No. __-____

IN THE
Supreme Court of the United States

CARMAX AUTO SUPERSTORES CALIFORNIA, LLC
AND CARMAX AUTO SUPERSTORES WEST COAST, INC.,
Petitioners,

v.

JOHN WADE FOWLER AND WAHID ARESO,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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October 8, 2013

QUESTION PRESENTED

Whether California's "*Gentry* rule" – under which class-action waivers in employment arbitration agreements are invalid if "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration," *Gentry v. Superior Court*, 165 P.3d 556, 568 (Cal. 2007) – is preempted by the Federal Arbitration Act in light of 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).

PARTIES TO THE PROCEEDINGS

Petitioners CarMax Auto Superstores California, LLC and CarMax Auto Superstores West Coast, Inc. were defendants in the California Superior Court, respondents in the California Court of Appeal, and petitioners in the California Supreme Court, in connection with the action filed by respondent John Wade Fowler, on behalf of himself and all others similarly situated. CarMax, Inc. also was a named defendant in that same action, 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.

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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners CarMax Auto Superstores California, LLC and CarMax Auto Superstores West Coast, Inc. state the following:

CarMax Auto Superstores California, LLC and CarMax Auto Superstores West Coast, Inc. are indirect, wholly owned subsidiaries of CarMax, Inc. ("CarMax"). T. Rowe Price Associates, Inc. holds 10.5% of CarMax's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER MATERIALS

Petitioners CarMax Auto Superstores California, LLC and CarMax Auto Superstores West Coast, Inc. (collectively, "Carmax") respectfully petition 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 petitions for review (App. 1a) is not reported. The opinion of the California Court of Appeal (App. 2a-21a) is not reported (but is available at 2013 WL 1208111). The order of the trial court granting defendants' motion to compel arbitration (App. 22a-51a) is not reported.

JURISDICTION

The California Court of Appeal entered its judgment on March 26, 2013. The California Supreme Court denied petitions for review on July 10, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a); *see*, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

CONSTITUTIONAL AND 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, § 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 Supremacy Clause of the Constitution, art. VI, cl. 2, provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof[,] . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

The California Court of Appeal refused to enforce the parties' arbitration agreement in this case on the ground that it contains a class-action waiver. In doing so, it continued to apply the California Supreme Court's *Gentry* decision, which held that class-action waivers in employment arbitration agreements are unenforceable under California law if "a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration," *Gentry v. Superior Court*, 165 P.3d 556, 568 (Cal. 2007). The California Supreme Court denied review.

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), leave no doubt that the FAA preempts the *Gentry* rule. First, *AT&T Mobility* held that the FAA preempts California's "*Discover Bank* rule."[1] Given that *Gentry* merely "clarif[ied] [the] holding in *Discover Bank*," 165 P.3d at 560, and relied on the same public-policy rationale that this Court rejected in *AT&T Mobility*, it is also preempted by the FAA.

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[1] *See Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

Second, *American Express* and *AT&T Mobility* held 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 and citations omitted; alteration in original); *see AT&T Mobility*, 131 S. Ct. at 1748-49. The FAA thus does not permit courts to refuse to enforce class-action waivers based on policy judgments that class proceedings would be more effective in vindicating plaintiffs' state-law claims.

Third, *American Express* squarely rejected the argument that the FAA permits courts to invalidate arbitration agreements based on an assessment that the parties' chosen procedures prevent the "effective vindication" of plaintiffs' claims. Any "effective vindication" exception, the Court held, applies only to arbitration agreements that contain a "prospective waiver of a party's *right to pursue* statutory remedies." 133 S. Ct. at 2310 (internal quotation marks omitted). A class-action waiver does not eliminate a plaintiff's right to pursue its claims; it only "limits arbitration to the two contracting parties." *Id.* at 2311. And, in all events, the "effective vindication" exception applies only to *federal* statutory claims, and thus cannot justify the *Gentry* rule.

Because the decision below 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, the decision below is so clearly erroneous that the Court should summarily reverse it. In the alternative, the Court should at least grant,

vacate, and remand for further consideration in light of *American Express*, which was issued after the decision on review.

A. The Parties

Petitioner CarMax is a Fortune 500 company 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* CNNMoney, http://money.cnn.com/magazines/fortune/best-companies/2013/snapshots/74.html (last visited Oct. 2, 2013). Respondents John Wade Fowler and Wahid Areso worked as CarMax sales consultants in California during the time period relevant to the parties' dispute.

B. The Arbitration Agreement

Fowler and Areso applied for employment with CarMax in 2006. App. 3a, 26a-27a. As part of their job application, each of them signed a written Employment Application and Dispute Resolution Agreement ("DRA"),[2] which calls for arbitration of any claims arising out of their 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 and binding arbitration before a neutral Arbitrator.

