No. __-____

IN THE
Supreme Court of the United States

CARMAX AUTO SUPERSTORES CALIFORNIA, LLC,
Petitioner,

v.

WAHID ARESO,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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August 20, 2015

QUESTION PRESENTED

In the Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 *et seq.*, California created a quasi-class-action procedure – known as a "representative" action – in which an "aggrieved employee" can sue for civil monetary penalties "on behalf of himself or herself and other current or former employees." *Id.* § 2699(a), (g)(1). The employee controls the lawsuit but has to pay 75% of the civil penalties recovered to a state labor agency.

Respondent Areso entered into an arbitration agreement in which he agreed to arbitrate any disputes arising from his employment with CarMax solely on an individual basis rather than as a representative of other employees. The California Court of Appeal, applying the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015), refused to compel individual arbitration of respondent's PAGA claim, and the California Supreme Court denied review.

The question presented is:

Whether California's *Iskanian* rule, which categorically exempts representative PAGA actions from mandatory arbitration, is preempted by the FAA.

PARTIES TO THE PROCEEDINGS

Petitioner CarMax Auto Superstores California, LLC was defendant in the California Superior Court, respondent in the California Court of Appeal, and petitioner in the California Supreme Court, in connection with the action filed by respondent Wahid Areso, on behalf of himself and all others similarly situated. CarMax, Inc. also was a named defendant, but pursuant to a tolling agreement by stipulation and order filed June 24, 2008, it was dismissed without prejudice and therefore is not a party to the proceedings in this Court.

CarMax Auto Superstores West Coast, Inc. was also a defendant in the California Superior Court and a respondent in the California Court of Appeal, in connection with the action filed by John Wade Fowler, on behalf of himself and all others similarly situated. However, the courts below granted CarMax's motion to compel arbitration of Mr. Fowler's claim, and he did not seek review of that decision in the California Supreme Court. Accordingly, neither CarMax Auto Superstores West Coast, Inc. nor Mr. Fowler is a party to the proceedings in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner CarMax Auto Superstores California, LLC states the following:

CarMax Auto Superstores California, LLC is an indirect, wholly owned subsidiary of CarMax, Inc. T. Rowe Price Associates, Inc. holds 14.94% of CarMax Inc.'s stock.

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Petitioner CarMax Auto Superstores California, LLC respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The order of the California Supreme Court denying a petition for review (App. 1a) is not reported. The opinion of the California Court of Appeal (App. 2a-25a) is not reported (but is available at 2015 WL 352045).

JURISDICTION

The California Court of Appeal entered its judgment on January 28, 2015. The California Supreme Court denied a petition for review on April 22, 2015. On July 15, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 20, 2015. App. 91a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, mandates that arbitration agreements in contracts involving transactions in interstate commerce be enforced according to their terms. Among other provisions, section 2 of the FAA, 9 U.S.C. § 2, provides, in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The provisions of California's Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.*, are reprinted at App. 58a-68a.

INTRODUCTION

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that when a party agrees to arbitration – and in doing so agrees to waive the ability to represent other plaintiffs in that arbitration – that agreement (including the waiver of class procedures) must be enforced under the FAA. The FAA displaces state laws that insist on classwide procedures the parties agreed to forgo. Moreover, class-arbitration procedures frustrate the FAA's purposes because they sacrifice the simplicity, speed, and informality of the arbitration process.

In this case, the California courts disregarded these settled principles in holding that the parties' agreement to waive "representative" actions under California's Private Attorneys General Act of 2004 ("PAGA") was unenforceable under state law. A PAGA representative action is a type of quasi-class action in which a single "aggrieved employee" may seek monetary civil penalties for violations of the State's Labor Code on behalf not only of himself, but also of other employees aggrieved by the challenged labor practice. Cal. Lab. Code § 2699(a). In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015), the California Supreme Court held that arbitration agreements that waive representative procedures under PAGA are contrary to public policy and unenforceable under state law. The *Iskanian* court also concluded that its rule was not preempted by the FAA because PAGA claims are brought "on behalf of the state" and thus "lie[] outside the FAA's cover-

age." *Id.* at 151. Applying *Iskanian*, the California Court of Appeal here refused to enforce the parties' arbitration agreement, which unequivocally states that respondent will proceed solely on an individual and not on a representative basis.

This Court should grant certiorari to review whether California's *Iskanian* rule complies with the FAA and this Court's precedents. It does not. It is "straightforward" that a state-law rule that categorically exempts certain claims from arbitration is "displaced by the FAA." *AT&T Mobility*, 131 S. Ct. at 1747. Moreover, the procedures PAGA creates – a single plaintiff seeking to recover based on violations of the rights of similarly situated plaintiffs – present the same obstacles to the FAA's purposes as the classwide procedures *American Express* and *AT&T Mobility* held could not be imposed on parties who agreed to arbitrate exclusively one-on-one. *Iskanian*'s sleight-of-hand argument that PAGA claims are really the *State's* claims cannot justify evading the FAA given that a PAGA representative claim is initiated, maintained, and controlled by the *employee*, who agreed to waive representative procedures.

Because the *Iskanian* rule flouts this Court's settled FAA precedents, and threatens to undermine the commercial benefits of arbitration agreements in a broad range of cases, this Court's intervention is critical. Indeed, if left unreviewed, *Iskanian* will provide a roadmap by which States hostile to arbitration can categorically exempt state-law claims from the FAA. *Iskanian* is but the latest example of the California judiciary's longstanding hostility toward arbitration and disregard for this Court's precedents. This Court should grant certiorari once again to vindicate the supremacy of federal law.

