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October 12, 2010

Chief Justice Ronald M. George  
and Associate Justices  
California Supreme Court  
350 McAllister St.  
San Francisco, CA 94102

RECEIVED

OCT 12 2010

CLERK SUPREME COURT

Re: **Amicus Letter Supporting Review**  
***Fisher v. DCH Temecula Imports, LLC, No. S186618***

Dear Chief Justice George and Associate Justices:

Amicus curiae American Financial Services Association (“AFSA”) urges the Court to grant review in this case. The Court of Appeal opinion is manifestly incorrect, conflicting with decisions of the United States Supreme Court and this Court. Review is needed to correct the lower court’s erroneous decision on an important issue that will arise repeatedly in this state’s courts in the future.

The principal issue in this case is whether an agreement for bilateral—i.e., non-class—arbitration is *per se* invalid as against public policy whenever the party opposing arbitration has alleged a class claim under the Consumer Legal Remedies Act (“CLRA”).

The issue is of continuing importance to litigants and courts in California. CLRA claims are often alleged in consumer class actions. The Administrative Office of the Court’s recent class action study found that CLRA claims were raised in nearly 20% of class actions alleging business torts. That number will undoubtedly rise dramatically if review is not granted.

Moreover, many consumer contracts contain agreements for bilateral—non-class—arbitration. Most car purchase contracts in California now contain the clause at issue in this case. Many bank account, credit card, telephone, and other consumer contracts as well as retail installment contracts contain similar clauses. If the Court of Appeal opinion stands, all of these arbitration agreements will be automatically invalidated whenever the consumer alleges a class claim under the CLRA.

The Court of Appeal decision is also plainly wrong. It conflicts with United States Supreme Court precedent, with this Court’s decisions, and a recent Court of Appeal decision upholding the very same arbitration clause in a different case raising identical claims. The Court should grant review to decide the important issue raised and to secure uniformity of decision.

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### **Interest Of Amicus**

Amicus American Financial Services Association (“AFSA”) is the nation’s largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 90 years, AFSA has represented financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA is dedicated to protecting access to credit and consumer choice. It encourages ethical business practices and supports financial education for consumers of all ages. AFSA advocates before legislative, executive and judicial bodies on issues affecting its members’ interests. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239.)

### **The Issue Is Important**

The enforceability of bilateral arbitration agreements (also referred to as “class action waivers”) has been and continues to be a matter of great controversy and repeated litigation in California and nationally as evidenced by the United States Supreme Court’s recent grant of certiorari in *AT&T Mobility, LLC v. Concepcion*, No. 09-893 and this Court’s grant of review and decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (“*Discover Bank*”) and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (“*Gentry*”) and attested by a plethora of lower appellate court decisions involving those agreements.

Bilateral arbitration clauses are common in consumer contracts. The standard form conditional car sale contract involved in this case and *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (“*Arguelles-Romero*”) is used by most automobile dealers in California—who in 2007 accounted for \$96 billion, a million sales transactions, and 21% of all retail sales in this state. Bilateral arbitration agreements are also often found in bank account agreements, credit card agreements (as in *Discover Bank*), retail installment contracts, Internet, cable and telephone service provider agreements (as in *AT&T Mobility*) and many other sorts of consumer contracts.

Bilateral arbitration provisions are all the more common now that the United States Supreme Court has held that for purposes of the Federal Arbitration Act, any arbitration clause that is silent on the subject must be interpreted as an agreement to individual arbitration only, not classwide arbitration. (See *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.* (2010) 130 S.Ct. 1758, 1775-1776 (“*Stolt-Nielsen*”).)

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CLRA class claims are equally common. Each year, California's trial courts handle hundreds of putative class action lawsuits. The AOC's recent study showed that at least 3,711 putative class actions were filed in California trial courts between 2000 and 2005, with the annual filings steadily increasing except in the study's final year.<sup>1</sup> (Hehman, Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report (Administrative Office of the Courts March 2009) p. 3.) Business tort claims are alleged in 27.4% of those actions. (*Id.*, p. 5.) CLRA claims were alleged in 18.7% of the business tort class actions. (*Id.*, p. B1.)