App. 53a. The DRA's arbitration agreement is mutual – *i.e.*, it equally requires arbitration of any

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[2] The entire DRA is reproduced at App. 53a-56a.

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. 56a.

The DRA advised both Fowler and Areso in boldfaced lettering that they might wish to seek legal advice before consenting to the agreement. App. 55a. Moreover, the DRA provided that, even after executing the agreement, Fowler and Areso could avoid being bound by its terms by notifying CarMax in writing within three days that they were withdrawing their employment application. *Id.*

The DRA provides that arbitration "will be conducted in accordance with the CarMax Dispute Resolution Rules and Procedures." App. 54a (hereinafter "Rules and Procedures" or "DRRP").[4] The Rules and Procedures contain a class-action waiver, which states:

> The Arbitrator shall not consolidate the 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. 67a (Rule 9(f)(ii)).

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[3] The arbitration agreement does not preclude employees from filing charges with the Equal Employment Opportunity Commission or any similar federal, state, or local agency. App. 54a.

[4] The Dispute Resolution Rules and Procedures are reproduced at App. 57a-74a.

The Rules and Procedures also contain numerous provisions designed to ensure that bilateral arbitration "provide[s] a fair, private, exclusive, expeditious, final, and binding means for resolving" the parties' disputes. App. 57a (Rule 1). For example, CarMax and the employee "participate equally in the selection of [the] Arbitrator." App. 60a (Rule 5). The arbitration shall be governed by the substantive law of the State in which the employee "is, was or sought to be predominantly employed," App. 67a (Rule 10), and it must be conducted no more than 50 miles from the employee's place of work at CarMax, unless the employee agrees otherwise, App. 61a (Rule 6).

The Rules and Procedures also provide for robust and expeditious discovery. Each party must provide the other within 14 days with copies of all documents on which they intend to rely for their claims and/or defenses, and must supplement these disclosures throughout the discovery period. App. 62a (Rule 8(a)). Upon request, the employee is entitled to receive his or her complete personnel file. *Id.* Each party is entitled to at least 20 interrogatories and three depositions, and may apply to the arbitrator for additional discovery based on substantial need. App. 63a (Rule 8(b)). Each party also may issue subpoenas to third parties to appear and produce documents at the arbitration hearing. App. 64a (Rule 9(a)(i)).

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. *Id.* (Rule 8(d)). Post-hearing briefing must be completed within 20 days of receipt of the hearing transcript, App. 66a (Rule 9(d)), and the arbitrators must issue a written award within 21 days

of receipt of the parties' post-hearing briefs, App. 69a (Rule 12). The Rules and Procedures specify that any such award is "enforceable and subject to the [FAA]." App. 71a (Rule 16).

The Rules and Procedures also provide that "CarMax shall pay the costs of arbitration," excluding "incidental costs" such as "photocopying or the costs of producing witnesses or proof." App. 69a-70a (Rule 13(a)). The arbitrator also may shift attorneys' fees in accordance with applicable law. App. 70a (Rule 13(b)).

C. The Underlying Allegations

Both plaintiffs' lawsuits, filed in California state court, involve employment-related claims that undisputedly fall within the scope of the parties' arbitration agreement. Fowler's complaint, filed on April 2, 2008, alleged that CarMax (1) failed to provide meal and rest periods; (2) failed to comply with wage statement requirements; (3) failed timely to pay wages due at termination; and (4) violated California's unfair competition law. App. 4a. Areso's complaint, filed on July 8, 2008, similarly alleged that CarMax failed to provide meal breaks and violated the unfair competition law. *Id.* It also alleged that CarMax was liable for civil penalties under California's Private Attorneys General Act of 2004. App. 4a-5a.

Despite having agreed to arbitrate exclusively on a bilateral basis in the DRA and the DRRP, both plaintiffs filed class-action complaints purporting to seek relief on behalf of all similarly situated CarMax employees. App. 4a.

D. Proceedings in the Trial Court

Fowler and Areso filed their lawsuits in 2008, just one year after the California Supreme Court's decision in *Gentry*. *Gentry* refused to enforce a class-action waiver between Circuit City Stores, Inc. ("Circuit City") and its employees that was identical to Rule 9(f)(ii) of the CarMax Rules and Procedures. *See Gentry v. Superior Court*, 37 Cal. Rptr. 3d 790, 791-92 (Cal. Ct. App. 2006) (quoting Circuit City's class-action waiver as providing: "The Arbitrator shall not consolidate claims of different Associates into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action."), *rev'd*, 165 P.3d 556 (Cal. 2007). Instead, it held that class-action waivers in employment agreements are unenforceable to the extent class arbitration is a "significantly more effective means than individual arbitration actions" in vindicating plaintiffs' rights. *Gentry*, 165 P.3d at 570.

