No. 13-439

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

REPLY BRIEF FOR PETITIONERS

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February 5, 2014

CORPORATE DISCLOSURE STATEMENT

Petitioners CarMax Auto Superstores California, LLC and CarMax Auto Superstores West Coast, Inc.'s Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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Under this Court's precedents, the FAA preempts California's judge-made *Gentry* rule, which was the lower court's sole ground for refusing to enforce the parties' arbitration agreement. This Court should not wait to intervene. It has jurisdiction under *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The California Supreme Court refused to vindicate federal law in this case, and it is far from certain whether or when it will do so. Meanwhile, enforcement of *Gentry* in violation of the FAA continues unabated in the California courts. This Court should grant certiorari and reverse.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW

A. The Fourth *Cox* Test Is Clearly Satisfied

This Court has jurisdiction under the fourth *Cox* test for finality of state-court judgments, which applies where (1) reversal of the state court's decision on a federal issue "would be preclusive of any further litigation" and (2) refusal to grant immediate review "might seriously erode federal policy." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975); *see Southland*, 465 U.S. at 6.

As this Court recognized in *Southland*, both prongs are satisfied where a state court refuses to enforce an arbitration agreement in contravention of the FAA. Reversal would "terminate litigation of the merits of [the] dispute" in favor of arbitration, and refusal to grant immediate review might seriously erode the FAA's policies because it "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Id.* at 6-7. "[T]o delay review of a state judicial decision denying enforcement of the contract to arbitrate until the

state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." *Id.* at 7-8.

Southland applies straightforwardly here. Reversal would end the parties' state-court litigation, and deferring review would result in protracted trial-court litigation under the "fact intensive" *Gentry* test – an issue the California Court of Appeal acknowledged could require extensive "additional discovery to establish a complete factual record." App. 19a-20a; *accord Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432, 450 (Cal. Ct. App. 2012) ("[T]he factual analysis as to whether the *Gentry* factors apply in any particular case must be specific, individualized, and precise."). "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." *American Express*, 133 S. Ct. at 2312. Failing to grant review now would thus "seriously erode" the FAA's core policies. *Southland*, 465 U.S. at 7-8 (internal quotations omitted).

B. Respondents' Arguments Against Jurisdiction Are Meritless

None of respondents' contrary arguments is availing. First, respondents argue (at 14) that the preemption issue has not been "finally decided" because the California Supreme Court may address it in other cases. But the relevant jurisdictional inquiry is whether the state courts have finally decided the federal question for purposes of *this case*. They clearly have: the California Court of Appeal held that the FAA does not preempt the *Gentry* rule, App. 18a-19a, and the California Supreme Court's denial of review makes that decision the "law of the case," Opp. 8. The decision below is a reviewable final

judgment irrespective of what the California Supreme Court may do in other future cases.

Respondents' second argument (at 15) – that reversal would not end the litigation but merely "affect [its] procedural form" – is foreclosed by *Southland*'s holding that compelling arbitration "terminate[s] litigation of the merits of [the] dispute." 465 U.S. at 6-7. "Litigation" refers to *court* proceedings, *see*, *e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009), and the parties' arbitration agreement, if enforced, unequivocally bars litigation in favor of private dispute resolution. App. 58a-59a.[1]

Finally, respondents (at 15) attempt to distinguish *Southland* on the ground that the Court of Appeal did not definitively deny CarMax's motion to compel arbitration. But even if the trial court ultimately compels arbitration, the need for litigation over the *Gentry* factors will have "hinder[ed] speedy resolution of the controversy." *AT&T Mobility*, 131 S. Ct. at 1749 (internal quotations omitted). *American Express* reaffirmed that such a "preliminary litigating hurdle" itself seriously erodes federal policy. 133 S. Ct. at 2312. Thus, no less than in *Southland*, delaying review "until the state court litigation has run its course would defeat the core purpose of [the parties'] contract to arbitrate." *Southland*, 465 U.S. at 8-9.