STATEMENT

A. The Federal Arbitration Act

As this Court has repeatedly held, the FAA evinces a federal policy that arbitration agreements be enforced "according to their terms" without interference by state law. *AT&T Mobility*, 131 S. Ct. at 1748; *see id.* (holding that the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *American Express*, 133 S. Ct. at 2309 (describing the "overarching principle that arbitration is a matter of contract"). Arbitration is a matter of consent, not coercion. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Accordingly, when parties specify "*with whom* they choose to arbitrate their disputes" – in this case, by providing for arbitration solely on a bilateral basis and not on a representative basis – the FAA requires that courts enforce the parties' choice. *Id.* at 683-84; *see also AT&T Mobility*, 131 S. Ct. at 1748-49.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It concluded that bilateral arbitration between a single claimant and a single defendant would benefit individuals and businesses alike by reducing the expense, delay, and uncertainties associated with court litigation. *See*, *e.g.*, S. Rep. No. 68-536, at 3 (1924) (noting that avoiding burdensome litigation would benefit "big business and little business alike," as well as "corporate interests" and "individuals").

Section 2 of the FAA, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The final clause of section 2 preserves the ability of States to apply "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements. But States may not categorically exempt specific claims from arbitration. *See AT&T Mobility*, 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."). Nor may States create rules that "interfere[] with fundamental attributes of arbitration" as envisioned by the FAA. *See id.* at 1748.

B. The Private Attorneys General Act

PAGA provides that "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a).[1] PAGA does not create new substantive

[1] If the Labor Code does not provide for a civil monetary penalty, PAGA provides its own penalties, generally $100 per employee subjected to a violation per pay period for the first violation, and $200 per employee per pay period for each subsequent violation. *See* Cal. Lab. Code § 2699(f)(2).

rights; it is merely "a procedural statute allowing an aggrieved employee to recover civil penalties – for Labor Code violations – that otherwise would be sought by state labor law enforcement agencies." *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009).

The plaintiff in a PAGA lawsuit is the "aggrieved employee," who seeks to recover penalties "on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a); *see id.* § 2699(g)(1) (providing that "an aggrieved employee may recover [a] civil penalty . . . in a civil action . . . filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed"). If the aggrieved employee succeeds in recovering any penalties, 75% of the recovery must be paid to California's Labor and Workforce Development Agency ("LWDA" or "Agency"), and the remaining 25% is retained by the plaintiff and the other "aggrieved employees" on whose behalf the plaintiff filed suit. *Id.* § 2699(i). A prevailing employee is also entitled to reasonable attorney's fees and costs incurred in the action. *Id.* § 2699(g)(1).

Before filing a PAGA action, an "aggrieved employee" must give notice of the claimed violations to the employer and the LWDA. *See id.* § 2699.3(a)(1). The LWDA is deemed to authorize the aggrieved employee to sue if it fails to respond within 33 days, responds that it does not intend to investigate, or investigates and does not issue a citation within 158 days. *See id.* §§ 2699.3(a)(2), 2699(h). Once the LWDA declines to proceed on its own, and the aggrieved employee commences suit, that employee retains sole control over the conduct of the litigation, including the decision whether to settle the case.

C. The California Supreme Court's *Iskanian* Decision

In *Iskanian*, the California Supreme Court held that "the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." 327 P.3d at 133. The parties in that case agreed to arbitration of all claims arising out of the plaintiff's employment, and the agreement provided that "class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration." *Id.* It was undisputed that this provision precluded the plaintiff from bringing a representative claim under PAGA. *Id.* at 145. But the California Supreme Court invalidated the representative-action waiver on the ground that it was contrary to the State's public policy of "augment[ing] the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code." *Id.* at 149.

The California Supreme Court also concluded that the FAA did not preempt its refusal to enforce arbitration agreements containing waivers of representative PAGA claims. According to the court, the "real party in interest" in a PAGA claim is the State of California, which receives 75% of the civil penalties recovered by the plaintiff's suit. *Id.* at 148; *see id.* at 147 ("[a]n employee plaintiff suing . . . under [PAGA] does so as the proxy or agent of . . . [and] represents the same legal right and interest as state labor law enforcement agencies") (internal quotation marks omitted). As a result, the court said, a PAGA claim is in reality "a dispute between an employer and the [LWDA]." *Id.* at 149. Because the court viewed the FAA's scope as limited to "the resolution of *private*

disputes," *id.*, it concluded that "a PAGA claim lies outside the FAA's coverage," *id.* at 151.

In a concurring opinion, Justice Chin rejected the *Iskanian* majority's "novel" FAA preemption analysis as "devoid of case law support" and contrary to this Court's precedents. *Id.* at 157, 158. As Justice Chin noted, PAGA claims fall within the ambit of the FAA because they are private disputes between an employee and an employer arising out of their contractual relationship. *See id.* at 157. While the State may benefit economically from any penalties recovered, the plaintiff in a PAGA case is still the "aggrieved employee," and what matters under the FAA is that the employee bringing the suit "*is* a party to the arbitration agreement." *Id.* at 158 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

Justice Chin also criticized the majority's holding that a "state may, without constraint by the FAA, simply ban arbitration of PAGA claims and declare agreements to arbitrate such claims unenforceable." *Id.* at 157-58. As Justice Chin observed, that logic would permit any State to exclude any state-law claim from the scope of the FAA simply by designating the plaintiff an agent of the State. *See id.* As Justice Chin recognized, any state policy interest in "enhanc[ing] their public enforcement capabilities by enlisting willing employees" to serve as PAGA plaintiffs must yield to the FAA's mandate that arbitration agreements be enforced according to their terms. *Id.* at 158 (citing *AT&T Mobility*) (internal quotation marks omitted).

Justice Chin ultimately agreed with the result in *Iskanian* on the alternative rationale that a waiver of representative procedures amounted to a *substantive* waiver of Iskanian's right to pursue a PAGA claim.

See id. at 157. Justice Chin relied on this Court's statement in *American Express* that the FAA may not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." 133 S. Ct. at 2310. Even though this Court made clear in *American Express* that any such exception applies only when rights under another *federal* statute are asserted, *see id.* at 2311, Justice Chin opined that it applied to the prospective waiver of Iskanian's right to bring a representative action under PAGA.

