No. S270798

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LAW FINANCE GROUP, LLC,

Plaintiff and Appellant,

v.

SARAH PLOTT KEY,

Defendant and Respondent.

California Court of Appeal, Second District, Div. Two
Case No. B305790
Appeal from Los Angeles Superior Court
Case No. 19STCP04251
Honorable Rafael A. Ongkeko

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Law Finance Group loaned Sarah Key $2.4 million to fund litigation, under an agreement that Key and her personal lawyer negotiated with LFG. But while Key won over $12 million in the funded litigation, she has refused to pay LFG any of the interest and fees she had agreed to pay. Arbitrators found that Key breached the loan agreement and that it was enforceable, except for two provision that they struck.

The trial court vacated the arbitration award at Key's request. The Court of Appeal reversed, holding that the trial court lacked power to vacate the award because Key missed the jurisdictional deadline for seeking vacatur.

That ruling was correct.

The California Arbitration Act imposes a firm deadline: A request for the trial court to vacate an arbitration award "*shall be served and filed not later than 100 days*" after service of the award. (Code Civ. Proc., §§ 1288, 1288.2.) That deadline applies to petitions to vacate (§ 1288) and to "response[s] requesting that an award be vacated" (§ 1288.2). Key's attempts to avoid the 100-day deadline are unavailing.

The 100-day deadline applies. Key argues that a response seeking vacatur can be filed *later* than 100 days after service of the arbitration award, so long as a petition to *confirm* is filed within 100 days of the award's service. But this assertion ignores section 1288.2's plain text and well-settled principles of

statutory interpretation. The Court should decline Key's invitation to rewrite the statute.

Equitable tolling and estoppel are unavailable. Key argues that the equitable tolling and equitable estoppel doctrines excused her from meeting section 1288.2's 100-day deadline. But those doctrines are categorically unavailable because the deadline is *jurisdictional,* and therefore not subject to common-law equitable relief. In any event, Key forfeited her tolling argument by failing to raise it in the trial court, and regardless, as the Court of Appeal found, she cannot meet the criteria for either form of relief on the record here.

Illegality challenges are subject to the 100-day deadline. For the first time in a Court of Appeal rehearing petition, Key argued that there is *no* deadline for seeking vacatur on the ground that an arbitration award enforces an illegal contract. But section 1288.2 contains no such carve-out. And this Court's prior decisions belie Key's premise that illegality challenges can be raised at any time.

The Court should affirm the Court of Appeal judgment ordering the trial court to confirm the arbitration award.

FACTUAL AND PROCEDURAL BACKGROUND

A. Law Finance Group lends Sarah Key money to finance her litigation.

Sarah Key became embroiled in a dispute over her deceased parents' estate. She sought to invalidate a trust amendment because rather than receiving the $1 million the trust amendment left to her, she wanted ongoing income from her parents' businesses, as well as a share of control over the estate's real estate investments. (1-AA-107-108; 2-AA-465-486; 6-AA-2029-2030, 2093.) But she needed money to continue pursuing her lawsuit. (Opinion ("Opn.")-4.)

Law Finance Group, LLC (LFG) is a California-licensed finance lender that has provided litigation capital in the State for more than 25 years. (1-AA-82; 8-AA-2892.) It loaned Key $2.4 million in 2013-2014 under a Loan and Security Agreement ("Agreement").[1] (Opn.-4; 1-AA-81-104, 108-109; 6-AA-1953-1954, 2095.)

LFG did not pressure Key to enter into the Agreement. (1-AA-111-112.) Key's personal attorney negotiated the Agreement on Key's behalf. (1-AA-111; 2-AA-264-270; 6-AA-2095-2096; 8-AA-3078, 3389.) Key—who went to law school—was involved in the negotiations, discussed the terms

[1] As part of a corporate restructuring, LFG recently assigned its interest in this case to Law Finance Group Holdings LP.

with her attorney, and understood them. (E.g., 1-AA-111; 8-AA-3396-3397, 3484.)

Under the Agreement, Key promised to repay the loan principal, and to pay interest compounded monthly, and several fees. (1-AA-81, 85-87.) The interest rate reflected the reality that the loan was non-recourse, meaning that LFG was only entitled to payment from Key's proceeds of the litigation and her portion of the trust. (1-AA-89.) If Key did not prevail in her litigation to reform the trust, LFG would lose most of its principal and all of its return.

B. Key wins millions of dollars in her litigation, but refuses to fully pay LFG as required by the loan agreement.

With LFG's funding, Key prevailed in her litigation in 2014. (1-AA-111.) She has received at least $12 million in distributions from the trust, with more forthcoming. (*Ibid.*; 6-AA-2103 & fn. 1; 8-AA-3782.)

Yet, Key repaid LFG *only* the principal; she refused to pay any interest or fees. (Opn.-2; 1-AA-111.) Indeed, despite having signed the heavily-negotiated Agreement and taken LFG's money, Key's later testimony indicates that she had *never* intended to pay the interest stated in the Agreement she signed. (8-AA-3782.)[2]

[2] Key testified: "I'm doing what I can to go through the [Agreement] document with [my attorney] to do appeasement behavior, but I'm not intending to keep the big ticket items,

C. LFG initiates arbitration to recover the funds that Key owes it under the loan agreement. Key files counterclaims.

LFG demanded arbitration under the Agreement's arbitration provision, asserting claims for breach of contract and unjust enrichment. (5-AA-1750-1760; 1-AA-103.)

Key did not object to arbitration. Quite the contrary, she counterclaimed for breach of contract and reformation. (6-AA-1951.) She asserted that the loan violated California's Finance Lender's Law because it was allegedly an improper *consumer* loan, notwithstanding the fact that the Agreement stated that the funds were intended to pay fees and costs of litigating her "*investment and business* claims." (Opn.-5; 1-AA-82; 6-AA-1951-1964, italics added.)

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which is the interest rate you're talking about and the compound. It's just insane."

Question: "You're not intending to keep the big picture items?"

Key: "No. The interest has to go down. It's got to be straight interest, and I'm thinking nine or eight percent was outrageous at that time. Remember, I'm doing appeasement behavior when I'm trying to get them to do the right thing, so I'm looking through stuff with [my attorney], but I'm not intending to keep the big picture items." (8-AA-3782.)

D. The arbitrators find the loan agreement is enforceable, except for provisions requiring compound interest and service fees. The arbitrators rule that Key instead owes LFG simple interest.

Three arbitrators presided over a six-day hearing that included extensive evidence and briefing.

The arbitrators found largely in LFG's favor. (Opn.-5; 1-AA-76, 106-123.) They found that Key was not pressured into signing the Agreement, that she understood its terms, and that the Agreement did not shock the conscience. (1-AA-111-112; see also 1-AA-118-119 [rejecting Key's claimed duress and alleged "conspiracy between some of her attorneys and LFG"].)

However, the arbitrators agreed with Key that the loan was a consumer loan, and they summarily rejected LFG's argument that Financial Code section 22250 exempted the loan from statutory compound-interest and service-fee limits. (1-AA-113-116.)[3] On that basis, the arbitrators disallowed compound

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[3] Under section 22250, the Financial Code sections prohibiting compound interest and service fees on consumer loans "do not apply to any loan of a bona fide principal amount of five thousand dollars ($5,000) or more, or to a duly licensed finance lender in connection with any such loan or loans, if the provisions of this section are not used for the purpose of evading this division . . . ." (Fin. Code, § 22250, subd. (b).)

The arbitrators simply stated that "exempting the prohibitions on compound interest and servicing fees in this case would undermine and evade the provisions of the California Finance Lenders Law." (1-AA-115.) But that bald assertion ignores Financial Code section 22251, which indicates that the

interest and service fees. (Opn.-5.) Instead, they enforced the Agreement with simple interest. (*Ibid.*)

The arbitrators awarded LFG $778,351, plus prevailing-party attorney fees and costs. (*Ibid.*)

E. LFG petitions to confirm the award; Key seeks to vacate it.

1. Background on statutory deadlines for petitions and responses.

The California Arbitration Act allows a party to petition to confirm an arbitration award within four years of being served with it. (Code Civ. Proc., § 1288.)[4]

The deadline for seeking to *vacate* an award is shorter: Any request for vacatur—*whether in a petition to vacate or in a response* to a petition to confirm—must be filed within 100 days of service of the award. (§§ 1288, 1288.2.)

Additionally, and more generally, any response to any arbitration-related petition "shall be served and filed within 10 days after service of the petition . . . ." (§ 1290.6.)

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exemption is only unavailable where the *amount* of the loan has been manipulated—i.e., where the amount is artificially inflated to exceed the $5,000 exemption threshold. There has been no suggestion that the amount of the loan here was artificially inflated to exceed $5,000—nor could there be, given that Key borrowed $2.4 million to fund her litigation.

[4] All further statutory citations are to the Code of Civil Procedure unless otherwise specified.

Section 1290.6 expressly allows the parties and the trial court to extend its 10-day deadline. (*Ibid.*) No provision authorizes any extension of section 1288's and 1288.2's *separate* requirement that petitions or responses seeking vacatur be filed within 100 days of service of the award. (§§ 1288, 1288.2.)

2. Filings in the present case.

The arbitrators served the award on September 19, 2019. (1-AA-76-77, 125-126.)

LFG petitioned to confirm the award approximately two weeks later, on October 1, 2019. (Opn.-5.)

Key's and LFG's attorneys agreed on a briefing schedule for the response and reply, and for a petition to vacate, response, and reply. (Opn.-6; 9-AA-4248-4272.) According to Key's attorney, "[w]e discussed the fact that there was a 10-day period of time after service of the Petition to Confirm for my client to respond to the Petition that could be changed by agreement of the parties," and agreed "that the 10-day period (which is referenced to CCP Section 1290.6) would be replaced by the briefing schedule made by agreement of the parties." (9-AA-4249-4250.)