As the dissent in *Gentry* recognized, that extremely strict condition for enforceability effectively spelled the end of class-action waivers in employment arbitration agreements in California. *See id.* at 577 & n.2 (Baxter, J., dissenting) (noting that, "[f]or all practical purposes," under the majority's rule, "class action waivers in arbitration agreements are *necessarily* invalid in suits to vindicate overtime-wage rights"). Worse yet, *Gentry* suggested that, if the trial court invalidated the class-action waiver, it could require the parties to proceed to *class arbitration* – a procedure that this Court has recognized is "not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility*, 131 S. Ct. at 1753; *see Gentry*, 165 P.3d at 570 ("[i]f the trial court invalidates the

waiver on public policy grounds, then the parties may proceed to class arbitration").

In light of *Gentry*, there was no realistic prospect that the class-action waiver in CarMax's arbitration agreement with Fowler and Areso would be enforced. Moreover, moving to compel arbitration created a serious risk that CarMax would be forced to defend against a class-action proceeding in arbitration and lose the procedural protections of Federal Rule of Civil Procedure 23 and plenary judicial review. CarMax thus determined that a motion to compel arbitration would be futile, and potentially even prejudicial, and proceeded to defend itself in state court.

"Discovery ensued on both sides." App. 5a (describing each side's discovery requests). CarMax then successfully obtained summary adjudication as to Areso's claim for failure to pay overtime and as to Fowler's claim for failure to provide itemized wage statements. Those rulings, which were affirmed on appeal, left only the claims for failure to provide meal periods (Fowler and Areso) and failure to provide rest periods (Areso) in the case. App. 5a-6a.

On June 16, 2009, the trial court stayed further proceedings because the California Supreme Court had granted review to decide certain legal issues central to plaintiffs' remaining claims – namely, the extent to which California law requires rest and meal breaks, and the timing of any required rest and meal periods. *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).

While the trial court's stay was in effect, this Court decided *AT&T Mobility*. Shortly thereafter, on June 2, 2011, CarMax sent a letter to plaintiffs' counsel

asserting that *AT&T Mobility* preempted *Gentry* and requesting that plaintiffs submit their cases to bilateral arbitration under the DRA and the DRRP. Fowler and Areso refused.

On June 17, 2011, CarMax filed a motion to vacate the trial court's stay and compel bilateral arbitration. Fowler and Areso opposed the motion, asserting that (1) CarMax had waived its right to arbitration; (2) the DRA and the DRRP were unenforceable under *Gentry* even after *AT&T Mobility*; (3) the DRA and the DRRP were 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, rejecting each of the four foregoing arguments. As to *Gentry*, the trial court agreed with CarMax that *AT&T Mobility*'s preemption of *Discover Bank* also "inescapabl[y]" "overruled similar appellate cases from the California state court system which . . . limit or prevent enforcement of mandatory arbitration clauses based on the perceived ineffectiveness of arbitration as a process to afford adequate relief to both the named plaintiff and putative class members." App. 23a; *see also* App. 41a-42a (stating that *Gentry*'s "premise that the court can and should attempt to rate the likely effectiveness of an arbitration process . . . before the court will give effect to the contract previously made by the parties . . . flies in the face of the majority's reasoning in [*AT&T Mobility*]").

The trial court thus ordered Fowler and Areso "to arbitrate their individual claims without inclusion of the class claims." App. 50a. The court also stayed the case pending completion of the arbitration. App. 7a. Fowler and Areso timely appealed.

E. Proceedings in the Court of Appeal

The California Court of Appeal reversed. First, as a threshold matter, the court found that the trial court's order granting the motion to compel was appealable. App. 8a-9a. Second, the court agreed with the trial court that CarMax did not waive its right to compel arbitration because, among other things, it filed its motion to compel promptly after this Court's decision in *AT&T Mobility*. App. 9a-13a. Third, the court affirmed the trial court's conclusion that the arbitration agreement as a whole is not unconscionable. App. 13a-16a. Fourth, the court agreed with the trial court that the NLRA does not bar enforcement of the parties' arbitration agreement.

Despite these rulings, the Court of Appeal refused to enforce the DRA and the DRRP on the sole ground that *Gentry* remained good law after *AT&T Mobility*. App. 16a-20a. The only basis the court gave for distinguishing *AT&T Mobility* was that this Court "did not have before it . . . an employment agreement," but rather a consumer contract. App. 18a-19a; *see also* App. 19a ("The Supreme Court did not address a situation in which an employee's unwaivable statutory rights were involved, and therefore [*AT&T Mobility*] does not preclude our application of a *Gentry* analysis.").

Having held that *Gentry* applied, the Court of Appeal stated that the trial court was required 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." App. 19a. The appeals court remanded to the trial court to conduct this analysis in the first instance, noting that "additional

discovery" might be required "to establish a complete factual record as to the *Gentry* factors." App. 19a-20a.

