No. 15-236

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 COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The California Labor Code's Private Attorneys General Act of 2004 (PAGA) creates an action in which an individual plaintiff may seek civil penalties for Labor Code violations on behalf of the state, with the majority of the penalties recovered paid to the state, and the rest paid to the plaintiff and other victims of the violations. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), the California Supreme Court held that an arbitration clause in an employment agreement may not prospectively waive an employee's entitlement to bring PAGA claims in some forum. In the present case, the California Court of Appeal, in reliance on *Iskanian*, affirmed an order granting a motion to compel arbitration, but reversed the lower court's ruling that the arbitration agreement waived the employee's PAGA claim.

The question presented by this case is:

1. Whether the Federal Arbitration Act (FAA) preempts the holding in *Iskanian* and requires California to enforce a provision in an arbitration agreement that purports to bar an employee from asserting claims under PAGA in any forum.

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INTRODUCTION

CarMax Auto Superstores California (CarMax) asks the Court to review an unpublished interlocutory order from the California Court of Appeal that decides an issue on which this Court has refused to grant certiorari twice this year. *See CLS Transp. Los Angeles, LLC v. Iskanian*, 135 S. Ct. 1155 (2015); *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015). The issue presented is whether the California Supreme Court correctly decided *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014) *cert. denied*, 135 S. Ct. 1155 (2015). Although the Court already declined to review *Iskanian* itself, as well as another decision that, like this one, merely applied *Iskanian*'s ruling without making any additional precedential rulings, *see Bridgestone*, CarMax nonetheless seeks indirect review of *Iskanian* via an order from an intermediate state court that applied *Iskanian* in deciding a motion to compel arbitration.

In *Iskanian*, the California Supreme Court declined to enforce an agreement waiving an employee's right to bring a claim under California's Private Attorneys General Act (PAGA), California Labor Code section 2698 *et seq.* PAGA deputizes employees who suffer a violation of California's labor laws to bring enforcement actions on the state's behalf. Employees in these types of qui tam actions recover civil penalties payable mostly to the state and partly to the plaintiff and other victims. In *Iskanian*, the California Supreme Court held that an arbitration clause in an employment agreement cannot waive altogether an employee's ability to bring PAGA claims on behalf of the state in some forum, whether arbitral or judicial. This Court declined to review *Iskanian* on January 20, 2015.

135 S. Ct. 1155 (2015). As CarMax's petition rehashes the same arguments that the petitioners made, and that this Court rejected, in *Iskanian* and *Bridgestone*, the reasons for denying review in those cases fully apply here.

First, this Court lacks jurisdiction because the decision of the California Court of Appeal is not "final." 28 U.S.C. § 1257. It neither terminates the litigation nor finally decides whether the PAGA claim will be arbitrated. In fact, the disposition here is nearly identical to that in *Iskanian*—in both cases, the court reversed an order that upheld a PAGA waiver and remanded for consideration of whether the PAGA claim would proceed in arbitration. App. 24a–25a.

Even if the Court has jurisdiction, it should deny certiorari for many reasons. First, after CarMax filed its petition, the Ninth Circuit decided a case that averts any conflict between state and federal courts regarding the FAA's preemption of California's rule against PAGA waivers. *Sakkab v. Luxottica Retail North America, Inc.*, No. 13-55184, – F.3d –, 2015 WL 5667912, (9th Cir. Sept. 28, 2015). *Sakkab* holds that the FAA does not preempt the *Iskanian* rule. Not only does *Sakkab* thus avoid any conflict between the California Supreme Court and the Ninth Circuit, but if the Court were inclined to review the *Iskanian* rule, *Sakkab* would provide a much stronger candidate for certiorari than the present case.

Moreover, as the Ninth Circuit confirmed in *Sakkab*, *Iskanian* does not conflict with any decision of this Court. It does not exempt any claim from arbitration, but merely holds that the FAA does not require enforcement of agreements that waive the pursuit of representative

claims on behalf of a state. This Court has never addressed an agreement containing such a waiver, much less enforced it.

In fact, this case does not even present the question posed by CarMax, which is whether the FAA precludes a state rule that "exempts representative PAGA actions from mandatory arbitration." *Iskanian* does not hold agreements to *arbitrate* PAGA claims unenforceable, but says only that an employer may not require an employee to waive the right to pursue such a claim in any forum. *Iskanian*, 327 P.3d at 155. As this rule applies equally to all types of PAGA waivers—whether in an arbitration agreement or otherwise—it is the exact type of "generally applicable contract defense" that the FAA authorizes. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

STATEMENT

1. The Private Attorneys General Act

PAGA provides a unique enforcement mechanism for California's Labor Code by enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share going to the individual plaintiffs and other aggrieved employees. *See* Cal. Lab. Code § 2698 *et seq.*

The California legislature designed PAGA to address two problems resulting in under-enforcement of the state's Labor Code: first, there was "a shortage of government resources" to pursue enforcement of Labor Code provisions that specify civil penalties; and second, many violations

of the Labor Code were punishable only as criminal misdemeanors but the state's district attorneys tended "to direct their resources to violent crimes and other public priorities." *Iskanian*, 327 P.3d at 146. PAGA confronts these problems by establishing civil penalties for Labor Code violations that previously were punishable only as misdemeanors and by deputizing aggrieved employees to bring private enforcement actions on the state's behalf to the full extent of the state's enforcement authority. *Id.* As the California Supreme Court explained in *Arias v. Superior Court*, 209 P.3d 923, 929–30 (Cal. 2009):

> The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

To achieve its goal of more rigorous enforcement of the Labor Code, PAGA authorizes recovery of penalties by "an aggrieved employee . . . 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." *Id.* § 2699(g). Penalties recovered under PAGA are "distributed . . . 75 percent to the Labor and Workforce Development Agency for enforcement of labor

laws and education of employers and employees about their rights and responsibilities under this code . . . ; and 25 percent to the aggrieved employees." *Id.* § 2699(i).