There is no indication anywhere in the record that the attorneys ever discussed section 1288.2's *100-day* deadline for seeking vacatur—a deadline that parties *cannot* extend.

Key petitioned to vacate the award on January 27, 2020—130 days after being served with the award. (Opn.-6.) Key argued that the arbitrators' remedy—permitting simple

interest—exceeded their powers. (Opn.-6-7; 1-AA-132-152.) Her theory was that upon finding that two of the Agreement's provisions violated the Financial Code, the arbitrators were required to void the entire Agreement, or at least cancel all interest. (Opn.-7; 1-AA-132-152.)

On February 5, 2020—139 days after service of the award—Key repeated her vacatur arguments in a response to LFG's petition to confirm. (Opn.-6; 9-AA-4045-4067.)

F. The trial court vacates the arbitration award.

1. Procedural ruling: The court decides that it lacks jurisdiction to grant Key's motion to vacate, but vacates the award anyway based on Key's response to LFG's petition to confirm the award.

The trial court recognized that it lacked jurisdiction to grant Key's *petition* to vacate because Key had missed section 1288's 100-day deadline for petitions to vacate. (Opn.-7; 9-AA-4280.) But the court considered the arguments in Key's *response* seeking vacatur, treating that response as "timely" because it was filed within section 1290.6's deadline (10 days after LFG's petition to confirm plus an agreed-upon extension of those 10 days). (Opn.-7; 9-AA-4281-4282, 4287, citing § 1290.6.) The court added that, "If there is a need to extend the time to the actual filing date to enable the court to decide the petition on its merits, the court finds good cause to grant such an extension." (Opn.-7; 9-AA-4282.)

The court did not mention section 1288.2's 100-day deadline for responses seeking vacatur.[5]

2. Substantive ruling: The court finds the arbitration award void as against public policy.

On the merits, the trial court vacated the award as violating Key's unwaivable statutory rights or contravening public policy. Pointing to the arbitrators' conclusion that the loan violated the Financial Code by charging compound interest and service fees, the court found that the arbitrators' remedy of striking those provisions rather than voiding the entire Agreement was improper because the Financial Code states that if a lender "'willfully charge[s]'" more than "'the charges permitted by this division,'" the loan contract is "'void, and no person has any right to collect or receive any principal, charges, or recompense in connection with the transaction.'" (9-AA-4284-4286.)

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[5] Contrary to Key's description, the court did not find that the parties had agreed to extend multiple "statutory time *limits*" (Opening Brief on the Merits (OBM)-45, italics added.) Nor did the court extend multiple "*deadlines* for good cause." (*Ibid.*, italics added.) The court only referenced one statutory time limit, and one deadline: section 1290.6. The court did not make any finding regarding section 1288.2's 100-day deadline. (9-AA-4281-4282)

G. The Court of Appeal reverses, finding that the trial court lacked jurisdiction to vacate the award because Key did not timely seek vacatur.

LFG appealed, arguing that the trial court lacked jurisdiction to vacate the award because Key did not seek vacatur within section 1288 and 1288.2's 100-day limit. (Opn.-3) As a fallback, LFG argued that even if the court had jurisdiction, it erred under *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, in failing to make independent findings on the predicate for its conclusion that the award violated statutory rights and public policy—namely, findings on whether the loan terms in fact violated the Financial Code. (Opn.-3.)

The Court of Appeal reversed the vacatur order for lack of jurisdiction, reasoning as follows:

Section 1288.2 applies. The statutory language does not support Key's position that section 1288.2's 100-day deadline disappears if a party seeks *confirmation* before the 100th day. (Opn.-9-10.) The appellate court "decline[d] to create such an exception that does not exist in [section 1288.2's] statutory language." (Opn.-10.) Rather, sections 1288.2 and 1290.6 must be read together: "[W]hen a petition to confirm an arbitration award is filed, a response requesting that the award be vacated must be filed within 10 days of the petition (plus any extensions), and in any event no later than 100 days after service of the award." (Opn.-12.)

The facts do not support waiver/estoppel. Key's equitable estoppel and waiver arguments lacked merit: "Even assuming (without deciding) that there could be situations in which a party's failure to comply with the 100-day rule may be excused on equitable grounds, this is not one of them." (Opn.-16.) Moreover, the 100-day deadline cannot be waived because it is jurisdictional, and parties cannot confer jurisdiction by agreement. (Opn.-17-18.) Key's attorney is charged with knowledge of the law, and therefore so is Key. (Opn.-20.)

Disposition. Because Key did not timely request vacatur, section 1286 compelled granting LFG's petition to confirm. (Opn.-20-21.) That disposition mooted LFG's independent-findings argument. (Opn.-3.)

H. The Court of Appeal modifies its opinion and denies rehearing.

Key petitioned for rehearing, arguing *for the first time* that (1) section 1288.2's deadline was equitably tolled under *Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710 (she previously had argued only equitable *estoppel*), and (2) there is no deadline for seeking vacatur based on a violation of public policy or unwaivable statutory rights. (See Order Modifying Opinion ("Mod.").)

The Court of Appeal denied rehearing, and modified its opinion as follows:

No equitable tolling on these facts. The court held that "even assuming" that section 1288.2 does not foreclose equitable

tolling, tolling was unavailable on the facts here: "Key's claimed reliance on LFG's purported agreement to extend the 100-day deadline was not objectively reasonable because LFG did not have the authority to extend that deadline" because it was a "jurisdictional deadline[]." (Mod.-2-3.)

Challenges of illegality are subject to the same deadline. The court rejected Key's new argument that there is no deadline for seeking to vacate an award allegedly based on an illegal contract. (Mod-2.) The court observed that Key's argument would "'create an exception that would swallow the general rule hinging jurisdiction on the timeliness of the challenge.'" (*Ibid.*)

ARGUMENT

I. Section 1288.2 Establishes The Outside Deadline For Responses Seeking To Vacate Arbitration Awards. Key's Novel Statutory Interpretation Fails.

Although Key primarily argues that equity or other considerations excuse her missing section 1288.2's 100-day deadline, the last three pages of her brief argue that her response seeking vacatur was *timely* because the 100-day deadline never applied at all. As Key sees it, where a petition to *confirm* is filed within 100 days of service an award, a response seeking vacatur can be filed *after* the 100-day deadline. (OBM-§ D.) This should be Key's starting point rather than an afterthought, since it would moot any need to consider exceptions to the 100-day rule. LFG therefore will begin by addressing this issue.

There is no textual or logical basis for Key's position. Section 1288.2 expressly requires that any "response requesting that an award be vacated" be filed "not later than" 100 days after the service of the award. The Opinion correctly recognized that Key's position contradicts that plain language, as well as fundamental statutory-interpretation principles. (Opn.-10-15.)

A. The Arbitration Act prohibits courts from vacating an award absent a vacatur request filed within 100 days of service of the award.

Through a series of interlocking provisions, the California Arbitration Act narrowly cabins a court's power to act on an arbitration award.

Section 1286.4 imposes conditions on vacatur: "The court *may not vacate* an award unless" a "petition or response requesting that the award be vacated" or corrected "has been *duly served and filed*." (§ 1286.4, subds. (a)-(b), italics added.)

Later sections establish what it means for a vacatur or correction request to be "duly served and filed." As relevant here:

Petitions to vacate. "A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner." (§ 1288.)

Responses seeking vacatur. A separate statute applies the same 100-day deadline to requesting vacatur in a response to a petition to confirm: "A response requesting that an award be vacated or that an award be corrected shall be served and filed

not later than 100 days after the date of service of a signed copy of the award." (§ 1288.2.)

The plain meaning of this statutory framework is that (1) any request for vacatur—whether in a petition or in a response—must be filed within 100 days of service of the award; and (2) absent a timely-filed vacatur (or correction) request, the court has no power to vacate an award.

Key did not file her vacatur request within 100 days of service of the award. (Opn.-2-3.) Accordingly, the trial court lacked the power to vacate the award. (Opn.-8-15.)

Section 1290.6 provides a separate, *additional* requirement. It generically requires a response to any arbitration-related petition be filed within 10 days after service of the petition. (§ 1290.6.) That is, a response to a petition to compel arbitration, to vacate an award, or to confirm an award must be filed within 10 days of the petition. That rule shortens the normal motions procedure. And, as relevant here, it can *shorten* the 100-day window to seek vacatur (or, for that matter, the 4-year window to seek confirmation). In other words, section 1290.6 provides an *additional hurdle* to seeking vacatur.

Neither section 1288.2 nor section 1290.6 indicates that the Legislature intended section 1290.6 to *extend* section 1288.2's 100-day cutoff for a response seeking vacatur.

B. The Court of Appeal correctly rejected Key's contrary position.

Key disputes that section 1288.2 means what it says. The Court of Appeal correctly rejected her position.

1. Key's position is contrary to every principle of statutory interpretation.

Key contends that if a party files a petition to *confirm* an arbitration award within section 1288.2's 100-day window for seeking *vacatur,* a response seeking vacatur can be filed *later than* 100 days after service of the award and need *only* comply with section 1290.6's requirement that responses be filed within 10 days of petitions. Multiple principles of statutory interpretation foreclose Key's interpretation.

Plain language governs. If the statutory language is unambiguous, "the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

Section 1288.2's language could not be any more clear: "A response requesting that an award be vacated or that an award be corrected shall be served and filed not later than 100 days" after service of the award. (§ 1288.2.)

