No. 13-439

IN THE

Supreme Court of the United States

CARMAX AUTO SUPERSTORES CALIFORNIA, LLC, *ET AL.*,

Petitioners,

v.

JOHN WADE FOWLER AND WAHID ARESO,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court has jurisdiction to review a non-final decision of an intermediate state court that does not determine whether arbitration will or will not be compelled.

2. Whether this Court should pretermit consideration by the California Supreme Court of the question of the continued vitality of its decision in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), by addressing that question in the context of an unpublished and nonprecedential intermediate court decision that does not finally resolve the issue.

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INTRODUCTION

The decision below is an interlocutory ruling of an intermediate California court that does not finally decide the question whether to enforce the arbitration agreement at issue in this case. The decision is unpublished, nonprecedential, and, noncitable in the California judicial system. And the legal issue on which petitioner CarMax seeks review in this Court is not only unresolved by the California courts, but is currently pending before the California Supreme Court in three cases in which that court has granted review. One or more of those cases will likely provide a definitive resolution in the California judicial system of the question CarMax asks this Court to decide, as well as of other issues that could obviate or inform the need for resolution of that question.

Because the decision below is not final, this Court lacks jurisdiction over this petition under 28 U.S.C. § 1257(a). Even if this Court could assert jurisdiction, however, intervention in this case would be unwarranted because of the California Supreme Court's ongoing consideration of the other cases presenting the same issue. Depending on their outcome, those cases could eliminate any arguable need for review of the issue CarMax raises, and they will in any event provide a better basis for a determination by this Court of whether California's law concerning the enforceability of arbitration agreements similar to those in this case requires review. The petition for certiorari here, which seeks to bypass both a final judgment in this case and an authoritative resolution by the California Supreme Court of the issues CarMax raises, should be denied.

STATEMENT

A. The Disposition Below and the Nature of the *Gentry* Rule.

CarMax's statement of the case obscures a critical point about the ruling below: It did not, as CarMax asserts, refuse to enforce CarMax's arbitration agreement, but instead remanded to the trial court for further proceedings to *determine* its enforceability. Although holding that the California Supreme Court's decision in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), had not been overruled, the panel of the California Court of Appeal that decided this case did not hold on that basis that the arbitration agreement in this case was unenforceable. Rather, the court held that whether the agreement was enforceable under *Gentry* should be determined as an initial matter in the trial court. Thus, there has as yet been no determination by the California courts of whether CarMax's motion to compel arbitration will be granted or denied.

The disposition below reflects an important aspect of *Gentry* that CarMax does not acknowledge: *Gentry* is not a rule of per se unenforceability of employment arbitration agreements that do not allow class actions. "By its own terms, *Gentry* creates no categorical rule applicable to the enforcement of class arbitration waivers in all wage and hour cases." *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 212 (Cal. Ct. App. 2012). Rather, it calls for consideration of all the circumstances of the agreement, the employment relationship, and the nature of the claims at issue to determine whether the agreement's enforcement would give effect to a waiver of non-waivable substantive rights under California's wage-and-hour

laws. Indeed, *Gentry* explicitly recognized that arbitration agreements limiting employees to individual arbitration may be enforceable. *See* 165 P.3d at 567–69. California courts applying *Gentry* have therefore repeatedly enforced agreements requiring individual arbitration of employment claims when employees have failed to carry their burden of demonstrating that arbitration would run afoul of *Gentry*'s holding that agreements that waive substantive rights are unenforceable.[1]

Thus, the disposition below does not, as CarMax suggests, make denial of its motion to compel arbitration in the trial court a forgone conclusion. Indeed, because of the nature of the *Gentry* rule, it would not, as CarMax contends, have been "futile" for CarMax to seek to compel individual arbitration (Pet. 9) even before this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Ex-*

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[1] *See*, *e.g.*, *Rivera v. Hilton Worldwide, Inc.*, 2013 WL 6230604, at *6–7 (Cal. Ct. App. Nov. 26, 2013); *Whalley v. Wet Seal, Inc.*, 2013 WL 6057679, at *7 (Cal. Ct. App. Nov. 15, 2013); *Arroyo v. Riverside Auto Holdings*, *Inc.*, 2013 WL 4997488, at *9–10 (Cal. Ct. App. Sept. 13, 2013); *Gomez v. Marukai Corp.*, 2013 WL 492544, at *3 (Cal. Ct. App. Feb. 11, 2013); *Outland v. Macy's Dep't Stores, Inc.*, 2013 WL 164419, at *3 (Cal. Ct. App. Jan. 16, 2013); *Rocha v. Kinecta Fed. Credit Union*, 2012 WL 3590855, at *2 (Cal. Ct. App. Aug. 22, 2012); *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616, 625 (Cal. Ct. App. 2012), *rev. granted*, 288 P.3d 1287 (Cal. 2012); *Truly Nolen of Am. v. Super. Ct.*, 145 Cal. Rptr. 3d 432, 448–50 (Cal. Ct. App. 2012); *Nelsen v. Legacy Partners*, 144 Cal. Rptr. 3d at 212; *Kinecta Alternative Fin. Solutions, Inc. v. Super. Ct.*, 140 Cal. Rptr. 3d 347, 350–51 (Cal. Ct. App. 2012); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 858–59 (Cal. Ct. App. 2011), *cert. denied*, 132 S. Ct. 1910 (2012); *Lawler v. 24 Hour Fitness USA, Inc.*, 2011 WL 6062027, at *4 (Cal. Ct. App. Dec. 7, 2011).

press Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), which CarMax contends have abrogated *Gentry*. CarMax made a deliberate choice not to pursue arbitration even though *Gentry* did not necessarily foreclose it, and changed its position only after successfully invoking the machinery of litigation to obtain summary judgments in its favor on some of the claims in the case (judgments that it does not now propose to give up notwithstanding its belated request for arbitration). Because *Gentry* was never an inflexible bar to arbitration, a party's waiver of the right to arbitrate should not be excused by the supposed futility of seeking to arbitrate under it prior to this Court's decisions in *Concepcion* and *American Express*.[2]

More fundamentally, the nature of the *Gentry* rule differentiates it significantly from the rule of *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005), which this Court abrogated in *Concepcion*. Although CarMax describes *Gentry* as merely a clarification of *Discover Bank*, the holdings of the two cases are markedly different. As California courts have explained, *Discover Bank* rested on the theory that class-action bans in consumer contracts involving small-dollar claims are unconscionable even where their enforcement would *not* amount to an effective waiver of substantive rights, and the effect of the ruling was to render such agreements broadly invalid in consumer contracts. *Gentry*, by contrast, erects no

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[2] *See, e.g., Ontiveros v. Zamora*, 2013 WL 593403, at *9 (E.D. Cal. Feb. 14, 2013); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 721 (9th Cir. 2012); *see also McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 164 Cal. Rptr. 751, 753–54 (Cal. Ct. App. 1980) (litigating merits through motions for summary judgment is inconsistent with asserting right to arbitrate).

categorical prohibition on requirements of individual arbitration in any type of contract, but instead disallows enforcement of an arbitration agreement only when the plaintiff shows that consideration of multiple factors demonstrates that the agreement effectively forfeits non-waivable statutory rights of employees, such as the right to receive a minimum wage. *See Franco v. Arakelian Enters., Inc.*, 149 Cal. Rptr. 3d 530, 532–33, 540–41, 555–58, 656–68 (Cal. Ct. App. 2012), *rev. granted*, 294 P.3d 74 (Cal. 2013); *see also Arguelles-Romero v. Super. Ct.*, 109 Cal. Rptr. 3d 289, 299–305 (Cal. Ct. App. 2010) (differentiating *Discover Bank* and *Gentry*).

B. The Current Status of *Gentry* in the California Courts.

CarMax characterizes the decision below as reflecting a broad pattern of unrelenting hostility toward arbitration among the California courts. But CarMax does so only by providing an incomplete picture of the current status of litigation in California concerning *Gentry*. A complete and accurate accounting of the relevant decisions reveals that the California appellate courts are themselves divided over whether *Gentry* remains the law. Moreover, even those courts that have assumed *Gentry* is still valid have for the most part *not* refused to enforce arbitration agreements based on *Gentry*. And as CarMax acknowledges, the differing approaches to the issue among the courts of appeal have led the California Supreme Court to grant review of multiple cases presenting the question whether *Gentry* remains valid—cases that, unlike this one, are likely to lead to an authoritative ruling as to whether, and to what extent, *Gentry* remains the law in the view of the California judicial system.

Since this Court's decision in *Concepcion*, the question whether *Gentry* remains valid has directly arisen in at least 16 cases in the California courts of appeal, with divergent results. In ten of the cases, the courts have stated either that they will assume that *Gentry* remains valid until the California Supreme Court says otherwise or that they need not decide the question; but those courts have then gone on to *enforce* class-action prohibitions in arbitration agreements because the plaintiffs failed to show that they were unenforceable under *Gentry*'s multifactor analysis.[3] In three cases, the courts compelled individual arbitration on the ground that *Gentry* had been abrogated by *Concepcion*.[4] In two cases—including this one—the courts held that *Gentry* remained valid but declined to apply it in the first instance, instead remanding for consideration of how the *Gentry* factors applied to the agreements in question and whether to compel or deny arbitration.[5] In only one case did a

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[3] *Rivera*, 2013 WL 6230604, at *6–7; *Whalley*, 2013 WL 6057679, at *7; *Arroyo*, 2013 WL 4997488, at *9–10; *Gomez*, 2013 WL 492544, at *3; *Reyes*, 146 Cal. Rptr. 3d at 625; *Truly Nolen*, 145 Cal. Rptr. 3d at 448–50; *Nelsen*, 144 Cal. Rptr. 3d at 212; *Kinecta*, 140 Cal. Rptr. 3d at 350–51; *Brown v. Ralphs Grocery*, 128 Cal. Rptr. 3d at 858–59; *Lawler*, 2011 WL 6062027, at *4.