"A PAGA representative action is . . . a type of qui tam action." *Iskanian*, 327 P.3d at 148; *Sakkab v. Luxottica Retail N. Am., Inc.*, 2015 WL 5667912, at *2 (9th Cir. Sept. 28, 2015). PAGA actions differ from classic qui tam actions in that "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation." *Id.* Still, because a PAGA action is aimed at deterring and punishing Labor Code violations and not at compensating individuals, "[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit." *Id.* "In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies." *Arias*, 209 P.3d at 933.

Every PAGA action, whether implicating violations involving one or a thousand employees, is a "representative" action on behalf of the state. *Id.* at 151. Accordingly, before filing a PAGA action, an "aggrieved employee" must give notice of the claimed violations to the employer and the California Labor and Workforce Development Agency. *Id.* § 2699.3(a)(1). The agency authorizes the employee to sue on the state's behalf 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. *Id.* §§ 2699.3(a)(2), 2699(h).

PAGA actions require neither class certification nor notice to other employees. *See Arias,* 209 P.3d at 929–34. Other employees are bound by a PAGA adjudication only

with respect to civil penalties, just as they would be "bound by a judgment in an action brought by the government." *Id.* at 933. The effect of a PAGA judgment rests not on the principles that make class action judgments binding on class members, see *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379–80 (2011), but on the basis that, "[w]hen a government agency is authorized to bring an action . . . a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party." *Arias*, 209 P.3d at 934 (citing Restatement (2d) of Judgments § 41(1)(d), cmt. d (1982)).

In short, a PAGA action is not a class action. It is a Labor Code enforcement action in which the plaintiff represents the state's interest in imposing civil penalties for violations suffered by the plaintiff and other employees. The action "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." *Iskanian*, 327 P.3d at 151; *Sakkab*, 2015 WL 5667912, at *11 (9th Cir. Sept. 28, 2015) (PAGA claims are brought "as a proxy for the state.").

2. The *Iskanian* Decision

In *Iskanian*, a driver alleged that his employer transportation company failed to pay him for overtime and missed meal and rest breaks, in violation of the California Labor Code. The driver sought to bring a class action and a representative claim under PAGA. The employer moved to compel arbitration under an agreement that barred both class actions and representative actions. The employee argued that the class-action ban was invalid

under *Gentry v. Super. Ct.*, 165 P.3d 556 (Cal. 2007), which held class-action bans in employment arbitration agreements unenforceable in some circumstances. The plaintiff also argued that the ban on representative actions was unenforceable because it would completely foreclose the pursuit of a PAGA claim.

After a court of appeal enforced the arbitration agreement, the California Supreme Court in *Iskanian* largely affirmed, but reversed in part. The court concluded that this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), required it to overrule *Gentry* and to enforce the class-action ban. The court also held that the class-action ban did not violate federal labor laws, based largely on the reasoning of *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). And the court held that the defendant had not waived arbitration because it would have been futile to seek to enforce the arbitration clause before *Concepcion*. All seven justices, however, ruled that the agreement was unenforceable to the extent it purported to bar the plaintiff from pursuing a PAGA claim in any forum. The court began by holding that, given the critical importance of PAGA in enforcing California's labor laws, agreements requiring employees to waive the entitlement to bring PAGA representative actions as a condition of employment are unenforceable under state law. The court then held that the FAA does not require enforcement of such a purported waiver.

The court's five-justice majority opinion on this point rested largely on the court's state-law holding that the real party in interest under PAGA is the state, on whose behalf

the PAGA plaintiff seeks penalties. As the court observed, any PAGA action is by definition a representative action on the state's behalf, *Iskanian*, 327 P.3d at 151, and thus enforcement of an employment agreement banning representative actions would prevent the state from pursuing its claim through the agent authorized by law to represent it: the PAGA plaintiff. Because "a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency," *id.* at 149, and because the state is not a party to the agreement invoked to bar the claim, the court held that permitting the PAGA action to proceed would not conflict with the FAA's fundamental requirement that private arbitration agreements be enforced as between the parties. *See id.* at 151 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Having held that a PAGA claim must be available in "some forum," *id.* at 155, the court remanded for consideration of whether the forum for the PAGA claims in *Iskanian* would be arbitral or judicial. *Id.*

Justices Chin and Baxter concurred in all aspects of the judgment. As to the PAGA waiver, the concurring justices relied on this Court's precedents, stating that the FAA does not require enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* at 157 (quoting *American Express*, 133 S. Ct. at 2310). Based on this "analysis firmly grounded in high court precedent," the concurring justices concluded that "the arbitration agreement here is unenforceable because it purports to preclude Iskanian from bringing a PAGA action in any forum." *Id.* at 158.