D. Factual Background

Petitioner CarMax is a Fortune 500 company based in Richmond, Virginia, and the largest used car retailer in the United States, with more than 100 locations nationwide. Fortune Magazine has named it one of the country's "100 Best Companies To Work For" every year since 2005. *See* Fortune, http://fortune.com/best-companies/ (last visited Aug. 18, 2015). Respondent Wahid Areso worked at CarMax as a sales consultant in California during the time period relevant to the parties' dispute.

Areso applied for employment with CarMax in 2006. App. 4a, 30a. As part of his job application, he signed a written Employment Application and Dispute Resolution Agreement ("DRA"),[2] which calls for arbitration of any claims arising out of his employment relationship with CarMax, as follows:

> I agree to settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application or candidacy for employment and employment and/or cessation of employment with CarMax, exclusively by final

[2] The entire DRA is reproduced at App. 69a-72a.

> and binding arbitration before a neutral Arbitrator.

App. 69a. The DRA's arbitration agreement is mutual – *i.e.*, it equally requires arbitration of any claims brought by a job applicant or employee against CarMax, and of claims by CarMax against any job applicant or employee. *Id.*[3] An authorized CarMax representative also signed each DRA. App. 72a.

The DRA advised Areso in bold-faced lettering that he might wish to seek legal advice before consenting to the agreement. App. 71a. Moreover, the DRA provided that, even after executing the agreement, Areso could avoid being bound by its terms by notifying CarMax in writing within three days that he was withdrawing his employment application. *Id.*

The DRA provides that arbitration "will be conducted in accordance with the CarMax Dispute Resolution Rules and Procedures." App. 70a (hereinafter "Rules and Procedures" or "DRRP").[4] The Rules and Procedures provide that Areso will arbitrate exclusively on a bilateral basis and not on a class or representative basis. Specifically, the provision states:

> The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves an arbitration or lawsuit where repre-

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[3] The arbitration agreement does not preclude employees from filing charges with the Equal Employment Opportunity Commission ("EEOC") or any similar federal, state, or local agency. App. 70a.

[4] The Dispute Resolution Rules and Procedures are reproduced at App. 73a-90a.

sentative members of a large group who claim to share a common interest seek collective relief).

App. 83a (Rule 9(f)(ii)).

To ensure that claims are resolved expeditiously, the Rules and Procedures provide a specific timeline for the arbitration. All discovery must be completed within 90 days of selection of the arbitrator, absent good cause. App. 80a (Rule 8(d)). Post-hearing briefing must be completed within 20 days of receipt of the hearing transcript, App. 82a (Rule 9(d)), and the arbitrator must issue a written award within 21 days of receipt of the parties' post-hearing briefs, App. 85a (Rule 12). The Rules and Procedures specify that any arbitration award is "enforceable and subject to the [FAA]." App. 87a (Rule 16).

E. Proceedings Below

1. On July 8, 2008, Areso filed an amended class-action complaint in California state court alleging that CarMax (1) failed to pay employees overtime; (2) failed to provide meal breaks; and (3) failed to reimburse employees for work-related expenses, all in violation of California's Labor Code and unfair competition law. App. 5a. In addition, the amended complaint alleged that CarMax was liable for civil penalties under PAGA for the same Labor Code violations. *Id.*[5]

Areso filed his amended complaint one year after California's *Gentry* decision, which held that class-action waivers in employment agreements are un-

[5] The original complaint was filed by Areso's wife, Leena Areso, who remained a named plaintiff in the amended complaint. App. 5a. As explained below, *see infra* p. 12 n.6, her claims were dismissed and are no longer at issue in this appeal. A third named plaintiff in the amended complaint, Ricardo Fernandez, voluntarily dismissed his claim. App. 33a.

enforceable to the extent class arbitration is a "significantly more effective means than individual arbitration actions" in vindicating plaintiffs' rights. *See Gentry v. Superior Court*, 165 P.3d 556, 570 (Cal. 2007). Because of *Gentry*, there was no realistic prospect that the class-action waiver in CarMax's arbitration agreement with Areso would be enforced. Accordingly, the parties proceeded to litigate in court.

Two of Areso's three causes of action were dismissed during the court proceedings. Areso stipulated to the dismissal without prejudice of the cause of action for failure to reimburse for work-related expenses. App. 56a-57a. In June 2009, the trial court granted CarMax's motion for summary adjudication of Areso's claim for overtime pay, and the Court of Appeal affirmed. App. 6a-7a, 32a-33a.[6] That left only Areso's claim for failure to provide meal periods and Areso's PAGA claim for those same alleged Labor Code violations. App. 7a. The trial court stayed further proceedings on those claims because the California Supreme Court had granted review to decide the extent to which California law requires rest and meal breaks, and the timing of any required rest and meal periods. App. 6a-7a; *see Brinker Rest. Corp. v. Superior Court*, 80 Cal. Rptr. 3d 781 (Cal. Ct. App. 2008), *aff'd in part, rev'd in part*, 273 P.3d 513 (Cal. 2012).

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[6] When the trial court granted summary adjudication of the overtime claim, Leena Areso dismissed her other claims and appealed. The Court of Appeal then affirmed the grant of summary adjudication to CarMax. App. 6a-7a, 32a-33a.

2. While the case was stayed, this Court decided *AT&T Mobility*. *AT&T Mobility* held that the FAA preempts California's "*Discover Bank* rule,"[7] which held that class-action waivers in arbitration agreements were unenforceable in a wide range of cases. On June 17, 2011, CarMax filed a motion to vacate the trial court's stay and compel bilateral arbitration, arguing that *AT&T Mobility* meant that the FAA also preempted the *Gentry* rule.[8] Areso opposed the motion, asserting that (1) CarMax had waived its right to arbitration; (2) the parties' bilateral arbitration agreement was unenforceable under *Gentry* even after *AT&T Mobility*; (3) the arbitration agreement was unconscionable; and (4) the National Labor Relations Act ("NLRA") precluded arbitration of their claims.

On November 21, 2011, the trial court granted CarMax's motion to compel, agreeing that the FAA preempts *Gentry* and rejecting Areso's remaining arguments against arbitration. The trial court thus ordered Areso "to arbitrate [his] individual claims without inclusion of the class claims." App. 54a. The court also stayed the case pending completion of the arbitration. App. 8a.