If the Court of Appeal decision remains as precedent, CLRA class claims are likely to rise dramatically. In the words of the AOC's class action study:

[The] "players" in the class action sphere are a somewhat exclusive group, and they have clear incentives to pursue the latest successful litigation tactics. Also, the field of class action practitioners is small and somewhat tight-knit, more so than in most other areas of practice, and the community is very active, with regularly read journals, news columns, and weblogs. Developments in the class action arena are publicized and discussed quickly among the specialists, and this cultivates rapid changes in response to the most recent case outcomes or litigation strategies. ... News of a winning tactic often creates a demonstration effect where a singular occurrence—for example, a successful filing approach—leads to wide-spread use of a particular claim or case type.

(*Id.*, at p. 2.)

As bilateral arbitration agreement are common in consumer contracts and class CLRA claims are commonly alleged in consumer complaints, the issue raised by the petition in this case is likely to be key in deciding whether hundreds of cases each year are sent to arbitration or retained by the court system.

In a word, the issue is important—important enough to warrant review.

### **Review Is Needed To Secure Uniformity Of Decision**

Review should also be granted because the Court of Appeal opinion is plainly wrong, conflicting with the United States Supreme Court's and this Court's decisions.

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<sup>1</sup> During the 2000-2005 study period, general unlimited civil filings decreased by 17.8% while class action filings increased by 63.3%. (*Id.*, p. 4.)

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Purporting to follow *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, the Court of Appeal held that because the bilateral arbitration clause in her car contract required Fisher to waive an unwaivable statutory right under the CLRA to bring a classwide arbitration or class action law-suit, the arbitration clause violated the public policy and was, *per se*, unenforceable. (114 Cal.Rptr.3d at pp. 33-34.) In the Court of Appeal's view, the Federal Arbitration Act did not preempt this ruling because violation of California public policy is a "ground[] exist[ing] at law or in equity for the revocation of any contract." (*Id.*, at p. 34, 9 U.S.C. § 2.)

These conclusions conflict with the United States Supreme Court's decision in *Southland Corp. v. Keating* (1984) 465 U.S. 1, a decision that the Court of Appeal opinion does not even mention. In *Keating*, the high court held that California cannot prevent arbitration of certain types of claims by declaring the right to a judicial remedy for particular statutory claims non-waivable.

In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.

(*Id.*, at p. 16; fns. omitted.)

The Court of Appeal opinion in this case cannot be reconciled with *Keating's* holding. The state statutes in the two cases are indistinguishable. The Franchise Investment Law had been interpreted to confer on franchisees a nonwaivable statutory right to judicial remedies for their statutory claims.<sup>2</sup> The Court of Appeal interpreted the CLRA to confer on consumers a nonwaivable statutory right to classwide remedies.<sup>3</sup> Whether it is judicial remedies in general or classwide relief in particular, in both cases state law granted the arbitration opponent a nonwaivable procedural right incompatible with that party's arbitration agreement.

In that situation, *Keating* holds that the Federal Arbitration Act preempts state law, requiring arbitration despite the state law guarantee of other procedural rights. The Court of Appeal opinion reaches the contrary conclusion. The two cannot be reconciled.

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<sup>2</sup> "The California Supreme Court interpreted this statute [former Corp. Code, § 31512, which voided any provision purporting to waive compliance with the statute] to require judicial consideration of claims brought under the statute ...." (*Keating*, 465 U.S. at 10.)

<sup>3</sup> "[U]nder the CLRA, Fisher could not be asked to waive her right to file a class action lawsuit or request classwide arbitration." (*Fisher*, 114 Cal.Rptr.3d at p. 31.) "The arbitration clause at issue here required Fisher to waive an unwaivable statutory right under the CLRA to bring a classwide arbitration or class action lawsuit ...." (*Id.*, at pp. 33-34.)

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*Keating* also refutes the Court of Appeal's attempt to avoid FAA preemption by invoking 9 U.S.C. § 2's exception for legal grounds for the revocation of any contract:

[T]he defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of any contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.

