and economical dispute resolution through private arbitration by deterring drafting parties from engaging in the gamesmanship of not paying what they agreed to pay. Accordingly, these provisions are not preempted by the FAA because they do not “stand[] as an obstacle to the accomplishment and execution” of the FAA. (*Lamps Plus, supra*, 587 U.S. at p. 183.) Rather, they *advance* the goals of the FAA.

The FAA was enacted a century ago to encourage “efficient and speedy dispute resolution” through arbitration in the face of judicial hostility to that practice. (*Concepcion, supra*, 563 U.S. at pp. 344-346.) Two years later, the California Legislature enacted the CAA “in terms identical to . . . the FAA” to express the state’s own policy in favor of enforcing arbitration agreements. (*Quach, supra*, 16 Cal.5th at p. 580.)

Both the FAA and the CAA serve to facilitate arbitration as an informal and swift procedure and to ensure that parties to arbitration agreements honor them as they would any other contract. (See *Stolt-Nielsen S.A. v. AnimalFeeds Internat. Corp.* (2010) 559 U.S. 662, 682-683 [declaring that “courts and arbitrators must give effect to the contractual rights and expectations of the parties” and that “as with any other contract, the parties’ intentions control”]; *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1358 [similar].)

By encouraging timely payment of arbitration fees, the Payment Law promotes the “efficient resolution of disputes” (Sen. Bill 707, § 1(c)), greasing the wheels of arbitration when they would otherwise be jammed by a recalcitrant party’s refusal to pay. The Legislature enacted the Payment Law to address a specific and prevalent practice, the “strategic non-payment of fees and costs,” which “severely prejudices the ability of employees or consumers to vindicate their rights” in arbitration. (*Id.*, § 1(d).) A drafting party’s refusal to pay outstanding costs can protract resolution of the dispute and cause the arbitrator to suspend or even terminate the proceeding, leaving the matter unsettled. That delay can—not unlike in litigation—drive up costs for both sides in terms of (1) attorney time dedicated to addressing the fee dispute; (2) increases in arbitrator fees

stemming from rescheduling, and (3) enhanced witness costs.³⁹ As a result, non-payment undercuts the promises of arbitration, including “lower costs” and “greater efficiency and speed.” (*Stolt-Nielsen, supra*, 559 U.S. at p. 685). Plainly, “procedural manipulations can be used by a party . . . to delay and obstruct the proceedings, thereby denying the other party the speed and efficiency that are the arbitration system’s primary justification.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 987 (conc. opn. of Kennard, J.)).⁴⁰ It follows that disincentivizing parties from delaying or obstructing arbitration proceedings promotes the FAA’s core goals of efficiency and economy.

Furthermore, apart from providing a means of judicial redress when the drafting party fails to pay its share of the costs of private arbitration, the law offers certain other options to kickstart a delayed arbitration. Notably, the law permits parties in pending arbitrations to (1) front the costs

³⁹ See Veasey, *The Conundrum of the Arbitration vs. Litigation Decision* (Dec. 15, 2015) <https://perma.cc/BBQ8-VMUN>; see also Pfeffer-Gillett, *Unfair By Default, supra*, at p. 485 (explaining that delay due to non-payment in arbitration can “allow[] evidence to get stale and test[] the plaintiff’s ongoing commitment”).

⁴⁰ By pointing only to the “informality and simplicity” of arbitration (AOB at p. 46), Golden State also ignores the well-established “efficiency” aims underlying the procedure and the FAA. (See *Stolt-Nielsen, supra*, at p. 685; *Dean Witter, supra*, 470 U.S. at p. 220 [noting the “impact of the [FAA] on efficient dispute resolution”].) Deliberately stalling an arbitration undoubtedly renders the procedure less efficient.

themselves, continue the proceedings, and seek reimbursement later, or (2) have the arbitrator cover the costs and collect later. (§ 1281.98, subd. (b)(2), (4).) These options help preserve the efficiency of the arbitral forums and honor the parties' preferred dispute resolution mechanism.⁴¹

The Payment Law also advances a critical aim of the FAA by obligating parties to comply with their contractual promises to pay their agreed-upon share of the costs. Arbitration agreements often either stipulate a fee schedule or incorporate the rules of the arbitration provider, which generally require proof of payment before the proceedings can continue. (See *supra* Background § 1.) And even when the agreement does not explicitly set forth the allocation of costs between the parties, this Court has repeatedly recognized that certain arbitration agreements impliedly obligate the drafting business to pay costs unique to arbitration. [See, e.g., *Ramirez, supra*, 16 Cal.4th at pp. 507-508 [holding that mandatory arbitration agreements in employment contracts may not obligate employees to pay the employer's attorneys' fees].) By encouraging compliance with those terms, explicit or implicit, the Payment Law is consistent with the FAA's call to

⁴¹ Golden State's opposite contention, that the Payment Law increases costs and delay, is nonsensical. (See Reply Br. at p. 21.) The entire purpose of the Payment Law is to deter drafting parties from dragging out arbitrations in the first place. As the stories related above show (*supra* Background § 3), deliberate stonewalling can result in non-paying parties having to seek assistance from the court or arbitrator, which drives up legal fees and unnecessarily expends the time and resources of the adjudicator.