F. Proceedings in the California Supreme Court

CarMax timely petitioned for review by the California Supreme Court on May 3, 2013. At that time, different panels of the California Court of Appeal had divided on the question whether *AT&T Mobility* overruled *Gentry*, and the California Supreme Court had granted review in cases in which that issue was among the questions presented. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 142 Cal. Rptr. 3d 372 (Cal. Ct. App.) (holding that *AT&T Mobility* abrogated *Gentry*), *review granted*, 286 P.3d 147 (Cal. 2012); *Franco v. Arakelian Enters., Inc.*, 149 Cal. Rptr. 3d 530 (Cal. Ct. App. 2012) (holding that *Gentry* survives *AT&T Mobility*), *review granted*, 294 P.3d 74 (Cal. 2013). Nonetheless, on July 10, 2013, the California Supreme Court denied CarMax's petition for review without explanation. App. 1a.[5]

[5] The court also denied a petition for review filed by Fowler and Areso.

REASONS FOR GRANTING THE PETITION

I. THE FAA PREEMPTS THE *GENTRY* RULE

The only basis for the lower court's refusal to enforce the parties' arbitration agreement in this case was its application of California's *Gentry* rule. This Court should grant certiorari and reverse because the *Gentry* rule is clearly inconsistent with the FAA and this Court's precedents.

A. *AT&T Mobility* Forecloses the *Gentry* Rule

In *Discover Bank*, the California Supreme Court held that class-action waivers in consumer arbitration agreements may be invalidated where "damages [are] predictably small, and . . . the consumer allege[s] a scheme to cheat consumers." *AT&T Mobility*, 131 S. Ct. at 1750. This Court held that the *Discover Bank* rule was preempted because it "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. In doing so, it held that the *Discover Bank* rule was not spared from preemption by § 2's "saving clause" because that clause does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.*

AT&T Mobility applies with full force to the *Gentry* rule. *Gentry*, by its own terms, was intended "to clarify" the *Discover Bank* rule. *Gentry*, 165 P.3d at 560. In doing so, it expanded *Discover Bank*, by stating that *Discover Bank* was "not intended to suggest that consumer actions involving minuscule amounts of damages were the only actions in which class action waivers would not be enforced." *Id.* at 564. Rather, *Gentry* requires invalidation of class-action waivers in any case where class proceedings would be a "significantly more effective practical means of vindicating the rights of" plaintiffs. *Id.* at 568. Because

Gentry is even broader than *Discover Bank*, *AT&T Mobility* necessarily forecloses it as well.

Gentry also rests on the same public-policy rationale as *Discover Bank*. *Gentry* repeatedly justified its invalidation of class-action waivers based on the allegedly "exculpatory effect" of such clauses. *Id.* at 564. As *Gentry* stated, "*Discover Bank* was an application of a 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." *Id.*; *cf. AT&T Mobility*, 131 S. Ct. at 1757 (Breyer, J., dissenting) (recognizing that *Discover Bank* and *Gentry* "represent[] the 'application of a more general . . . principle'") (quoting *Gentry*, 165 P.3d at 564). Moreover, "[e]ach decision looked to the modest size of individuals' potential recovery, unequal knowledge and bargaining power in the contractual relationship, and 'other real world obstacles' to vindication of the individuals' rights." *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 840-41 (N.D. Cal. 2012) (quoting *Gentry*, 165 P.3d at 568).

Because *Gentry* merely elaborated on *Discover Bank*, and relied on the same public-policy rationale as *Discover Bank*, numerous lower federal courts have recognized that *AT&T Mobility* also abrogates *Gentry*.[6] Similarly, the Third, Ninth, and Eleventh

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[6] *See, e.g.*, *Velazquez v. Sears, Roebuck & Co.*, No. 13-cv-680-WQB-DHB, 2013 WL 4525581, at *8 (S.D. Cal. Aug. 26, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *4 (C.D. Cal. June 25, 2013); *Steele v. American Mortg. Mgmt. Servs.*, No. 2:12-cv-00085 WBS JFM, 2012 WL 5349511, at *4 n.1 (E.D. Cal. Oct. 26, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal.