As the Opinion observed, Key's position contradicts this plain language. (Opn.-10.) She advocates a rule that interpolates an unwritten, convoluted exception into the unequivocal statutory mandate. But if the Legislature had intended to provide a separate deadline for responses seeking vacatur when a petition to confirm is filed within 100 days of

service, then surely the Legislature would have said so. After all, section 1288.2's *sole* purpose is to set a deadline for responses seeking vacatur or correction. (§ 1288.2.) The Legislature said nothing about special rules for responses when a petition to confirm is filed within 100 days. Instead, it used blanket language that makes 100 days the outside limit for *all* responses seeking vacatur, no matter whether the petition to confirm was filed on Day 20, Day 99, or Day 110.

The exception that Key urges simply does not exist.

Statutes must be harmonized. Statutes relating to the same subject are supposed to be harmonized where possible, giving effect to every provision. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091; *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476; § 1858.) That is especially true when, as here, the statutes were enacted as part of the same legislation. (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 932; see West's Ann. Code Civ. Proc., §§ 1288.2, 1290.6 [both added by Stats.1961, c. 461].)

Key's position runs afoul of this bedrock principle. Her position would give effect to *only* section 1290.6's deadline (10 days after service of the petition), while utterly ignoring section 1288.2's deadline (100 days after service of the award). As the Opinion held, nothing in the statutory scheme indicates that was the Legislature's intent. (Opn.-12.)

The correct interpretation effectuates *both* section 1288.2 *and* section 1290.6. As the Opinion put it: "[W]hen a petition to

confirm an arbitration award is filed, a response requesting that the award be vacated must be filed within 10 days of the petition (plus any extensions), *and* in any event no later than 100 days after service of the award. A response that fails to comply with either deadline is untimely." (Opn.-12, italics added.)

Again, section 1290.6 can *shorten* the 100-day deadline to seek vacatur when a petition to confirm is filed, requiring the response to be filed within 10 days of the petition. But section 1290.6 does not *substitute* for section 1288.2; rather, it is an *additional* requirement that applies *along with* section 1288.2's outside 100-day deadline.

Consistency with the broader statutory scheme. Sections 1288 and 1288.2 reflect the Legislature's intent to have *all* vacatur requests (whether by petition or response) filed within 100 days of service of the award. Key's interpretation contravenes that manifest intent by permitting responses to be filed after the 100-day window. (Opn.-10-11.)

Moreover, there would be no limit to the length of Key's proposed post-100-day extension. Key takes the view that the response deadline is controlled solely by section 1290.6, which sets a 10-day deadline but expressly allows the parties to extend that time. (Opn.-11 & fn. 4, 14.) As the Opinion correctly observes: "[T]he outside limit of timely responses would [thus] be uncertain and beyond the court's control . . . ." (Opn-11, fn. 4.) And, the parties could agree to extensions despite the fact section 1288.2 *does not allow* the parties to extend the 100-day

deadline for a response seeking vacatur. As the Opinion also correctly notes, "Key's interpretation therefore undermines the legislative scheme by permitting the parties to alter a deadline that the statutory language treats as firm." (Opn.-14.)

Key's interpretation would conflict even with *her own* statement of the statutes' purpose. She claims that the statutory scheme was designed "to have the *proceeding to vacate the award commenced* within 100 days." (OBM-62, italics added.) Filing a petition to *confirm* within 100 days only commences a *proceeding to confirm*. The trial court is not even empowered to consider vacatur unless and until a timely petition to vacate (or correct), or timely response seeking vacatur (or correction), is filed—without such a request, the court must confirm. (§§ 1286, 1286.4.)

Like everything else in the Arbitration Act, this statutory framework furthers the public policies of arbitral finality and limited judicial review. It does this by creating tight deadlines for requests to vacate awards (which must be filed within 100 days of the award) and longer deadlines to request confirmation (within 4 years of the award).

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There is no textual support for the rule that Key posits. Courts cannot rewrite a statute by "giv[ing] the words an effect different from the plain and direct import of the terms used." (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992.) The Court of Appeal correctly declined to do so here.

2. The appellate decisions that Key cites do not refute the Opinion's well-reasoned holding.

Instead of addressing section 1288.2's actual text, Key relies on language in various Court of Appeal decisions describing the vacatur-request deadlines. (OBM-63-64.) None of those cases involved the situation here—namely, a response seeking vacatur that was filed later than 100 days after service of the award, but within section 1290.6's response window.

All of the cases that Key cites are inapposite:

- One held that section 1290.6's 10-day rule can *shorten* the 100-day period—a holding that requires a response to be filed *both* within the 10-day period *and* within the 100-day period. (*Coordinated Construction, Inc. v. Canoga Big "A," Inc.* (1965) 238 Cal.App.2d 313, 316-317.)

- Three involved responses that *missed both* the 100-day *and* 1290.6 deadlines. (*DeMello v. Souza* (1973) 36 Cal.App.3d 79, 83-84 ["the conclusion is inescapable that Respondents violated both the 100-day statute of limitation set forth in section 1288.2 and the 10-day statute of limitation contained in section 1290.6"]; *Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* (2015) 243 Cal.App.4th 538, 543 [petition to vacate served 108 days after service of award; later-filed response seeking vacatur filed 41 days after service of petition to confirm]; *Lovret v. Seyfarth*

(1972) 22 Cal.App.3d 841, 847-848 [award served Dec. 16; petition to confirm filed Jan. 30; "answer" seeking correction filed Apr. 14].)

- One involved a response that *satisfied both* deadlines. (*Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 63-66 [response filed within 100 days of award's service and within section 1290.6 deadline].)

Nor do the snippets that Key quotes from these inapposite decisions (OBM-63-64) shore up her position. Intermediate appellate decisions do not bind this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [decisions binding only in *inferior* courts].) They are relevant only for their persuasive value. Even if any of the decisions that Key cites could be read as hinting at the rule she urges, they certainly do not articulate any reasoned or persuasive basis for it.

- *Santa Monica, supra*, 243 Cal.App.4th at p. 544, stated that "'[a]s a general matter,' a party seeking vacatur "must either" (1) file and serve a timely vacatur petition "or (2) file and serve a timely response (that is, within 10 days) to the other party's petition to confirm the award . . . .'" *Santa Monica* did not mention section 1288.2 or explain the omission. (*Id.* at p. 545.) And *Santa Monica*'s authoring justice joined the Opinion here, including the Opinion's explanation that *Santa Monica* does *not* stand for the rule Key advocates. (Opn.-15.)

- *DeMello, supra*, 36 Cal.App.3d at p. 83, did not elaborate on its statement that an "exception" exists to section 1288.2's 100-day rule if a party petitions to confirm the award before expiration of the 100-day period. *DeMello* simply cited section 1290.6, without any analysis. It supplies no basis for ignoring section 1288.2's plain language.

- *Coordinated, supra*, 238 Cal.App.2d at p. 317, stated that "section 1290.6 limits the 100-day provision found in section 1288.2," and that "the 100-day limit applies only when the other party to the arbitration does not file a petition to confirm the award." But in context, *Coordinated* meant only that section 1290.6 requires filing a response within 10 days of a petition to confirm, even where that deadline falls *before* the 100-day deadline. Indeed, that was the only issue before the court. (*Id.* at pp. 316-319.) In other words, a response seeking vacatur must comply *both* with section 1290.6's 10-day rule *and* with the 100-day rule. We agree.

- *Lovret, supra*, 22 Cal.App.3d at p. 856, simply cited *Coordinated* for the proposition that response-filing time is governed by section 1290.6, with no further analysis.

- *Oaktree, supra*, 182 Cal.App.4th at pp. 66-67, quoted *DeMello*'s "one exception" language, with "see also" citations to *Lovret* and *Coordinated*. *Oaktree* acknowledged that the 10-day and 100-day deadlines "are not inherently inconsistent." (*Id.* at p. 67.) *Oaktree* did not articulate any basis for choosing one over the other. Like the other decisions that Key cites, *Oaktree*

therefore supplies no basis for ignoring section 1288.2's dictate that "[a] response requesting that an award be vacated" "*shall* be served and filed not later than 100 days" after service of the award. (§ 1288.2, italics added.)

In sum, Key cites no authority providing any reasoned basis for the rule she advocates. Section 1288.2 must be given its plain meaning, which is supported by all principles of statutory interpretation: Section 1288.2's 100-day deadline sets the outside limit for *all* responses seeking vacatur. Because Key's response missed this deadline, the trial court had no power to vacate the arbitration award.

II. Section 1288.2's 100-Day Deadline Cannot Be Equitably Tolled; Even If It Could, The Court Of Appeal Correctly Rejected Tolling Here.

Key argues that equitable tolling excused her missing section 1288.2's deadline. (OBM-31-48.) But section 1288.2 is not subject to equitable tolling. Further, even if equitable tolling was otherwise available, (1) Key forfeited the issue by not raising it in the trial court, and (2) Key cannot meet the tolling criteria.

A. Section 1288.2 is a jurisdictional deadline and therefore is not subject to tolling.

1. Jurisdictional deadlines cannot be equitably tolled.

Equitable tolling is a "judicially created, nonstatutory doctrine" that allows courts to suspend or extend a "statute of limitations" for practical or equitable reasons. (*Saint Francis, supra*, 9 Cal.5th at p. 719, quotation marks omitted.)