(*Id.*, at p. 16 n. 11.)

In the same way, the CLRA is not a ground that exists at law for revoking any contract, but only a ground for revoking certain contracts to which it applies.<sup>4</sup> Invoking the rule that contracts contrary to public policy are void, as the Court of Appeal opinion does (114 Cal. Rptr.3d at p. 34), fails to overcome the FAA's preemptive force for the obvious reason that otherwise a state legislature could easily eviscerate the FAA's general validation of arbitration agreements by declaring a contrary state public policy.

[Under Justice Steven's] view, "a state policy of providing special protection for franchisees ... can be recognized without impairing the basic purposes of the federal statute." If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements "upon the same footing as other contracts," simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

(*Keating*, 465 U.S. at p. 16 n. 11; citations omitted.)<sup>5</sup>

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<sup>4</sup> See *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 65 ("The Consumers Legal Remedies Act is not an otherwise applicable general law, however. Rather than applying to all businesses, or to business transactions in general, the Consumers Legal Remedies Act applies only to transactions for the sale or lease of consumer "goods" or "services" as those terms are defined in the act.").

<sup>5</sup> The just-quoted *Keating* footnote also refutes the Court of Appeal's assertion that "the FAA would not be furthered by finding the waiver of classwide arbitration was enforceable in order to save the arbitration of Fisher's individual claims." (114 Cal.Rptr.3d at p. 34.) The FAA does not "encourage arbitration" willy-nilly, as the Court of Appeal supposed. (*Ibid.*) Instead, "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced *according to their terms.*'" (*Stolt-Nielsen*, 130 S.Ct. at p. 1773; citations omitted; emphasis added.) Under the FAA, "parties may specify *with whom* they choose to arbitrate their disputes," (*Id.*, at p. 1774.) "[I]t follows that a party may not be compelled under the FAA to submit to class arbitration unless there is

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The Court of Appeal opinion is as incompatible with this Court's decisions as it is with the United States Supreme Court's rulings. This Court has considered bilateral arbitration agreements or "class action waivers" in two cases, *Discover Bank* and *Gentry*. In both, this Court rejected any *per se* rule of invalidation.<sup>6</sup>

In *Discover Bank*, the Court held instead that a bilateral arbitration agreement may be avoided as unconscionable only when the arbitration agreement operates as an exculpatory clause "in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy." (*Gentry*, 42 Cal.4th at p. 457.) In assessing whether bilateral arbitration operates, in practical terms, to exculpate, the Court required careful consideration of the context in which the bilateral arbitration clause operated in the particular case, focusing on such factors as whether the parties' disputes "predictably involve small amounts of damages" and whether "the party with the superior bargaining power [is alleged to have] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (*Discover Bank*, 36 Cal.4th at pp. 162-163.)

Similarly, in *Gentry*, which involved nonwaivable statutory rights to overtime pay, this Court avoided any automatic rule voiding bilateral arbitration and instead directed trial courts to consider, among other factors,

the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that 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, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that

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a contractual basis for concluding that the party *agreed* to do so. (*Id.*, at p. 1775.) As the Court of Appeal interpreted it, the CLRA either voids arbitration agreements or forces classwide arbitration despite the parties' contrary agreement. In that respect, the CLRA conflicts with, and is preempted by, the FAA and its rule that arbitration agreements must be enforced according to their terms.

<sup>6</sup> *Discover Bank*, 36 Cal.4th at p. 162 ("We do not hold that all class action waivers are necessarily unconscionable."); *Gentry*, 42 Cal.4th at p. 462 ("We cannot say categorically that all class arbitration waivers in overtime cases are unenforceable.").

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these employees can “vindicate [their] unwaivable rights in an arbitration forum.”

(*Gentry*, 42 Cal.4th at p. 463.)