The California Court of Appeal reversed. *Fowler v. CarMax, Inc.*, No B238426, 2013 WL 1208111 (Mar. 26, 2013). The court agreed that CarMax had not waived its right to arbitrate, and it rejected Areso's

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[7] *See Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by AT&T Mobility*, *supra*.

[8] *Gentry* expressly relied on *Discover Bank* as "an application of [the] more general principle" that class-action waivers are unenforceable where they are "exculpatory in practical terms" because they "make it very difficult for those injured by unlawful conduct to pursue a legal remedy." 165 P.3d at 564.

arguments based on unconscionability and the NLRA. The court refused to enforce the parties' bilateral arbitration agreement, however, on the sole ground that *Gentry* remained good law after *AT&T Mobility*. *Id.* at *6-7. The court thus remanded to the trial court with instructions to conduct a "fact intensive" analysis of whether "class litigation is likely to be significantly more effective as a practical means of vindicating the rights of members of the putative class." *Id.* at *7. The California Supreme Court denied discretionary review.

This Court then granted CarMax's petition for certiorari, vacated the decision of the California Court of Appeal, and remanded for further consideration in light of *American Express*. *CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014).

3. On remand, the California Court of Appeal agreed that the *Gentry* rule was preempted by the FAA in light of *American Express* and that Areso's arbitration agreement with CarMax required him to bring his claims on an individual basis rather than as a class action. App. 17a-23a. However, the court held that, under *Iskanian*, which had been decided in the meantime, the arbitration clause was unenforceable to the extent it would preclude Areso from pursuing a representative action under PAGA. *See* App. 24a (rejecting CarMax's argument that "Plaintiffs could pursue only their individual PAGA claims in arbitration"). It therefore reversed the trial court's order insofar as it had compelled individual arbitration of Areso's PAGA claim. App. 24a-25a. In all other respects, it affirmed the trial court's judgment. App. 25a.

The Court of Appeal gave CarMax the option on remand to waive arbitration of Areso's remaining non-PAGA claim so that both claims could be brought in court. *See* App. 25a ("[o]n remand, the parties shall decide whether to agree on a single forum for all claims"). Unsurprisingly, CarMax declined to do so. *See* Joint Status Report at 2, *Fowler v. CarMax, Inc.*, No. BC388340 (Cal. Super. Ct. filed Aug. 10, 2015). The Court of Appeal also left open whether the parties' arbitration should be stayed pending litigation of the PAGA representative action in court. App. 25a. The parties declined to adopt that approach. Instead, they have commenced arbitration of the remaining non-PAGA claim while the trial court has deferred litigation of the PAGA claim pending resolution of this petition. *See* Order, *Fowler v. CarMax, Inc.*, No. BC388340 (Cal. Super. Ct. Aug. 12, 2015).

The California Supreme Court denied CarMax's petition for review. App. 1a.

REASONS FOR GRANTING THE PETITION

I. THE *ISKANIAN* RULE CONTRAVENES THE FAA'S MANDATE TO ENFORCE ARBITRATION AGREEMENTS EVEN IF THEY LIMIT THE PLAINTIFF TO INDIVIDUAL RATHER THAN REPRESENTATIVE CLAIMS

A. California's Exemption of PAGA Claims from the FAA Flouts This Court's Precedents

The California Supreme Court's holding in *Iskanian* is simple but sweeping:

> Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*, which alleges directly or through its agents – either the Labor and Workforce Development Agency or aggrieved employees – that the employer has violated the Labor Code.

327 P.3d at 151.[9] That holding is squarely at odds with this Court's precedents, which forbid courts from categorically putting state-law causes of action beyond the FAA's reach. As this Court explained in *AT&T Mobility*: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." 131 S. Ct. at 1747; *accord Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012) (per curiam). That "straight-

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[9] One California intermediate court put *Iskanian*'s holding even more succinctly: "PAGA claims are not subject to private arbitration agreements." *Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal. App. 4th 651, 657 (2015).

forward" rule precludes *Iskanian*'s holding that PAGA claims "lie[] outside the FAA's coverage." 327 P.3d at 151.

Indeed, this Court has reversed – sometimes summarily – several prior attempts by California and other States to override arbitration of certain state-law claims. *See Marmet Health Care Ctrs.*, 132 S. Ct. at 1203-04 (summarily vacating the West Virginia Supreme Court's prohibition on arbitration of certain claims against nursing homes); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-58 (1995) (holding that the FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas*, 482 U.S. 483, 489-92 (1987) (holding that the FAA preempted a law requiring a judicial forum for California Labor Code violations); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (holding that the FAA preempted California's attempt to preclude arbitration of disputes arising out of its Franchise Investment Law). This Court should likewise grant review – and consider summary reversal – of *Iskanian*'s holding that PAGA claims are outside the FAA's scope.

The majority in *Iskanian* claimed support for its decision in this Court's decision in *Waffle House*. But *Waffle House* confirms that the FAA preempts the *Iskanian* rule. In *Waffle House*, this Court held that the EEOC could not be compelled to arbitrate a civil enforcement action it brought to redress violations of a specific employee's rights under the Americans with Disabilities Act of 1990 ("ADA"). Although the employee was subject to a binding arbitration clause, the EEOC – not the employee – was the plaintiff in the lawsuit, and the EEOC was not a party to the arbitration agreement. This Court held that the

fact that the EEOC was seeking "victim-specific judicial relief," including "backpay, reinstatement, and damages," 534 U.S. at 282, did not change the fact that the agency itself could not be compelled to arbitrate when it had not agreed to do so. *See id.* at 289 (holding that the FAA "does not purport to place any restriction on a nonparty's choice of a judicial forum"). *Waffle House*'s teaching is straightforward: if a government agency files a lawsuit, it is not bound to arbitrate even if it is seeking relief on behalf of an individual who is; but if the *individual* is the plaintiff and is subject to a binding arbitration agreement, that agreement must be enforced. *See Marmet Health Care Ctrs.*, 552 U.S. at 358 (stating that *Waffle House* applies when the government files an "enforcement action in its own name").

