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 California Court of Appeal

REPLY BRIEF FOR PETITIONER

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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 14.2% of CarMax Inc.'s stock.

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Under this Court's precedents, the FAA clearly preempts California's *Iskanian* rule, which bars agreements requiring arbitration of PAGA claims on a bilateral rather than representative basis. As it has done consistently, this Court should grant review to enforce the FAA's mandate. There is no need to defer review pending the remote possibility of *en banc* proceedings in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). As the *Sakkab* panel recognized, this Court will have the last word on *Iskanian*'s validity. Further proceedings in *Sakkab* – if there are any – would shed no further light on that already extensively litigated question. Irrespective of *Sakkab*, enforcement of *Iskanian* in violation of the FAA will continue to disrupt employment arbitration in California courts unless this Court intervenes. This Court has jurisdiction under the fourth *Cox* test for finality of state-court judgments. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984). It should grant certiorari now and hold the *Iskanian* rule preempted.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO ENFORCE THE FAA AND PREVENT ONGOING DISRUPTION OF EMPLOYMENT ARBITRATION IN CALIFORNIA

A. The Ninth Circuit Panel Decision in *Sakkab* Does Not Warrant Deferring Review

Respondent argues (at 21) that certiorari is unwarranted because there is no conflict between *Iskanian* and the Ninth Circuit. But that is not the standard for certiorari in FAA preemption cases. *Iskanian* will remain controlling in California state courts regardless of whether the Ninth Circuit finds it preempted. State courts are the FAA's principal enforcers. *See*

Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500, 501 (2012) (per curiam). It is thus "a matter of great importance" that they "adhere to a correct interpretation of the [FAA]." *Id.* Accordingly, this Court has intervened promptly – and often summarily – to correct state-court decisions that flout the FAA's mandates. It has not waited for the respective federal circuit to find preemption. Pet. 25-26, 28. The Court should adhere to its consistent practice and grant prompt review.[1]

Respondent argues (at 22) that the Court would "benefit immensely" if the Ninth Circuit were to rehear *Sakkab en banc*.[2] But the Ninth Circuit grants *en banc* review in only a tiny fraction of cases.[3] And any *en banc* decision is unlikely to add materially to the wealth of existing judicial analysis on this issue. The Court already has the benefit of the majority and concurring opinions in *Iskanian*, the majority and dissenting panel opinions in *Sakkab*, and more than a dozen divergent district court

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[1] Respondent's suggestion (at 21) that the decision below does not warrant review because it is unpublished and non-precedential misses the point. Certiorari is warranted to review the California Supreme Court's *Iskanian* rule, which is unquestionably binding on all lower California courts. The decision below provides an ideal vehicle for this Court to review *Iskanian*. Pet. 30-34.

[2] The appellee in *Sakkab* filed a petition for rehearing *en banc* on November 11, 2015. No. 13-55184, Dkt. 87. The court has not acted on the petition.

[3] The Ninth Circuit currently has 14 pending *en banc* cases. *See* http://www.ca9.uscourts.gov/enbanc/ (listing the status of pending *en banc* cases as of October 19, 2015). By contrast, as of September 30, 2014, there were nearly 14,000 appeals pending before the court. *See* http://www.uscourts.gov/statistics/table/b/judicial-business/2014/09/30.

opinions. Pet. 28-29 & n.14.[4] The speculative possibility of one more opinion by the *en banc* panel does not justify delaying review.

B. Delaying Review Will Create Significant Hardship for Employers Across California

If the Ninth Circuit decides to grant rehearing *en banc*, a decision would take many months, if not several years.[5] Delaying review will create significant hardship for CarMax and employers doing business in California. As this case illustrates, *Iskanian* creates an unworkable and burdensome regime. On one hand, bilateral arbitration agreements are enforceable on employees' Labor Code claims. *See* App. 17a-23a (recognizing that, under *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), respondent's non-PAGA claims are subject to bilateral arbitration). On the other hand, those same arbitration agreements are unenforceable to the extent employees seek to bring representative claims for penalties under PAGA based on alleged violations of those same Labor Code provisions. As a result, employers like CarMax are faced with the

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[4] There are even more opinions addressing the question presented before *Iskanian* was decided, the vast majority of which hold that a rule refusing to enforce representative-action PAGA waivers is preempted by the FAA. *See Estrada v. CleanNet USA, Inc.*, No. C 14-01785 JSW, 2015 WL 833701, at *4-5 (N.D. Cal. Feb. 24, 2015) (collecting cases).