3. The *Sakkab* Decision

On September 28, 2015, the Ninth Circuit decided *Sakkab v. Luxottica Retail North America, Inc.*, No. 13-55184, – F.3d –, 2015 WL 5667912 (9th Cir. Sept. 28, 2015), which upholds application of the *Iskanian* rule in the federal courts. As the *Sakkab* panel stated: "[T]he *Iskanian* rule does not conflict with the FAA, because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration. It only prohibits them from opting out of the central feature of the PAGA's private enforcement scheme—the right to act as a private attorney general to recover the full measure of penalties the state could recover." *Id.* at *11.

In *Sakkab*, the plaintiff alleged that the defendant eyewear retailer misclassified him as a supervisor to avoid paying overtime and offering required meal and rest breaks. *Id.* at *1. The employee brought state wage and hour claims on behalf of a class and as a private attorney general under the PAGA statute. *Id.* The employer moved to compel arbitration based on an arbitration agreement in the employee handbook that provided:

> You and the Company each agree that, no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that relates in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim).

Id. There was no question that, pursuant to *Concepcion*, the agreement required the employee to individually arbitrate the claims he intended to bring on behalf of the class. *Id.* However, the court held that "the portion of the . . . agreement prohibiting [the employee] from bringing any PAGA claims on behalf of other employees was unenforceable under California law." *Id.* The employee "could not be denied a forum for his representative PAGA claim," whether that forum was arbitral or judicial. *Id.*

In holding that the FAA does not preempt the *Iskanian* rule, the *Sakkab* court "consider[ed] the history of the PAGA statute and the Supreme Court's FAA preemption cases." *Id.* First, the Court agreed with *Iskanian* that two California statutes bar "pre-dispute agreements to waive PAGA claims." *Id.* at *3. This extends to PAGA claims brought on behalf of other employees because allowing a waiver of these representative claims would not "punish and deter employer practices that violate the rights of numerous employees under the Labor Code." *Id.* at *3.

The Court then discussed whether the FAA preempts California's rule against PAGA waivers: "If the *Iskanian* rule is valid, Sakkab's waiver of his right to bring a representative PAGA action is unenforceable. Therefore, this case turns on whether the FAA, 9 U.S.C. § 2 et seq., preempts the *Iskanian* rule." *Id.* at *4. The Court cited *Concepcion* for the proposition that the FAA preempts state laws that single out arbitration agreements for special treatment or "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* However, the *Sakkab* panel also noted that the FAA does not preempt generally applicable contract defenses from applying to arbitration agreements in the same way

they apply to other contracts. *Id.* It concluded that "[t]he *Iskanian* rule complies with this requirement. The rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Id.*

Moreover, unlike traditional class action claims that might interfere with the informality and efficiency of arbitration, "[t]he *Iskanian* rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures." *Id.* at *7. Whereas a class action resolves the claims of absent parties, "a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." *Id.* at *7. The civil penalties recovered in a PAGA action are distinct from whatever statutory damages to which an employee may be entitled in his individual capacity. *Id.* Thus, "[a]n agreement to waive 'representative' PAGA claims—that is, claims for penalties arising out of violations against other employees—is effectively an agreement to limit the penalties an employee plaintiff may recover on behalf of the state." *Id.*

The court distinguished PAGA claims from class actions in several other critical respects: "Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations." *Id.* at *8. PAGA arbitrations therefore do not require the formal procedures of class arbitrations. *Id.* "Because representative PAGA claims do not require any special procedures, prohibiting waiver of such claims

does not diminish parties' freedom to select the arbitration procedures that best suit their needs. Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims. This is a critically important distinction between the *Iskanian* rule and the rule at issue in *Concepcion*." *Id.* at *8.

Finally, the *Sakkab* court also held that California has the right under its police powers to make the legislative determination that PAGA is the optimal way to enforce state labor laws, and it is presumed that Congress does not intend to preempt state police powers unless it clearly manifests its intention to do so. The *Sakkab* court found that the *Iskanian* rule upholds a state regulation under California's police power to protect workers within the state. *Id.* at *11. Indeed, "[t]he explicit purpose of the rule barring enforcement of agreements to waive representative PAGA claims is to preserve the deterrence scheme the legislature judged to be optimal." *Id. Sakkab* concluded that the FAA was not intended to preclude states from authorizing these types of qui tam actions to enforce state law. *Id.*

4. The Proceedings in the Present Case

CarMax is the largest used-car retailer in the United States. Pet. 9. Respondent Wahid Areso worked at CarMax as a sales consultant starting in approximately June, 2006. As a condition of his employment (and part of his employment application), he signed a CarMax Dispute Resolution Agreement and accompanying Dispute Resolution Rules and Procedures (collectively "CarMax Arbitration Agreement" or the "Arbitration Agreement"). App. 5a, 69a, 73a.

The Arbitration Agreement provides that any claims arising out of Areso's employment with CarMax will be "settle[d] . . . exclusively by final and binding arbitration before a neutral Arbitrator," and that any arbitration "will be conducted in accordance with the CarMax Dispute Resolution Rules and Procedures." App. 69a–70a.