Applying that principle here, respondent must arbitrate his PAGA claim because he is the plaintiff in the underlying litigation and is a party to a binding arbitration agreement, whose terms require arbitration on an individual rather than classwide or representative basis. And that conclusion holds even though respondent seeks relief that may benefit the LWDA, which is not a party to the agreement. Of course, if the *LWDA* were to file its own enforcement action, the *LWDA* could not be required under *Waffle House* to arbitrate. But the plaintiff here is not the LWDA; it is the employee, who consented voluntarily to arbitrate *all* disputes arising out of his employment on an individual basis. *See* Cal. Lab. Code § 2699(a), (g)(1) (providing that an aggrieved employee may sue "on behalf of himself or herself and other current or former employees").

Moreover, in rejecting the argument that the EEOC's case should be equated with a *private* ADA

lawsuit brought by the employee, *Waffle House* focused on the fact that the EEOC controlled the litigation. *See* 534 U.S. at 291 (noting that EEOC is "in command of the [litigation] process" and "master of its own case"). Were it the employee who controlled the litigation, with the EEOC only as a nominal plaintiff, the Court stated that the arbitration agreement might well be binding. *See id.* Here, PAGA itself makes clear that it is the employee, not the LWDA, who controls the litigation. Once the LWDA fails to act to preclude the suit, the "aggrieved employee" has full control over the prosecution and settlement of the litigation without any supervision by the State. *See* Cal. Lab. Code § 2699.3. Indeed, the history of PAGA litigation highlights the absence of State control: in many settlements, plaintiffs and defendants have effectively cut the State out of any recovery by agreeing to attribute the vast majority of the settlement amount to non-PAGA claims.[10] Because the employee here *is* a party to the arbitration agreement, *Waffle House* requires that the arbitration clause be enforced by its terms even if his lawsuit purports to vindicate the State's interest in obtaining civil penalties. *See Iskanian*, 327 P.3d at 158 (Chin, J., concurring).

This Court's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), reinforces *Waffle House*. In *AU Optronics*, the State of Mississippi, through its Attorney General, brought a *parens*

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[10] *See*, *e.g.*, *Nordstrom Comm'n Cases*, 112 Cal. Rptr. 3d 27, 37-38 (Cal. Ct. App. 2010) ($8.9 million settlement that allocated *zero* dollars to plaintiffs' PAGA claim); *Chu v. Wells Fargo Invs., LLC*, Nos. C 05-4526 MHP & C 06-7924 MHP, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) ($6.9 million settlement that allocated $7,500 to plaintiffs' PAGA claims).

patriae action in state court seeking restitution for injuries suffered by a group of its citizens. The defendant sought to remove the action to federal court under the Class Action Fairness Act of 2005, arguing that the case qualified as a "mass action" because it involves "monetary relief claims of 100 or more persons." *Id.* at 739 (internal quotation marks omitted). This Court rejected that argument, holding that the State was the only plaintiff, and that the fact that the State sought to vindicate the rights of other non-parties did not transform the case into a suit *brought by* those parties. *See id.* at 745. Here, likewise, the fact that the "aggrieved employee" may seek to recover civil penalties that benefit the State does not change the fact that the employee himself is the plaintiff in the lawsuit and is subject to binding individual arbitration.[11]

B. The *Iskanian* Rule Also Contravenes This Court's Decisions in *AT&T Mobility* by Imposing Representative Procedures

Iskanian also contravenes this Court's holdings in *AT&T Mobility* and *American Express* that courts may not invalidate arbitration agreements because they preclude aggregate procedures. *See AT&T Mobility*, 131 S. Ct. at 1744 (holding that the FAA prohibits States from "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures"); *American Express*,

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[11] The *Iskanian* majority described a representative PAGA suit as a "dispute between the employer and the *state*," 327 P.3d at 151, but that characterization is inaccurate. Although the State benefits from a share of the aggrieved employee's recovery, PAGA's plain language makes clear, and *Iskanian* itself recognized, that the "aggrieved employee" is the plaintiff in a representative PAGA action and controls the lawsuit. *Id.*

133 S. Ct. at 2312 (same). Section 2 of the FAA mandates that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *American Express*, 133 S. Ct. at 2309 (internal quotation marks, citations, and alterations omitted). Thus, the California courts were required to enforce the parties' unequivocal agreement to forgo representative procedures.

Moreover, under *AT&T Mobility* and *American Express*, States may not insist on class-arbitration procedures, because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility*, 131 S. Ct. at 1748. As this Court explained, classwide arbitration "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Moreover, class arbitration "greatly increases risks to defendants" because the absence of judicial review "makes it more likely that errors will go uncorrected." *Id.* at 1752. While parties may agree to accept that risk in exchange for the lower costs and increased efficiency of bilateral arbitration, that risk of error "will often become unacceptable" to the parties when "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* "Faced with even a small chance of a devastating loss, defendants will be pressured into . . . 'in terrorem' settlements" of even meritless claims. *Id.* Requiring class procedures is thus functionally equivalent to

invalidating the parties' arbitration agreement altogether. *See id.* at 1752 n.8.

Like class actions, representative actions under PAGA are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Id.* at 1753. A representative PAGA action shares the same characteristics of class actions that led this Court in *AT&T Mobility* to hold that the FAA prevents States from requiring that class arbitration be available. Such claims may involve thousands of allegedly aggrieved employees seeking many millions of dollars in civil penalties. Just as "[a]rbitration is poorly suited to the higher stakes of class litigation," *id.* at 1752, it is equally ill suited to the higher stakes of *representative* litigation. And it is "hard to believe that defendants would bet the company" by agreeing to forgo judicial review in a representative claim asserting such potentially "devastating" civil penalties. *Id.* PAGA representative actions are therefore every bit as incompatible with the "fundamental attributes of arbitration" as class arbitration, and *Iskanian*'s requirement that arbitration agreements permit such actions "creates a scheme inconsistent with the FAA." *Id.* at 1748.