Circuits and the highest courts of Massachusetts and Florida have concluded, based on *AT&T Mobility*, that state-law rules similar to *Gentry* and *Discover Bank* are preempted by the FAA.[7] As these cases

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2012) ("In light of [*AT&T Mobility*], the California Supreme Court's decision in *Gentry* no longer provides a means to avoid enforcement of an arbitration agreement containing a class action waiver in an employment agreement."); *Morvant*, 870 F. Supp. 2d at 840 (finding "no principled basis to distinguish between *Discover Bank* . . . and *Gentry*"); *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1035 (N.D. Cal. 2012) ("*Gentry* was overruled by the Supreme Court in [*AT&T Mobility*]."); *Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1167 (N.D. Cal. 2011) ("[*AT&T Mobility*] effectively overrules *Gentry*."); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1141-42 (C.D. Cal. 2011) (finding *Gentry* "no longer tenable" in light of *AT&T Mobility*); *Murphy v. DirecTV, Inc.*, No. 2:07-cv-6465-JHN-VBKx, 2011 WL 3319574, at *4 (C.D. Cal. Aug. 2, 2011) ("[I]t is clear to the Court that [*AT&T Mobility*] overrules *Gentry*"), *aff'd in relevant part*, 724 F.3d 1218 (9th Cir. 2013); *Morse v. ServiceMaster Global Holdings, Inc.*, No. C10-00628 SI, 2011 WL 3203919, at *3 n.1 (N.D. Cal. July 27, 2011).

[7] *See Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (holding that Pennsylvania's rule invalidating class-action waivers "where 'class action litigation is the only effective remedy' such as when 'the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy'" "is surely preempted by the FAA under [*AT&T Mobility*]") (quoting *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 883-84 (Pa. Super. Ct. 2006)) (alteration in original); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158-59 (9th Cir. 2012) (holding that the FAA preempts Washington state-law rule "invalidat[ing] class-action waivers when such waivers preclude effective vindication of statutory rights"); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) ("[i]nsofar as Florida law would invalidate [exculpatory arbitration] agreements as contrary to public policy," it would be preempted by the FAA); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235 (11th Cir. 2012) (applying *Cruz*); *Feeney v. Dell Inc.*, 993 N.E.2d 329, 330 (Mass. 2013) (recognizing that *AT&T Mobility* foreclosed its prior

indicate, the decision below is clearly erroneous because the FAA preempts *Gentry* under a straightforward application of *AT&T Mobility*.

B. The *Gentry* Rule Contravenes the Text and Purposes of the FAA

The *Gentry* rule violates the text of the FAA and interferes with the FAA's purposes in the same way as the *Discover Bank* rule. 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." *AT&T Mobility*, 131 S. Ct. at 1748; *see American Express*, 133 S. Ct. at 2309 (describing the "overarching principle that arbitration is a matter of contract"). As a result, "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 and citations omitted; alteration in original); *see AT&T Mobility*, 131 S. Ct. at 1748-49; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-84 (2010). The *Gentry* rule, just like the *Discover Bank* rule, defies that basic command and therefore "stands as an obstacle to the accomplishment and execution of the full purposes

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holding that class-action waivers are unenforceable where they "operate[] in practice to deny a willing plaintiff any and all practical means of pursuing a claim against a defendant") (internal quotation marks omitted); *McKenzie Check Advance of Florida, LLC v. Betts*, 112 So. 3d 1176, 1178 (Fla. 2013) (holding that the "the FAA preempts invalidating [a] class action waiver . . . on the basis of it being void as against public policy").

and objectives of [the FAA]." *AT&T Mobility*, 131 S. Ct. at 1753 (internal quotation marks omitted).[8]

Moreover, *Gentry*'s refusal to respect the parties' agreement to bilateral rather than class arbitration "interferes with fundamental attributes of arbitration." *Id.* at 1748. First, "the switch from bilateral to class 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. Class arbitration "*requires* procedural formality": "before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* "Confidentiality becomes more difficult" because of the need for notice to absent class members. *Id.* at 1750. "And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of

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[8] Justice Thomas joined the Court's opinion in *AT&T Mobility* in full, but added his view that § 2 of "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." 131 S. Ct. at 1753 (Thomas, J., concurring); *see id.* at 1755 (interpreting § 2 as providing that "[c]ontract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause"). Like the *Discover Bank* rule, the *Gentry* rule violates the FAA because it "does not" "relate[] to the making of [the arbitration] agreement" and instead imposes a "public policy" exception to the enforcement of arbitration agreements. *Id.*

certification, such as the protection of absent parties." *Id.*

Class arbitration also "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 the risk of error in exchange for the lower costs and increased efficiency of arbitration in the context of an individual dispute, that risk "will often become unacceptable" 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.*; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Stolt-Nielsen*, 559 U.S. at 685-86; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.").

Because class arbitration is "not arbitration as envisioned by the FAA" and "lacks its benefits," *AT&T Mobility* held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." 131 S. Ct. at 1750-51, 1753. The same reasoning forecloses the decision below: to the extent that class proceedings are "manufactured by" the *Gentry* rule, rather than agreed upon by the parties, they are incompatible with the FAA.

The *Gentry* rule also interferes with the benefits of arbitration agreements, even in cases where class arbitration is not imposed. In order to persuade the trial court to enforce the parties' bilateral arbitration agreement, the *Gentry* rule requires the parties to engage in extensive threshold litigation about whether individual proceedings would be effective – for example, regarding "the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." *American Express*, 133 S. Ct. at 2312. The court below recognized these proceedings would be "fact intensive" and might require discovery. App. 19a-20a. As this Court stated:

> Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

American Express, 133 S. Ct. at 2312.