[5] Of the 14 pending *en banc* cases, *see supra* note 3, one has been pending for more than two years. *See Mondaca-Vega v. Holder*, No. 03-71369 (*en banc* review granted November 6, 2013). Two have been pending for more than one year. *See McKinney v. Ryan*, No. 09-99018 (review granted March 12, 2014); *Wolfson v. Concannon*, No. 11-17364 (review granted September 26, 2014). Review was granted in the remaining 11 cases between February and August 2015.

untenable choice of either having to relitigate the same issues in two different fora or having to abandon their right to arbitrate employees' non-PAGA claims. Either way, the core purpose of arbitration is defeated. The California Court of Appeal put CarMax to that Hobson's choice here. *See* App. 25a.

Moreover, if not corrected promptly, *Iskanian* will continue to generate a significant increase in PAGA claims against employers. *See* Erin Coe, *Iskanian Ruling To Unleash Flood Of PAGA Claims*, Law360 (June 24, 2014), *available at* http://www.law360.com/articles/551335/iskanian-ruling-to-unleash-flood-of-paga-claims. Employers subject to California law should not have to continue to suffer *Iskanian*'s infringement on their federal rights under the FAA. The far-reaching and destabilizing consequences of the *Iskanian* rule require this Court's prompt intervention.

C. *Iskanian* Contravenes This Court's FAA Precedents

Respondent's contention (at 23) that *Iskanian* is "fully consistent with this Court's precedents" distorts *Iskanian* and misconstrues this Court's decisions.

1. Respondent makes no effort to defend *Iskanian*'s holding that "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." 327 P.3d at 151; *see also Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal. App. 4th 651, 657 (2015) (under *Iskanian*, "PAGA claims are not subject to private arbitration agreements"). For good reason: As this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and reiterated in its summary reversal in

Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam), States may not exempt causes of action from the FAA's mandate. Pet. 16-17. As respondent implicitly concedes, the FAA preempts *Iskanian*'s holding that representative PAGA claims are exempt from the Act.

Respondent also concedes that the employee, not the State of California, is the plaintiff and controls the PAGA representative action. That concession also fatally undermines *Iskanian*. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), recognized that the FAA does not apply where the plaintiff (there, the EEOC) is not a party to the arbitration agreement. But it also made clear that a plaintiff who *is* a party to an arbitration agreement (like respondent is here) is bound to abide by the agreement's terms. *See id.* at 289 (FAA "*ensures the enforceability of private agreements to arbitrate*, but otherwise does not purport to place any restriction on a *nonparty's* choice of a judicial forum") (emphases added). *Waffle House* is simply a straightforward application of the general principle that arbitration under the FAA requires consent. *See*, *e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Here, respondent unequivocally consented to arbitrate on a bilateral rather than representative basis.

Respondent argues (at 26) that *Waffle House* does not require enforcement of the arbitration agreement where an employee seeks to advance the State's interests. But *Waffle House* rejected the suggestion that the arbitrability of the plaintiff's claims should turn on whether the plaintiff is a "proxy" for another party. *See* 534 U.S. at 296-98. Moreover, States can always vindicate their own interests by bringing their own suits. States' "general policy goal[]" of

enlisting private individuals to pursue their enforcement objectives cannot override the FAA's mandates. *Id.* at 294.[6]

2. Despite *Iskanian*'s clear statement that PAGA claims are not covered by the FAA, respondent insists (at 23-24) that *Iskanian* "did not hold that [PAGA] claims are non-arbitrable." Rather, respondent says, *Iskanian* leaves CarMax free to arbitrate as long as respondent can assert PAGA penalties for alleged violations of other employees' Labor Code rights. *See also Sakkab*, 803 F.3d at 435 ("The *Iskanian* rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures."). Of course, defendants always have the option to abandon their right to bilateral arbitration. But that possibility does not avoid FAA preemption, for two reasons.