This Court's jurisdiction is sufficiently clear that, in an analogous case, the Court reversed the Califor-

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[1] Justice Stevens' concurring opinion in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), is inapposite. Justice Stevens reasoned that reversal could leave Nike open to suit for some, but not all, of its allegedly deceptive statements. *See id.* at 659-60. Here, reversal would undoubtedly end plaintiffs' litigation against CarMax.

nia Court of Appeal without discussing jurisdiction. *See Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) (reversing decision requiring claimant to exhaust state administrative remedies before pursuing claims in arbitration). If the Court prefers to address its jurisdiction explicitly, it can certainly do so. *See*, *e.g.*, *United States v. Woods*, 134 S. Ct. 557, 562 (2013). But *Southland* clearly establishes that jurisdiction exists to review the decision below.

II. THIS COURT SHOULD NOT POSTPONE REVIEW

A. Immediate Review Is Necessary To Vindicate the FAA and Prevent Ongoing Disruption of Employment Arbitration in California

Respondents argue that this Court should wait to see whether the California Supreme Court overrules *Gentry* on its own in *Iskanian*.[2] Deferring review is unwarranted, for three reasons. First, the grant of review in *Iskanian* has not stopped lower state courts from continuing to apply *Gentry* vigorously to interfere with the enforcement of arbitration agreements, as occurred here. This Court's prompt intervention is necessary to prevent ongoing violation of the FAA's policies in a significant number of cases. Second, there is no assurance that the California Supreme Court will address the *Gentry* issue in *Iskanian*, much less faithfully apply this Court's precedents. Third, this case is a clean vehicle to address this critically important issue, which threatens the long-term viability of employment arbitration programs in

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[2] The California Supreme Court has granted review in two other cases and held them in abeyance pending the outcome of *Iskanian*. *See* Opp. 7.

California. *See* Br. of Equal Employment Advisory Council et al. at 14-18. Further decisions by the California Supreme Court will likely hinder, not assist, this Court's decision-making.

1. This Court's immediate intervention is required because the California courts continue to apply *Gentry* to interfere with arbitration agreements in a significant number of cases. As respondents acknowledge (at 6), of the 16 state-court cases to address *Gentry*'s vitality since *AT&T Mobility*, 13 held or assumed that *Gentry* remains good law and scrutinized the parties' arbitration agreement under that standard. The fact that plaintiffs failed to meet their evidentiary burden in 10 of the 13 cases does not show that the California courts are respecting the FAA, because requiring litigation over *Gentry*'s vague and fact-intensive test itself deprives parties of the expeditious resolution that arbitration was intended to guarantee.

The California Supreme Court has done nothing to prevent *Gentry*'s enforcement while it considers *Iskanian*. Instead of granting and holding cases raising the issue, it has in all but two cases denied discretionary review, *see supra* note 2, leaving lower courts unconstrained to enforce *Gentry* as a preliminary litigating hurdle to the enforcement of arbitration agreements. As a result, the California courts continue to engage in ongoing violations of the FAA in a wide range of cases.

2. There is no end in sight to this ongoing interference with federal law, because it is unclear whether (or when) the California Supreme Court will overrule *Gentry*. Notwithstanding respondents' confident predictions, the court may decide *Iskanian* on one of two other asserted grounds for invalidating

the arbitration agreement – that the defendants waived their right to compel arbitration or that the class-action waiver violates the National Labor Relations Act.

Nor is it at all certain that the California Supreme Court will overrule *Gentry* if it addresses the issue, given that court's pattern of undercutting this Court's FAA precedents. *See* Pet. 25-26. Respondents (at 19-20) hail *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *petition for cert. pending*, No. 13-856 (filed Jan. 15, 2014), but they tell only half the story. After holding that the FAA precluded an across-the-board rule against waiver of administrative *Berman* hearings in wage-and-hour disputes, the court proceeded to expand dramatically its unconscionability doctrine, thus recreating in a new guise the same fact-intensive "effective vindication" public-policy limitation that this Court held preempted in *AT&T Mobility*. *See id.* at 200-08 (remanding to trial court to weigh evidence). The court also brushed aside *American Express* as irrelevant to FAA preemption because this Court "did not construe the FAA in light of basic principles of federalism" and the State's "historic police powers." *Id.* at 209. Given that the California Supreme Court continues to adopt impermissibly cramped interpretations of this Court's precedents, immediate review is warranted.