“rigorously enforce [arbitration] agreements according to their terms.” (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1988) 489 U.S. 468, 479.)

Golden State offers a litany of reasons why the Payment Law is supposedly inconsistent with the goals of the FAA (see AOB at pp. 43-44; Reply Br. at p. 27), but its arguments are untethered to the practical experiences of parties contending with arbitrations that cannot proceed because the party obligated to pay the fees has refused to do so. First, far from “stripping arbitrators of [] authority” or rendering them “puppets of the state” (AOB at p. 43),⁴² the Payment Law simply provides parties with the means to enforce an arbitration agreement’s fee and cost provisions according to their terms and to choose the best next step to advance the case: pay ahead and collect later, seek a judicial order compelling immediate payment, or return to court. (§ 1281.97, subd. (b); § 1281.98, subd. (b)).

Second, Golden State’s concern about delay because of additional arbitral proceedings is misplaced. An arbitrator is far less likely to attempt

⁴² Golden State mischaracterizes this Court’s statements in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33. (See AOB at p. 43.) That case involved an arbitration between an attorney and his former firm over apportionment of attorneys’ fees earned from clients the attorney obtained at the firm. (*Moncharsh, supra*, at p. 6.) The “ordinary fee dispute” referenced there (*id.* at p. 33) thus had nothing to do with the fees owed to the arbitrator in that case and is wholly inapposite.

to adjudicate whether a non-paying party is in material breach than to simply pause or close the case for non-payment per the arbitral rules.⁴³

Further, contrary to Golden State’s assertion, the requirements of Sections 1281.97 *et seq.* are not “stricter than judicial proceedings” (AOB at p. 44) and thus do not interfere with the fundamental informality of private arbitration. While Golden State emphasizes that a civil litigant may have a second bite at the apple to file a brief after missing a deadline (*ibid.* [citing Cal. Rule of Court, rule 8.220(a)]), the correct comparator would be what happens if a party fails to pay a court fee. In standard litigation, non-payment of court fees is significant: It can result in sanctions or an award of costs to the other side (see § 128.5; Cal. Rule of Court, rule 2.30), or even outright dismissal of the action (see Cal. Rule of Court, rule 8.100(c)-(d) [authorizing dismissal of appeal if appellant fails to pay fees]). In that way, the Payment Law treats non-payment for arbitration just as seriously as non-payment of court fees.

Finally, Golden State’s assertion that parties to an arbitration should “have no contact with the courts” (AOB at p. 44) is belied by recent authority from the U.S. Supreme Court, which has explained that “[t]he

⁴³ See AAA Employment Rules, *supra*, rule 47 [providing that in the event of non-payment, the arbitrator may order the suspension or termination of the proceedings]; AAA Consumer Rules, *supra*, rule R-54 [same]; JAMS Rules, rule 6(c) [same].

FAA provides mechanisms for courts with proper jurisdiction to assist parties in arbitration” using various statutory tools. (*Smith v. Spizzirri* (2024) 601 U.S. 472, 478; see 9 U.S.C., §§ 5, 7, 9.) Sections 1281.97 *et seq.* merely provide another tool for courts to assist the parties and effectuate an efficient and orderly administration of the arbitration. (*Smith* at p. 478.)

Because Sections 1281.97 *et seq.* impose requirements that facilitate, not frustrate, arbitration, the Payment Law poses no obstacle to effectuation of the FAA and thus is not preempted by federal law.

II. THE PAYMENT LAW MAINTAINS ARBITRATION AGREEMENTS ON EQUAL FOOTING WITH OTHER CONTRACTS BY CODIFYING GENERALLY APPLICABLE PRINCIPLES OF CALIFORNIA CONTRACT LAW.

Of course, promoting speed and efficiency will not save a state law from FAA preemption if that law does not treat arbitration agreements on par with other contracts. The Payment Law scrupulously observes that requirement with respect to what happens if a drafting party fails to meet its payment obligations under an arbitration agreement in a timely manner and with respect to what constitutes timely payment.