The Court of Appeal’s blanket rule—no bilateral arbitration of any case in which a CLRA class claim is alleged—clearly conflicts with the approach this Court has taken in *Discover Bank* and *Gentry*, both of which eschew such *per se* rules and, instead, require fact-intensive consideration of the “real world” practicalities of individual arbitration. Under *Discover Bank* and *Gentry*, only when individual arbitration raises significant practical obstacles to the protection of nonwaivable statutory rights or operates to exculpate a wrongdoer allegedly engaged in a scheme to cheat consumers of individually small sums is a court permitted to invalidate a bilateral arbitration clause.

The Court of Appeal opinion is also inconsistent with the recent Court of Appeal opinion in *Arguelles-Romero*, 184 Cal.App.4th 825 which involved the same claims and the same arbitration clause in the same standard form conditional car sale contract. Unlike the Court of Appeal opinion in this case, *Arguelles-Romero* carefully analyzes this Court’s decisions in *Discover Bank* and *Gentry*. It holds that the bilateral arbitration provision is not unconscionable under *Discover Bank*’s analysis in a case like this one,<sup>7</sup> and it remands for consideration whether the provision is enforceable under the “rule of *Gentry*.”

The Court of Appeal opinion in this case stands alone in adopting a *per se* rule that any bilateral arbitration agreement is unenforceable whenever the plaintiff alleges a CLRA class claim. An outlier decision misleads other courts often leading to a line of erroneous authority. This outlier is particularly pernicious as it reaches the wrong result on an important and oft-recurring question.

The Court should grant review to bring California back into line with this Court’s opinions and those of the United States Supreme Court on this important topic.

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<sup>7</sup> *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, on which the Court of Appeal purported to rely, did not hold otherwise. (*Fisher*, 114 Cal. Rptr.3d at pp. 32-34) *Gutierrez* was fully compatible with this Court’s analysis in *Discover Bank*. It held a bilateral arbitration agreement unconscionable because of the real world, practical barrier to enforcement of legal rights which the agreement erected by imposing substantial arbitration fees on the plaintiffs. Nothing in *Gutierrez* supports the notion that all bilateral arbitration clauses are unenforceable or that they may be voided as against California public policy simply because they require individual arbitration of nonwaivable statutory rights.

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Respectfully yours,

A handwritten signature in black ink that reads "Jan T. Chilton". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Jan T. Chilton

JTC:j



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and Associate Justices  
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October 12, 2010  
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**PROOF OF SERVICE**

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City and County of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, California 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

**Amicus Letter Supporting Review**

on all interested parties in said case addressed as follows:

Christian Joseph Scali  
Manning, Leaver, Bruder and Berberich  
5750 Wilshire Boulevard, Suite 655  
Los Angeles, CA 90036

Christopher P. Barry  
Rosner, Barry and Babbitt, LLP  
10085 Carroll Canyon Road, Suite 100  
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*Attorneys for Defendant and Appellant  
DCH Temecula Imports LLC*

*Attorneys for Plaintiff and Respondent  
Amberlee Fisher*

Court of Appeal  
Fourth Appellate District, Division 2  
3389 Twelfth Street  
Riverside, CA 92501

<input checked="" type="checkbox"/>	<b>(BY MAIL)</b> By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, in sealed envelopes with postage fully prepaid.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on October 12, 2010.



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Marilyn Li

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October 12, 2010

SUPREME COURT  
FILED

Chief Justice Ronald M. George  
and Associate Justices  
California Supreme Court  
350 McAllister St.  
San Francisco, CA 94102

OCT 12 2010

Frederick K. Ohlrich Clerk

Deputy

Re: **Letter Requesting Depublication Of  
*Fisher v. DCH Temecula Imports, LLC*, No. S186618; E047802**

Dear Chief Justice George and Associate Justices:

Pursuant to California Rules of Court, rule 8.1125(a), American Financial Services Association ("AFSA") respectfully requests that the Court order the Court of Appeal opinion in this case depublished, if the Court chooses not to grant review.<sup>1</sup>

The Court of Appeal's opinion holds that an agreement for bilateral arbitration (otherwise known as a class action waiver) is *per se* unenforceable if the party opposing arbitration alleges a class claim under the Consumers Legal Remedies Act ("CLRA"). As shown in AFSA's concurrently filed amicus letter, this holding is important (pp. 2-3), and incorrect (pp. 4-7).