The decision below concluded that *Gentry* was not preempted by the FAA because *AT&T Mobility* dealt with consumer claims, whereas this case involves employment claims. App. 18a-19a. That reasoning does not withstand even cursory scrutiny. This Court long has held that the FAA applies with full force to employment claims. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the FAA covers employment agreements except for "transportation workers"); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (holding Age Discrimination in Employment Act of 1967 claims

arbitrable). The California Court of Appeal's attempt to distinguish *AT&T Mobility* based on the nature of plaintiffs' claims thus lacked any basis in the FAA or this Court's decisions.

C. *AT&T Mobility* and *American Express* Foreclose *Gentry*'s "Effective Vindication" Policy Rationale

Gentry rooted its holding in a judicially created state public policy against contracts that are "exculpatory in practical terms" because they "undermine the vindication of the employees' unwaivable statutory rights." 165 P.3d at 559, 564. Both *AT&T Mobility* and *American Express* addressed that same public policy and squarely held that it is insufficient to override the FAA's mandates.

In *AT&T Mobility*, this Court addressed California's policy against exculpation head on: "The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA § 2." 131 S. Ct. at 1746-47 (quoting 9 U.S.C. § 2) (alteration in original). That "public-policy disapproval of exculpatory agreements" cannot justify invalidating arbitration agreements with class-action waivers because, under the Supremacy Clause, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1747, 1753; *see also id.* at 1747 (stating that "say[ing] that such agreements are exculpatory" is not a justifiable "rationalization[]" for imposing rules that have a "disproportionate impact on arbitration agreements").

In *American Express*, this Court reaffirmed *AT&T Mobility*'s rejection of an "effective vindication"

public-policy rationale for invalidating class-action waivers in arbitration agreements. While *AT&T Mobility* makes clear that *state* public policy cannot override the FAA under the Supremacy Clause, *American Express* dealt with claims brought under federal statutes, which stand on equal constitutional footing with the FAA.[9] As to federal statutory claims only, the Court acknowledged that it has "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.'" *American Express*, 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).

That principle has no application here, because respondents raise purely state-law claims. But, even if it did, *American Express* held that the "effective vindication" principle does not provide a basis to invalidate class-action waivers – even where federal claims are at issue – because such provisions do not prospectively waive a party's right to pursue the underlying federal claim. "The class-action waiver merely limits arbitration to the two contracting parties"; it does not alter or abridge the plaintiff's substantive rights. *Id.* at 2311; *accord Shady Grove Orthopedic Assocs.*, 559 U.S. at 402 (class procedures "affect only the procedural means by which [a] remedy may be pursued").

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[9] Numerous cases have recognized that the judicially created "effective vindication of rights" exception to the FAA has no application when state-law claims are involved. *See*, *e.g.*, *Homa v. American Express Co.*, 494 F. App'x 191, 196 n.2 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2885 (2013); *Coneff*, 673 F.3d at 1158 n.2; *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 346 (6th Cir. 2006).

Like the plaintiffs in *American Express*, respondents here merely argue that the absence of class arbitration procedures imposes a practical impediment to their ability to vindicate their claims. "But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *American Express*, 133 S. Ct. at 2311; *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (distinguishing the underlying "statutory guarantees and the procedure for enforcing them" and "the applicable liability principles and the forum in which they are to be vindicated"). Thus, even if the "effective vindication" principle applied to respondents' state-law claims (which it does not), *American Express* makes clear that it would not authorize the *Gentry* rule.

At bottom, the decision below "ignore[d] what [*AT&T Mobility*] established" and *American Express* confirmed: "that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *American Express*, 133 S. Ct. at 2312 n.5. The FAA "favor[s] the absence of litigation when that is the consequence of a class-action waiver, since its principal purpose is the enforcement of arbitration agreements according to their terms." *Id.* (internal quotation marks omitted). The FAA's mandate to enforce the parties' agreed-upon bilateral arbitration procedures thus preempts *Gentry*'s public policy against exculpatory agreements.

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW

Because the *Gentry* rule is plainly incompatible with the FAA and this Court's decisions, CarMax respectfully requests that the Court summarily reverse the decision below and remand for proceedings not inconsistent with this Court's precedents. In the alternative, CarMax requests that the Court grant plenary review and set the case for argument.[10]

Although summary reversal is strong medicine in the ordinary case, it is appropriate here, for three reasons.

First, summary reversal is warranted because "'the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" Eugene Gressman et al., *Supreme Court Practice* 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). Indeed, "th[is] Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous." *Id.* at 352. Here, as explained in Part I, there is no dispute that the parties entered into a binding bilateral arbitration agreement, and that agreement clearly should have been enforced under *AT&T Mobility* and *American Express*.