[4] *Teimouri v. Macy's, Inc.*, 2013 WL 2006815, at *10 (Cal. Ct. App. May 14, 2013), *rev. denied* (Cal. July 31, 2013); *Outland*, 2013 WL 164419 at *2–3 (Cal. Ct. App. Jan. 16, 2013); *Iskanian v. CLS Transp. Los Angeles, LLC*, 142 Cal. Rptr. 3d 372, 379–81 (Cal. Ct. App. 2012), *rev. granted*, 286 P.3d 147 (Cal. 2012).

[5] The other case is *Papudesi v. Northrop Grumman Corp.*, 2012 WL 5987550, at *6–7 (Cal. Ct. App. Nov. 29, 2012). In two other cases, courts of appeal remanded for further briefing in the trial court, or before an arbitrator, about *Gentry*'s continued viability without otherwise expressing a view on the issue. *Mohammadian v. Fry's Elecs., Inc.*, 2012 WL 1510289, at *8 (Cal.

(*Footnote continued*)

court of appeal hold that *Gentry* remained valid *and* hold that under the circumstances of the case *Gentry* prevented enforcement of an agreement requiring non-class arbitration of the wage-and-hour claims at issue.[6]

The disparate approaches of the courts of appeal to the issue of *Gentry*'s survival led the California Supreme Court to grant review of that issue in September 2012 in *Iskanian v. CLS Transportation Los Angeles LLC*, one of the cases in which a court of appeal had held that *Concepcion* abrogated *Gentry*. 286 P.3d 147 (Cal. 2012) (granting review of 142 Cal. Rptr. 3d 372). In December 2012, the California Supreme Court also granted review in *Reyes v. Liberman Broadcasting*, which presents the question of *Gentry*'s continued viability in the context of an appellate decision holding that the party opposing arbitration failed to make a sufficient showing under *Gentry*. 288 P.3d 1287 (2012) (granting review of 146 Cal. Rptr. 3d 616). And in February 2013, the California Supreme Court again granted review on the question whether *Gentry* has been overruled in *Franco v. Arakelian Enterprises, Inc.*, the one post-*Concepcion* case in which a court of appeal has held a class-action ban unenforceable under *Gentry*. 294 P.3d 74 (Cal. 2013) (granting review of 149 Cal. Rptr. 3d 530).

The California Supreme Court suspended briefing in *Franco* and *Reyes* pending its decision in *Iskanian*. Briefing is now complete in *Iskanian*, and the most recent briefs submitted by the parties discuss the rel-

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Ct. App. May 1, 2012); *Collins v. Contemp. Servs. Corp.*, 2011 WL 3630516, at *10 (Cal. Ct. App. Aug. 18, 2011).

[6] *Franco*, 149 Cal. Rptr. 3d at 571–72.

evance of this Court's decision in *American Express*, which was decided after the submission of the parties' initial briefs.

Meanwhile, not only the appellate opinions in the cases in which the California Supreme Court granted review, but also the decision below and other post-*Concepcion* decisions that take a definite position one way or the other on *Gentry*'s survival are unpublished, nonprecedential, and noncitable (except with respect to such matters as preclusion and law of the case) in the California judicial system. Given the pendency of *Iskanian* and the noncitable status of this case and other lower court opinions holding that *Gentry* has or has not been abrogated, it is evident that the decision below does not reflect any settled position of the California courts concerning the status of *Gentry*.

As CarMax points out, the California Supreme Court denied the petition for review in this case rather than granting and holding it pending the decision in *Iskanian*, as it did in *Reyes* and *Franco*. There is an obvious reason for treating the cases differently: In this case, the court of appeal did not decide one way or the other whether arbitration would occur. Allowing the remand to proceed so that the trial court could determine whether *Gentry* made a difference to the outcome made perfect sense, especially because the lower courts in the post-remand proceedings will be able to apply the California Supreme Court's decision in *Iskanian*. To be sure, as CarMax states, the California Supreme Court's denial of review was "without explanation" (Pet. 12), as that court, like this Court, does not explain its decisions to deny discretionary review. But in light of the evident reasons to decline

review in the procedural posture of the case, the denial of review provides no basis for inferring how the California Supreme Court anticipates deciding the *Gentry* issue in *Iskanian*.