If left published, the opinion will set California law at odds with United States Supreme Court precedent and will confuse the standards this Court adopted in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 ("*Discover Bank*") and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 ("*Gentry*") for evaluating the enforceability of bilateral arbitration agreements.

The Court of Appeal opinion cannot be squared with the United States Supreme Court's decision in *Southland Corp. v. Keating* (1984) 465 U.S. 1 ("*Keating*"). In *Keating*, the high court held that California cannot prevent arbitration by declaring the right to a judicial remedy for particular statutory claims nonwaivable.

In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.

<sup>1</sup> AFSA explains its interest in this case in its concurrently filed amicus letter urging the Court to grant review.

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(*Id.*, at p. 16; fns. omitted.)

The Court of Appeal opinion in this case cannot be reconciled with *Keating's* holding. The state statutes in the two cases are indistinguishable. The Franchise Investment Law had been interpreted to confer on franchisees a nonwaivable statutory right to judicial remedies for their statutory claims.<sup>2</sup> Similarly, here, the Court of Appeal interpreted the CLRA to confer on consumers a nonwaivable statutory right to classwide remedies.<sup>3</sup> Whether it is judicial remedies in general or classwide relief in particular, in both cases state law granted the arbitration opponent a nonwaivable procedural right incompatible with that party's arbitration agreement.

In that situation, *Keating* holds that the Federal Arbitration Act preempts state law, requiring arbitration despite the state law guarantee of other procedural rights. The Court of Appeal opinion reaches the contrary conclusion. The two cannot be reconciled.

*Keating* also refutes the Court of Appeal's attempt to avoid FAA preemption by invoking 9 U.S.C. § 2's exception for legal grounds for the revocation of any contract:

[T]he defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of any contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.

(*Id.*, at p. 16 n. 11.)

In the same way, the CLRA is not a ground that exists at law for revoking any contract, but only a ground for revoking certain contracts to which it applies.<sup>4</sup> Invoking the rule that contracts contrary to public policy are void, as the Court of Appeal opinion does (114 Cal. Rptr.3d at

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<sup>2</sup> "The California Supreme Court interpreted this statute [former Corp. Code, § 31512, which voided any provision purporting to waive compliance with the statute] to require judicial consideration of claims brought under the statute ...." (*Keating*, 465 U.S. at 10.)

<sup>3</sup> "[U]nder the CLRA, Fisher could not be asked to waive her right to file a class action lawsuit or request classwide arbitration." (*Fisher*, 114 Cal.Rptr.3d at p. 31.) "The arbitration clause at issue here required Fisher to waive an unwaivable statutory right under the CLRA to bring a classwide arbitration or class action lawsuit ...." (*Id.*, at pp. 33-34.)

<sup>4</sup> See *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 65 ("The Consumers Legal Remedies Act is not an otherwise applicable general law, however. Rather than applying to all businesses, or to business transactions in general, the Consumers Legal Remedies Act applies only to transactions for the sale or lease of consumer "goods" or "services" as those terms are defined in the act.").

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p. 34), fails to overcome the FAA's preemptive force for the obvious reason that otherwise a state legislature could easily eviscerate the FAA's general validation of arbitration agreements by declaring a contrary state public policy.

[Under Justice Steven's] view, "a state policy of providing special protection for franchisees ... can be recognized without impairing the basic purposes of the federal statute." If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements "upon the same footing as other contracts," simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

(*Keating*, 465 U.S. at p. 16 n. 11; citations omitted.)<sup>5</sup>

The Court of Appeal also creates confusion regarding the appropriate standards for determining, under California law, whether a bilateral arbitration agreement or "class action waiver" is enforceable. This Court announced the applicable standards in *Discover Bank* and *Gentry*. The Court of Appeal opinion in this case adopts a different and incompatible *per se* rule of unenforceability.<sup>6</sup>

In *Discover Bank*, the Court held that a bilateral arbitration agreement may be avoided as unconscionable only when the arbitration agreement operates as an exculpatory clause "in practical terms because it can make it very difficult for those injured by unlawful conduct to pursue a legal remedy." (*Gentry*, 42 Cal.4th at p. 457.) In assessing whether bilateral arbitration