As a court-created doctrine, equitable tolling cannot extend a jurisdictional statutory deadline. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674 [courts cannot extend jurisdictional notice-of-appeal deadline absent statutory authorization, regardless of "considerations of estoppel or *excuse*," italics added]; *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 482 ["[b]ased on the jurisdictional nature" of the deadline to rule on a new trial motion, "courts have rejected requests to create equitable exceptions or provide equitable relief from the harsh consequences of the trial court's failure to rule timely"]; *Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 524 ["With jurisdictional deadlines, the rule, like the song, is what a difference a day makes. If the statute is to provide exceptions, the job is for the Legislature, not the courts, to carve them out"]; cf. *U.S. v. Wong* (2015) 575 U.S. 402, 408-409 [a deadline is not subject to equitable tolling if "Congress made the time bar at issue jurisdictional"; rather, court must enforce limitation "even if equitable considerations would support extending the prescribed time period"].)

This rule follows from the nature of jurisdictional statutory deadlines: They are limits that the *Legislature* has imposed on the *courts' power*. If courts could simply extend jurisdictional deadlines based on a court-created doctrine, then "jurisdictional" would have no meaning.

2. Section 1288.2's 100-day deadline is jurisdictional.

Statutory time limits are jurisdictional "where the Legislature clearly so intends." (*Kabran v. Sharp Memorial Hosp.* (2017) 2 Cal.5th 330, 343.)

Such intent is found where a statute's plain text "deprive[s] courts of the *power"* to act on an untimely request. (*Ibid.*)

That is the case here. Multiple appellate decisions hold that the Arbitration Act's 100-day filing and service deadlines are jurisdictional. (E.g., Opn.-17-18 [citing cases and concluding that sections 1288 and 1288.2 are jurisdictional]; *Santa Monica, supra*, 243 Cal.App.4th at pp. 544-545 [section 1288 is a "jurisdictional statute of limitations"; "noncompliance deprives a court of the power to vacate an award"].)

The jurisdictional nature of section 1288/1288.2's 100-day deadline is evident in how those statutes are incorporated into the neighboring statutes that are part of the same chapter, Code Civil Procedure, Part 3, Title 9, Chapter 4. Indeed, courts regularly—and properly—read the statutory provisions together. (E.g., *Santa Monica, supra*, 243 Cal.App.4th at pp. 544-545 [citing section 1286.4 as making section 1288 a "jurisdictional statute of limitations" that impacts the court's "power to vacate"].)

Taken as a whole, the detailed statutory framework plainly and narrowly limits a court's *power* (i.e., jurisdiction) to grant vacatur when a party fails to comply with sections 1288/1288.2:

Court's powers. Section 1286 cabins the court's powers: "[T]he court *shall confirm* the award as made," unless it corrects or vacates the award, or dismisses the proceeding, "*in accordance with this chapter*," i.e., in accordance with Chapter 4. (§ 1286, italics added.) The court *must* confirm the award, unless the court takes another of the short menu of permitted actions allowed by the other statutes in Chapter 4.

Conditions for vacatur. In that same Chapter 4, section 1286.4 builds on section 1286 by specifying the conditions for vacating an award. Again, the Legislature framed this as a *restriction* on the court's *powers*: "The *court may not* vacate an award *unless* . . . [a] petition or *response requesting that the award be vacated"* or corrected "has been *duly served and filed*[.]" (§ 1286.4, italics added.) "Duly" means "in accordance with legal requirements." (Black's Law Dict. (11th ed. 2019).)

Thus, the court has no power to vacate *unless* a vacatur request is filed in accordance with the legal requirements set forth elsewhere in the Arbitration Act. (*Rivera v. Shivers* (2020) 54 Cal.App.5th 82, 94 ["Section 1286.4 conditions the court's *power* to vacate on the petition or response requesting such relief being 'duly served and filed,'" italics added]; *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, 1203, 1205-1206 ["Section 1286.4 limits the court's *power* to vacate an award" to instances where there was a "'duly served and filed'" petition or response seeking vacatur or correction, italics added].) And if the court lacks the

power to vacate the award "in accordance with this chapter" the court "shall confirm the award." (§ 1286.)

Requirements to "duly" serve and file a vacatur request. The only remaining question is what it means to "duly serve[] and file[]" a "petition or response requesting that the award be vacated," the limit on a court's power to vacate (§ 1286.4).

Much of the rest of Chapter 4 is devoted to answering that question. Sections 1288 and 1288.2 (which are part of Chapter 4) supply the service and filing deadlines: A petition to vacate or a response seeking vacatur "shall be served and filed not later than 100 days after" service of the award. (§§ 1288, 1288.2.)

Accordingly, a court cannot vacate an award "in accordance with this chapter" if no vacatur request was duly served and filed within section 1288/1288.2's 100-day deadline. (§§ 1286, 1286.4, 1288, 1288.2.) Absent a vacatur request that is "duly" served and filed in accordance with that statutory deadline, the court *must* confirm the award. (§ 1286.) Indeed, the court has no "power"—i.e., no jurisdiction—to vacate. (*Santa Monica, supra*, 243 Cal.App.4th at pp. 544-545; *Abers, supra,* 217 Cal.App.4th at p. 1203.) And, because jurisdictional deadlines are not subject to equitable tolling, there can be no tolling here as a matter of law.

Key reaches the opposite conclusion—i.e., that the 100-day deadline is an ordinary statute of limitations subject to tolling—only by looking at section 1288.2 in a vacuum. (OBM-36-41.) But statutory language is not supposed to be examined "in isolation";

rather, it is examined "in the context of the statutory framework as a whole in order to determine its scope and purpose . . . ." (*Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856-857.) And as shown, the statutory context here—including sections 1286 and 1286.4—indicates a legislative intent to curtail judicial power by imposing a *jurisdictional* deadline. Simply put: The face of the statutory scheme constrains the court's powers. That's jurisdictional.

None of the reasoning in the intermediate appellate decisions that Key cites changes the analysis. Two of her cited cases glancingly describe section 1288 as a "statute of limitations" or "limitations period," without any explanation. (*Humes v. Margil Ventures, Inc.* (1985) 174 Cal.App.3d 486, 499; *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1192, fn. 10.) The third refers to "the 100-day statute of limitation," and then explains that section 1286.8 prohibits a court from correcting an award absent a duly served and filed request. (*DeMello, supra*, 36 Cal.App.3d at pp. 83-84.) But that decision did not analyze section 1286.8's impact on whether the deadline is jurisdictional. It therefore does not persuasively refute the jurisdictional analysis described above.

B. The *Saint Francis* analytical framework points to the same result: Equitable tolling is categorically unavailable.

The fact that section 1288.2 is jurisdictional is dispositive, and the Court need not use the *Saint Francis* framework to

determine whether the Legislature intended to foreclose equitable tolling as to section 1288.2. That is because jurisdictional deadlines are never subject to court-created extensions. But even if section 1288.2 was *not* jurisdictional, the *Saint Francis* framework would dictate the same conclusion: Equitable tolling does not apply to section 1288.2's deadline as a matter of law.

1. *Saint Francis* requires analyzing whether the Legislature intended to foreclose equitable tolling of a given deadline.

Although courts presume that ordinary statutory deadlines are subject to equitable tolling, "that presumption can be overcome." (*Saint Francis, supra,* 9 Cal.5th at p. 720.) Overcoming the presumption does not require an express statutory prohibition on tolling. Rather, "[a] court may conclude that explicit statutory language or a manifest policy underlying a statute simply cannot be reconciled with permitting equitable tolling, 'even in the absence of an explicit prohibition.'" (*Ibid.*)

In analyzing whether the Legislature intended to foreclose equitable tolling, courts consider a statute's language, structure, and legislative history. (*Ibid.*; see, e.g., *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 373-383 [based on these factors, 10-year limitations period for latent construction defects is not subject to tolling].) Here, those indicators signal that the Legislature intended to foreclose tolling of section 1288.2's 100-day deadline.

2. The Arbitration Act's language and structure indicate an intent to foreclose equitable tolling.

Section 1288.2 is part of an interlocking set of statutes that circumscribe courts' powers when presented with a petition to confirm or vacate an arbitration award. (See § II.A.2., ante.) Section 1288.2 must be read together with those statutes. (E.g., *Meza, supra*, 6 Cal.5th at pp. 856-857 [statutory language is not examined "in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose"].)

The statutes that flow into section 1288.2 use absolute language:

- The "*court shall*" confirm an award unless it vacates, corrects, or dismisses "*in accordance with this chapter*"; and

- "The *court may not vacate* an award unless" a petition or response seeking vacatur or correction "has been *duly served and filed*" (i.e., as specified in sections 1288 and 1288.2).

(§§ 1286, 1286.4, italics added.)

These statutes' phrasing contrasts with the run-of-the-mill statutes imposing the limitations periods and other deadlines that Key cites. (OBM-36-37 & fn. 4.) Although those run-of-the-mill statutes specify a deadline for filing a case or a petition, they are not framed as limitations on the *court's* power—i.e., they do not mandate what the court "*shall*" do and what it "*may not*" do.

Rather, they simply speak to when a *party* must file a document or commence a suit. (See *ibid.*)

Thus, the Legislature's curtailing of courts' vacatur power reflects an intent to displace the common law, including the equitable tolling doctrine. If the Legislature intended courts to have the power to equitably toll the vacatur deadlines, it would make no sense for the Legislature to have expressly directed that courts "may not vacate" an award absent compliance with specific service and filing requirements.

3. Key's arguments are unavailing.

Key argues that the Legislature did not intend to foreclose equitable tolling. Her arguments lack merit.

Federal Arbitration Act (FAA) cases are inapposite. That the Ninth Circuit has held that equitable tolling can extend the *Federal Arbitration Act's* vacatur-request deadline (OBM-35) is beside the point. The FAA's vacatur provisions do not condition trial courts' power to vacate on a duly served and filed request. FAA section 9 requires a court to confirm an award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." (9 U.S.C. § 9.) The cross-referenced sections 10 and 11 specify the grounds on which a court "may make an order" modifying, correcting, or vacating an award. (9 U.S.C. §§ 10, 11.) Neither section prohibits a court from granting vacatur absent a duly served and filed request. The FAA's timing requirement (section 12) is neither referenced

in section 9 nor does it contain its own limitation on court powers. (9 U.S.C. §§ 9, 12.)