Indeed, CarMax's speculation that the denial reflects the California Supreme Court's predisposition to reaffirm *Gentry* is contradicted by the same court's denial of review, only three weeks after its denial of review in this case, of the decision in *Teimouri v. Macy's, Inc.*, 2013 WL 2006815 (Cal. Ct. App. May 14, 2013), *rev. denied* (Cal. July 31, 2013). The lower court in *Teimouri* had held that *Concepcion* effectively overruled *Gentry*, and it therefore had compelled individual arbitration of the claims of an employee who had sought to pursue a class action. The contemporaneous denial of review in *Teimouri*—which CarMax does not mention—firmly rebuts CarMax's contention that the California Supreme Court's decisions with respect to the granting or denial of discretionary review in cases involving *Gentry* reflect a predetermined intention to adhere to *Gentry*.

It is exceedingly unlikely that the California Supreme Court's resolution of *Iskanian* will not also dispose of the issues in this case. CarMax correctly notes that *Iskanian* involves issues besides *Gentry*'s continued viability. Two of those issues (whether the prohibition of class actions in an employment arbitration agreement violates employees' rights to engage in collective action under the National Labor Relations Act, and whether the employer waived arbitration by not seeking to compel arbitration until after this Court's decision in *Concepcion*) could, if decided in favor of the employee-plaintiff in that case, obviate the need

for the California Supreme Court to consider *Gentry*.[7] But a decision on either point in *Iskanian* would likewise control the outcome on remand in *this* case, in which identical issues concerning the NLRA and waiver are present, and equally obviate the need to address *Gentry* here. Moreover, even in the event that the Court did not decide the *Gentry* question in *Iskanian*, its acceptance of review in two other cases presenting that issue leaves little doubt that it will decide it.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final.

A. The Decision Is Not Final.

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review only "[f]inal judgments or decrees" of state courts. As the Court has explained, this limitation on its certiorari jurisdiction is no mere formality to be observed in the breach:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-

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[7] The other issue in *Iskanian*, whether an arbitration agreement can bar an individual employee from pursuing representative claims under California's Private Attorneys General Act (PAGA)—claims that are *not* pursued through class actions—presents a distinct issue, the resolution of which one way or the other would not avoid the need to resolve the issue whether *Gentry*'s holding concerning employment arbitration agreements that bar class actions remains valid. The PAGA question in *Iskanian* would, however, also have an impact on a question present in this case but not decided by the court of appeal, as this case also involves PAGA representative claims as well as class claims.

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

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

The judgment below is not final in either of the two relevant senses. First, it is not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. The case came to the court of appeal on an interlocutory appeal from a decision compelling arbitration. The appellate court reversed and remanded with the direction that the trial court engage in the "fact intensive" analysis under *Gentry* and that it "determine what additional factual and legal inquiries are necessary." Pet. App. 19a–20a. The case is far from over.

Second, the decision is not one that is "subject to no further review or correction in any state tribunal." *Jefferson*, 522 U.S. at 81. The court of appeal's order leaves open the possibility that the trial court may again compel arbitration, a determination that would again be subject to appellate review by the court of appeal, following which the issue of *Gentry*'s survival, if it remained potentially dispositive (and had not already been resolved in *Iskanian*), could again be pre-

sented to the California Supreme Court. Likewise, if the trial court were to deny the motion to compel arbitration on the ground that the plaintiffs had made the showing required by *Gentry*, CarMax could appeal and, again assuming the issue had not in the meantime been resolved in *Iskanian*, seek review by the California Supreme Court if it did not prevail in the court of appeal.

In sum, the decision does not terminate the litigation, nor is it subject to no further review by the California state court system: It is not the "final word of a final court." *Market St.*, 324 U.S. at 551.

B. No Exception to the Finality Requirement Applies.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). This case fits none of those narrow categories.

The first *Cox* category covers cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," and "the judgment of the state court on the federal issue is deemed final" because "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. Here, however, the outcome is far from preordained. Either side could win or lose on the merits, in court or in arbitration,

however the *Gentry* issue were decided. *See Thomas*, 532 U.S. at 778.

Cox's second category is confined to cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Even leaving aside that the federal issue here has not been finally decided by the state's highest court—which denied review but is addressing the issue in other cases and could again consider it in this one—the federal issue here will not survive and require decision regardless of the outcome of the state-court proceedings yet to come. Any number of potential dispositions of merits or procedural issues could effectively moot the *Gentry* issue in this case. *Jefferson*, 522 U.S. at 82.