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<sup>5</sup> The just-quoted *Keating* footnote also refutes the Court of Appeal's assertion that "the FAA would not be furthered by finding the waiver of classwide arbitration was enforceable in order to save the arbitration of Fisher's individual claims." (114 Cal.Rptr.3d at p. 34.) The FAA does not "encourage arbitration" willy-nilly, as the Court of Appeal supposed. (*Ibid.*) Instead, "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced *according to their terms.*'" (*Stolt-Nielsen*, 130 S.Ct. at p. 1773; citations omitted; emphasis added.) Under the FAA, "parties may specify *with whom* they choose to arbitrate their disputes," (*Id.*, at p. 1774.) "[I]t follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. (*Id.*, at p. 1775.) As the Court of Appeal interpreted it, the CLRA either voids arbitration agreements or forces classwide arbitration despite the parties' contrary agreement. In that respect, the CLRA conflicts with, and is preempted by, the FAA and its rule that arbitration agreements must be enforced according to their terms.

<sup>6</sup> *Discover Bank*, 36 Cal.4th at p. 162 ("We do not hold that all class action waivers are necessarily unconscionable."); *Gentry*, 42 Cal.4th at p. 462 ("We cannot say categorically that all class arbitration waivers in overtime cases are unenforceable.").

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operates, in practical terms, to exculpate, the Court required careful consideration of the context in which the bilateral arbitration clause operated in the particular case, focusing on such factors as whether the parties' disputes "predictably involve small amounts of damages" and whether "the party with the superior bargaining power [is alleged to have] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." (*Discover Bank*, 36 Cal.4th at pp. 162-163.)

Similarly, in *Gentry*, which involved nonwaivable statutory rights to overtime pay, this Court avoided any automatic rule voiding bilateral arbitration and instead directed trial courts to consider, among other factors,

the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that 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, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can "vindicate [their] unwaivable rights in an arbitration forum."

(*Gentry*, 42 Cal.4th at p. 463.)

The Court of Appeal's blanket rule—no bilateral arbitration of any case in which a CLRA class claim is alleged—conflicts with the approach this Court has taken in *Discover Bank* and *Gentry*, both of which eschew such *per se* rules and, instead, require fact-intensive consideration of the "real world" practicalities of individual arbitration. Under *Discover Bank* and *Gentry*, only when individual arbitration raises significant practical obstacles to the protection of nonwaivable statutory rights or operates to exculpate a wrongdoer allegedly engaged in a scheme to cheat consumers of individually small sums is a court permitted to invalidate a bilateral arbitration clause.

In short, the Court of Appeal opinion in this case is wrong about an issue of significant importance. If the Court does not grant review, it should order the Court of Appeal decision depublished so as to avoid the confusion that will inevitably result from this decision which

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conflicts with the decisions of this Court and the United States Supreme Court on the same issue..

Respectfully yours,

A handwritten signature in black ink, appearing to read "Jan T. Chilton", with a long horizontal flourish extending to the right.

Jan T. Chilton

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and Associate Justices  
California Supreme Court  
October 12, 2010  
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**PROOF OF SERVICE**

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City and County of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, California 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

**Letter Requesting Depublication of *Fisher v. DCH Temecula Imports, LLC*,  
No. S186618; E047802**

on all interested parties in said case addressed as follows:

Christian Joseph Scali  
Manning, Leaver, Bruder and Berberich  
5750 Wilshire Boulevard, Suite 655  
Los Angeles, CA 90036

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Rosner, Barry and Babbitt, LLP  
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*Attorneys for Defendant and Appellant  
DCH Temecula Imports LLC*

*Attorneys for Plaintiff and Respondent  
Amberlee Fisher*

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Fourth Appellate District, Division 2  
3389 Twelfth Street  
Riverside, CA 92501

<input checked="" type="checkbox"/>	<b>(BY MAIL)</b> By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, in sealed envelopes with postage fully prepaid.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on October 12, 2010.



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Marilyn Li