Those Rules, in turn, contain a waiver of the right to pursue consolidated and class claims in arbitration:

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

App. 83a. While this clause arguably does not cover representative PAGA claims because PAGA claims do not "resolv[e] the claims of absent parties," *Sakkab*, 2015 WL 5667912, at *7, and aggrieved employees thus do not "claim to share a common interest" in collective relief, CarMax has taken the position that this clause does, in fact, effect a waiver of the right to pursue representative PAGA claims in any forum. The trial court agreed, finding that this clause resulted in "an implied waiver of Plaintiffs' PAGA claims." App. 24a, 50a–52a. CarMax never argued that, if the representative PAGA claims were not validly waived, then they should be arbitrated.

In July, 2008, after suffering alleged employment violations while working for CarMax, Areso added himself

as a named plaintiff to a putative class action complaint previously filed in California state court by his wife, Leena Areso, who had also worked for CarMax as a sales consultant.[1] App. 5a. Areso's operative First Amended Complaint ("FAC") contains causes of action for failure to provide meal periods, failure to timely pay wages due at termination, violation of California's unfair competition law, and a claim for civil penalties under PAGA.[2] App. 7a.

On June 17, 2011, CarMax moved to compel Areso to arbitrate all of his claims individually. App. 7a, 31a. On November 21, 2011, the trial court granted this motion, ordering that all claims—including Areso's representative PAGA claims—must be arbitrated on an individual basis. App. 50a–52a.

At first, the California Court of Appeal reversed as to all claims based on a California rule prohibiting waiver of class claims that has since been overturned. *See Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). However, after the Court of Appeal issued its initial decision, this Court issued a GVR order and the California Supreme Court decided *Iskanian*, wherein it rejected *Gentry* in light of this Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 and, as explained above, held that an arbitration agreement may not waive the right to pursue a PAGA claim.

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1. The Aresos' case was later consolidated with a class action complaint filed in April, 2008, by a third Carmax sales consultant, John W. Fowler. App. 5a.

2. Claims that Areso originally asserted for overtime and failure to reimburse work-related expenses, as well as all of Leena Areso's claims, were dismissed. App. 7a.

On January 28, 2015, the California Court of Appeal revisited CarMax's appeal in light of *Iskanian* and *Concepcion*, and "affirm[ed] the trial court order granting the motion to compel arbitration as to all but . . . Areso's representative claims under [PAGA]." App. 3a.

Regarding PAGA, the Court of Appeal held that the lower Court erred by holding that the arbitration agreement waived Areso's right to bring a representative PAGA claim, and it issued a remand order that explicitly left open the option for the parties to arbitrate that claim:

> As in *Iskanian, supra*, 59 Cal.4th 348, questions remain that the parties have not briefed: "(1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2?" (*Id.* at pp. 391-392.) The parties may address those questions on remand. (*Id.* at p. 392.)

App. 24a–25a.

The California Supreme Court denied CarMax's petition for review on April 22, 2015. App. 1a. CarMax filed the instant petition on August 20, 2015.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction because the decision below is not final.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction only over "[f]inal judgments or decrees" of state courts.

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

The order below is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id.* Here, as in *Iskanian* and *Bridgestone*, the case came to the California appellate courts on interlocutory review of a decision compelling arbitration. The intermediate appellate court affirmed the trial court's determination that the arbitration agreement's class-

action ban was enforceable but held that the trial court erred in enforcing the PAGA waiver, and remanded for consideration of whether the PAGA claim should proceed in arbitration or in a judicial forum. The California Supreme Court denied review.

The Court of Appeal's order did not, as CarMax argues, "refuse[] to enforce the parties' arbitration agreement with respect to respondent's PAGA claim." Pet. 31. It did not order that the PAGA claim was non-arbitrable, only that the PAGA claim could not be waived outright. "As in *Iskanian*," the Court of Appeal remanded for determination of "whether to agree on a single forum for all claims; if not, whether to bifurcate the claims, sending individual claims to arbitration and the representative Private Attorneys General Act claims to litigation; and if bifurcation occurs, whether to stay the arbitration pursuant to Code of Civil Procedure section 1281.2." App. 24a–25a.

CarMax reads this disposition as giving it only a choice to "waive arbitration of Areso's remaining non-PAGA claim" and proceed with that claim in Court, which it says it "declined to do." Pet. 15. However, as pertinent to jurisdiction, CarMax ignores the other option that the remand order leaves open, which was to arbitrate Areso's representative PAGA claim. *See* Pet. 30–34. As the Court of Appeal's interlocutory order merely refuses to enforce the agreement's PAGA waiver and remands for determination of whether to arbitrate Areso's PAGA claim, the order in this case is nearly identical to the interlocutory orders at issue in *Iskanian* and *Bridgestone*, on which this Court refused to grant certiorari.

This Court has exercised jurisdiction over state-court judgments that do not terminate a case only in a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *See Florida v. Thomas*, 532 U.S. 774, 777 (2001). CarMax's only argument for jurisdiction is under the fourth *Cox* category, Pet. 30, however this case does not fit into that or any of the other narrow *Cox* categories.

The first *Cox* category covers cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. Here, it is by no means "preordained" that the plaintiffs will prevail on their PAGA claims. *See Thomas*, 532 U.S. at 778. Whether the claims will proceed in arbitration or in court is undecided, and the plaintiffs may not succeed in proving their claims wherever they ultimately proceed.

Cox's second category includes only cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Here, the highest court did not finally decide anything, it merely declined review. Moreover, the federal issue will not necessarily survive and require decision regardless of the outcome of future proceedings. If the PAGA claims fail on the merits, the FAA preemption issue will be moot. *Jefferson*, 522 U.S. at 82.