In any event, other courts have held that the FAA's deadline *cannot* be equitably tolled, because application of the equitable tolling doctrine runs afoul of speedy resolution of arbitration disputes, as well as arbitral finality. (E.g., *Chilcott Entertainment v. John G. Kinnard* (Colo.Ct.App. 2000) 10 P.3d 723, 725-726 ["[T]he congressional purpose in enacting the FAA was to encourage speedy and final resolution of arbitration disputes. A determination that equitable tolling is not permitted is consistent with that goal"]; *Cigna Ins. Co. v. Huddleston* (5th Cir. 1993) 986 F.2d 1418, 1993 WL 58742, at *11 (per curiam) ["there is no 'discovery rule' or 'equitable tolling' exception"].)

Section 1288.2 must be construed in context. Key asserts that section 1288.2 is an ordinary statute of limitations because some courts have referred to it that way, it is located in an article entitled "Limitations of Time," and its language is similar to that of limitations periods that can be tolled. (OBM-36.) Key's focus on section 1288.2's language is too narrow. As shown, section 1288.2 must be construed along with sections 1286 and 1286.4. Read against the backdrop of those sections, section 1288.2 is far from an ordinary deadline, but rather can only be read as a legislative limitation on courts' power. (§ II.A.2., *ante*.)

Express prohibitions are not the only way to foreclose tolling. Key notes that certain statutes and court rules

expressly prohibit tolling, and that there is no expressly stated prohibition here. (OBM-37-39.) But express prohibitions are not required. Rather, legislative intent to foreclose tolling can be gleaned from other indicators. (*Saint Francis, supra,* 9 Cal.5th at p. 720.) Here, the structure of the statute, its language, and the language of the surrounding sections evidence a legislative intent to foreclose equitable tolling.

Some deadlines shorter than 100 days are exempt from tolling. Key argues that short statutory deadlines do not demonstrate a legislative intent to forbid tolling. (OBM-39.) But even Key does not argue that the length of a statutory deadline is dispositive. Nor could she, since courts have held deadlines *shorter* than 100 days immune to equitable tolling. (*Ventura Coastal, LLC v. Occupational Safety and Health Appeals Bd.* (2020) 58 Cal.App.5th 1, 35 ["equitable tolling has not been applied to the [60-day] time limit for filing a civil appeal"]; *Kabran, supra*, 2 Cal.5th at p. 342 [trial court has "no power" to rule on new trial motion absent notice of intent to move for a new trial filed within 15-days deadline].)

Section 1290.6 reinforces that section 1288.2 is not subject to tolling. Section 1290.6 provides a general 10-day window for responding to petitions to commence an arbitration-related proceeding, and section 1290.6 expressly permits courts to extend that time for "good cause." The Legislature thus knew how to permit judicial extensions when it so intended. Yet, there is no comparable extension provision in section 1288.2, which was

adopted at the same time as section 1290.6. That, too, evinces an intent by the Legislature to foreclose tolling as to section 1288.2.

Key urges a different inference by analogizing to *Saint Francis*. Her analogy does not work.

Saint Francis involved Government Code section 11523, which permits parties to seek judicial review of an agency decision by filing a mandamus petition "within 30 days after the last day on which reconsideration can be ordered." (Gov. Code, § 11523.) Under section 11523, a petitioner's request for the agency to prepare the record can extend the petition deadline until 30 days after delivery of the record. (*Ibid.*) *Saint Francis* concluded that this extension provision did not evince an intent to foreclose equitably tolling the 30-day filing deadline in other circumstances. (9 Cal.5th at p. 722.) It reasoned that the statutory exception "bears little relation to the purpose of equitable tolling"—excusing noncompliance that resulted from "an obstacle not acknowledged in the statute." (*Ibid.*)

Our circumstance is nothing like section 11523. First, ours is not a situation concerning two possible exceptions (one statutory, one non-statutory) to a single deadline. Sections 1290.6 and 1288.2 impose two different deadlines, and the Legislature allowed extending only one. Second, unlike section 11523, section 1290.6's statutory extension *is* related to "the purpose of equitable tolling" (9 Cal.5th at p. 722): Section 1290.6 allows the court to extend the 10-day deadline for "good cause." (§ 1290.6.) The Legislature, thus, *specifically*

authorized courts to extend the section 1290.6 deadline for obstacles not acknowledged in the statute. It chose *not* to authorize any such extension for section 1288.2. The only reasonable inference is that although the Legislature allowed some flexibility in the shorter 10-day deadline for responses generically, the Legislature intended section 1288.2 to provide a firm, outside deadline for responses seeking vacatur specifically.

Nor is *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327 (OBM-41) on point. The statute there imposed a 60-day filing deadline. (*Id.* at p. 341; § 863.) In holding that this deadline could be equitably tolled, *Wolstoncroft* noted that the statute at issue excused certain filing requirements upon a showing of good cause, and interpreted this as legislative recognition "that the short deadline to file a reverse validation action precludes strict enforcement." (*Id.* at p. 341; § 863.) Here, neither section 1288.2 nor any of the other statutes addressing vacatur excuse any filing requirements.

Legislative history undercuts Key's position. Key notes that the legislation enacting section 1288.2 increased the time to seek vacatur from 90 days to 100 days. (OBM-42.) Key construes the Legislature's amenability to that 10-day increase as a signal that the Legislature did not intend the 100-day deadline to be rigid. (*Ibid.*)

But the change from 90 to 100 days was not intended to add flexibility to the deadline; it was to make the deadline easier to compute and therefore, more certain. (Key Motion for Judicial

Notice Exh. 1, p. 9 [Recommendation of the California Law Revision Commission: "[t]he 100-day period is easier to compute accurately than the 90-day period which is often thought of as a three-month period"].) Easing computation of a deadline is consistent with an intent that it be rigidly enforced. It does not signal that the Legislature intended any judicial extensions.

C. Additionally, Key is not entitled to tolling on the facts here.

Even if tolling was not categorically unavailable, it is not available here.

1. Key forfeited her tolling argument by failing to timely raise it.

Key did not argue in the trial court that section 1288.2's 100-day deadline was equitably tolled, much less develop a reasoned argument that she met the tolling criteria. (9-AA-4238-4244; see also Mod.-2 [appellate court: Key cited *Saint Francis* "for the first time in her petition for rehearing"].)[6] She thereby forfeited the issue. (*Daneshmand v. City of San Juan Capistrano* (2021) 60 Cal.App.5th 923, 936 [plaintiffs forfeited equitable

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[6] Key's trial-court pitch for unspecified "equitable" relief under the heading "Under Section 1290.6, This Court May Excuse the Timing Requirements" (9-AA-4243-4244) does not constitute an argument that *section 1288.2's* deadline was *tolled,* given that Key did not use the word "tolling," identify the tolling criteria, or explain why she met them. And Key's attorneys' declarations argued only that LFG was "*estopped*" from disputing timeliness. (9-AA-4254, 4276, italics added.) Estoppel and tolling are distinct doctrines, as Key's own brief points out. (OBM-50, citing *Lantzy, supra*, 31 Cal.4th at p. 383.)

tolling by failing to raise it in the trial court]; *Gray1 CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897 [same].)

2. In any event, tolling is unavailable because missing the 100-day deadline was not objectively reasonable.

Even for deadlines that *can* be equitably tolled, tolling is not "'a cure-all for an entirely common state of affairs.'" (*Saint Francis*, *supra*, 9 Cal.5th at p. 724.) Rather, equitable tolling applies "only 'occasionally and in special situations,'" where well-settled criteria are met. (*Ibid.*) The Court of Appeal correctly held that Key did not meet the criteria. (Mod.-2-3.)

Equitable tolling requires "objectively reasonable" conduct. (*Saint Francis, supra*, 9 Cal.5th at p. 729.) This requirement is distinct from subjective good faith. As relevant here, it focuses on whether Key's attorneys' actions "were fair, proper, and sensible in light of the circumstances." (*Ibid.*)

The Court of Appeal held that it was objectively *unreasonable* for Key's attorneys to rely on LFG's purported agreement to extend section 1288.2's deadline, because parties do not have the power to extend that deadline. (Mod-3.) Key's opening brief does not develop any argument that there was a reasonable basis to believe that the parties can agree to extend the section 1288.2 deadline. (See OBM-45-48.)

Instead, Key argues that her attorneys reasonably believed that where a petition to confirm is filed within 100 days of service

of the award, the response can be filed after section 1288.2's 100-day deadline. (OBM-45-48 & fn. 5.) But that belief was objectively unreasonable, as section 1288.2 states no such exception. On the contrary, it broadly and unequivocally requires that "[a] response requesting that an award be vacated . . . shall be served and filed not later than 100 days after" service of the award. (§ I.A., *ante*.) Key has not identified any statutory language or interpretive principle that even arguably supports the exception she claims, nor do any of the cases that she cites provide a reasoned basis for it. (§ I.B., *ante*.)

Key's attorneys are charged with knowledge of California law. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1316.) Assuming the existence of a statutory exception that is contrary to the plain language of the governing statute and unsupported by any principle of statutory interpretation or reasoned analysis in the case law is objectively unreasonable. (Cf. *Saint Francis Memorial Hosp. v. State Department of Public Health* (2021) 59 Cal.App.5th 965, 977-982 (*Saint Francis II*) [on remand from this Court, denying equitable tolling because attorney's mistake in missing significance of statutory language that affected deadline was objectively unreasonable].)