First, the Payment Law incorporates generally applicable contract law to make clear what has long been understood in California for all types of contracts: A party’s “failure to perform a contractual obligation”—pay the requisite costs of arbitration, for example—“constitutes a material

breach of the contract,” placing the party in default and “discharg[ing]” the other party “from its duty to perform under the contract.” (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277.) A party’s failure to pay the requisite costs of arbitration also constitutes waiver of its right to continue in arbitration, consistent with the general rule that a party that acts inconsistently with a known right waives that right. (See *Quach, supra*, 16 Cal.5th at p. 586.)

Second, the Payment Law allows a reasonable period of 30 days for payment—a standard timeframe for the performance of contracts generally and one that is consistent with the timeframes the Legislature has traditionally set in the context of particular types of contractual relationships.

Golden State tries to manufacture meaningful differences between Sections 1281.97 *et seq.* and general contract law, but there are none. And while Golden State claims that precedent from the U.S. Supreme Court compels the conclusion that the provisions are preempted, the opposite is true. The Payment Law satisfies the high court’s call for state laws regulating arbitration to neither disfavor nor favor arbitration clauses and instead treat them just like any other contracts.

A. The Payment Law Adopts General Principles Of California Contract Law.

The Payment Law treats arbitration agreements like other contracts. It incorporates general background contract law standards that excuse a party from performance in the event of breach or waiver by the other party, and it incorporates an established measure of reasonable time—30 days—to meet contractual payment obligations. As a result, Sections 1281.97 *et seq.* adhere to the requirement that arbitration agreements remain on “equal footing with all other contracts.” (*Kindred Nursing Centers Ltd. Partnership v. Clark* (2017) 581 U.S. 246, 248; accord *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1171.)

Under this “equal footing” principle, agreements to arbitrate must be “as enforceable as other contracts, but not more so.” (*Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395, 404, fn.12; see *Morgan, supra*, 596 U.S. at pp. 418-419; *Ramirez, supra*, 16 Cal.5th at p. 518 [“It was not Congress’s intent to make arbitration agreements more enforceable than other contracts.”].) So, as this Court has put it, “courts may not invalidate arbitration agreements under state law contract principles applicable only to arbitration provisions, and that therefore disfavor such contracts, or single them out for ‘suspect status.’” (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 385; accord *Ramirez, supra*, 16 Cal.5th at p. 492; *Quach, supra*, 16 Cal.5th at p. 578;

see also *Kindred, supra*, 581 U.S. at p. 251 [similar].) But they can, and indeed must, hold arbitration agreements to the same standards that apply to other contracts.

That is what the Payment Law does. By enacting SB 707 and SB 762, the Legislature simply made explicit the rules that a court would otherwise apply when “look[ing] to generally applicable law” to evaluate an agreement to arbitrate. (See *Quach, supra*, 16 Cal.5th at p. 578 [interpreting section 1281.2 of the CAA as “directing courts to apply generally applicable law in determining whether the right to compel arbitration has been waived”].) Here, those generally applicable principles are material breach, default, waiver, and the reasonable time in which a party must perform its contractual payment obligations.

1. The Payment Law Is Consistent With California Law Regarding Material Breach, Default, And Waiver.

The Payment Law applies longstanding contract law to specify what happens when a drafting party fails to meet its payment obligations under an arbitration agreement: It breaches that agreement and waives its right to arbitration.

With respect to material breach or default, it is well-established in California that “one party to a contract need not perform if the other party refuses in a material respect to do so.” (*Crowley v. City & County of S.F.* (1976) 64 Cal.App.3d 450, 458; see *De Burgh v. De Burgh* (1952) 39

Cal.2d 858, 863 [“[A] material breach excuses further performance by the innocent party.”]; *Beverage v. Canton Placer Mining Co.* (1955) 43 Cal.2d 769, 777 [“[A] formal tender of performance is excused by the refusal in advance of the party to accept the performance owing.”]; 1 Witkin, *Contracts* (2024) Nonperformance of Covenant: General Rule, § 874.) The standard is similar for default. (See, e.g., *Lewis Publishing Co. v. Henderson* (1930) 103 Cal.App.425, 429 [“one party to a contract cannot compel another to perform” when he commits a “default”].)

Under general principles that apply to all contracts, including arbitration agreements, whether a party is in material breach depends primarily on whether the breach “‘go[es] to the root’ or ‘essence’ of the agreement” or “touches the fundamental purpose of the contract.” (23 Williston on Contracts (4th ed., 2024) Degree of breach; “material breach” or “total breach,” § 63:3.) While the material breach inquiry can be fact-specific, “if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law.” (*Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 87 [determining that breach of rental agreement was not material as a matter of law].) Under general contract law, the remedy for material breach is not automatic termination; instead, the non-breaching party has the “right and option” to terminate the contract. (*B. L. Metcalf General Contractor, Inc. v. Earl Erne Inc.* (1963) 212 Cal.App.2d 689, 693; see Civ. Code, § 1689.)

