Case No. S284498

In the

Supreme Court

of the

State of California

DANA HOHENSHELT,
Plaintiff and Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

GOLDEN STATE FOODS CORP.,
Defendant and Real Party in Interest.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B327524
LOS ANGELES SUPERIOR COURT ·HON. THOMAS FALLS · NO. 20PSCV00827

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION IN SUPPORT OF DEFENDANT GOLDEN STATE FOODS CORP.

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND REAL PARTY IN INTEREST

Pursuant to California Rule of Court 8.520(f), the Retail Litigation Center, Inc. hereby requests permission to file the attached brief as *amicus curiae* supporting Defendant and Real Party in Interest Golden State Foods Corp. This application is timely made within 30 days of the filing of the last party brief.

The Retail Litigation Center, Inc. (RLC) is a unique public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's most innovative retailers, ranging in size from some of the largest retailers in the country to smaller businesses. Since its founding in 2010, the RLC has filed over 250 *amicus* briefs in a variety of courts, including the California Supreme Court and the U.S. Supreme Court, in order to provide the retail industry's perspectives on important legal issues and highlight the potential industry-wide consequences of significant pending cases, such as this one.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retailers represent the nation's largest private sector employer, contributing $5.3 trillion to the annual GDP and supporting more than one in four U.S. jobs – 55 million working Americans. For

over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits filings in cases raising significant legal issues for the retail community.

No party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: February 10, 2025 Respectfully submitted,

MCGUIREWOODS LLP

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and The National Retail Federation

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers, including many of California's largest and most innovative retailers and smaller businesses across a breadth of retail verticals. The RLC's members employ millions of people throughout California, provide goods and services to millions more, and account for tens of billions of dollars in annual sales within the state. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 *amicus* briefs on issues of importance to the retail industry.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retailers represent the nation's largest private sector employer, contributing $5.3 trillion to the annual GDP and supporting more than one in four U.S. jobs – 55 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits filings in cases raising significant legal issues for the retail community.

The RLC and NRF share a particular interest in this case because many of their retail members implement arbitration programs to efficiently resolve individual disputes with their employees, their customers, or both. The issue of whether the Federal Arbitration Act ("FAA") preempts California Code of Civil Procedure Sections 1281.97 *et seq.* is thus an important question of law that will impact RLC's and NRF's members with California-based employees or customers.

INTRODUCTION

The question posed here is whether the FAA preempts California Senate Bill 707 ("SB 707"). The answer is yes. SB 707 waives all rights to arbitration if an employer or business fails to pay an arbitrator's invoice within 30 days. SB 707 is strictly construed. It does not consider the factual circumstances surrounding the late payment or the prejudice (if any) to the employee or consumer because of the late payment.

SB 707 substantively modifies California contract law. Under California law, the issues of waiver and breach of agreements are fact-specific inquiries. Before SB 707, an employer or business ***might*** breach its arbitration agreement or waive its right to arbitrate by failing to timely pay arbitration fees. But whether the employer or business committed any breach or waiver was based on an analysis of the facts of each case. SB 707 ***requires*** a finding of material breach and waiver of the right to arbitrate based on an arbitrary and strict deadline.

Under the equal treatment principle set forth by the United States Supreme Court, the FAA preempts a law if it invalidates an arbitration agreement based on legal rules that apply only to arbitration. As Justice Wiley put it in his dissent, because "[o]nly arbitration contracts face this firing squad" of SB 707, it is preempted by the FAA.

ARGUMENT

I. Background on California's Law Governing a Failure to Pay Arbitration Fees.

In 2019, through SB 707, the California legislature added sections 1281.97, 1281.98, and 1281.99 to the California Arbitration Act. The purported purpose of SB 707 was "to assist consumers and employees who find themselves in 'procedural limbo' because they are required to submit a dispute to arbitration, but the entity enforcing the arbitration agreement has not paid the arbitration fees required to proceed." *Hernandez v. Sohnen Enterprises, Inc.*, 102 Cal. App. 5th 222, 233-34 (2024), *reh'g denied* (June 3, 2024) (citing 2019 Cal. Legis. Serv. Ch. 870 (S.B. 707) (WEST), § 4).