In holding that an employee cannot waive his right to bring a representative PAGA claim, *Iskanian* held that such waivers would harm the State's efforts to "punish and deter employer practices that violate the rights of numerous employees under the Labor Code." 327 P.3d at 149 (internal quotation marks omitted). Yet that is precisely the argument California made and this Court rejected in *AT&T Mobility*. *See* 131 S. Ct. at 1753 (holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons");

see also American Express, 133 S. Ct. at 2312 n.5 ("[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."). Under this Court's precedents, California's desire to enlist individual employees to do the State's work cannot override the FAA's mandate that agreements to pursue exclusively bilateral arbitration must be enforced even if they preclude the claimant from pursuing the rights of others.

C. The *Iskanian* Rule Cannot Be Justified Under the "Effective Vindication of Statutory Rights" Doctrine

Justice Chin's alternative justification for the *Iskanian* rule under this Court's "effective vindication" doctrine is also contrary to this Court's decisions. In *American Express*, this Court explained that, as to federal statutory claims, it has in limited circumstances "expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies.'" 133 S. Ct. at 2310 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)) (alterations in original). But, even assuming the arbitration agreement did operate as a substantive waiver (which it does not),[12] that principle has

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[12] A PAGA representative action is a procedural device for enforcing substantive rights created by the Labor Code; it does not create new substantive rights. Moreover, the parties' arbitration agreement's prohibition against representative claims still permits each employee to assert a PAGA claim to recover civil penalties for the violation of that employee's substantive Labor Code rights. The *Iskanian* majority said that the waiver of the right to bring a representative PAGA claim would be contrary to public policy even if each individual employee remained

no application where *state-law* claims are asserted. As Justice Kagan explained in her dissenting opinion in *American Express*, the effective-vindication rule "comes into play only when the FAA is alleged to conflict with another *federal* law." *Id.* at 2320 (Kagan, J., dissenting). By contrast,

> [w]hen a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so – as the Court found in *AT&T Mobility* – the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law.

Id.

Because the FAA's command trumps any state-law interest in vindicating PAGA claims, *Iskanian*'s refusal to enforce the parties' agreement cannot be justified under the "effective vindication" doctrine. *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms . . . unless [that] mandate has been overridden by a contrary *congressional* command.") (emphasis added; internal quotation marks omitted).

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free to bring an individual PAGA claim – a point it declined to decide. *See* 327 P.3d at 149.

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S PROMPT REVIEW

A. This Court's Intervention Is Warranted To Vindicate the FAA's Pro-Arbitration Mandate

This case presents an issue of exceptional importance warranting this Court's review, for three reasons. Indeed, given that the *Iskanian* rule is preempted under a straightforward application of this Court's FAA precedents, the Court should consider summary reversal.

First, it is a "matter of great importance" that state courts "adhere to a correct interpretation of the [FAA]." *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). As this Court has recognized, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]." *Id.*; *see also Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (noting that "state courts have a prominent role to play as enforcers of agreements to arbitrate"). States play that important role because, although the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate," it "does not create any independent federal-question jurisdiction" over disputes regarding the enforceability of such agreements. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32.

Consistent with these principles, this Court has frequently found it appropriate to intervene to reverse – sometimes summarily – state-court decisions that contravene the FAA and this Court's FAA precedents. *See*, *e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) (unanimous summary vacatur); *Marmet Health Care Ctr.*, 132 S. Ct. at 1204 (per curiam) (same); *Nitro-Lift*, 133 S. Ct. at 503-04 (per curiam) (same). Whether by summary reversal

or plenary review, this Court should likewise ensure that *Iskanian*'s rule exempting PAGA claims from the FAA's scope does not evade scrutiny.

Second, the *Iskanian* rule continues the California courts' pattern of "judicial hostility towards arbitration" in defiance of this Court's authoritative interpretation of the FAA. *AT&T Mobility*, 131 S. Ct. at 1747; *see id.* (noting that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts"); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (noting the California courts' efforts to "chip[] away at [this Court's] precedents broadly construing the scope of the FAA") (internal quotation marks omitted). California courts have repeatedly flouted the FAA, either by prohibiting arbitration of certain types of claims or by imposing onerous conditions on the enforcement of arbitration agreements that are inconsistent with the FAA and contrary to this Court's precedents.[13] This Court's

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[13] *See Discover Bank*, 113 P.3d at 1110-11, *abrogated by AT&T Mobility*, *supra*; *Gentry*, 165 P.3d at 568, *abrogated by AT&T Mobility*, *supra*; *Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 76-77 (Cal. 1999) (categorically prohibiting arbitration of claims for public injunctive relief under California's Consumers Legal Remedies Act); *Little*, 63 P.3d at 990 (holding that arbitration agreements with respect to state-law wrongful-termination claims can be invalidated if plaintiffs cannot "effectively prosecute such a claim in the arbitral forum"); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003) (extending *Broughton* to prohibit arbitration of claims under California's unfair competition and misleading advertising laws); *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 634 (Cal. Ct. App. 2006) (invalidating arbitration agreements based on a provision of California's Talent Agencies Act vesting primary jurisdiction over covered claims in the Labor Commissioner), *rev'd*, 552 U.S. 346 (2008); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 146-48 (Cal.) (invalidating waivers of

repeated intervention has been required to bring the California courts into line. *See AT&T Mobility*, *supra*; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry*, *supra*; *Southland Corp.*, *supra*; *see also Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (mem.) (vacating California Supreme Court decision for further consideration in light of *AT&T Mobility*); *CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014) (mem.) (vacating California Court of Appeal decision for further consideration in light of *American Express*). This Court's intervention is once again required to ensure that the basic constitutional principle of federal supremacy is vindicated.