3. This case presents a clean vehicle to address the question presented, because *Gentry* was the lower court's sole basis for refusing to enforce the parties' arbitration agreement.[3] This Court has not

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[3] Contrary to respondents' suggestion (at 18), this Court may "decline to entertain" alternative grounds for affirmance. *See United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011) (internal quotations omitted).

viewed the unpublished nature of a decision refusing to enforce an arbitration agreement as a basis to eschew review. Indeed, it reviewed a similar unpublished, non-precedential California Court of Appeal decision in *Perry v. Thomas*, 482 U.S. 483, 488-89 (1987) (reversing decision refusing to enforce arbitration of wage-and-hour disputes). Moreover, this Court has recognized the importance of correcting even fact-bound state-court decisions that undermine the FAA's "emphatic federal policy" favoring arbitration. *KPMG*, 132 S. Ct. at 25-26 (per curiam) (vacating fact-specific Florida appeals court ruling); *see Nitro-Lift Techs.*, 133 S. Ct. at, 501 (per curiam) (emphasizing the "great importance" of ensuring state courts' adherence to the FAA and vacating a fact-bound decision by the Oklahoma Supreme Court).

Allowing the California Supreme Court another chance to address the *Gentry* issue will not aid this Court's resolution. Instead, deferring review risks giving the California Supreme Court an opportunity to insulate the *Gentry* rule from this Court's review. As respondents themselves suggest (at 17), the court may "modify *Gentry*" to try to side-step *AT&T Mobility* and *American Express*, just as it has done in *Sonic-Calabasas*. Even more troubling is that the California Supreme Court could also try to undercut this Court's jurisdiction by finding waiver as an alternative and adequate state-law ground. *See Michigan v. Long*, 463 U.S. 1032, 1038-39 (1983).[4]

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[4] Respondents acknowledge (at 9-10) that a waiver finding would moot the *Gentry* issue in *Iskanian*, but they incorrectly suggest (at 18) that such a finding would govern this case. Waiver under California law is fact-dependent, *see Iskanian*, 142 Cal. Rptr. 3d at 386, and the court's finding here was based

Respondents suggest (at 19) that this Court would be "withhold[ing] the respect due" to the California judiciary by not awaiting a decision in *Iskanian*. But this Court shows no disrespect when, as here, the State's highest court passes up the opportunity to address a clearly presented federal question and, by doing so, effectively sanctions ongoing violations of federal law. Moreover, this Court need not ignore the California courts' long and persistent history of "chip[ping] away at [this Court's] precedents broadly construing the scope of the FAA." *Little*, 63 P.3d at 999 (Brown, J., concurring and dissenting) (internal quotations omitted; first alteration in original); *see also AT&T Mobility*, 131 S. Ct. at 1747 (noting California's anti-arbitration decisions).[5] This Court should once again intervene promptly to vindicate the FAA's policies.

B. At the Very Least, a GVR Is Warranted

If this Court decides not to resolve the case on the merits, through either summary reversal or plenary review, it should at least GVR in light of *American Express*. Respondents do not dispute that the standard for a GVR is met here. *See* Pet. 29-30. The Court of Appeal held *AT&T Mobility* inapplicable because it did not address a claim of "effective vindication" of rights. App. 18a-19a. *American Express*,

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on compelling facts not present in *Iskanian*. App. 12a-13a (emphasizing that the litigation was stayed for two years by stipulation). CarMax also disagrees with respondents' description (at 10 n.7) of the relevance of the PAGA issue in *Iskanian* to this case.

[5] While respondents try to explain away the decisions in *Ajamian* and *Brown*, they have no answer to the litany of other California cases refusing to enforce arbitration agreements on the basis of state public policy. *See* Pet. 25-26 & nn.12, 14.

which the Court of Appeal had no opportunity to consider, addressed and rejected just such a claim.

Contrary to respondents' contention (at 17), moreover, a GVR in this case is not "pointless," because there is at least a reasonable likelihood that the Court of Appeal would reverse its prior decision and compel arbitration. While the Court of Appeal reconsiders its decision, CarMax would not be required to engage in expensive trial-court litigation that defeats the very purpose of arbitration. At a minimum, the Court should require the California Court of Appeal to reconsider its erroneous holding that the FAA does not preempt the *Gentry* rule.

III. RESPONDENTS' ARGUMENTS AGAINST PREEMPTION DISTORT *AT&T MOBILITY* AND *AMERICAN EXPRESS*

As the petition explains (at 20-22), the FAA preempts *Gentry* because it rests on the same "effective vindication" public policy that this Court rejected in *AT&T Mobility* and *American Express*. Respondents' efforts to distinguish those decisions badly distort this Court's precedents.