Section 1281.97 addresses the failure to timely pay fees or costs to *initiate* arbitration. Cal. Civ. Proc. Code § 1281.97. Section 1281.98 addresses the failure to timely pay fees or costs to *continue* arbitration. *Id.* § 1281.98. Under both Sections 1281.97 and 1281.98, the drafting party of an employee or consumer arbitration agreement "is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel" or "to proceed" with arbitration if it does not pay an invoice for arbitration fees or costs within 30 days of receipt. *See id.* §§ 1281.97(a)(1), 1281.98(a)(1). The statutes also require that the arbitral provider "issue all invoices to the parties as due upon receipt." *Id.* §§ 1281.97(a)(2), 1281.98(a)(2).

If the drafting party "materially breaches the arbitration agreement and is in default," the consumer or employee may

either: (1) withdraw the claim from arbitration and proceed in court; or (2) petition a court to compel arbitration and force the drafting party to pay reasonable attorneys' fees, costs, and fees related to arbitration. *See id.* §§ 1281.97(b), 1281.98(b). If the consumer or employee withdraws the claim from arbitration and proceeds in court, the statutes require a court to impose sanctions on the drafting party. *Id.* §§ 1281.97(d), 1281.98(c)(2).

The sanctions are not discretionary and are set forth in Section 1281.99. The statute requires a court to punish a company that has not paid arbitration fees by the statutorily imposed deadline by ordering the drafting party to pay the "reasonable expenses, including attorneys' fees and costs, incurred by the employee or consumer as a result of the material breach." Cal. Civ. Proc. Code § 1281.99(a). An additional sanction may also be imposed on the drafting party unless it "acted with substantial justification" or "other circumstances make the imposition of the sanction unjust." *Hernandez*, 102 Cal. App. 5th at 235 (citing Cal. Civ. Proc. Code § 1281.99(b)).

Notably, the foregoing statutes do not require an arbitrator to make a finding of breach, default, or waiver. *Hernandez*, 102 Cal. App. 5th at 234. Rather, the statutes define a material breach as a matter of law, without leaving materiality as an issue of fact for the trier of fact to determine. *See id.* (quoting *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621, 644 (2022)). Moreover, there are no exceptions to Sections 1281.97 and 1281.98, even for substantial compliance or lack of prejudice.

Thus, SB 707 mandates a finding that a business is in breach of its arbitration agreement, has waived its right to arbitrate, and is on the hook for the consumer's (or employee's) attorney's fees and costs if the business fails to pay an invoice within 30 days of receipt *for any reason*—regardless of the circumstances surrounding the delayed payment or whether the business fully intends to arbitrate the dispute. This can play out in a number of ways. For example, SB 707 requires a finding of material breach if an arbitral provider's invoice for initial fees went to the business representative's spam folder, was never seen by the business, and the business was unaware of the invoice until the consumer or employee filed a lawsuit alleging breach of the arbitration agreement. Courts have held SB 707 requires a finding of material breach if a business sent payment of an invoice for initial fees via mail prior to the 30-day deadline, but because of delays by the postal service, the payment was not received until after the deadline. Worse still, courts have also held that SB 707 requires a finding of material breach if a business has the same issue with slow postal delay for an invoice of final pre-hearing fees which could be paid months (or even years) into litigating a matter, and regardless of a business's full participation in the arbitration and timely payment of all other invoices.

II. Statutes that Make Arbitration Provisions Unenforceable on Arbitration-Specific Grounds are Preempted by the FAA.

"The FAA was enacted in response to judicial hostility to arbitration." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 649 (2022). Section 2 of the FAA makes arbitration agreements "'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Viking River*, 596 U.S. at 649-50 (quoting 9 U.S.C. § 2). The United States Supreme Court has interpreted Section 2 to contain two provisions: (1) an enforcement mandate rendering arbitration agreements enforceable as a matter of federal law; and (2) a savings clause, which permits invalidation or non-enforcement of arbitration clauses on grounds applicable to any contract. *See Belyea v. GreenSky, Inc.*, 637 F. Supp. 3d 745, 756 (N.D. Cal. 2022) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339-40 (2011)).

Together, the clauses in Section 2 establish an "equal treatment" principle. *Id.* Under the equal treatment principle, a court may not invalidate or refuse to enforce an arbitration agreement based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (quoting *Viking River*, 596 U.S. at 650). As a result, the FAA preempts rules "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers." *Id.* (quoting *Kindred Nursing Ctrs. L. P. v. Clark*, 581 U.S. 246, 252 (2017)).