Cox category three comprises unusual "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. This category encompasses only cases where state law offers no subsequent opportunity to obtain a judgment over which this Court could exercise jurisdiction. *See id.* at 481–82. Here, there is no "federal claim" at issue, and the Court of Appeal's decision leaves open review of federal issues after a final judgment on the PAGA claim, or via an appeal from denial of CarMax's application to vacate the result of a PAGA arbitration (which is not likely to happen because CarMax refuses to arbitrate the representative PAGA claim).

The fourth *Cox* category—the only category that CarMax argues is applicable—"covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*, 539 U.S. 654, 658–59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482–83). The interlocutory order that CarMax challenges did not finally decide any federal issue, and denial of immediate review would not "seriously erode" federal policy.

Specifically, the order did not deny arbitration of any claim; it remanded for determination of whether the PAGA

claim would proceed in court or in arbitration. The case is thus wholly unlike *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984), and *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987), where this Court held that definitive state-court decisions refusing arbitration were "final" under *Cox*. See Pet. 31.

Further, there was no definitive state-court decision refusing arbitration of PAGA claims. Exactly like in *Iskanian*, the Court of Appeal here left open the possibility that the parties would arbitrate Areso's PAGA claim. Pet. 24a–25a. Because federal policy does not favor use of compulsory arbitration to waive claims, the Court of Appeal's holding that PAGA claims may not be waived—unlike a holding denying arbitration—in no way threatens federal policy.

Finally, CarMax's argument that the lower court's disposition would "seriously erode federal policy" is significantly weakened by the fact that the only federal appellate court to have considered whether the FAA preempts the *Iskanian* rule found that it did not. *Sakkab*, – F.3d –, 2015 WL 5667912. The fact that this Court denied two petitions for certiorari on the *Iskanian* issue in the last 10 months only lends further support to *Sakkab*'s holding that *Iskanian* does not run afoul of the federal policies embodied in this Court's FAA jurisprudence. *See Iskanian*, 135 S. Ct. at 1155 (denying certiorari); *Bridgestone*, 135 S. Ct. at 2377 (same).

II. The question presented does not merit review.

A. In light of *Sakkab*, there is no conflict between decisions of a state supreme court and a federal court of appeals.

On September 28, 2015, the Ninth Circuit issued its opinion in *Sakkab*, which decides the exact issues raised in CarMax's petition. Whereas there is zero precedential value to the unpublished, unciteable opinion of the California Court of Appeal on which CarMax seeks review, the *Sakkab* decision constitutes the controlling federal voice within the Ninth Circuit on whether the FAA preempts California's rule against PAGA waivers.

In deciding to follow *Iskanian*, *Sakkab* put to rest any differences of opinion that previously existed among federal district courts in the Ninth Circuit about the applicability of FAA pre-emption to PAGA waivers. *See* Pet. 28–30. As *Sakkab* and *Iskanian* are in perfect harmony and constitute the only federal appellate or state supreme court decisions addressing whether the FAA mandates enforcement of an agreement to waive PAGA claims, there is no split of authority warranting intervention from this Court. Any respectful disagreement that previously existed among some of California's federal district courts has now been resolved.

While there is still a possibility that the Ninth Circuit will rehear *Sakkab* en banc, that possibility further supports a denial of certiorari in this case. On September 30, 2015, the panel in *Sakkab* granted the employer's request for an extension to file a petition for rehearing en banc. That petition is now due on November 11, 2015,

and will not be decided prior to the deadline for filing the instant brief. Contrary to CarMax's argument that "[a]n opinion from the Ninth Circuit . . . will not enhance this Court's analysis of this issue," Pet. 29, if the Ninth Circuit grants an en banc petition in *Sakkab*, this Court would benefit immensely from reviewing the en banc panel's opinion before wading into the issue of FAA preemption of the *Iskanian* rule. An en banc opinion would shed additional light on the application of FAA preemption analysis to California's prohibition on employment agreements that waive PAGA claims, which would be valuable for this Court's consideration were it to weigh in on this issue.

Moreover, should a conflict develop between state and federal law as a result of any en banc decision in *Sakkab*, this Court may consider, following the en banc ruling, whether such a conflict justifies review. Conversely, congruence of results and reasoning by yet another federal panel may indicate that review is unwarranted. Meanwhile, absent a conflict over *Iskanian*'s application of preemption principles to the unusual PAGA right of action, the reasons ordinarily justifying review by this Court remain lacking. *See* S. Ct. R. 10(b).

Of course, if the Ninth Circuit declines to take *Sakkab* en banc, this Court will still retain the power to review the three-judge panel's decision if it so desires. Indeed, if the Court were still interested in taking up the *Iskanian* issue after having declined to review it twice earlier this year, *Sakkab* would offer a better candidate for review than the present case because *Sakkab* is the only precedential authority from a federal appellate court on the FAA's preclusive effect on PAGA waivers, whereas the lower

court opinion here cannot "be cited or relied on by a court or a party in any other action." Cal. R. Ct. 8.1115.