Cox category three comprises those unusual "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue *cannot* be had, *whatever the ultimate outcome of the case*." *Cox*, 420 U.S. at 481 (emphasis added). *Cox* explained that this category encompasses cases in which state law offers *no* subsequent opportunity to obtain a court judgment over which this Court could exercise jurisdiction. *See id.* at 481–82. The parties here do not face such a situation. As explained above, they can seek further appellate review if the trial court compels or declines to compel arbitration, and will also have the opportunity to request that the trial court apply any intervening decision in *Iskanian*. Because the California Supreme Court's denial of review "is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunci-

ated in a published opinion of a Court of Appeal," *Trope v. Katz*, 902 P.2d 259, 268 n.1 (Cal. 1995), the California Supreme Court could also take up the merits of CarMax's preemption argument in such a later appeal in the unlikely event that it had not already decided the issue in *Iskanian*. But even if the California courts in a subsequent appeal were to treat the court of appeal's "interlocutory ruling as 'law of the case,' that determination [would] in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 83. The third exception is thus inapplicable. *See id*.

Last, "the fourth category of such cases identified in *Cox* … covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*, 539 U.S. 654, 658–59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482-83). This case falls well outside the fourth category. To begin with, because California's Supreme Court did not address the merits of the issue here but is addressing it in other cases the issue has not been "finally decided in the state courts." Moreover, reversal of the lower court would not "be preclusive of litigation on [any] relevant cause

of action," but would instead affect the procedural form in which that litigation occurred.[8]

Most importantly, denial of immediate review would not "seriously erode federal policy." If the trial court on remand declines to compel arbitration, CarMax may take the appeal permitted from such a disposition. If, on the other hand, the trial court compels arbitration, even CarMax presumably would not assert that federal policy had been seriously eroded.[9] Furthermore, the pendency of other cases in which a truly final resolution of the *Gentry* question by the California courts is likely in the near future negates any suggestion that concern for federal policy requires this Court to address the issue in a case where there is no final decision on whether arbitration will occur. This case is thus wholly unlike *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984), and *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987), which held that definitive state-court decisions refusing to compel arbitra-

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[8] *Cf. Nike*, 539 U.S. at 660 ("[B]ecause an opinion on the merits in this case could take any one of a number of different paths, it is not clear whether reversal of the California [Court of Appeal] would 'be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come.'").

[9] CarMax's claimed concern that *Gentry* might permit compulsion of a party to arbitrate on a class basis is eliminated by this Court's intervening decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). As the one post-*Concepcion* decision applying *Gentry* to hold an arbitration clause actually unenforceable recognized, *Stolt-Nielsen* does not permit a court to order class arbitration where an arbitration agreement prohibits it; if the agreement is unenforceable under *Gentry*, a judicial class action, not an arbitral one, would be the remedy. *Franco*, 149 Cal. Rptr. 3d at 562–63.

tion were "final" for purposes of § 1257(a) as construed in *Cox*.

Finally, this Court's decision whether to review the preemption issue CarMax raises would be better informed if the Court had the benefit of the California Supreme Court's anticipated ruling in *Iskanian*. Even considering this case in isolation, the Court's decision would benefit if the Court knew the outcome of the remand proceedings—that is, whether and why the lower courts in fact compelled or denied arbitration. For both reasons, federal policy would be enhanced, not eroded, by awaiting further developments before considering whether review of the *Gentry* issue is needed.

A thorough review of the *Cox* categories thus confirms that this case does not in any way present this Court with the opportunity to review "the final word of a final court." *Market St.*, 324 U.S. at 551. The Court lacks jurisdiction under § 1257(a), and the petition must be denied.

II. Given the Pendency of the *Gentry* Issue in the California Supreme Court, Review of the Issue in This Case Is Wholly Unnecessary.

Even assuming this Court had jurisdiction to review the non-final decision below, exercise of that jurisdiction to review an unpublished and nonprecedential disposition of an intermediate state court would be unwarranted in light of the pendency of cases presenting the same issue in the California Supreme Court. Those cases, unlike this one, will likely result in an authoritative expression by the California Supreme Court as to whether it adheres to its precedent in *Gentry*, why or why not, and how its decisions are

consistent with this Court's precedents. The decisions will likely also shed greater light on the nature of the holding in *Gentry* and the circumstances (if any) to which it applies. The decisions could also conceivably modify *Gentry* in light of this Court's precedents.

These considerations counsel strongly in favor of awaiting the ruling in *Iskanian* and/or the other cases presenting the issue before determining whether this Court can or should decide *Gentry*'s fate. If the California Supreme Court decides that *Gentry* has already been effectively overruled by this Court's decisions, there will be no need for this Court to consider the issue unless it is presented by the plaintiffs in a petition for certiorari of their own. If, on the other hand, the California Supreme Court determines that *Gentry* survives, this Court will be able to better judge whether review is necessary based on that court's considered explanation of its view and its further explication, and possible modification, of *Gentry* in light of the decisions that have intervened since *Gentry* was decided.