In his dissent below, Justice Wiley provided several examples of these impermissible laws from here in California. "Over and over again," California law "continues to find new ways to disfavor arbitration." *Hohenshelt v. Superior Court*, 99 Cal. App. 5th 1319, 1327 (2024) (Wiley, J., dissenting). Whether it was mandating a judicial forum for wage disputes, requiring disputes to be initially referred to an administrative agency, holding unconscionable class-action waivers in arbitration agreements, construing ambiguities against the drafter of an arbitration agreement, or preventing the individual aspects of a representative claim from being sent to arbitration—"over the last few decades" the U.S. Supreme Court has "rebuked" *all* of these California laws disfavoring arbitration. *Id.* at 1327-28. SB 707 thus "invites a *seventh* reprimand from the" U.S. Supreme Court on these same grounds. *Id.* at 1327.

Of course, California is not alone in passing laws that impermissibly disfavor arbitration. Other states have also enacted laws disfavoring arbitration, much like SB 707, by imposing "threshold limitations placed specifically and solely on arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996). Such impermissible limitations include Montana's law that made an arbitration agreement unenforceable unless the contract had proper notice on the first page, *id.* at 683; and Kentucky's law that forbade a person with a general power of attorney from entering into an arbitration agreement for his principal. *Kindred Nursing*, 581 U.S. at 249-51. These laws have likewise been struck down as preempted by the FAA.

III. SB 707 Makes Arbitration Agreements Unenforceable on Arbitration-Specific Grounds.

In enacting SB 707, the legislature "expressed concern that an entity's failure to pay the arbitration provider hindered the efficient resolution of disputes." *Hernandez*, 102 Cal. App. 5th at 34 (citing 2019 Cal. Legis. Serv. Ch. 870 (S.B. 707) (WEST), § 1, subd. (c)). SB 707 allows employees and consumers to void an arbitration agreement "on a hair-trigger basis due to tardy performance." *Hohenshelt*, 99 Cal. App. 5th at 1328 (Wiley, J., dissenting). It does so by mandating a finding of material breach and waiver of the right to arbitrate no matter the factual circumstances at issue. This legislatively imposed determination of material breach stands alone in California law governing contracts.

Waiver and breach are background principles of California contract law. *Belyea*, 637 F. Supp. 3d at 756-57 (citing *Cinel v. Barna*, 206 Cal. App. 4th 1383, 1389 (2012)) ("Contractual rights are subject to waiver[.]"); *see also* *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 280, (1985) (stating "the requirement of performance" of a contractual obligation "may be excused by the other party's breach" or default).

Prior to the enactment of SB 707, a failure to pay an arbitrator or refusal to participate in arbitration ***could*** constitute waiver or breach of an arbitration agreement. *Id.* at 757 (citing *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1010-13 (9th Cir. 2005) (finding waiver and breach for refusal to pay arbitration fees and participate in arbitration)); *see also*

352 F.3d 1197, 1201 (9th Cir. 2003) (finding arbitration agreement unenforceable for failure to pay arbitration fees after arbitrator granted a motion for default). But, like any other breach of contract action, a court would determine whether such conduct was a material breach of contract on a fact-specific basis.

Before SB 707, employees or consumers seeking to avoid enforcement of an arbitration agreement could ask a court to find that the business's failure to perform an obligation under the arbitration agreement was a material breach, in keeping with traditional principles of contract law in California. *See* *Hernandez*, 102 Cal. App. 5th at 233 (citing *Brown*, 430 F.3d at 1010-12). Just as in non-arbitration cases, whether a party's breach of an agreement was material was a question of fact. *Id.* (citing *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011)). Unless a contract stated that time was of the essence, however, a payment made "within a reasonable time after the specified due date [would] usually constitute substantial compliance." *Id.* (citing *Magic Carpet Ride LLC v. Rugger Inv. Grp., L.L.C.*, 41 Cal. App. 5th 357, 364 (2019)).

Similarly, before the enactment of SB 707, a business that failed to perform an obligation under an arbitration agreement may have been deemed to have waived the right to demand arbitration. *Id.* (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 983 (1997)). But, like material breach, whether there had been a waiver of the right to arbitrate was a fact-specific question. *Id.* (citing *Engalla*, 15 Cal. 4th at 983-84).

SB 707's sanctions terms expressly redefine the general contract principles of waiver and breach by ***mandating*** a finding of material breach and waiver without a fact specific inquiry. This "creates a substantive modification of California contract law," ***but only as to arbitration agreements***. *Belyea*, 637 F. Supp. 3d at 756-57.