B. *Iskanian* is fully consistent with this Court's precedents.

Like the petitioners in *Iskanian* and *Bridgestone*, CarMax seeks review principally on the theory that *Iskanian* conflicts with this Court's FAA jurisprudence. But its arguments are no more persuasive than those of the petitioners in those cases, and they provide no basis for granting review in the wake of the Court's denial of review in *Iskanian* itself and in *Bridgestone*. CarMax's petition, like the ones in *Iskanian* and *Bridgestone*, points to no decision of this Court that addresses whether an arbitration agreement can preclude assertion of a representative or qui tam claim, and thus there is no conflict of decisions within the meaning of this Court's Rule 10(c).

Rather, CarMax argues that *Iskanian* misapplied this Court's precedents. Such arguments "rarely" justify a grant of certiorari. S. Ct. R. 10. This case is not one of those rare instances because the decision below aligns with this Court's FAA jurisprudence, and CarMax's variations on the arguments presented in *Iskanian* and *Bridgestone* do not demonstrate otherwise.

1. *Iskanian* does not create an "exemption" from the FAA.

CarMax wrongly argues that *Iskanian* runs afoul of the FAA by "exempt[ing] representative PAGA actions from mandatory arbitration." Pet i, 16. However, *Iskanian*

did not create an "exemption" from the FAA for PAGA claims—it did not hold that those claims are non-arbitrable. Rather, what *Iskanian* held to be outside the FAA was an employment agreement that prospectively waived an employee's right to bring a PAGA claim altogether, and thus the court held only that such a claim must be available "in some forum," *Iskanian*, 327 P.3d at 155; *see also id.* at 159 (Chin, J., concurring). *Iskanian*—like the present case—left open the possibility that the forum could be arbitration. The Ninth Circuit echoed this understanding: "[t]he *Iskanian* rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures." *Sakkab*, No. 13-55184, 2015 WL 5667912, at *7 (9th Cir. Sept. 28, 2015).

As such, *Iskanian* is not an attempt to "override arbitration" and cannot be equated with attempts to prohibit arbitration of particular types of claims at issue in the cases cited by CarMax. Pet. 17 (citing *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012), *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), *Perry v. Thomas*, 482 U.S. 483, and *Southland*, 465 U.S. 1. Those cases stand for—as CarMax suggests—the "straightforward" proposition that the FAA preempts a "categorical rule prohibiting arbitration of a particular type of claim." *Marmet*, 132 S. Ct. at 1204. For example, in *Marmet*, the Court reversed a decision of the West Virginia Supreme Court that held an agreement unenforceable because it viewed compelled arbitration of personal injury and wrongful death claims against nursing homes to be contrary to the state's public policy. *See id.* at 1203.

California fully endorses the proposition that "the FAA clearly preempts a state unconscionability rule that establishes an unwaivable right to litigate particular claims by categorically deeming agreements to arbitrate such claims unenforceable." *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 220 (2013), *cert. denied*, 134 S. Ct. 2724 (2014). *Iskanian* accords with that principle: It does not hold agreements to arbitrate PAGA claims unenforceable, but says only that an employee may not, as a condition of employment, be required to waive the right to pursue such a claim in any forum. *Iskanian*, 327 P.3d at 155. That is why the California Court of Appeal in the present case remanded for a determination of whether the parties would pursue Areso's representative PAGA claim in arbitration. App. 25a. CarMax's question is thus not presented by either *Iskanian* or by the order in this case.

By disallowing waiver of PAGA claims, *Iskanian* neither placed arbitration agreements on an "unequal 'footing'" with other contracts, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), nor "invalidate[d] [an] arbitration agreement[] under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Perry*, 482 U.S. at 492 n.9. *Iskanian* provides even-handedly that an employment agreement may not forbid employees to bring PAGA actions, whether or not the prohibition is in an arbitration agreement. *Iskanian*, 327 P.3d at 133, 148–49. That holding falls well within the principle that the FAA does not preempt state laws concerning the "enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. The *Sakkab* court reaffirmed *Iskanian*'s holding in this respect, finding that the *Iskanian* rule is a "'generally applicable' contract defense" because it

"bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement." *Sakkab*, No. 13-55184, 2015 WL 5667912, at *4 (9th Cir. Sept. 28, 2015).

Likewise, CarMax gets no support by asserting that *Iskanian* conflicts with this Court's decisions in *Waffle House*, 534 U.S. 279, and *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014). Pet. 17–20.

Waffle House does not "confirm that the FAA preempts the *Iskanian* rule." Pet. 17. Quite the opposite: That case holds that an arbitration agreement cannot bind a governmental enforcement agency that is not a party to it. *See* 534 U.S. at 294. CarMax interprets that holding to mean that an *employee* who is bound by an arbitration agreement must individually arbitrate claims brought on behalf of a state. That reading takes *Waffle House* well beyond its holding. *Waffle House* did not address a claim brought by an employee plaintiff, nor did it consider an agreement that purports to waive an employee's right to bring a qui tam claim. Here, as in *Waffle House*, "[n]o one asserts that the [State of California] is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty." *Id.* "Nothing in *Waffle House* suggests that the FAA preempts a rule prohibiting the waiver of this kind of qui tam action on behalf of the state . . . ." *Iskanian*, 327 P.3d at 151.