Applying these principles to payment due under an agreement, California courts have long held that a “refusal of one party to a contract to make payment . . . excuses the other party from further performance on his part.” (*Wood, Curtis & Co. v. Scurich* (1907) 5 Cal.App.252, 254; see also, e.g., *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 230-231 [finding breach where defendant failed to make payment under contract, despite saying he would, because plaintiff “was not required to endure the uncertainty or to await [defendant’s] convenience”].)

Similarly, as to waiver, it is a “general principle of contract law that either party to a contract may waive virtually any contractual provision or right in its favor.” (13 Williston on Contracts (4th ed., 2024) § 39:14.) Indeed, this Court recently confirmed that, “under generally applicable contract law,” a party to an agreement waives a known contractual right to arbitrate when it “knew of the contractual right” but then engages in conduct that is “inconsistent” with an intent to exercise that right. (*Quach, supra*, 16 Cal.5th at p. 569 [considering waiver of contractual right to arbitrate disputes]; see also *Lynch v. Cal. Coastal Comm.* (2017) 3 Cal.5th 470, 475 [stating the test for waiver].) The focus of the waiver inquiry is on the purported “waiving party’s words or conduct; neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party’s subjective evaluation of the waiving party’s intent is

relevant.” (*Quach, supra*, at p. 584 [listing cases].) In other words, general rules of waiver do not require a showing of prejudice to the other party.

The Ninth Circuit’s holdings in *Brown* and *Sink*—on which the Legislature relied when enacting Sections 1281.97 *et seq.*—reflect that courts apply these background contract principles of material breach, default, and waiver in the context of arbitration agreements. In *Brown*, the Ninth Circuit applied general principles of breach and waiver to determine that the employer’s refusal to “participate in the arbitration proceedings,” let alone pay its portion of the initial arbitration fee, deprived the employer of the right to compel arbitration. (*Brown, supra*, 430 F.3d at pp. 1008-1010, 1012.) Similarly, in *Sink*, the Ninth Circuit held that an employer’s refusal to pay arbitration fees for two months constituted “default” and “material breach” not just under California contract law, but also under Section 3 of the FAA. (*Sink, supra*, 352 F.3d at pp. 1201-1202.)⁴⁴

The whole point of the Payment Law as described in the legislative history is to ensure that, where a drafting party withholds payment of compulsory arbitration fees, the concepts of material breach, default, and

⁴⁴ Other courts have also concluded that a failure to pay arbitration fees constitutes a default under Section 3 of the FAA, which “includes ‘waiver,’” (see, e.g., *Pre-Paid Legal Services, Inc. v. Cahill* (10th Cir. 2015) 786 F.3d 1287, 1294-1295), or “material breach” of an agreement to arbitrate (see, e.g., *Roach v. BM Motoring, LLC* (N.J. 2017) 155 A.3d 985, 992-993, 994-995).

waiver are applied consistently with prevailing case law—namely, the *Brown* and *Sink* decisions and well-established principles of California contract law.⁴⁵ (See *supra* Background § 2; cf. *Quach, supra*, 16 Cal.5th at p. 580 [assessing legislative history of CAA provision on waiver of the right to compel arbitration to conclude that Legislature intended courts to “look to generally applicable law”].)

The text of Sections 1281.97 and 1281.98 confirms that the Legislature accomplished its goal in a clear and administrable way. Those provisions state that when a drafting party fails to pay its arbitration fees within 30 days of their due date, that party is “in *material breach* of the arbitration agreement, is in *default* of the arbitration, and *waives* its right to compel arbitration.” (§§ 1281.97, subd. (a)(1), 1281.98, subd. (a)(1), emphases added). In other words, the Legislature determined, as a matter of law, that the failure to pay arbitration fees constitutes a breach of a material term of the agreement.

That makes sense. In any arbitration agreement, the parties agree to resolve their disputes in a private forum, where payment of compulsory fees is a necessary condition for any arbitration to proceed. (See *supra* Background § I.) When a drafting party withholds payment of the arbitration fees it previously agreed to pay, it fails to perform a material

⁴⁵ Sen. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at p. 6; Assem. Judiciary Comm., Analysis of S.B. No. 707, *supra*, at p. 9.

term of the arbitration agreement, causing the proceeding to halt and undermining the entire purpose of the agreement to expeditiously resolve disputes. General contract law principles provide that the material breach of an arbitration agreement discharges the obligation by the other party to continue in the arbitration. Moreover, the Payment Law provides consumers and employees as the non-defaulting parties with the typical choice of remedies in the event of breach: to forbear from further performance under the arbitration agreement (by terminating the proceedings and returning to court), *or* to continue in arbitration notwithstanding the breach. (§ 1281.97, subd. (b); § 1281.98, subd. (b).)