SB 707 requires that arbitration agreements be treated differently than other contracts under California law in another manner. A court may, "upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." CCP § 473(b). Yet SB 707, which addresses only arbitration, does not provide a similar safe harbor for a party's mistake, inadvertence, surprise, or excusable neglect. That is, on any ordinary contract dispute in the California courts, paying a required fee a few days late would almost certainly have no negative impact on the party committing such a foot-fault, and courts have—and would—consider a party's explanation if presented to it pursuant to CCP § 473. But in arbitration, paying a fee on the 31st day—even if the arbitrator happily accepts the payment—is a dispositive issue. CCP § 473(b) makes the difference in treatment between other contracts (disputed in court) and arbitration contracts obvious.

Nor does SB 707 allow CCP § 473(b), as pre-existing California law, to relieve a party of SB 707's anti-arbitration consequences. Instead, SB 707 essentially dismisses any

arbitration proceeding and voids the arbitration agreement even when there is excusable but untimely payment. The California Court of Appeal recently held that "an order pursuant to [SB 707] vacating an order to arbitrate is not . . . within the meaning of the mandatory relief provisions of [CCP §] 473(b)." *Colon-Perez v. Security Industry Specialists, Inc.*, --- Cal. Rptr. 3d ---, 2025 WL 322949, *13-14 (Cal. Ct. App. Jan. 29, 2025). The court also prohibited CCP § 473(b)'s discretionary relief from applying to SB 707. Such discretionary relief is "inconsistent with the plain language of [SB 707] and the Legislature's purpose in enacting the statute." *Id.* at *15. While the supposed "purpose" behind SB 707 is "to ensure efficient adjudication of employee claims that are subject to arbitration,"[1] California courts forbid discretionary relief under CCP § 473(b) even when excusable but untimely payments did not delay arbitration. *Id.* at *10, 15. In other words, by categorically exempting SB 707 from the discretionary relief of CCP § 473(b), California courts have ensured that SB 707's 30-day payment requirement will frustrate arbitration, even when such anti-arbitration consequences do not further the supposed pro-arbitration purpose of SB 707. Ultimately, unlike actions implicating other types of contracts, CCP § 473(b) is unavailable as a potential avenue for "just" relief from SB 707's inflexible, arbitration-destroying consequences.

[1] *Colon-Perez* documented the thinly-veiled anti-arbitration motivation for SB 707. 2025 WL 322949, at *8 (quoting Assem. Com. on Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.), as amended May 20, 2019, p.10).

For all these reasons, SB 707 violates the equal treatment principle and is preempted by the FAA. *See, e.g.*, *Belyea*, 637 F. Supp. 3d at 756-59 ("[SB 707] makes arbitration agreements unenforceable on grounds that exist in the arbitration context only. That violates the equal-footing principle inherent in 9 U.S.C. § 2.[2]

IV. The Current Application of SB 707 Proves that the Statute Creates a Substantive Modification of California Contract Law, Requiring Preemption.

That SB 707 substantively modifies the principles of material breach and waiver is made even clearer by the application of the statutes by California state courts and arbitral providers. Repeatedly, businesses are summarily being deemed to have materially breached an arbitration agreement, waived their right to arbitrate, or had their arbitrations closed based on SB 707's artificial deadline to pay arbitral fees. These decisions have been made without any analysis into the circumstances of the late payment, regardless of whether the business was attempting to avoid arbitration or participating in good faith, and without a

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[2] *See, e.g.*, *Lee v. Citigroup Corp. Holdings, Inc.*, No. 22-cv-02718-SK, 2023 WL 6132959, at *2 (N.D. Cal. Aug. 29, 2023) (holding that the FAA preempts SB 707); *Miller v. Plex, Inc.*, No. 22-cv-05015-SVK, 2024 WL 348820, at *5 (N.D. Cal. Jan. 30, 2024) ("every court in this district that has considered the issue has held that the FAA does preempt [SB 707]"); *Hernandez*, 102 Cal. App. 5th at 243 (holding that SB 707 is preempted by the FAA because it "violates the equal-treatment principle" by "mandat[ing] findings of material breach and waiver for late payment that do not apply generally to all contracts or even to all arbitrations").

determination that the employee or consumer was prejudiced or the payee was harmed in any way.