Third, if *Iskanian* is not reversed, it will invite other States hostile to arbitration to evade the FAA simply by deeming private lawsuits to be brought on the State's behalf. *See Iskanian*, 327 P.3d at 157-58 (Chin, J., concurring). Indeed, the regime blessed in *Iskanian* is a win-win situation for anti-arbitration States and their plaintiffs' bars: plaintiffs can unilaterally avoid their arbitration agreements and pursue potentially enormous aggregate claims in court, while States can reap a percentage of the recovery – the tax to be paid for creating the fiction that the plaintiff's lawsuit is really the State's. And this end-run around the FAA can be achieved while leaving control of the lawsuit entirely in the hands of plaintiffs and their counsel without any state supervision or political accountability. The *Iskanian* rule's potential for mischief – and the gaping loophole it creates in the FAA – warrants this Court's intervention.

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certain administrative hearings before the California Labor Commissioner in arbitration agreements contrary to public policy), *vacated*, 132 S. Ct. 496 (2011) (mem.).

B. The Question Presented Is Ripe for Review

Respondent will likely argue that the absence of a conflict between the California Supreme Court and the Ninth Circuit warrants deferring review. But, in past cases where state courts have disregarded the FAA's mandates, this Court has intervened promptly, without waiting for a conflict with the respective federal circuit. *See*, *e.g.*, Pet. for Cert. at 6-8, *Preston v. Ferrer*, No. 06-1463 (U.S. filed May 4, 2007), 2007 WL 1319352 (no circuit split alleged); Pet. for Cert. at 9-10, *Marmet Health Care Ctr., Inc. v. Brown*, No. 11-391 (U.S. filed Sept. 27, 2011), 2011 WL 4500752 (same); Pet. for Cert. at 9-17, *Nitro-Lift Techs., LLC v. Howard*, No. 11-1377 (U.S. filed May 14, 2012), 2012 WL 1708828 (same). That practice is appropriate given the importance of state-court enforcement of the FAA, *see supra* p. 25, and this Court should follow it by promptly granting review here.

Moreover, further percolation of the question will not materially aid the Court's consideration of the question presented. The arguments on each side have been thoroughly vetted. The majority and concurring opinions in *Iskanian* set forth extensive justifications for their respective positions. Were that not sufficient, numerous federal district courts have addressed *Iskanian*'s reasoning – with the large majority (but not all) of those decisions rejecting *Iskanian* as contrary to this Court's holdings.[14] It is

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[14] For cases that refused to follow *Iskanian*, see *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152, at *6-7 (N.D. Cal. Apr. 13, 2015); *Estrada v. CleanNet USA, Inc.*, No. C 14-01785 JSW, 2015 WL 833701, at *4-5 (N.D. Cal. Feb. 24, 2015); *Lucero v. Sears Holdings Mgmt. Corp.*, No. 14-cv-1620 AJB (WVG), 2014 WL 6984220, at *4-6 (S.D. Cal. Dec. 2, 2014); *Mill v. Kmart Corp.*, No. 14-cv-02749-KAW, 2014 WL

ultimately for this Court to decide whether *Iskanian* comports with its FAA precedents, and the issue is "straightforward." An opinion from the Ninth Circuit, which could take months if not years, especially if it grants *en banc* review, will not enhance this Court's analysis of the issue.[15] By contrast, deferring review will mean that *Iskanian* will continue to be applied so as to abrogate employment arbitration agreements in California on a broad scale. *See*, *e.g.*, *Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 966 (2015) (post-*Iskanian* decision holding that

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6706017, at *6-7 (N.D. Cal. Nov. 26, 2014); *Langston v. 20/20 Cos.*, No. EDCV 14-1360 JGB (SPx), 2014 WL 5335734, at *6-8 (C.D. Cal. Oct. 17, 2014); *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW (SSx), 2014 WL 5088240, at *12-13 (C.D. Cal. Oct. 7, 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1083-87 (E.D. Cal. 2014); *Fardig v. Hobby Lobby Stores Inc.*, No. SACV 14-00561 JVS(ANx), 2014 WL 4782618, at *3-4 (C.D. Cal. Aug. 11, 2014). A minority of federal district court cases have agreed with *Iskanian* that PAGA claims are exempt from the FAA. *See Mohamed v. Uber Techs., Inc.*, Nos. C-14-5200 EMC & C-14-5241 EMC, 2015 WL 3749716, at *23-25 (N.D. Cal. June 9, 2015), *appeal pending*, No 15-16250 (9th Cir.); *Zenelaj v. Handybook Inc.*, No. 14-CV-05449-TEH, 2015 WL 971320, at *7-8 (N.D. Cal. Mar. 3, 2015); *Hernandez v. DMSI Staffing, LLC*, No. C-14-1531 EMC, 2015 WL 458083, at *6-9 (N.D. Cal. Feb. 3, 2015), *appeal pending*, No. 15-15366 (9th Cir.); *Martinez v. Leslie's Poolmart, Inc.*, No. 8:14-cv-01481-CAS (CWx), 2014 WL 5604974, at *4-5 (C.D. Cal. Nov. 3, 2014). The vast majority of pre-*Iskanian* cases also held that a rule against PAGA representative-action waivers was preempted. *See Estrada*, 2015 WL 833701, at *4-5 (collecting cases).

[15] On June 3, 2015, a panel of the Ninth Circuit heard oral argument on whether the FAA requires enforcement of representative-action waivers in three consolidated cases, *Sakkab v. Luxottica Retail N. Am., Inc.*, No. 13-55184 (9th Cir.), *Sierra v. Oakley Sales Corp.*, No. 13-55891 (9th Cir.), and *Hopkins v. BCI Coca-Cola Bottling Co.*, No. 13-56126 (9th Cir.). The panel has not issued an opinion.

the parties' arbitration agreement "cannot be enforced to preclude [plaintiff] from prosecuting claims against [defendant] under the PAGA in a non-arbitration forum").