In particular, the California Supreme Court, unlike the court of appeal in this case, will have had the opportunity to consider the impact of this Court's decision in *American Express*, enabling this Court better to evaluate the consistency of whatever California law turns out to be with that decision. That the California Supreme Court's decision will be informed by *American Express* renders CarMax's suggestion that the Court grant certiorari, vacate, and remand for reconsideration by the court of appeal in light of *American Express* particularly pointless. Because the impact of *American Express* on *Gentry* is already pending before the California Supreme Court in *Iskanian*, considera-

tion of that question by a subordinate court that will be bound by the higher court's resolution of the matter would make little sense.

The possibility that the California Supreme Court may decide *Iskanian* on other grounds that would make decision of the *Gentry* issue unnecessary does not counsel in favor of granting certiorari in this case, but against it. The issues in *Iskanian* that might obviate the need for decision of the *Gentry* issue are: (1) whether the defendant waived arbitration by seeking to compel it only after this Court's decision in *Concepcion* rather than pursuing it pre-*Concepcion* by asserting, as permitted by *Gentry*, that the arbitration agreement was enforceable; and (2) whether the NLRA's protection of employees' right to engage in concerted action bars enforcement of employment arbitration agreements that purport to prohibit concerted legal action in the form of class actions.

A decision not to enforce the arbitration agreement in *Iskanian* on either ground would effectively moot the *Gentry* issue in that case, but, because the decision would be binding on lower California courts, including the trial court on remand in this case, it would also obviate the need to decide the *Gentry* issue in *this* case, which presents exactly the same waiver and NLRA questions as *Iskanian*. Moreover, because the waiver and NLRA issues would likely have to be considered by this Court in this case as possible alternative grounds for affirmance in any event, it would be preferable to consider whether those questions merited review in a case where this Court had the benefit of rulings on them by the California Supreme Court rather than deciding them in the absence of resolution by the state's highest court here.

Not only this Court's own interest in avoiding unnecessary issues and ensuring that its decisions whether to grant review are fully informed, but also respect for the judiciary of the State of California counsels awaiting the California Supreme Court's resolution of the *Gentry* issue rather than bypassing that court and reviewing the issue prematurely. CarMax, however, suggests that this Court should withhold the respect due to the decisional processes of the California court system because of what it describes as the California courts' "ongoing effort" to undermine the Federal Arbitration Act (FAA). Pet. 24. The California courts in fact adhere to the principle that "public policy strongly favors arbitration." *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US) LLC*, 282 P.3d 1217, 1231 (Cal. 2012). That this Court has "intervened" in arbitration cases from the California state courts five times in the space of 30 years (Pet. 25 & n.13) hardly suggests that the Court should set aside its usual presumption that state courts endeavor in good faith to follow federal law. *See Tafflin v. Levitt*, 493 U.S. 455, 465–66 (1990).

Moreover, one of the "interventions" CarMax cites was merely an order granting, vacating and remanding for further consideration in light of *Concepcion* in *Sonic-Calabasas A, Inc. v. Moreno,* 132 S. Ct. 496 (2011). Such a disposition is nonprecedential and does not determine that the lower court erred; rather, it invites further consideration because of a reasonable prospect that intervening developments might change the lower court's decision. *See Gonzalez v. Justices of Mun. Ct.*, 420 F.3d 5, 7 (1st. Cir. 2005) (citing *Stutson v. United States,* 516 U.S. 193, 194 (1996); *Lawrence v. Chater,* 516 U.S. 163, 165–66 (1996)). The California Supreme Court recently responded in *Sonic-*

Calabasas by recognizing that federal law preempted its previous ruling in the case—hardly the mark of a court obdurately bent on subverting the FAA. *See Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013).

Nor do CarMax's references to other California decisions establish that the California courts, in the wake of *Concepcion*, "continue to display the type of hostility toward arbitration agreements that the FAA was designed to end." Pet. 25. CarMax's examples include *Ajamian v. CantorC02e, L.P.*, 137 Cal. Rptr. 3d 773 (Cal. Ct. App. 2012), whose unremarkable holding was that it was unconscionable for an employment arbitration agreement to grant the *employer* enhanced damages and attorney fees if the employee lost, but prohibit the *employee* from recovering enhanced damages and fees if the employee won (despite statutory rights to those remedies). Refusing to enforce such an agreement reflects no hostility to arbitration.

CarMax also cites *Brown v. Superior Court*, 157 Cal. Rptr. 3d 779, 781 (Cal. Ct. App. 2013), *rev. granted*, 307 P.2d 877 (Cal. 2013), which held that an arbitration agreement cannot deprive a plaintiff of the right to bring a representative action under California's Private Attorneys General Act (PAGA). But the California appellate courts have split over that question, and it, too, is currently pending before the California Supreme Court in *Iskanian*. Indeed, the California Supreme Court has granted review on the question in *Brown* itself, and is holding the case pending decision in *Iskanian*.