This case is a prime example. After being ordered to arbitration by the Los Angeles County Superior Court, Dana Hohenshelt initiated arbitration against Golden State Foods Corp. with Judicial Arbitration and Mediation Services ("JAMS"). Appellant's Opening Br. 14-15. The parties then arbitrated the dispute ***for over a year***. *Id.* at 15. This included exchanging discovery, taking several depositions, submitting multiple discovery disputes to the arbitrator, and filing dispositive motions. *Id.* As the hearing date was approaching, JAMS issued two additional invoices on July 29 and August 29, 2022. *Id.* at 16. On September 30, 2022, consistent with its rules, JAMS informed the parties that "all fees must be paid in full by October 28, 2022, or [the] hearing may be subject to cancellation." *Id.* at 16-17. Shortly after receipt, Hohenshelt filed a letter with JAMS stating that he was unilaterally withdrawing from the arbitration under § 1281.98. *Id.* at 17. After Golden State received Hohenshelt's letter, it paid all outstanding fees by October 5, 2022—well before the October 28, 2022 deadline set by JAMS. *Id.*

Hohenshelt moved to lift the stay the trial court had entered pending arbitration. *Id.* at 17. The trial court denied the motion, finding that § 1281.98 required payment by the "due date," and that Golden State had complied with the requirement by paying the invoices before the deadline set by JAMS. The Court of Appeal reversed, holding that Golden State had materially breach its arbitration agreement with Hohenshelt and

that "[t]here is no escape hatch" for businesses that miss SB 707's 30-day payment deadline. *Hohenshelt*, 99 Cal. App. 5th at 1324-25. As a result, the Court of Appeal ruled that it did not matter that Golden State had engaged in the arbitration in good faith and paid all invoices by the deadline set by JAMS. The Court of Appeal instructed that the case could proceed in court, effectively ending the arbitration in the middle.

The Court of Appeal in *Espinoza v. Superior Court* reached a similar decision. 83 Cal. App. 5th 761, 773-78 (2022). There, after being compelled to arbitration, an employee filed a demand with the Arbitration Association ("AAA") against her employer. *Id.* at 772. On May 24, 2021, AAA issued an invoice to the employer for administrative fees. *Id.* On July 1, 2021, AAA confirmed to the employee's counsel that it had not yet received payment from the employer. *Id.* The employee moved to lift the trial court's stay, contending that under SB 707 the employer had materially breached the arbitration agreement. *Id.* The employer opposed the motion and provided evidence that it had approved the payment of the invoice within the 30-day period, but "due to a clerical error," the payment had not been received by the arbitration service provider within 30 days. *Id.* Nonetheless, when the employer learned on July 1, 2021 that the invoice had not been paid, it promptly paid the invoice on July 9, 2021. *Id.* The trial court denied the employee's motion, noting the clerical error and that the employee suffered no material prejudice from the delay. *Id.* The Court of Appeal reversed, finding that SB 707

contains no exceptions for substantial compliance, unintentional nonpayment, or the lack of prejudice. *Id.* at 775-78.

Perhaps the worst such exemplar is the outcome in *Bates v. Sephora USA, Inc.*, No. CPF-24-518617, 2024 WL 4452040 (Cal. Super. Oct. 03, 2024). There, a single consumer filed an arbitration demand against Sephora as part of a mass arbitration. Petition for Writ of Mandate at 16, *Sephora USA, Inc. v. Superior Court*, No. A171817 (Cal. Ct. App. Nov. 27, 2024). On April 16, 2024, JAMS issued an invoice to Sephora for the non-refundable filing fee associated with that consumer's arbitration, as well as filing fees for all the other consumers within the mass arbitration. *Id.* at 17. The very next day, Sephora informed JAMS that the consumers' demands were filed under an outdated and superseded arbitration agreement, and that JAMS did not have authority to preside over the arbitrations. *Id.* After review, JAMS determined that it did not have authority to preside over the arbitrations, and JAMS withdrew the invoice. *Id.*

The individual consumer then petitioned to compel Sephora to arbitrate with JAMS under the prior arbitration agreement, and also requested that the trial court issue sanctions under SB 707 based on Sephora's failure to pay the withdrawn invoice. *Id.* The trial court ultimately disagreed with JAMS and ordered Sephora to arbitrate the consumer's arbitration pursuant to its prior arbitration agreement. *Bates*, 2024 WL 4452040, at *1-2. But, the trial court went further. Despite JAMS's determination that it did not have authority to preside over the consumer's arbitration and its own withdrawal of the issued invoice, the trial

court held that Sephora had breached the arbitration agreement by failing to pay the withdrawn invoice. *Bates*, 2024 WL 4452040, at *2. The trial court then issued sanctions under SB 707. *Id.* Such a result would never have come about under typical contract interpretation jurisprudence. This is a clear example of SB 707 violating the equal treatment principle.

In addition to creating absurd results in California courts, under SB 707, plaintiffs have threatened arbitration providers with sanctions for simply accepting payment a few days late. This has resulted in providers preemptively jettisoning arbitrations midstream without any analysis of the circumstances surrounding the late payment.