III. THIS CASE DOES NOT RAISE THE JURISDICTIONAL QUESTION THAT IMPEDED REVIEW IN *ISKANIAN* AND *BRIDGESTONE*

This Court denied certiorari in *Iskanian* and *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015), on substantially the same question as is presented in this case. Those cases, however, raised a serious threshold question about this Court's appellate jurisdiction. By contrast, this Court clearly has jurisdiction in this case. In *Southland Corp.*, this Court held that appellate jurisdiction exists under the fourth *Cox* test for finality of state-court judgments when a state court definitively refuses to enforce a binding arbitration agreement. The California Court of Appeal did exactly that here. This case thus is well-suited for review of the question presented.

A. The Fourth *Cox* Test Is Clearly Satisfied

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four circumstances in which it is appropriate to exercise appellate jurisdiction over state-court judgments that do not finally terminate the case. Under the fourth *Cox* category, this Court has appellate jurisdiction where (1) reversal of the state court's decision on a federal issue "would be preclusive of any further litigation" and (2) refusal to grant immediate review "might seriously erode federal policy." *Id.* at 482-83; *see* Charles A. Wright et al., *Federal Practice and Procedure* § 4010, at 248-49 (3d ed. 2012).

As this Court recognized in *Southland Corp.*, both prongs of that test are satisfied where a state court violates the FAA by refusing to enforce an arbitration agreement. Reversal in that case would "terminate litigation of the merits of th[e] dispute" in favor of arbitration, and refusal to grant immediate review might seriously erode the FAA's policies, because it "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." 465 U.S. at 6-7. Thus, "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." *Id.* at 7-8.

Southland Corp. applies straightforwardly here because the California Court of Appeal reversed the trial court's grant of CarMax's motion to compel arbitration and refused to order individual arbitration of respondent's PAGA claim. App. 24a ("The trial court's order enforcing the [PAGA] waiver in the arbitration agreement is reversed."). Reversal of that decision by this Court would result in bilateral arbitration of respondent's PAGA claim being ordered. And because that claim is the only claim remaining in court – the rest having already been sent to arbitration (*see supra* p. 12) – reversal by this Court would end the parties' state-court litigation in its entirety. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009) ("litigation" refers to court proceedings).

By contrast, refusal to grant immediate review would result in CarMax having to litigate respondent's PAGA claim in court before it could appeal the Court of Appeal's denial of its arbitration rights.

Having to litigate the merits of respondent's PAGA claim before obtaining a resolution of the arbitrability of that claim would certainly frustrate arbitration's promise of efficient and expeditious resolution of the parties' dispute. *See American Express*, 132 S. Ct. at 2312 (holding that a "preliminary litigating hurdle" to enforcement of arbitration itself seriously erodes federal policy); *Preston*, 552 U.S. at 357-58 (California's requirement that plaintiff exhaust administrative procedures prior to arbitration violates the FAA because it would frustrate the FAA's objective of expeditious and streamlined proceedings). Even if arbitration ultimately were compelled, the failure to provide immediate appellate review will have "hinder[ed] speedy resolution of the controversy." *AT&T Mobility*, 131 S. Ct. at 1749 (internal quotation marks omitted). Thus, as *Southland Corp.* recognized, jurisdiction is proper because deferring review of the Court of Appeal's refusal to compel arbitration would "defeat the core purpose" of the parties' arbitration agreement and "seriously erode" the FAA's core policies. 465 U.S. at 7-8 (internal quotation marks omitted).

B. Respondents' Arguments Against Jurisdiction in *Iskanian* and *Bridgestone* Do Not Apply Here

In *Iskanian* and *Bridgestone*, the respondents contended that the fourth *Cox* test was not satisfied, but those arguments are inapplicable here. In both those cases, petitioners sought review of orders from the California Supreme Court that remanded to the Court of Appeal to determine whether arbitration of the plaintiff's PAGA claim should proceed. In *Iskanian*, the court remanded to the Court of Appeal to determine whether the plaintiff's "PAGA claims

are time-barred, as well as Iskanian's response that CLS has forfeited this contention and cannot raise it on appeal." 327 P.3d at 155. If the PAGA claims were time-barred, the arbitrability issue would have become moot. And, in *Bridgestone*, the California Supreme Court held the parties' petition for review pending *Iskanian* and then vacated the Court of Appeal's order and remanded for further consideration in light of *Iskanian* – the equivalent of a "GVR." As a result, *Iskanian* and *Bridgestone* arguably did not fit squarely into *Southland Corp.* because the California Supreme Court's orders did not themselves "deny[] enforcement of the contract to arbitrate," 465 U.S. at 7-8, and the possibility remained that the court on remand would not deny enforcement of the arbitration agreement.[16]

In this case, by contrast, the California Court of Appeal definitively refused to enforce the parties' arbitration agreement with respect to respondent's PAGA claim. *See* App. 24a (reversing the trial court's order requiring that respondent pursue his individual PAGA claim in arbitration). And, unlike in *Iskanian* and *Bridgestone*, the California Supreme Court did not remand for further consideration; it denied the petition for review. The Court of Appeal's refusal to enforce the parties' arbitration agreement with respect to respondent's PAGA claim is clearly a

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[16] *See* Br. in Opp. at 13, *CLS Transp. Los Angeles, LLC v. Iskanian*, No. 14-341 (U.S. filed Nov. 24, 2014), 2014 WL 6706850 (arguing that the Supreme Court "did not resolve whether the [PAGA] claim would ultimately be arbitrated or litigated in court"); Br. in Opp. at 14, *Bridgestone Retail Operations, LLC v. Brown*, No. 14-790 (U.S. filed Apr. 27, 2015), 2015 WL 1951868 (explaining that the California Supreme Court order "leaves open the question of the extent to which arbitration will ultimately be compelled").

final decision of a final court on that issue. There is no possibility that the Court of Appeal – or the trial court – will enforce the representative-action waiver provision of the parties' agreement.

In sum, the California Court of Appeal's order refusing to compel arbitration pursuant to the parties' agreement is precisely the kind of final decision denying arbitration that this Court held justiciable in *Southland Corp.* and numerous subsequent cases. *See*, *e.g.*, *Perry*, 482 U.S. at 489 n.7; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam). Because this Court's precedents clearly answer the jurisdictional question in the affirmative, it should pose no obstacle to this Court's grant of review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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