In any event, what the California courts have done in other cases presenting other issues is not the question here. As to whether and to what extent *Gentry*

remains valid, the California courts are treading carefully. As explained above, the majority of courts facing *Gentry* challenges to arbitration agreements since *Concepcion* have held that the challengers failed to make the necessary showing under *Gentry*; two others, including the court below, have remanded for findings under *Gentry*; and three have held that *Gentry* has been overruled. Only one, *Franco*, held that *Gentry* prohibited enforcement of a particular arbitration agreement. *See supra* pp. 6–7.

The California Supreme Court has appropriately responded by granting review in three cases, including *Iskanian*, where the lower court held *Gentry* was overruled by *Concepcion*; *Franco*, where the lower court held *Gentry* was still good law; and *Reyes*, where the lower court held that plaintiff's showing did not satisfy *Gentry*. The range of cases in which the court granted review seems likely to ensure resolution of the issue and indicates no predisposition toward resolving it one way or another. Pending the California Supreme Court's decisions, the lower court opinions that take definite views one way or another on *Gentry*'s survival are nonprecedential. And, as explained above (at 9), CarMax's baseless speculation that "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*" (Pet. 29) is contradicted by its nearly simultaneous denial of review in *Teimouri*, 2013 WL 2006815, which held that *Gentry* had been overruled.

In sum, there is no warrant for accepting CarMax's invitation to pretermit the California Supreme Court's deliberations over the viability of California case law while the issue is already pending before that

court. Nor does the interest of a single litigant in a faster resolution of the issue in its particular case justify such disruption of the ordinary course of judicial proceedings.

III. The Decision Below Does Not Conflict with This Court's Decisions or Those of Federal Courts of Appeals and State Courts of Last Resort.

CarMax rests its plea for review largely on the contention that the decision below is incorrect. Error correction is not, of course, this Court's function, *see* S. Ct. R. 10, especially when, as here, an issue remains unresolved and pending decision in the state court system. In any event, CarMax's contention that this Court's decisions in *Concepcion* and *American Express* clearly foreclose the possibility that *Gentry* may have any legitimate application is incorrect.

As explained above, *Gentry* differs from the *Discover Bank* rule abrogated by *Concepcion* in that it does not reflect a virtually blanket rule that class-action bans are unconscionable in arbitration agreements covering small-dollar transactions. Rather, it attempts to identify those circumstances in which a prohibition of class proceedings, together with all other features of an arbitration agreement and its surrounding circumstances, would amount to a waiver of substantive rights, such as rights under the wage-and-hour laws, that, as a matter of California law, cannot be waived in any contract. *See Gentry*, 165 P.3d at 563–64. *Concepcion* did not address such a rule, but instead held that state law may not broadly preclude individual arbitration even where such arbitration would *not* have the effect of waiving nonwaivable substantive rights. *See Concepcion*, 131 S. Ct. at 1753.

Moreover, *Concepcion*, while discussing other California precedent (*id*. at 1746), made no mention of *Gentry*, although the case had been repeatedly cited in briefs submitted to this Court.

American Express also does not abrogate *Gentry*. *American Express* holds that the FAA does not preclude enforcement of an arbitration agreement banning class actions merely because the ban will make it economically infeasible to pursue particular claims as to which "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." 133 S. Ct. at 2307. The Court reasoned that statutes creating substantive rights "do not guarantee an affordable procedural path to the vindication of every claim." *Id*. at 2309. Thus, "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." *Id*. at 2311.

At the same time, however, the Court reiterated that an arbitration agreement cannot be used as a mechanism for prospectively waiving rights to pursue otherwise unwaivable statutory claims and remedies, and that the FAA therefore does not require enforcement of agreements that would have that effect. *Id*. at 2310. Significantly, the Court reaffirmed its earlier statement in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), that high arbitration fees could render an arbitration agreement unenforceable if they had the effect of preventing assertion of underlying substantive rights. *Am. Express*, 133 S. Ct. at 2311. The Court explained that the principle that prospective waivers of rights are forbidden "would perhaps" cover fees "that are so high as to

make access to the forum impracticable." *Id*. at 2310–11.

Thus, *American Express* drew a distinction between, on one hand, terms in an arbitration clause that waive rights either by expressly precluding their assertion or effectively cutting off access to the arbitral forum and, on the other hand, provisions such as the class-action ban before it in that case that merely make pursuing a remedy uneconomical in particular cases but "do[] not constitute the elimination of the right to pursue that remedy." *Id*. at 2311. The FAA, the Court held, provides for enforcement of the latter but may not require enforcement of the former. Thus, *American Express* indicates that the FAA does not authorize a court to determine that a class-action ban is unenforceable merely because its enforcement will make the pursuit of valid claims too costly in particular cases. But it does not exclude the possibility that an arbitration agreement may be unenforceable if it amounts to a waiver of claims and remedies because its conditions make access to the forum impracticable.