A. *AT&T Mobility* Abrogates *Gentry*

Despite virtual unanimity outside the California courts that *AT&T Mobility* overrules *Gentry*, *see* Pet. 14-15 & nn.6-7,[6] respondents (at 22) seek to distinguish *AT&T Mobility* because "*Gentry* differs from the *Discover Bank* rule." To the extent any difference exists, *Gentry* is more expansive in its anti-arbitration sweep than *Discover Bank*. As respond-

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[6] *Accord Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, No. 5:13-cv-01007-EJD, 2013 WL 6158040, at *4 (N.D. Cal. Nov. 22, 2013) ("Federal courts have uniformly rejected [respondents'] argument.").

ents acknowledge (*id.*), *Discover Bank* precluded bilateral arbitration only in the context of "small-dollar" claims, whereas *Gentry* permits parties to resist bilateral arbitration on the basis of *any* "features of an arbitration agreement and its surrounding circumstances" that might make arbitration less effective as a practical matter. *AT&T Mobility* applies *a fortiori* to the broader *Gentry* rule.

More fundamentally, any differences in the scope of *Gentry* and *Discover Bank* are immaterial given *AT&T Mobility*'s holding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. The FAA preempts both rules because they rest on the same state public policies "unrelated" to the FAA – namely, the concern that arbitration agreements will have an "exculpatory effect" by making it impracticable to pursue state-law claims. *See* Pet. 14; *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12CV2724, 2013 WL 5472589, at *5 (S.D. Cal. Aug. 9, 2013) ("[T]he Court cannot recognize any distinction between *Discover Bank* and *Gentry* that would preserve *Gentry*'s applicability in light of [*AT&T Mobility*].").[7]

B. *Gentry* Contravenes *American Express*

According to respondents, *American Express* does not abrogate *Gentry* because it held that the FAA "do[es] not require enforcement of an agreement that, by making 'access to the forum impracticable,' effectively 'constitutes the elimination of the right to

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[7] Respondents' argument (at 22-23) that *AT&T Mobility* is inapplicable because it did not mention *Gentry* is frivolous. It also ignores Justice Breyer's dissenting opinion, which recognized that *Discover Bank* and *Gentry* are grounded in the same public-policy rationale. *See* 131 S. Ct. at 1757.

pursue a remedy.'" Opp. 25 (quoting 131 S. Ct. at 2310-11) (alterations omitted). Respondents' splicing of selective quotations distorts this Court's opinion beyond recognition. What this Court said is that its prior decisions had "expressed a willingness to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's *right to pursue* statutory remedies." 133 S. Ct. at 2310 (internal quotations and alterations omitted).

As an initial matter, that willingness has always been limited to cases involving *federal* statutory remedies. It has never applied to state-law claims, which must yield to federal law under the Supremacy Clause. *See id.* As Justice Kagan stated in her *American Express* dissent, federal courts "have no earthly interest (quite the contrary) in vindicating [state] law." *Id.* at 2320. Numerous other courts have recognized that limitation. *See* Pet. 21 n.9; *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 935-36 (9th Cir. 2013) ("The 'effective vindication' exception . . . does not extend to state statutes."). Respondents offer no response to this dispositive point.

Moreover, the Court was clear that its "willingness to invalidate" arbitration agreements has been limited to situations where an arbitration agreement "eliminates" the claimant's "right to pursue [its] statutory remedy." *American Express*, 133 S. Ct. at 2310-11. Bilateral arbitration merely prescribes the procedures for resolving claims; it "no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Id.* at 2311.

The issue here is straightforward: *American Express* held that "the FAA's command to enforce arbitration

agreements trumps any interest in ensuring the prosecution of low-value claims." *Id.* at 2312 n.5. That holding forecloses state-law rules such as *Gentry*, which refuse to enforce arbitration agreements on the ground that the parties' procedures impede the "effective vindication" of state-law claims. *See also id.* at 2313 (Kagan, J., dissenting) (acknowledging the majority's holding that the FAA requires enforcement of bilateral arbitration agreements even where it "imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand"). The decision below flouts the FAA and this Court's precedents, and it should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 2014