First, the FAA's core requirement is that arbitration agreements be enforced "in accordance with the terms of the agreement." 9 U.S.C. § 4; *see American Express*, 133 S. Ct. at 2309 (under FAA § 2, 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") (internal quotation marks, citations, and alterations omitted). Respondent expressly agreed that he would not assert claims in a representative capacity, and *Iskanian*'s refusal to enforce that promise contravenes the FAA.

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[6] Respondent's cursory effort to distinguish *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), likewise misses the point, which is that the FAA focuses on the actual plaintiff in the lawsuit, not third parties that might indirectly benefit from the plaintiff's suit.

Second, respondent's argument is foreclosed by *AT&T Mobility*. The *Discover Bank* rule also technically left the defendant free to acquiesce to arbitrate on a *classwide* basis. But *AT&T Mobility* held that the FAA preempts state-law rules that condition the enforceability of arbitration clauses on the imposition of procedures that defeat the FAA's core purpose of facilitating *bilateral* arbitration. Pet. 20-21. That is exactly what *Iskanian* does: CarMax can obtain arbitration of respondent's claims only if it gives up its right to a one-on-one arbitration.[7]

3. Respondent also attempts (at 28) to distinguish *AT&T Mobility* on the ground that representative PAGA claims do not require binding other employees to the proceeding. As respondent acknowledges, however, PAGA penalties are "measured by the number of Labor Code violations committed by the employer" against *other* employees. Opp. 28 (internal quotation marks omitted). As a result, representative PAGA claims, like class claims, functionally require adjudication of many plaintiffs' claims "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Even if representative PAGA arbitration is technically "bilateral," a claim for PAGA penalties cannot be resolved without resolving the claims of the entire class of employees.

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[7] Contrary to respondent's contention (at 25-26), *Iskanian* is not saved from preemption on the ground that it is a "generally applicable contract defense" that does not discriminate against arbitration. As *AT&T Mobility* makes clear, contract defenses that apply equally to arbitration and court proceedings are still preempted if they frustrate the purposes of the FAA, as the *Iskanian* rule (like the *Discover Bank* rule) clearly does. *See* 131 S. Ct. at 1747-48.

Injecting other employees' claims into arbitration "sacrifices the principal advantage of arbitration" by making the process "slower, more costly, and more likely to generate procedural morass." *AT&T Mobility*, 131 S. Ct. at 1751. As with class actions, representative claims raise serious manageability problems. They routinely engender disputes regarding the identification of the other employees for whom penalties are sought and whether the plaintiff is "sufficiently representative and typical" to justify extrapolating his claims to those other employees. *Id.*; *see*, *e.g.*, *Amey v. Cinemark USA Inc.*, No. 13-cv-05669-WHO, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015) (PAGA claim "fail[ed] to adequately identify the aggrieved individuals"); *Ortiz v. CVS Caremark Corp.*, No. C-12-05859 EDL, 2014 WL 1117614, at *4 (N.D. Cal. Mar. 18, 2014) (striking PAGA claim as "unmanageable" "because a multitude of individualized assessments would be necessary").

Representative claims also complicate proceedings by spawning disputes over third-party discovery of other employees. *Cf. AT&T Mobility*, 131 S. Ct. at 1751 (class arbitration requires decisions on "how discovery for the class should be conducted"). And because representative PAGA claims are not limited to the "size of individual disputes," "[a]rbitration is poorly suited to the higher stakes of [representative] litigation." *Id.* at 1752; *see id.* ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). For these reasons, representative PAGA claims, no less than class claims, frustrate the core benefits of arbitration – "lower costs, greater efficiency and speed" – and imposing such claims on unwilling

parties thus "is inconsistent with the FAA." *Id.* at 1751 (internal quotation marks omitted).

4. In a last-ditch argument, respondent defends *Iskanian* (at 29-32) on the alternative rationale – adopted by the *Iskanian* concurrence – that the State can invalidate the parties' arbitration agreement under what little remains of the "effective vindication" of substantive rights doctrine. *See American Express*, 133 S. Ct. at 2311-12. The premise of respondent's argument – that the arbitration agreement prevents him from bringing *any* PAGA claim in *any* forum – is simply inaccurate.[8] The arbitration agreement leaves respondent free to pursue PAGA penalties based on violations of *his* Labor Code rights. Respondent merely waived his procedural right to seek penalties on behalf of *other* employees.