Gentry is aimed at identifying the circumstances in which a class-action ban in an arbitration agreement amounts to a waiver of unwaivable statutory rights because, together with other features of the agreement and the relationship from which it arises, it effectively precludes access to the forum. Although the costs of proceeding are one of the factors to be considered (a factor that *American Express*'s favorable citation of *Green Tree* indicates is still relevant), the *Gentry* rule is not simply that class actions must be permitted whenever necessary to make pursuing a claim cost-effective. Rather, *Gentry* requires consideration of whether access to the arbitral forum is cut off not

only by such economic factors, but also by employees' fears of retaliation from employers if they proceed individually and by the need for group remedies in a sphere where employees are likely to be unfamiliar with their rights, as well as any and all other "real world obstacles" to access to the arbitral forum. *Gentry*, 165 P.3d at 568. At the same time, *Gentry* requires consideration of the features of particular arbitration agreements that might overcome these obstacles to forum access. *Id*. at 568–69.

Here, of course, the state courts have not yet determined whether the arbitration agreement at issue would have the effect of rendering the forum unavailable. That issue remains to be addressed on remand. Only if *American Express* excluded the possibility that *any* showing of the kinds of factors relevant under *Gentry* could render an arbitration agreement unenforceable would it arguably foreclose application of *Gentry* at this stage of the litigation.

American Express, like *Concepcion* before it, does not go so far. To be sure, the two decisions together likely preclude a state from determining that an arbitration clause that bars class actions may not be enforced simply because it would make certain claims economically infeasible because their anticipated payoff does not justify the cost of individual proceedings. But those decisions do not require enforcement of an agreement that, by making "access to the forum impracticable," effectively "constitute[s] the elimination of the right to pursue [a] remedy." *Am. Express*, 133 S. Ct. at 2310–11. A state contract-law principle that makes an arbitration agreement unenforceable in such limited circumstances remains protected by the FAA's savings clause, 9 U.S.C. § 2, which was not di-

rectly at issue in *American Express*, as such a rule reflects an arbitration-neutral expression of the general principle of contract law that claims and remedies serving a public purpose may not be prospectively waived by contract.[10]

This case also involves no conflict among decisions of the federal courts of appeals or state courts of last resort. Indeed, because California's court of last resort has not yet spoken, any claim of conflict is premature. In any event, the allegedly conflicting decisions cited by CarMax (Pet. 15–16 n.7) all involve direct application of *Concepcion* to the same circumstances at issue there: claims that class action bans in small-stakes consumer cases are broadly unconscionable. The cases CarMax cites do not concern rules similar to *Gentry* concerning the circumstances under which enforcement of an arbitration agreement may violate state contract-law principles prohibiting the enforcement of agreements waiving substantive rights under wage-and-hour laws.

Finally, CarMax invokes this Court's summary reversals in *Nitro-Lift Technologies., L.L.C. v. Howard*, 133 S. Ct. 500 (2012), *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), and *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011). In each of those cases, however, a state court directly disregarded longstanding precedents of this Court. In *Nitro-Lift*, the Oklahoma Supreme Court refused to follow the venerable

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[10] If *Concepcion* and *American Express* were to be construed so broadly as to invalidate *Gentry*, respondents reserve the right to argue that those decisions were erroneous and should be overruled by this Court (an argument that the California courts obviously could not entertain).

principle that challenges to the validity of an agreement as a whole are not a basis for refusing to enforce an arbitration clause it contains. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Marmet*, the West Virginia Supreme Court of Appeals flouted the long-settled principle that a state may not prohibit the arbitration of particular types of claims (there, bodily injury claims against nursing homes). *See*, *e.g.*, *Perry v. Thomas*, 482 U.S. 483 (1987). And in *KPMG*, the lower court ignored the established rule that a court must compel arbitration of any arbitrable claim in a case even if other claims are not subject to arbitration. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985).

This case is not remotely comparable. Unlike such cases, where "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error," (Pet. 23 (citation omitted)), here the law is neither well settled nor stable: This Court's evolving jurisprudence has not yet addressed the circumstances of *Gentry*, nor has California law itself come to rest. The facts that are determinative are not undisputed, but as yet wholly undetermined. And the decision below is not clearly in error.

Moreover, in none of the summary reversals CarMax cites was a state supreme court engaged in ongoing consideration of the very issue on which this Court summarily reversed. Rather, two of the cases (*Nitro-Lift* and *Marmet*) reversed precedential opinions of a state's highest court, and in the third (*KPMG*) there was no indication that the issue was under active consideration in a pending case before the state's highest court. CarMax cites no cases in-

volving intervention by this Court in circumstances comparable to those here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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