Key asserts that in all of the cases where courts found vacatur untimely, the party seeking vacatur failed to comply with section 1290.6 or did not file a response at all. (OBM-47.) But even if true, that does not make it reasonable for her attorneys to

rely on some never-before-applied exception that is directly contrary to section 1288.2's unambiguous language.

Finally, the record does not support Key's assertion that LFG's attorneys "apparently" believed that section 1288.2 was inapplicable. (OBM-48.) The emails between LFG's attorney and Key's attorney never even mention section 1288.2. Nor does Key's attorney's declaration state that he and LFG's attorney ever discussed section 1288.2. (See 9-AA-4249-4272.) As far as the record shows, it just never came up.

It isn't surprising that there is no indication that LFG's attorney had section 1288.2 in mind when discussing the briefing schedule. Section 1288.2 only governs *responses seeking vacatur*. In other words, section 1288.2 stated a deadline relevant to Key, not to LFG. LFG was not seeking vacatur, and therefore had no reason to pay attention to that deadline. As one court summed up in rejecting an argument similar to Key's, where a deadline can negatively impact only one party's rights, that party has "far more incentive to be careful" than the opposing party. (*Saint Francis II, supra,* 59 Cal.App.5th at p. 982 [rejecting equitable tolling; attorney's failing to identify correct deadline was objectively unreasonable].)

Section 1288.2 unequivocally imposes a 100-day deadline for a "response requesting that an award be vacated . . . ." There was no objectively reasonable basis for Key's counsel to nonetheless conclude that section 1288.2 contains an unwritten exception that made compliance unnecessary. Thus, Key cannot

invoke equitable tolling, even if the statutory deadline could be tolled and even if Key had not forfeited the issue by failing to timely raise it.

III. Section 1288.2's Deadline Is Not Subject To Equitable Estoppel. In Any Event, The Opinion Correctly Rejected Estoppel On The Facts Here.

Key argues that LFG is equitably *estopped* from enforcing section 1288.2's 100-day deadline. That argument fails for two independent reasons. First, estoppel does not apply to jurisdictional deadlines. Second, as the Opinion held, even if equitable grounds *could* excuse noncompliance with section 1288.2 in some situations, "this is not one of them." (Opn.-16.)

A. Equitable estoppel is categorically unavailable.

1. Because section 1288.2's deadline is jurisdictional, it is not subject to estoppel.

"The expiration of a jurisdictional period is not, and by its nature cannot, be affected by the actions of the parties." (*Hollister, supra*, 15 Cal.3d at p. 674.) In the same vein, "fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent." (*Kabran, supra*, 2 Cal.5th at p. 339; see also *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2020) 9 Cal.5th 125, 138-139 ["the consent of parties cannot confer jurisdiction"].)

These rules dispose of Key's estoppel claim.

Her claim is based on "the actions of the parties" (*Hollister,* 15 Cal.3d at p. 674)—namely, on the parties' stipulated briefing schedule. (OBM-53-56.) But those actions cannot excuse compliance with section 1288.2 because its deadline is *jurisdictional.* (§ II.A.2., *ante;* cf. *Hollister,* 15 Cal.3d at p. 674 [notice-of-appeal deadline not subject to extension]; *Garibotti, supra*, 243 Cal.App.4th at p. 482 [estoppel cannot extend court's jurisdictional deadline to grant motion to vacate].)

2. Key's arguments are unavailing.

Key does not address whether jurisdictional deadlines are subject to estoppel. Instead, she erroneously treats section 1288.2 as an ordinary statute of limitations and argues that no statutory language forecloses estoppel. (OBM-51-53.) But because section 1288.2 is jurisdictional (§ II.A.2., *ante*), no explicit statutory language is required to foreclose equitable estoppel.

Nor do any of Key's other arguments withstand scrutiny.

Case law does not support Key's position. Key string-cites decisions that she describes as considering equitable relief claims on the merits. (OBM-51-52.) The Opinion correctly rejected her reliance on those decisions. (Opn.-17-20 & fn. 8.) None actually analyzed an argument that section 1288.2 is immune from equitable estoppel because it is jurisdictional. To the extent they addressed section 1288.2 estoppel at all, they did so on the specific facts presented, without analyzing the predicate

jurisdictional question.[7] They therefore provide no reasoned basis for finding that section 1288.2 is non-jurisdictional or that

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[7] See *Abers, supra*, 217 Cal.App.4th at pp. 1208-1209 [*on the facts*, respondents not estopped from enforcing section 1290.4's service requirement; no analysis of whether jurisdictional deadlines are subject to estoppel, but concludes that section 1288's 100-day deadline is jurisdictional and not subject to section 473(b) relief]; *Coordinated, supra*, 238 Cal.App.2d at pp. 318-320 [affirming denial of section 473(b) relief from missed section 1290.6 deadline]; *DeMello, supra*, 36 Cal.App.3d at p. 84 [denying section 473(b) or equitable relief from missed section 1288.2 and 1290.6 deadlines; states that relief can be granted where criteria are met, without explaining why]; *Southern Cal. Pipe Trades Dist. Council No. 16 v. Merritt* (1981) 126 Cal.App.3d 530, 541 [finding "[g]ood grounds" to excuse missed section 1288.2 deadline, where appellant was never properly served with the award; no reference to estoppel or discussion of whether section 1288.2 is subject to it]; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1512 [court lacked jurisdiction to grant untimely section 473(b) motion; no discussion of whether section 1288.2 is susceptible to section 473(b) or equitable relief]; *Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 746 [in affirming confirmation of arbitration award, stating without explication that section 473(b) or equitable relief may be available as to section 1288.2—but "none of those exceptions applies here"]; *Lovret, supra*, 22 Cal.App.3d at pp. 856-857 [section 1288.2 waiver ineffective because solicited by an unqualified temporary judge; no analysis whether section 1288.2 is jurisdictional or can be waived]; *Trabuco, supra*, 96 Cal.App.4th at p. 1192, fn. 10 [declining to consider last-minute argument that the failure to timely seek vacatur barred challenges to award; no discussion of whether section 1288.2 is jurisdictional or subject to estoppel]; *Shepherd v. Greene* (1986) 185 Cal.App.3d 989, 993-994 [in nonbinding State Bar arbitration, where there is right to post-arbitration de novo trial, post-arbitration trial tolls section 1288 deadline]; *Humes, supra*, 174 Cal.App.3d at pp. 492, 495-500 [defendant's incarceration excused his missing section 1288.2

jurisdictional deadlines are subject to estoppel. Nor are intermediate appellate decisions binding on this Court, in any event. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

Legislative history does not support Key's position. Equally unavailing is Key's reliance on legislative *inaction.* She emphasizes that even after appellate decisions suggested that equitable relief is available, the Legislature did not amend section 1288.2 to clarify that they were wrong. (OBM-52-53.)

But "legislative inaction is a weak reed upon which to lean." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156, quotation marks omitted.) Legislative inaction may signal many things other than acquiescence with case law, including "the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors." (*Saint Francis, supra*, 9 Cal.5th at p. 723, quotation marks omitted [declining to infer legislative intent from lack of statutory amendments].)

Further undermining any inference based on inaction, the Legislature did not intervene when decisions held that section 1288.2 is jurisdictional and that relief is *not* available. (E.g., *Santa Monica, supra*, 243 Cal.App.4th at p. 545.) Thus, nothing can be read into the legislative inaction here.

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deadline to challenge Labor Commissioner award; no analysis whether 1288.2 is jurisdictional and not subject to estoppel].)

The bottom line: Key has articulated no persuasive basis for concluding that section 1288.2's jurisdictional deadline is subject to equitable estoppel. It isn't.

B. Additionally, the Opinion correctly held that the circumstances here do not trigger estoppel.

The Opinion rejected Key's estoppel argument on its facts, holding that Key could not have reasonably believed that LFG had legal authority to waive section 1288.2's 100-day deadline. (Opn.-20.)[8] The Court need not review that holding if it agrees that section 1288.2 is categorically immune from estoppel. But if the Court does reach this issue, the merits independently dispose of Key's estoppel claim.

Key's estoppel claim required her to establish that (1) LFG was apprised of the facts; (2) LFG behaved in a way that gave Key a right to believe that LFG intended its statements to be acted on; (3) Key was ignorant of the true state of facts; and

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[8] Contrary to Key's claim, the trial court did not "determine[] the issue as a matter of fact," nor did LFG have an opportunity to present contradictory evidence. (OBM-55-56.) In the trial court, the only place Key argued estoppel was in her attorneys' *declarations* accompanying her *reply* in support of the petition to vacate. (9-AA-4254, 4276.) There was no opportunity for LFG to refute her reply declarations. Moreover, the trial court held it lacked jurisdiction to consider the petition to vacate because Key failed to comply with section 1288, and considered her response seeking vacatur only because it found "good cause" to extend the *section 1290.6* deadline. (9-AA-4280-4282.) The court did not discuss section 1288.2's deadline or find that LFG was estopped to enforce it. (*Ibid.*)

(4) Key reasonably relied on LFG's statements. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1338.)

Key bears the burden of establishing all of these elements. (*Id.* at p. 1337.) She cannot do so, for multiple reasons.

No showing that LFG was apprised of the facts. Key's core premise is that LFG agreed in writing that a stipulated briefing schedule would replace the "statutory deadlines" and "statutory limitations" for responses, i.e., sections 1290.6 and 1288.2. (OBM-54-55.)

But the record belies that premise. The emails between the parties' attorneys do not mention section 1288.2. They only reference section 1290.6's 10-day deadline. (9-AA-4257-4272.)