Similarly, because the failure to pay the fees required to keep arbitration proceedings moving along is “inconsistent” with an intent to proceed with the arbitration, non-payment amounts to a waiver of a drafting party’s right to arbitrate—just like any other circumstance where a defendant is clearly aware of its contractual right but engages in conduct inconsistent with the exercise of that right. (*Quach, supra*, 16 Cal.5th at p. 584-585 [applying generally applicable waiver principles to arbitration]; see also *Morgan, supra*, 596 U.S. 411 at p. 419 [applying similar waiver standard as a matter of federal procedural law and holding that party need not establish prejudice to show waiver of right to arbitrate].)

Golden State quibbles with these legislative determinations, claiming they create a “unique standard” applicable “only to arbitration

agreements. (Reply Br. at 6, 11-12; see also AOB at pp. 38, 40, 48.) At bottom, its argument seems to be that a legislature can *never* specify how generally applicable contract principles like material breach, default, or waiver apply in the context of arbitration because, it claims, under cases like *Brown* and *Sink*, those principles must be decided on a case-by-case basis. (See AOB at pp. 27-28 [“whether a party has materially breached its arbitration agreement depends on the circumstances”]; Reply Br. at p. 26.)

That argument reaches too far. *Brown* simply declared that any dispute about the facts underlying the circumstances of the defendant’s failure to pay arbitration fees could be contested on remand. (*Brown, supra*, 430 F.3d at p. 1004; see *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1123-1124 [explaining that the *Brown* court reached its conclusion “based on the facts summarized above”].) And in *Sink*, because both parties treated the question of default as a fact-based determination, the Ninth Circuit did not have the opportunity to address the question. (*Sink, supra*, 352 F.3d at p. 1199.) None of these cases foreclosed the circumstances in which the Legislature could determine what constitutes material breach of an arbitration agreement as a matter of law. To the contrary, as explained *supra*, while it is true that the material breach inquiry can be fact-specific, “the issue may be resolved as a matter of law” when “reasonable minds cannot differ on the issue of materiality.” (*Boston, supra*, 245 Cal.App.4th at p. 87.) And in the context of arbitration, it would be

patently *unreasonable* to conclude that a failure to pay is not material when that failure gums up the process the parties agreed to in the first place.

Golden State also offers a more specific version of this argument: that the Payment Law deviates from the usual rules because it has been strictly interpreted to deem what the company calls “insignificant conduct” a breach or waiver, even if that conduct does not result in the termination of the proceedings. (AOB at p. 33; *id.* at p. 27 [claiming arbitration must be “stalled” or “closed” for there to be breach due to nonpayment.]) In other words, Golden State claims there must be some showing of intent on the part of the non-paying party and harm to the other party. But that is not the way waiver works in California. Waiver focuses on the “waiving party’s words or conduct; neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party’s subjective evaluation of the waiving party’s intent is relevant.” (*Quach, supra*, 16 Cal.5th at p. 584 [listing cases].) Consistent with this standard, Sections 1281.97 *et seq.* focus on whether there has been a timely payment of fees—that is, the drafting party’s “conduct”—and not on whether any failure to timely pay was intentional or prejudicial.

Moreover, Sections 1281.97 *et seq.* create the same remedies that courts have provided when a party defaults on its obligation to pay its fees: The non-defaulting party can choose to litigate its claims in court, or it can choose to continue in arbitration. (Contra AOB at p. 41.) It is commonplace

for a defaulting party to pay the reasonable expenses caused by its obstruction, both in the context of arbitration and in other contexts too. (§ 1281.99; *Brown, supra*, 430 F.3d at 1013 [affirming denial of motion to compel arbitration after drafting party refused to pay fees, and ordering payment of non-drafting party’s attorney’s fees on appeal]; § 425.16, subd. (c)(1) [anti-SLAPP fee-shifting]; Gov. Code, § 12965, subd. (c)(6) [Fair Employment and Housing Act]; § 6259, subd. (d) [Public Records Act].)