An example of this is clearly illustrated in *Miller v. Plex, Inc.*, a consumer initiated arbitration with JAMS. No. 22-CV-05015-SVK, 2024 WL 348820, at *1 (N.D. Cal. Jan. 30, 2024). After JAMS sent a payment reminder with an extended payment due date for fees invoiced to continue the arbitration, the consumer threatened to sue JAMS, citing SB 707. Although the invoice recipient paid the fee on the date of the reminder, JAMS nevertheless closed the matter—apparently concerned about liability under SB 707 even though it had expressed its own willingness to accept payment a month after that date. Again, such a result would not have come about in a case outside the arbitration context.

AAA's decision in a mass arbitration against Wells Fargo & Company further highlights the issue. On March 13, 2024, AAA invoiced Wells Fargo for $465,000 for arbitrator compensation

related to 186 individual arbitrations. *Mosley v. Wells Fargo & Co.*, No. 24-CV-03173-JST, 2024 WL 4804972, at *2 (N.D. Cal. Nov. 14, 2024). The invoice stated that payment was due April 12, 2024. *Id.* After seeking clarification as to why it was being billed for arbitrator compensation at that point of the relevant fee schedule, Wells Fargo sent payment for the invoice by the due date.[3] *Id.* On April 17, 2024, AAA confirmed receipt of Wells Fargo's payment, but informed the parties that it did not receive the payment until after the April 12 deadline. *Id.* The AAA explained that under SB 707 and absent party agreement, it would close the arbitrations of 46 claimants residing in California. *See id.* Critically, AAA stated that it would be moving forward with the arbitrations of the remaining 140 claimants ***who were subject to the same invoice***. In other words, the mere fact that AAA purportedly did not receive payment within 30 days had no impact on claimants who were not subject to SB 707.

Over and over, California courts and arbitral providers have disregarded valid arbitration agreements, closed active arbitrations, and imposed steep financial penalties based on SB 707's harsh requirements related to arbitrary payment deadlines, regardless of harm to the payee or a party to an arbitration. These decisions were made only because of SB 707, and without analyzing the particular circumstances of each situation—in stark contrast to California's breach of contract jurisprudence outside the arbitration context. The decisions illustrate that SB

[3] Wells Fargo asserted that it sent payment of the invoice via electronic funds transfer on April 12, 2024. *Id.* at *2, n.3.

707 "singles out arbitration agreements for disfavored treatment" by "void[ing] [arbitration agreements] on a hair-trigger basis due to tardy performance." *Hohenshelt*, 99 Cal. App. 5th at 1328 (Wiley, J., dissenting). "Only arbitration contracts face this firing squad." *Id.* SB 707 is therefore preempted by the FAA.

CONCLUSION

For these reasons, amicus asks this Court to reverse the judgment of the Court of Appeal.

DATED: February 10, 2025

Respectfully submitted,

MCGUIREWOODS LLP

/s/ *Sabrina A. Beldner*
Sabrina A. Beldner

Counsel for Amicus Curiae
The Retail Litigation Center, Inc.
and The National Retail Federation

CERTIFICATE OF COMPLIANCE

Under Rule 8.520(c)(3) of the California Rules of Court, I hereby certify that this brief contains 4,438 words, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3). In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: February 10, 2025 Respectfully submitted,

MCGUIREWOODS LLP

/s/ *Sabrina A. Beldner*
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Counsel for Amicus Curiae
The Retail Litigation Center, Inc.
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 355 S. Grand Avenue, 42nd Floor, Los Angeles, California 90071.

On February 10, 2025, I served a copy of the within document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION IN SUPPORT OF DEFENDANT GOLDEN STATE FOODS CORP.** on the interested parties as follows:

SEE ATTACHED LIST

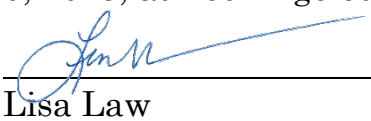
☒ **BY MAIL as noted on attached service list:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid on that same day following ordinary business practices. (C.C.P. § 1013 (a) and 1013a(3))

☒ **BY TRUEFILING:** I caused said document(s) to be serviced via electronic Service through TrueFiling at the time that I electronically filed this document.

On February 10, 2025**, I submitted to TrueFiling an electronic copy of the document to the California Supreme Court, which also satisfies any service requirement to the California Court of Appeal.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 10, 2025, at Los Angeles, CA.



Lisa Law

SERVICE LIST

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