Key's attorney's summary of his call with LFG's attorney likewise does not mention any agreement about section 1288.2; Key's attorney said that they discussed that the *section 1290.6* deadline "would be replaced by" the parties' agreed-on schedule. (9-AA-4250.) There is no evidence that LFG's attorney thought about *section 1288.2* (which applied only to Key, not to LFG), realized that the briefing schedule might push Key's response beyond the 100-day deadline, or intentionally waived that deadline. (OBM-56.) Key therefore cannot show that LFG was apprised of *any* fact that she was unaware of.

No showing that LFG made a representation about section 1288.2. The absence of any discussion between the attorneys about section 1288.2 dooms Key's estoppel claim for another reason, too. To justify reliance, a statement must be

"plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels." (*Steinhart, supra*, 47 Cal.4th at p. 1318.) Yet, Key relies on inference, not certainty: She asks the Court to infer that LFG's explicit agreement to a briefing schedule included an *implicit* agreement to forego enforcing a statutory deadline that the parties never discussed. There is no basis for that inference. As noted, there is no evidence that LFG's attorney was thinking about section 1288.2 or when that statutory deadline would fall. Key's attorney knew how to elicit and document an explicit waiver when he wanted to: He and LFG's attorney specifically agreed that section 1290.6 would not apply. (9-AA-4250.) There is no parallel statement regarding section 1288.2.

Key's attorney could not reasonably rely on an *assumption* that LFG was *implicitly*, knowingly waiving that deadline.

LFG had no authority to waive section 1288.2. Unlike section 1290.6, section 1288.2 does not state that the parties can extend or waive its deadline by stipulation. (§§ 1290.6, 1288.2.) Rather, section 1288.2 is a jurisdictional deadline that the parties cannot change or waive. (§ II.A.2., *ante*.)

Key's attorney is charged with this knowledge of California law. (*Steinhart, supra*, 47 Cal.4th at p. 1316; *Abers, supra*, 217 Cal.App.4th at p. 1210.) As the Opinion correctly reasons, Key's attorney therefore "could not have reasonably believed that LFG had the legal *authority*" to waive section 1288.2. (Opn.-20.) Any reliance on a supposed implicit agreement by LFG to waive

section 1288.2 was not reasonable and cannot support estoppel. (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1262 ["To give rise to equitable estoppel, the promisee's reliance must be reasonable"]; *Parsons v. Bristol Development* Co. (1965) 62 Cal.2d 861, 869 ["*Reasonable reliance* resulting in a foreseeable prejudicial change in position is the essence of equitable estoppel," italics added].)

Estoppel is particularly disfavored when the party asserting it "is represented by an attorney at law." (*Steinhart, supra*, 47 Cal.4th at p. 1316.)

The facts here do not overcome that disfavor. Key's attorney never asked LFG whether it intended to waive section 1288.2, nor would LFG have had the power to do so in any event. LFG therefore is not estopped from enforcing that deadline.

IV. The 100-Day Deadline Applies Equally To Arguments That An Arbitration Award Enforces An Illegal Contract.

Key contends that the 100-day vacatur deadline does not apply where, as here, a party seeks vacatur on the ground that an award violates public policy by enforcing an illegal contract. (OBM-56-62.)[9] Such a rule is at odds with the deadline's

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[9] The arbitrators struck the compound-interest and service-fee Agreement terms that they incorrectly found violated the Financial Code, and instead required Key to pay simple interest. (1-AA-115-118.) Key has not argued that charging simple interest on a loan is inherently illegal. Rather, her public-policy argument is that the Financial Code required the arbitrators to

jurisdictional nature and with this Court's own precedent recognizing that parties can waive such objections. This Court should reject it.

A. The 100-day deadline's jurisdictional nature is dispositive.

The 100-day deadline limits courts' *fundamental jurisdiction* to consider vacatur. (§ II.A.2., *ante*.) In this respect, it is similar to the new-trial-motion and notice-of-appeal deadlines—absent compliance, the court *has no power* to act. (*Kabran, supra*, 2 Cal.5th at p. 342 ["the court has no power" absent a timely-filed notice of intent to move for a new trial]; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56 ["the appellate court has no power" to consider an untimely-filed appeal].)

The jurisdictional deadlines for new trial motions and notices of appeal are not excused just because the moving party/appellant challenges the judgment as contrary to public policy or enforcing an illegal contract. Does that mean courts may sometimes have to dismiss an appeal, or deny a new trial motion, despite an argument that a judgment violates fundamental public policy or an unwaivable statutory right? Yes. But jurisdictional time limits serve purposes that reflect their own critical public policies. Where the Legislature has tied the

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declare the Agreement *entirely* void instead of enforcing it as modified to excise the offending provisions. (9-AA-4045-4067.)

courts' hands, the courts cannot act even when doing so would prevent a violation of some other public policy.

The same is true of the jurisdictional deadline to seek vacatur. On its face, the 100-day deadline is absolute. It applies to every "petition to vacate an award" and to every "response requesting that an award be vacated . . . ." (§§ 1286.2, 1286.4, 1288, 1288.2.) There can be no judicial review for untimely vacatur requests simply because they "assert that the award contravenes a statute; to do so would create an exception that would swallow the general rule hinging jurisdiction on the timeliness of the challenge." (*Santa Monica, supra*, 243 Cal.App.4th at p. 546.)

B. This Court has already recognized that contract-illegality arguments are waived if not timely raised.

Key argues that courts must vacate awards that enforce an illegal contact, even absent a timely vacatur request. (OBM-60-61.) Her premise is that a party cannot "'waive[]'" illegality claims by failing to timely raise them. (*Ibid.*)[10] Yet, this Court has already recognized that illegality arguments are waived if not timely raised. Although those decisions did not

[10] This is technically a forfeiture, not a waiver, but we use the term "waiver" to match the terminology in Key's brief and in other cases discussed in this section. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [forfeiture is the loss of a right based on a failure to timely assert it; waiver is the intentional relinquishment or abandonment of a known right].)

specifically involve the 100-day deadline for seeking vacatur, they defeat Key's premise that courts must *always* consider illegality arguments, with no timing restrictions. Claims that a contract is illegal or that an award violates public policy by enforcing an illegal contract are forfeited if not timely raised. A party therefore cannot escape the 100-day vacatur deadline merely by making such a claim.

1. In *Moncharsh*, this Court concluded that parties waive judicial review of whether a contract is illegal if they fail to timely raise illegality before or during arbitration.

Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, considered two different types of illegality arguments: (1) arguments that "only a portion" of the contract is illegal, and (2) arguments that an "entire contract" is illegal. (*Id.* at pp. 29-32.) *Moncharsh* concluded that *both* types of claims of illegality are waived if not timely raised.

Partial illegality. A claim that part of a contract is illegal is an arbitrable assertion, unless the illegality argument implicates the legality of the contract's arbitration provision. (*Id.* at p. 30.) Judicial review of the resulting arbitration award may be available when a party argues that the award violates public policy or that party's unwaivable rights. (*Id.* at p. 32-33.) But *Moncharsh* restricted the availability of such review. (*Id.* at pp. 30-31.) The plaintiff in *Moncharsh* claimed that an arbitration award enforced an illegal contractual fee-splitting

provision. (*Id.* at p. 30.) Because that single-provision-illegality issue did not call into question the enforceability of the contract's arbitration provision, the plaintiff "was not required to first raise the issue of illegality in the trial court in order to preserve the issue for later judicial review." (*Ibid.*)

But the Court went on to state: "The issue *would have been waived*, however, had [the plaintiff] *failed to raise it before the arbitrator*." (*Ibid.*, italics added.) Claims that the arbitrator violated public policy by enforcing an illegal contract provision are waived "for *any future judicial review*" if those issues were not promptly raised before the arbitrator. (*Id.* at p. 31, italics added [finding illegality issue "preserved for our review" because it was timely raised in arbitration]; see also, e.g., *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1386 [holding, based on *Moncharsh*, that appellant "waived for any judicial review" argument that an arbitration award was illegal by failing to raise it first before the arbitrator]; *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 761-762 [under *Moncharsh*, party had to raise argument that award violated its rights "with the arbitrator in order to preserve it for judicial review"].)

Moncharsh explained the important policy rules animating this waiver doctrine:

- "Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally

decide a dispute between the parties." (3 Cal.4th at p. 30.)

- "[W]e cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award." (*Ibid.*)
- "A contrary rule would condone a level of 'procedural gamesmanship' that we have condemned as 'undermining the advantages of arbitration.'" (*Ibid.*)
- "Such a waste of arbitral and judicial time and resources should not be permitted." (*Ibid.*)

Entire-contract illegality. A claim that an *entire contract is illegal*—i.e., that "grounds exist to revoke the entire contract"—must be raised in the trial court *before arbitration* to "preserve the issue for later judicial review." (*Id.* at pp. 29-30.) This is because entire-contract illegality "would also vitiate the arbitration" provision and permit the party to "avoid arbitration altogether." (*Ibid.* [plaintiff did not have to object to arbitration on illegality grounds to preserve claim that a single provision was illegal as opposed to entire-contract illegality]; see also *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 680-681 [plaintiff forfeited argument that language in arbitration agreement violated public policy and rendered the agreement

unconscionable, by failing to raise it in opposing petition to compel arbitration].)[11]

The take-away message: An argument that an entire contract is void or that a provision violates public policy must be timely raised or else the award enforcing the contract will be confirmed.

2. In *Richey,* this Court deemed forfeited an illegality argument raised for the first time on appeal.

This Court has similarly applied ordinary forfeiture rules to a late argument that an arbitration award enforces an illegal contract provision.