What is more, discretionary sanctions are perfectly consistent with the inherent authority a court already has “to punish for contempt and control its own proceedings.” (*Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142, 153, fn.9.) Under Section 1281.99, a court does not have discretion to impose additional sanctions where the party “acted with substantial justification” or where “other circumstances make the imposition of the sanction unjust.” But there is nothing arbitration-specific about allowing a court to impose sanctions on a party that obstructs or delays proceedings *without* justification. (See, e.g., § 177.5 [authorizing “reasonable money sanctions . . . for any violation of a lawful court order by a person, done without good cause or substantial justification”]; § 2023.030, subd. (a) [authorizing “monetary sanction,” including the “reasonable expenses, including attorney’s fees,” on party “engaging in the misuse of the discovery process” unless they “acted with substantial justification or that other circumstances make the imposition of the sanction unjust”].)

2. The Payment Law Is Also Consistent With Generally Applicable Rules Regarding A Reasonable Period Of Time To Perform Contractual Payment Obligations.

In drafting the Payment Law, the Legislature also consulted and adopted generally applicable contract law to establish a reasonable period of time for performance of the material duty to make timely payment. By selecting a 30-day period from the date payment is due, the Legislature chose a span that is drawn from common law and that appears in analogous provisions throughout the California code.

Golden State, however, misconstrues the operation of the Payment Law. It asserts that Sections 1281.97 *et seq.* require payment “‘upon receipt’ of the arbitrator’s invoice.” (AOB at p. 38.) That reading ignores the statutory grace period of 30 days in which a drafting party may make the payment. It is that month-long period that this Court should assess, not the chimerical “hair-trigger” of immediacy that Golden State and the dissent below claim. (*Id.* [quoting *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, 1328 (dis. opn. of Wiley, J.)].)

More than a century ago, this Court explained the common law rule that “[i]f the contract specifies no time, the law implies that it shall be performed within a reasonable time.” (*Greenberg v. Cal. Bituminous Rock Co.* (1895) 107 Cal. 667, 671; see Civ. Code, § 1657 [“If no time is specified for the performance of an act required to be performed, a

reasonable time is allowed.”]; 1 Witkin, *Contracts* (2024) Reasonable Time, § 785 [“If the contract does not specify the time of performance, and the act cannot be done ‘instantly,’ a reasonable time is allowed.”]; see also *Patel v. Liebermensch* (2008) 45 Cal.4th 344, 352 [same].) Indeed, even Golden State recognizes this well-established rule of reasonableness. (See AOB at p. 38 [citation omitted].)

Absent a specific countervailing contractual provision or rule, a period of 30 days for performance is generally considered reasonable. (See, e.g., *King v. Stanley* (1948) 32 Cal.2d 584, 590 [stating that 30 days is a “reasonable time” for completion of escrow in a real property sale], *disapproved of on other grounds by Patel, supra*, 45 Cal.4th at pp. 350-351; *Leitler v. Handelsman* (1954) 125 Cal.App.2d 243, 251 [real property sale]; see also *Steiner v. Jarrett* (1954) 130 Cal.App.2d Supp. 869, 873 [notice given for breach of warranty].)

Moreover, the Legislature can, and regularly does, codify its determination that 30 days is a reasonable period in a wide range of contractual provisions. For example, in the context of seller-assisted marketing plans, sellers must deliver equipment or supplies within 30 days of the delivery date, or else the purchaser may void the contract. (Civ. Code, § 1812.215.) Certain loan transactions also typically are given statutory 30-day limits. (See, e.g., Civ. Code, § 2923.5, subd. (a)(1) [recordation of notice of mortgage default], § 2941, subd. (a) [execution of

discharge certificate for satisfied mortgage]; Fin. Code, § 4979.7 [prohibition on providing certain loan and insurance products by the same consumer lender].) Insurance laws, too, mandate 30 days for payment of policies in certain cases before interest accrues. (See, e.g., Ins. Code, § 2057 [payment of fire insurance]; § 10172.5, subd. (a) [payment of life insurance policies to decedent’s beneficiary].) A period of 30 days is also standard for services to refund a consumer who cancels a contract. (See, e.g., Civ. Code, § 1748.82, subd. (a) [refunds for hosting platforms, hotels, and short-term rentals]; § 1810.3, subd. (f)(5) [refunds for credit balances on retail installment accounts]; § 2954.65 [refunds of unused premiums for real property mortgages]; Bus. & Profs. Code, § 732, subd. (a)(1) [patient refunds from their physicians or dentists].) The Legislature often enacts these kinds of bright-line time limits as a means to protect parties who have been subject to abusive business practices in a particular industry. (See, e.g., Civ. Code, § 1812.200 [enacting protections for seller assisted marketing plans “to safeguard the public against deceit and financial hardship . . . and to prohibit or restrict unfair contract terms”].)