Likewise, *Hood* held that, under the language of the statutory provision at issue there (which defines "mass actions" subject to federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)), the identity of the "real party in interest" in an action brought by

a state attorney general on behalf of the state is not determinative of whether the action meets the statutory definition. 134 S. Ct. at 742–45. That holding, resting on the language and context of the specific statute before the Court, has no bearing on whether the FAA, which incorporates ordinary principles of contract law, see 9 U.S.C. § 2, requires that a waiver of the right to bring a claim be enforced against a real party in interest who is not a party to the purported contractual waiver.

In fact, none of this Court's decisions enforcing arbitration agreements has even touched on whether such an agreement can waive a claim on behalf of a state. As *Iskanian* correctly stated, this Court's "FAA jurisprudence—with one exception …—consists entirely of disputes involving the parties' own rights and obligations, not the rights of a public enforcement agency." 327 P.3d at 150. As shown above, the "one exception," *EEOC v. Waffle House*, "does not support [the] contention that the FAA preempts a PAGA action." *Id.* at 151.

2. *Iskanian* does not interfere with the fundamental attributes of arbitration.

Both the California Supreme Court in *Iskanian*, and now the Ninth Circuit in *Sakkab*, have resoundingly rejected CarMax's argument that PAGA arbitrations "interfere[] with fundamental attributes of arbitration." Pet. 22. PAGA claims are materially distinguishable from class claims so that enforcing them in arbitration does not interfere with the informality and efficiency of arbitration or create "a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748.

In *Concepcion*, this Court found such interference because California's rule against consumer contracts banning class actions effectively "allowed any party to a consumer contract to demand" classwide arbitration. *Id.* at 1750. The Court held that classwide arbitration conflicted with the FAA because it fundamentally changed the nature of arbitration, requiring complex and formal procedures attributable to the inclusion of absent class members. *Id.* at 1750–52.

No such interference results from holding PAGA claims nonwaivable. "Representative actions under the PAGA, unlike class action suits for damages, do not displace the bilateral arbitration of private disputes between employers and employees over their respective rights and obligations toward each other." *Iskanian*, 327 P.3d at 152. As the Ninth Circuit explained, unlike class actions, "[t]he *Iskanian* rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures." *Sakkab*, No. 13-55184, 2015 WL 5667912, at *7 (9th Cir. Sept. 28, 2015). Whereas a class action resolves the claims of absent parties, a PAGA action is a bilateral "statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." *Id.*

Because there is "no need to protect absent employees' due process rights in PAGA arbitrations," those arbitrations do not require the types of formal procedures necessary to arbitrate class claims. *Id.* at *8. For example, class certification, notice, opt-out rights, and the other procedures that concerned the Court in *Concepcion* (*see* 131 S. Ct. at 1751–52) are not features of PAGA

proceedings. *See Arias*, 209 P.2d at 929–34. Further, the parties to a PAGA arbitration may decide on discovery limitations and other procedural rules to simplify the arbitration process. *Id.* at *10. At all times, the parties retain "freedom to select the arbitration procedures that best suit their needs . . . . This is a critically important distinction between the *Iskanian* rule and the rule at issue in *Concepcion*." *Id.* at *8.

Thus, far from conflicting with the FAA's preference for informal procedures in arbitration, "the *Iskanian* rule . . . . only prohibits [parties] from opting out of the central feature of the PAGA's private enforcement scheme–the right to act as a private attorney general to recover the full measure of penalties the state could recover." *Id.* at *11.

3. This Court's FAA decisions do not require enforcement of agreements barring assertion of statutory rights.

CarMax admits that this case involves a limited ruling reversing "the trial court's order enforcing the [PAGA] waiver in the arbitration agreement," yet it does not point to a single case of this Court requiring enforcement of an agreement to waive a PAGA claim or any other statutory right. Pet. 31 (citing App. 24a). As the concurring Justices in *Iskanian* pointed out, this Court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims. And CarMax's argument that *American Express* applies only to federal claims does not provide any support for expanding the FAA's reach to require enforcing a waiver of state statutory claims for which arbitration remains available. Pet. 24.

In fact, holding that the FAA preempts a state's chosen means for pursuing its claims against those who violate its laws would flout fundamental preemption principles. As the California Supreme Court and the Ninth Circuit have both pointed out, this Court has repeatedly held that "the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." *Iskanian*, 327 P.3d at 152 (quoting *Ariz. v. United States*, 132 S. Ct. 2492, 2501 (2012)); *see also Sakkab*, No. 13-55184, 2015 WL 5667912, at *11 (9th Cir. Sept. 28, 2015). Enforcing wage-and-hour laws falls squarely within state police powers, and the structure of a state's law enforcement authority is central to its sovereignty. *Printz v. United States*, 521 U.S. 898, 928 (1997). The FAA evinces no manifest purpose to displace state law enforcement. Its manifest purpose is to render arbitration agreements in contracts affecting commerce enforceable as between the contracting parties.

By making agreements to arbitrate claims enforceable, the FAA does not provide for enforcement of agreements that claims cannot be pursued at all—regardless of whether they are based on state or federal law. This Court's decisions enforcing arbitration agreements thus repeatedly emphasize that arbitration involves choice of forums, not waiver of claims: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Waffle House*, 534 U.S. at 295, n.10; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *McMahon*,

482 U.S. 220, 229–30 (1987). Indeed, this Court has insisted it would "condemn[] . . . as against public policy" an arbitration clause containing "a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637, n.19.