In *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, the arbitrator ruled that an employer did not violate California and federal law by terminating an employee based on a company policy against employees engaging in outside employment while on protected medical leave. (*Id.* at pp. 912-913.) The plaintiff's answering brief in this Court argued that the employer's policy was "illegal" and that the arbitration award therefore "denied Appellant his unwaivable legal right to be protected from discrimination and retaliation based on taking [statutory] medical leave." (Answering Brief On the Merits in *Richey v.*

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[11] Key violated this rule: She did not raise her argument that the entire "Loan Agreement is void" and that "it is an unenforceable illegal contract" (OBM-57-58) to a court pre-arbitration. Indeed, she did not resist arbitration at all; she even filed counterclaims. (6-AA-1951.)

AutoNation, Inc., No. S207536 (filed June 17, 2013) 2013 WL 3809590, at *36-37.)

The Court found that the plaintiff had "forfeited" this argument by "failing to raise it in the trial court." (60 Cal.4th at p. 920, fn. 3, citing *Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 660.) The Court "express[ed] no opinion" on the merits of the forfeited illegality issue, and affirmed the order confirming the arbitration award. (*Ibid.*)

3. Because this Court has long recognized that illegality/public-policy claims are waived if not timely raised, it follows that such claims are not exempt from the statutory deadline for seeking vacatur.

Moncharsh and *Richey* eviscerate Key's premise that in cases involving arbitration, there can be no time constraints on presenting arguments challenging a contract's legality or the award's consistency with public policy. Both decisions establish that failing to *timely* assert such an illegality claim waives judicial review of the claim. Once Key's premise drops away, there is no reason to exempt this ground for vacatur from the statutory deadline that applies to all grounds for vacatur.

The Arbitration Act reflects the strong public policy of encouraging the use of alternative dispute resolution by ensuring that arbitration is "a speedy and relatively inexpensive means of dispute resolution." (*Moncharsh, supra,* 3 Cal.4th at p. 9.) As part of that public policy, the Legislature required filing vacatur requests within 100 days of service of the award—a far shorter

time than the 4 *years* to petition to confirm an award. (§§ 1288, 1288.2.) Timeliness and the public policies it furthers are no less important when the vacatur ground is contract illegality or voidness. And since this Court has long recognized that such a ground can be waived if not timely raised, there is no basis to exempt contract-illegality/public-policy vacatur arguments from the Legislature's decision that all vacatur requests must be served and filed within 100 days of service of the award.

C. The cases that Key cites do not warrant ignoring the 100-day deadline.

Key cites cases that authorize judicial review of whether an award enforces an illegal contract. (OBM-56-61.) Almost none of those cases addressed *when* such an argument can be raised. The vast majority did not consider or decide that issue.

For example, *Loving & Evans v. Blick* (1949) 33 Cal.2d 603 (OBM-58-60) says that judicial review is available because courts should not enforce illegal claims or awards. (*Id.* at pp. 611-614.) *Loving* did not address *when* parties can seek vacatur. The decision does not mention timing. Indeed, there was no need to, because motions to confirm and to set aside the award were filed and decided *within two months* of the arbitrator issuing his award—well within the then-applicable three-month deadline for such motions. (*Id.* at pp. 605-606; Stats. 1927, c. 225, p. 406, § 8.) And the more-recently decided *Moncharsh* and *Richey* decisions

make clear that judicial review can be waived if not timely sought.[12]

That *Loving* and most of Key's other cases did not address timing means that they did not consider the enforceability of the statutory 100-day deadline, which balances the availability of judicial review with another important policy: prompt resolution of challenges to an arbitration award. Those cases thus provide no support for Key's proposed rule, which would open the door to vacatur arguments whenever a party seeks to confirm an

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[12] Likewise, the following cases were about the *scope* of review; none held there is no deadline for seeking vacatur on the ground that an award enforces an illegal contract—and several *acknowledged Moncharsh*'s waiver rule: *Pearson, supra,* 48 Cal.4th at pp. 676, 681; *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1353, fn. 14; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 277; *Brown v. TGS Management Company, LLC* (2020) 57 Cal.App.5th 303, 313-314; *Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 1200; *Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 452-453; *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327; *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal.App.4th 882, 890, fn. 6, 892-893.

Other cases did not involve arbitration confirmation/ vacatur at all. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 91, 101 [enforceability of arbitration agreement]; *Olivera v. Grace* (1942) 19 Cal.2d 570 [power to set aside default judgment against incompetent defendant]; *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312 [choice-of-law issue].)

arbitration award—even years after the 100-day deadline has passed.

Key's only case that even arguably *may* endorse her position is *South Bay Radiology Medical Associates v. W.M. Asher, Inc.* (1990) 220 Cal.App.3d 1074.[13] *South Bay*'s introductory paragraph states that "the defense of illegality may be raised at any time," and it later concludes that under *Loving*, illegality "would not be waived by failure to petition to vacate the award within 100 days," but rather could be raised "in response to [a] petition to confirm." (*Id.* at pp. 1079-1081.)

It is unclear whether *South Bay* intended to authorize *untimely* responses seeking vacatur, given that *South Bay* did not mention section 1288.2's response deadline. (See *Santa Monica, supra*, 243 Cal.App.4th at p. 546 ["declin[ing] to construe" *South Bay* as authorizing judicial review of untimely challenges];

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[13] Neither of the cases that Key cites in a footnote to her *South Bay* discussion (OBM-61, fn. 6) endorsed an exception to the 100-day deadline for arguments that the underlying contract is illegal. *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581-1582, was an appeal from an order compelling arbitration, which is only appealable after an award is confirmed and judgment entered; the Court of Appeal held that the appellant did not have to seek vacatur to appeal the order compelling arbitration. *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 817-820, held that the appellant did not have to seek vacatur to preserve an argument that he was entitled to disaffirm an agreement containing an arbitration clause and the arbitration award because he was not represented by a guardian ad litem.

Mod.-2 [same].) But to the extent that's what *South Bay* meant, it was wrongly decided and is unpersuasive. *South Bay*:

- Did not address the effect of the 100-day deadline's *jurisdictional* status;
- Relied on *Loving*, which involved a timely vacatur request and which addressed only the scope of judicial review, not timing (see p. 67, *ante*); and
- Pre-dates *Moncharsh* and *Richey*, so did not have the benefit of this Court's guidance that contract-illegality claims are waived if not timely raised.

South Bay therefore provides no basis for jettisoning the 100-day rule whenever a disgruntled party argues that an award enforces an illegal contract, violates public policy, or contravenes unwaivable rights.

V. At A Minimum, Key Is Not Entitled To Judgment In Her Favor: The Court Of Appeal Must Consider LFG's Argument That The Trial Court Committed Another, Independent Error.

Key's failure to timely request vacatur compels affirming the Court of Appeal's judgment directing confirmation of the arbitration award. (§ 1286.) But even if the trial court had power to consider vacatur, the proper disposition would *not* be affirmance of the trial court's vacatur order, as Key urges. (OBM-14, 65.) It would be to direct the Court of Appeal to decide an alternate ground for reversing the vacatur order that the parties briefed, and that the trial court did not reach.

Specifically: The trial court accepted Key's argument that the Financial Code required voiding the Agreement because the arbitrators found that its compound interest and service fee provisions are impermissible, and that the arbitrators' failure to void the Agreement violated public policy and unwaivable statutory rights. (9-AA-4286.)

LFG argued in the Court of Appeal that the trial court erred in vacating the award without *reviewing the evidence de novo* and making *independent* findings on the underlying issue—i.e., on whether the compound interest and service fee provisions violate the Financial Code. (LFG's Opening Brief 44-58; LFG's Reply Brief 43-56; *Ahdout, supra*, 213 Cal.App.4th at pp. 39-40; *Lindenstadt, supra*, 55 Cal.App.4th at p. 893 & fn. 8.) LFG has consistently argued that those provisions are permissible. If they are, there would be no basis to void the Agreement, and the arbitrators' failure to void it could not be contrary to public policy

LFG sought a remand for the trial court to undertake the necessary analysis—an analysis that would require the trial court to independently consider LFG's arguments that the Financial Code restrictions on compound interest and service fees *do not even apply* to the loan both because it is a commercial loan, not a consumer loan, and because regardless of the consumer/commercial distinction, Financial Code section 22250 clearly exempts the loan from the restrictions. (6-AA-2113-2114, 2236-2238, 2264-2271.)

The Opinion's holding that the trial court lacked jurisdiction to consider vacatur mooted LFG's independent-findings argument. (Opn.-3.) But if the jurisdictional holding is reversed, the appellate court must be directed to decide the independent-findings issue—not, as Key urges, to simply affirm the trial court's vacatur order. The trial court's failure to make independent findings severely prejudiced LFG, given that the court vacated the award on the ground that two of the Agreement's terms violated the Financial Code, without ever considering LFG's arguments that the provisions were entirely legal. Fairness and the strong public policy favoring arbitral finality dictate that before a trial court takes the extreme measure of vacating an arbitration award, it must independently examine all aspects of whether the award in fact violates public policy—not just whether the arbitrators' remedy is permissible in light of the arbitrators' findings.

CONCLUSION

The trial court had no power to vacate the arbitration award, because Key failed to file a petition or response seeking vacatur within the statutory 100-day deadline. The Court of Appeal's judgment directing the trial court to confirm the award should be affirmed.

Alternatively, if the Court of Appeal's judgment is reversed, the Court of Appeal should be directed to consider whether the trial court erred in vacating the award without independently reviewing the evidence and making findings on whether the loan was subject to the Financial Code restrictions on which Key's vacatur argument relies.

Date: March 11, 2022

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **Answer Brief on the Merits** contains 13,836 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: March 11, 2022 s/ Alana H. Rotter

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