Here, the Legislature determined that 30 days is a reasonable amount of time for drafting parties to make their payments once an arbitrator issues an invoice. (See § 1281.97, subd. (a); § 1281.98, subd. (a); see also *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 644 [explaining that “[t]he California Legislature had a good reason for declaring untimely

payment a material breach as a matter of law”].) This leads to the unexceptional conclusion that the Payment Law’s statutory grace period accords with applicable common law and analogous statutory standards and is therefore not preempted by the FAA.⁴⁶

B. Golden State Fails To Show That The Payment Law Singles Out Arbitration For Disfavored, Or Favored, Treatment.

Golden State offers two final reasons why the FAA preempts the Payment Law. It relies on precedent from the U.S. Supreme Court to argue that the Payment Law either singles out arbitration agreements for disfavored treatment in violation of the equal footing principle or singles out those agreements for favored treatment in violation of the equal footing principle. Neither is true.

Because Sections 1281.97 *et seq.* merely codify generally applicable contract principles in the context of arbitration (*supra* Argument § II(A)),

⁴⁶ If this Court, however, agrees with some recent federal district court decisions that this “30-day requirement modifies California contract law as to waiver and material breach” and is therefore preempted by the FAA (*Ding v. Structure Therapeutics, Inc.* (N.D.Cal. Oct. 29, 2024) 2024 WL 4609593, at *p. 6), the remedy is not to strike the whole of the Payment Law but rather to conduct a restrained judicial reformation of the specified period to conform it to a “reasonable” period that would “closely effectuate[] the policy judgment” of the Legislature. (See *Kopp v. Fair Political Practices Comm.* (1995) 11 Cal.4th 607, 660-661.) In light of its clear intent in SB 707 and SB 762 to codify generally applicable contract law of material breach, default, and waiver in the context of arbitration, the Legislature would clearly prefer a “reformed construction to invalidation of the statute.” (See *ibid.*)

the law does not “singl[e] out arbitration agreements for disfavored treatment” (see *Kindred, supra*, 581 U.S. at p. 248; *Cronus, supra*, 35 Cal.4th at p. 385). As a result, Golden State is wrong to rely on the line of U.S. Supreme Court cases in which the Court held that the state laws in question impermissibly targeted arbitration for harsh treatment. (See AOB at pp. 36, 40.) The trigger for preemption in cases like *Kindred Nursing Centers* and *Doctor’s Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, was that the states had invented *novel* rules to invalidate arbitration agreements. (See *Kindred, supra*, at pp. at 252-253 [holding that a clear statement rule that applied only to the right to access courts and trial by jury lacked any foundation in general contract principles]; *Casarotto, supra*, at p. 687 [concluding that a notice requirement applicable only to arbitration clauses lacked any basis in generally applicable contract law].) Unlike those rules, the Payment Law simply clarifies how generally applicable rules regarding material breach, default, waiver, and a reasonable time to perform payment obligations apply in the context of arbitration.

By the same token, Sections 1281.97 *et seq.* do not impermissibly create rules that *favor* arbitration, which could also be inconsistent with the FAA. (See *Morgan, supra*, 596 U.S. at p. 418 [explaining that “federal policy is about treating arbitration contracts like all others, not about fostering arbitration”].) Golden State seizes on Hohenshelt’s argument that the statute is consistent with the goals of the FAA for a gotcha point that, if

Sections 1281.97 *et seq.* “foster arbitration generally,” they “would still be preempted as applied” because the FAA “preempt[s] special, arbitration-preferring procedural rules enacted at the state level.” (AOB at p. 48, citing *Morgan, supra*, 596 U.S. at 418.) But Golden State’s argument proves too much. Just because a state law is *consistent* with the fundamental attributes of arbitration does not mean it *favors* arbitration in the manner prohibited by *Morgan*. Rather, the gravamen of the U.S. Supreme Court’s holding in that case is that, as a corollary to the equal footing principle, “a court may not devise novel rules to favor arbitration over litigation.” (*Morgan, supra*, at p. 418.) Instead, consistent with that principle, it “must hold a party to its arbitration contract just as the court would to any other kind.” (*Ibid.*)

Sections 1281.97 *et seq.* readily satisfy that condition. The Payment Law treats arbitration agreements like other contracts, clarifying how common contract defenses of material breach, default, and waiver apply to the specific factual scenario the Legislature sought to address: a drafting party that fails to pay its share of the arbitration fees, potentially trapping a consumer or employee in potential procedural limbo absent intervention. It also incorporates common law to require payment within a reasonable period of time and then defines, consistent with countless other statutory provisions, a reasonable period in this context as 30 days. Its provisions are thus fully compatible with the FAA.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: February 10, 2025