American Express strongly underscores that an arbitration agreement purporting to waive PAGA claims is unenforceable. While holding that a class action ban in an arbitration agreement was enforceable despite its *practical* effect of making particular claims too costly for the plaintiffs, 133 S. Ct. at 2312, *American Express* reiterated that arbitration agreements may not expressly waive statutory claims and remedies. As the Court explained, the principle that an arbitration agreement may not foreclose assertion of particular claims "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (emphasis added by Court). The Court added unequivocally: "That [principle] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id*.

A contractual ban on PAGA actions prospectively waives the right to pursue statutory remedies and flatly forbids the assertion of statutory rights under PAGA. *American Express* reaffirms that "elimination of the right to pursue [a] remedy," *id*. at 2311, remains off-limits for an arbitration agreement. Nothing in *American Express*, *Concepcion* or any of this Court's rulings supports the use of an arbitration agreement to prohibit assertion of a claim for relief or suggests that the FAA preempts state law precluding enforcement of such an agreement. Rather,

as the two concurring justices in *Iskanian* recognized, this Court's decisions strongly support the view that an agreement that "purports to preclude [plaintiffs] from bringing a PAGA action *in any forum*" is unenforceable. *Iskanian*, 327 P.3d at 158.

C. *Iskanian* does not reflect judicial hostility to arbitration and will not open the floodgates to FAA exceptions.

The *Iskanian* opinion does not reflect hostility toward arbitration. Significant aspects of *Iskanian*'s holding—just like the holding in the present case—unambiguously *favored* enforcement of arbitration agreements. Applying this Court's decision in *Concepcion*, the *Iskanian* court explicitly overruled its decision in *Gentry* and held class-action prohibitions in employment arbitration agreements enforceable because class actions would "interfere[] with fundamental attributes of arbitration." *Iskanian*, 327 P.3d. at 137. *Iskanian* likewise rejected a challenge to arbitral class-action bans based on federal labor laws. *Id.* at 137–43. And in holding that the defendant had not waived its right to arbitrate, *Iskanian* emphasized that "[i]n light of the policy in favor of arbitration, 'waivers are not to be lightly inferred.'" *Id.* at 143 (citation omitted).

The opinion in the present case tracks *Iskanian*: the Court of Appeal "affirm[ed] the trial court order granting the motion to compel arbitration" of all class claims. App. 3a. It held that "*Gentry* does not apply to subject the class action waiver in this case to special scrutiny as a precondition to enforcement." App. 23a. It also found that CarMax did not waive the right to compel arbitration, App. 10a; that the arbitration agreement is not unconscionable,

App. 14a; and that the NLRA does not bar enforcement of the arbitration agreement, App. 23a.

Amidst all these rulings favorable to arbitration, the unwillingness of the courts in the present case and in *Iskanian* to enforce a provision barring PAGA claims reflects not hostility to arbitration, but refusal to expand approval of arbitration to encompass agreements that waive claims—particularly claims belonging to the state. Indeed, the *Iskanian* court's two staunchest pro-arbitration justices, Justices Chin and Baxter, agreed that the holding that "the arbitration agreement is invalid insofar as it purports to preclude plaintiff . . . from bringing in any forum a representative action under [PAGA] . . . is not inconsistent with the FAA." *Id.* at 155 (Chin, J., concurring).

Similarly, the Court should reject CarMax's mischaracterization of *Iskanian* as creating a "gaping loophole" that would allow FAA exceptions based on the fiction that a claim is on behalf of a state. Pet. 27. Contrary to CarMax's position, the state's status as the real party in interest in PAGA claims is not a mere label that can be stamped on other claims willy-nilly; it is supported by the structure of the PAGA statute. Pet. 27. The PAGA right of action arose from the addition of a new section in the California Labor Code added to address unique enforcement challenges in the employment context. *Iskanian*, 327 P.3d at 146. As 75 percent of the PAGA recovery goes directly to the state, it would take drastic changes to other statutes to create the same level of state interest elsewhere. Nothing in *Iskanian* suggests that a state could slap the same label on an action in which the state had no similar interest. All rights of action under

state law may advance enforcement of state law, but not all seek relief directly on behalf of the state.

Iskanian expressly stated that it would not allow a state to "deputiz[e] employee A to bring a suit for the individual damages claims of employees B, C, and D." *Id.* at 152. An action seeking such "victim-specific relief by a party to an arbitration agreement on behalf of other parties to an arbitration agreement would be tantamount to a class action . . . [and] could not be maintained in the face of a class waiver." *Id.* The court explained that the distinction between a PAGA claim and such an evasion of *Concepcion* "is not merely semantic; it reflects a PAGA litigant's substantive role in enforcing our labor laws on behalf of state law enforcement agencies." *Id.*

By contrast, CarMax's position would severely limit the state's ability to pursue its claims. By extracting representative PAGA waivers from all of its employees as a condition of employment, CarMax will, if its preemption argument is accepted, have successfully immunized itself from liability for representative PAGA claims. That result would hardly be inconsequential. Allowing employers to opt out of liability for representative PAGA penalties would overturn California's legislative judgment that it is "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations" to the same extent as state enforcement agencies. *Arias*, 209 P.3d at 929; *Sakkab*, No. 13-55184, 2015 WL 5667912, at *7 (9th Cir. Sept. 28, 2015).

CONCLUSION

For the foregoing reasons, the Court should deny CarMax's petition for a writ of certiorari.

Respectfully submitted,

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