Second, summary reversal is vital to ensuring that the FAA's pro-arbitration policies are protected against intrusion by States. As this Court recently recognized, "[s]tate courts rather than federal courts

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[10] As noted above, the decision below conflicts with the decisions of the Third, Ninth, and Eleventh Circuits and the highest courts of Massachusetts and Florida, which have held that the FAA preempts state laws that refuse to enforce class-action waivers in arbitration agreements on public-policy grounds. *See supra* pp. 14-15 & n.7.

are most frequently called upon to apply the [FAA]." *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam).[11] It thus is a "matter of great importance" that state courts "adhere to a correct interpretation of the legislation." *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"). Accordingly, three times in the last two Terms, this Court found it appropriate summarily to reverse state court decisions that flout the FAA and this Court's FAA precedents. *See KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam) (vacating Florida intermediate court of appeal); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (vacating West Virginia Supreme Court); *Nitro-Lift*, 133 S. Ct. at 500 (per curiam) (vacating Oklahoma Supreme Court); *see also*, *e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (reversing Alabama Supreme Court). This case warrants the same treatment.

Summary reversal is especially important in this case to remedy the California state courts' ongoing effort to "chip[] away at [this Court's] precedents broadly construing the scope of the FAA." *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (internal quotation marks omitted); *see AT&T Mobility*, 131 S. Ct. at 1747 (noting that "California's courts have been more likely to hold contracts to arbitrate un-

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[11] State courts play this 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. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

conscionable than other contracts") (citing, *inter alia*, Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006)).

The *Gentry* rule perpetuates a troubling pattern. Time and again, the California courts have either prohibited arbitration of certain types of claims or imposed onerous conditions on the enforcement of arbitration agreements that are inconsistent with the FAA and contrary to this Court's precedents.[12] This Court's repeated intervention has been required to rectify these decisions – including three times in the last five years.[13] Even after *AT&T Mobility*,

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[12] In addition to *Discover Bank* and *Gentry*, see *Broughton v. Cigna Health Plans of California*, 988 P.2d 67 (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 (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 (Cal. Ct. App. 2007) (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 (Cal.) (invalidating waivers of certain administrative hearings before the California Labor Commissioner in arbitration agreements contrary to public policy), *vacated*, 132 S. Ct. 496 (2011) (mem.).

[13] *See Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating California Supreme Court decision for further consideration in light of *AT&T Mobility*); *AT&T Mobility*, 131 S. Ct. at 1751 (reversing Ninth Circuit); *Preston v. Ferrer*, 552 U.S. 346 (2008) (reversing California Court of Appeal); *Perry v. Thomas*, 482 U.S. 483 (1987) (reversing California Court of

California courts continue to display the type of hostility toward arbitration agreements that the FAA was designed to end.[14]

Third, the *Gentry* rule, if left unreviewed, will continue to undermine the benefits of arbitration for a large number of employment disputes. California, the Nation's most populous State, accounted for more than 11% of all U.S. private-sector employees in 2011. *See* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/06000.html (showing that California had 12,698,427 private nonfarm employees out of 113,425,965 nationwide). Arbitration agreements in employment are widespread. *See*, *e.g.*, Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* at 2 (Mar. 2003) ("Eisenberg & Hill") (noting the "well documented" increase in the use of employment arbitra-

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Appeal's determination that a provision of California's Labor Code requiring a judicial forum for wage and hour disputes was not preempted by the FAA); *Southland Corp.*, 465 U.S. at 10-16 (reversing California Supreme Court's invalidation of arbitration agreements under California's Franchise Investment Law).

[14] In addition to the decision below, see, e.g., *Brown v. Superior Court*, 157 Cal. Rptr. 3d 779, 781 (Cal. Ct. App.) (holding that a claim under California's Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.*, is non-arbitrable because it "is necessarily a representative action intended to advance a predominantly public purpose"), *review granted*, 307 P.3d 877 (Cal. 2013); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 800 n.18 (Cal. Ct. App. 2012) (invalidating arbitration provision in employment agreement and dismissing the "concerns expressed in *AT&T Mobility*" as irrelevant); *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (noting that, even after *AT&T Mobility*, California courts continue to find arbitration forum-selection clauses unenforceable under a far more stringent test than applicable to litigation forum-selection clauses).

tion agreements), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=389780. Like arbitration generally,[15] employment arbitration benefits both employees and employers because it provides faster and more cost-effective dispute resolution. Indeed, empirical studies have shown that employment arbitration provides results comparable to litigation but in less time and at lower cost.[16]

The *Gentry* rule undermines the benefits of arbitration in a large number of cases. Because class arbitration imposes fundamentally different procedures on the parties, *Gentry*'s insistence on class procedures "will have a substantial deterrent effect on incentives to arbitrate." *AT&T Mobility*, 131 S. Ct. at 1752 n.8. Indeed, faced with the unwanted choice between accepting class procedures in arbitration and defending class-action litigation in court, defendants predictably will abandon arbitration

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[15] *See*, *e.g.*, Mark Fellows, *The Same Result As In Court, More Efficiently: Comparing Arbitration And Court Litigation Outcomes*, Metro. Corp. Couns., July 1, 2006, at 32, *available at* http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf.