Respectfully submitted,

Seth E. Mermin (SBN: 189194)
David S. Nahmias (SBN: 324097)
MacKenna Alvarez
UC BERKELEY CENTER FOR
CONSUMER LAW &
ECONOMIC JUSTICE
305 Berkeley Law
Berkeley, CA 94720-7200
tmermin@law.berkeley.edu
dnahmias@law.berkeley.edu
(510) 643-3519

/s/ Hannah M. Kieschnick
Hannah M. Kieschnick (SBN: 319011)
Counsel of Record
PUBLIC JUSTICE
475 14th St., Ste. 610
Oakland, CA 94612-1946
hkieschnick@publicjustice.net
(510) 622-8150

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in California Rules of Court, rule 8.204(c)(1). The brief has been prepared in 13-point Times New Roman font. The word count is 10,215 words based on the word count of the program used to prepare the brief.

Dated: February 10, 2024

By: /s/ David S. Nahmias

David S. Nahmias

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I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in Oakland, California, and not a party to the within action. My business address is the University of California, Berkeley, School of Law, 308 Berkeley Law, Berkeley, CA 94720-7200.

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Attorneys for Plaintiff-Petitioner

Nicholas John Scardigli
MAYALL HURLEY P.C.
2453 Grand Canal Boulevard
Stockton, CA 95207

Attorneys for Plaintiffs-Respondents

Melvin L. Felton
Reginald Roberts
Tyler S. Dobberstein
Ashley Nicole Bobo
Anand Singh
SANDERS ROBERTS LLP
1055 West 7th Street
Suite 3200
Los Angeles, CA 90017-2557

Wendy S. Albers
Bendon & Serlin, LLP
BENEDON & SERLIN, LLP

Court Counsel
Superior Court of Los Angeles County
111 North Hill Street, Room 546
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 10, 2025, in Berkeley, CA.

By: /s/ David S. Nahmias
David S. Nahmias

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Supreme Court of California

PROOF OF SERVICE

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Lower Court Case Number: **B327524**

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Melvin Felton Sanders Roberts LLP 276047	mfelton@sandersroberts.com	e-Serve	2/10/2025 7:26:37 PM
Kelly Horwitz Benedon & Serlin, LLP 205932	kelly@benedonserlin.com	e-Serve	2/10/2025 7:26:37 PM
Melinda Steuer The Law Offices of Melinda Jane Steuer 216105	msteuer@californiainvestoradvocate.com	e-Serve	2/10/2025 7:26:37 PM
Nicholas Scardigli Mayall Hurley PC 249947	nscardigli@mayallaw.com	e-Serve	2/10/2025 7:26:37 PM
Susan Robbins Benedon & Serlin LLP	srobbins@benedonserlin.com	e-Serve	2/10/2025 7:26:37 PM
David Mara Mara Law Firm, PC	dmarea@maralawfirm.com	e-Serve	2/10/2025 7:26:37 PM
Court Counsel Superior Court of Los Angeles County	court counselwrits@lacourt.org	e-Serve	2/10/2025 7:26:37 PM
Wendy Albers Benedon & Serlin, LLP 166993	wendy@benedonserlin.com	e-Serve	2/10/2025 7:26:37 PM
Leonard Steiner Attorney at Law	is@steinerlibo.com	e-Serve	2/10/2025 7:26:37

			PM
David Mara Mara Law Firm, PC 230498	dmara@maralawfirm.com	e-Serve	2/10/2025 7:26:37 PM
Jesse Cripps GIBSON DUNN & CRUTCHER LLP - PA 222285	jcripps@gibsondunn.com	e-Serve	2/10/2025 7:26:37 PM
Tina Lara Benedon & Serlin, LLP	accounts@benedonserlin.com	e-Serve	2/10/2025 7:26:37 PM
David Arbogast Arbogast Law 167571	david@arbogastlaw.com	e-Serve	2/10/2025 7:26:37 PM
Gerson Smoger Smoger & Associates	gerson@texasinjurylaw.com	e-Serve	2/10/2025 7:26:37 PM
Neil Steiner Steiner & Libo, Professional Corporation 98606	ns@steinerlibo.com	e-Serve	2/10/2025 7:26:37 PM
David Nahmias Berkeley Center for Consumer Law & Economic Justice 324097	dnahmias@law.berkeley.edu	e-Serve	2/10/2025 7:26:37 PM
Seth E. Mermin 189194	mermin@berkeley.edu	e-Serve	2/10/2025 7:26:37 PM
Hannah M. Kieschnick 319011	hkieschnick@publicjustice.net	e-Serve	2/10/2025 7:26:37 PM

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Date

/s/David Nahmias

Signature

Nahmias, David (324097)

Last Name, First Name (PNum)

Berkeley Center for Consumer Law & Economic Justice

Law Firm