Even if representing other employees could be viewed as a "substantive" right, moreover, both the majority and the dissent in *American Express* agreed that the FAA evinces "no earthly interest" in preserving *state-law* rights. *Id.* at 2319, 2320 (Kagan, J., dissenting); *see id.* at 2310 (majority op.); Pet. 23-24. Respondent's protest (at 34) that FAA preemption infringes on state sovereignty simply ignores our system of federal supremacy. *See also AT&T Mobility*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

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[8] *See, e.g.*, Opp. i (incorrectly asserting in reformulated question presented that arbitration agreement prevents respondent "from asserting claims under PAGA in any forum").

II. RESPONDENT'S JURISDICTIONAL OBJECTION IS BASELESS

This Court should reject respondent's effort to erect a meritless jurisdictional obstacle to granting review. Under *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court clearly has jurisdiction under the fourth *Cox* test for finality of state-court judgments. Pet. 30-32.

Respondent argues (at 17, 19) that *Southland* does not apply because CarMax still has the option to accede to arbitration of respondent's representative PAGA claim. Under *Southland*, however, the lower court's refusal to enforce the parties' arbitration agreement *as written* constitutes "denying enforcement of [a] contract to arbitrate" and thus triggers jurisdiction. 465 U.S. at 7-8. The court's suggestion that CarMax could agree to arbitrate under *different* terms does not undermine jurisdiction. As explained above, it highlights the lower court's abrogation of the FAA's policy of enforcing arbitration "in accordance with the terms of the agreement." 9 U.S.C. § 4.

Respondent's jurisdictional argument is nothing more than a rehash of arguments this Court rejected when it granted certiorari, vacated, and remanded for further consideration in light of *American Express*. *See CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014). In its 2013 decision, the California Court of Appeal refused to enforce the parties' class-arbitration waiver under the California Supreme Court's *Gentry* rule. *See Fowler v. CarMax, Inc.*, No B238426, 2013 WL 1208111, at *7 (Cal. Ct. App. Mar. 26, 2013). In doing so, it remanded to the trial court with instructions to conduct a "fact intensive" analysis under *Gentry* 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.* In this Court, respondent opposed certiorari using the same jurisdictional argument it repeats nearly verbatim here. *Compare* Br. in Opp. 11-12, *CarMax Auto Superstores California, LLC v. Fowler*, No. 13-439 (U.S. filed Jan. 17, 2014) ("[t]he court of appeal's order leaves open the possibility that the trial court may again compel arbitration"), *with* Opp. 20 ("[T]he Court of Appeal here left open the possibility that the parties would arbitrate Areso's PAGA claim."). Respondent's arguments are no more persuasive now than they were then.

The Court's denial of certiorari in *Iskanian* does not alter that conclusion. As explained in the petition (at 32-34), *Iskanian* remanded to the Court of Appeal not only to determine whether the plaintiff's PAGA claim would proceed in court or in arbitration, but also to determine whether the plaintiff's "PAGA claims are time-barred, as well as [the plaintiff's] response that [the defendant] has forfeited this contention and cannot raise it on appeal." 327 P.3d at 155. *Iskanian* thus arguably was not final because it was entirely possible that the enforceability of the arbitration agreement could become moot on remand. No such possibility exists here. Respondent offers no argument to the contrary.

Finally, respondent contends (at 20) that *Iskanian* does not undermine federal policy because it complies with the FAA. As explained above, that is wrong: *Iskanian* contravenes this Court's FAA precedents, including *Waffle House*, *AT&T Mobility*, *Marmet Health Care Center*, and *American Express*. Refusal to enforce provisions waiving representative procedures will vitiate the FAA's core policy and impose

severe consequences on employers doing business in California. It also will provide a ready roadmap for other States to circumvent the FAA's mandates.[9] This Court's intervention is urgently required. It should grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] Respondent argues (at 33) that States' willingness to expand PAGA-type claims to other areas will be limited by *Iskanian*'s suggestion that a significant share of PAGA recovery must go to the State. But that is no constraint: the allure of government revenue makes it *more* tempting for States to enact laws modeled on PAGA. Pet. 27.