[16] *See*, *e.g.*, Eisenberg & Hill at 5 (finding "no statistically significant differences between arbitration and litigation in employee win rates or in median or mean award levels for higher pay employees" bringing non-civil-rights-employment claims); Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (citing study showing that "[e]mployees won more often in arbitration than similar plaintiffs in court"); Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 Disp. Resol. Mag. 23, 24 (1999) (article by the director of the ACLU's National Task Force on Civil Liberties in the Workplace finding that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court").

altogether. Prior experience with the *Discover Bank* rule proves that this deterrent effect is severe.[17]

Moreover, even if the parties' bilateral arbitration agreement ultimately is upheld, the very process of having to engage in "fact intensive," costly, and time-consuming litigation to determine the enforceability of the parties' arbitration clause, App. 19a-20a, will "destroy the prospect of speedy resolution" that arbitration was designed to ensure. *American Express*, 133 S. Ct. at 2312; *see Preston*, 552 U.S. at 357-58 (noting that a "prime objective" of arbitration is "streamlined proceedings and expeditious results") (internal quotation marks omitted). *Gentry* thus undermines the benefits of arbitration, and the purposes of the FAA, in all cases to which it applies.

In sum, the decision below is "both incorrect and inconsistent with the clear instruction in the precedents of this Court." *Marmet*, 132 S. Ct. at 1203. This Court's intervention is required to put a stop to California's interference with employment arbitration agreements. This Court thus should summarily reverse or, in the alternative, grant plenary review.

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[17] After *Discover Bank*, corporations predictably abandoned arbitration for California residents altogether. *See* Br. for Pet'r at 55-56, *AT&T Mobility*, No. 09-893 (U.S. filed Aug. 2, 2010), 2010 WL 3017755 (citing Comcast residential services agreement). After [*AT&T Mobility*], corporations resumed agreeing to arbitrate with California residents. *See*, *e.g.*, Comcast Agreement for Residential Services, *at* http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html.

III. ALTERNATIVELY, THIS COURT SHOULD GVR FOR FURTHER CONSIDERATION IN LIGHT OF *AMERICAN EXPRESS*

As noted, the California Supreme Court has two cases pending before it that raise the question whether *AT&T Mobility* overruled *Gentry*. *See supra* p. 12. The plaintiffs in those cases, however, have raised three other defenses to the enforcement of the parties' arbitration agreements that may cause the California Supreme Court not to address whether *Gentry* remains good law.[18] Indeed, the California Supreme Court's failure even to hold this case pending its decisions may be an indication that it has no intention of overruling *Gentry*. Accordingly, the possibility that the California Supreme Court might correct its own mistake is not a sufficient basis to screen the current case from review by this Court.[19]

If, however, the Court is not inclined summarily to reverse the decision below or to grant plenary review, it should at least grant, vacate, and remand for further consideration in light of *American Express*. The California Court of Appeal reaffirmed the *Gentry* rule prior to this Court's decision in *American Express*. The California Supreme Court also did not consider the impact of *American Express* on the Court of Appeal's decision because it denied CarMax's peti-

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[18] *See* Appellant's Opening Br. on the Merits at 1, 21-43, *Iskanian v. CLS Transp. of Los Angeles*, Case No. S204032 (Cal. filed Dec. 19, 2012) (arguing that the class-action waivers are unenforceable, *inter alia*, because the class-action waivers violate the NLRA and other federal labor-law provisions and because defendant waived its right to arbitrate).

[19] Nor should the court below's election not to publish its decision provide any grounds for denying review. *See*, *e.g.*, *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam) (summarily reversing unpublished Ninth Circuit decision).

tion for review. *See Trope v. Katz*, 902 P.2d 259, 268 n.1 (Cal. 1995) (California Supreme Court's denial of review of a decision by the Court of Appeal does not reflect any consideration of the merits of the case).

GVR is warranted because *American Express* creates a "'reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.'" *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). Indeed, as explained above in Part I, *American Express* leaves no real doubt that the FAA preempts *Gentry*. Because *American Express* clearly undercuts the sole legal premise on which the decision below refused to enforce the parties' arbitration agreement, CarMax respectfully submits that summary reversal or plenary review is appropriate. At the very least, however, this Court should grant the petition, vacate the decision below, and require the California courts to address the implications of *American Express* on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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