

IN THE SUPREME COURT OF THE UNITED STATES

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No. A-\_\_\_\_\_

OTO, L.L.C., APPLICANT

v.

KEN KHO; JULIE A. SU, CALIFORNIA LABOR COMMISSIONER

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APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

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Pursuant to Rules 13.5 and 30.2 of this Court, counsel for OTO, L.L.C., respectfully requests a 45-day extension of time, to and including January 13, 2020, within which to file a petition for a writ of certiorari to review the judgment of the California Supreme Court in this case. The California Supreme Court entered its judgment on August 29, 2019. App., infra, 1a-96a. Unless extended, the time for filing a petition for a writ of certiorari will expire on November 27, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. 1257(a).

1. This case presents the question whether the Federal Arbitration Act (FAA) preempts a state-law rule that deems substantively unconscionable contracts for arbitration of wage disputes if the contemplated arbitration procedures are not sufficiently similar to those of the administrative proceeding that would otherwise be available under state law. Applicant is an auto dealership; respondent Ken Kho worked as a service technician for

applicant.\* During that time, applicant and Kho entered an arbitration agreement that provided that all disputes arising from Kho's employment, including wage disputes, would be resolved by arbitration. The agreement specified that arbitration would be conducted by a retired California Superior Court judge in accordance with certain provisions of the California Code of Civil Procedure and Evidence Code. App., infra, 4a-5a.

California law provides an administrative procedure for resolving wage claims as an alternative to civil litigation. See Cal. Lab. Code §§ 98-98.8, 218, 1194. A wage claimant may file a claim with the California Labor Commissioner, who may decline to take any further action, prosecute a civil action on the employee's behalf, or conduct a "Berman" hearing -- a streamlined administrative proceeding that limits pleadings, eliminates discovery, and operates without formal rules of evidence. When the Commissioner conducts a Berman hearing, either party may appeal the Commissioner's decision to the California Superior Court, which reviews the decision de novo. App., infra, 7a-10a.

The California Supreme Court has repeatedly refused to enforce arbitration agreements that displace that administrative proceeding, primarily by aggressively applying the unconscionability doctrine to invalidate those agreements. As this Court has explained, "California's courts have been more likely to hold contracts to arbitrate unconscionable than any other contracts." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011). In Sonic-

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\* Respondent Julie A. Su intervened in the litigation in her official capacity as the California Labor Commissioner.

Calabasas A, Inc. v. Moreno, 247 P.3d 130 (2011) (Sonic I), the California Supreme Court held that arbitration agreements that waived Berman hearings were always substantively unconscionable. Id. at 144-146. But in AT&T Mobility, this Court held that the FAA preempted a California rule classifying most collective-arbitration waivers in consumer contracts as unconscionable, on the ground that the rule violated the equal-treatment principle; under that principle, a court may invalidate an arbitration agreement based on "generally applicable contract defenses," but not on legal rules that "apply only to arbitration" or "derive their meaning from the fact that an agreement to arbitrate is at issue." 563 U.S. at 339, 344.

This Court vacated the California Supreme Court's decision in Sonic I in light of its decision in AT&T Mobility. See Sonic-Calabasas A, Inc. v. Moreno, 565 U.S. 973 (2011). On remand, the California Supreme Court held that waivers of Berman hearings are not substantively unconscionable where "the arbitral scheme at issue provides employees with an accessible and affordable process for resolving wage disputes." Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 204 (2013)(Sonic II).

2. After applicant terminated Kho for poor performance, Kho filed an unpaid wage claim against applicant with the California Labor Commissioner. A Berman hearing was scheduled. Applicant then petitioned the California Superior Court to compel arbitration and stay the administrative proceedings; applicant notified the Commissioner of its petition and asked that the Berman hearing be taken off the calendar. The Commissioner refused and proceeded

to conduct the Berman hearing without applicant's participation. The Commission ultimately awarded Kho more than \$150,000 in unpaid wages, liquidated damages, interest, and penalties. App., infra, 5a-6a.

The California Superior Court vacated the Commissioner's award but denied applicant's petition for arbitration, holding that the arbitration agreement was unconscionable. App., infra, 6a. Under California law, the defense of unconscionability requires a showing of both procedural and substantive unconscionability. See Armendariz v. Foundation Health Psychcare Service, Inc., 6 P.3d 669, 690 (Cal. 2000). The Superior Court deemed the agreement unconscionable in both respects. It first concluded that procedural unconscionability "attended the agreement's execution" because it "created oppression or surprise due to uneven bargaining power." App., infra, 6a. It then concluded that the agreement was substantively unconscionable insofar as it "fail[ed] to provide a speedy, informal and affordable method of resolving wage claims" and "ha[d] virtually none of the benefits afforded by the Berman hearing procedure." Ibid. According to the court, the agreement effectively "restore[d] the procedural rules and procedures that create expense and delay in civil litigation." Ibid.

3. The California Court of Appeal reversed. While the Court of Appeal agreed that Kho had established procedural unconscionability, the court explained that it was not substantively unconscionable to provide the procedures specified in the arbitration agreement -- which were akin to those in civil litigation -- because those procedures provided a suitable process for resolving

wage disputes. App., infra, \_\_\_a. In any event, the court reasoned that the specified arbitration procedure was not all that different from the administrative procedure that would otherwise be available: while that administrative procedure begins with a Berman hearing that lacks the formalities of civil litigation, it “anticipates” a subsequent de novo proceeding in Superior Court subject to the ordinary procedures of civil litigation. Id. at 6a-7a.

4. The California Supreme Court reversed. App., infra, 1a-41a.

a. The California Supreme Court held that both procedural and substantive unconscionability were present. The court explained that, in the unique context of “compelled arbitration of wage claims,” substantive unconscionability should be determined by comparing the procedures contemplated by the arbitration agreement to those the claimant would have received without it. App., infra, 28a, 34a. That approach, the court noted, is “different” from the approach used in evaluating unconscionability in other contexts. Id. at 27a. Applying that unique rule of decision, the court concluded that the arbitration agreement in this case was unconscionable: while it acknowledged that civil litigation is a “system of statutory and common law carefully crafted to ensure fairness to both sides,” it deemed the arbitration procedures substantively unconscionable precisely because they “incorporate[d]” too many “intricacies of civil litigation,” unlike the more “accessible, informal, and affordable” Berman hearing. App., infra, 10a, 26a-27a.

b. Justice Chin dissented. He reasoned that, in addition to misapplying California law, the majority had “run[] afoul” of the FAA’s equal-treatment principle. App., infra, \_\_\_a. In his view, “under the cloak of unconscionability,” the majority had applied an arbitration-specific rule of decision to invalidate the agreement on the ground that the arbitration procedure was “less advantageous” for Kho “than the Berman procedure.” App., infra, 86a-91a. The majority’s approach, Judge Chin explained, was “nothing more than a mere preference” for the administrative procedures for resolving wage disputes otherwise available under state law -- the same preference this Court had held to be incompatible with the FAA in Sonic I. Id. at 89a (internal quotation marks and citation omitted). Justice Chin added that the majority’s approach was “incompatible with, and thus preempted by, the FAA” because the application of its “unique unconscionability analysis” amounted to a “preliminary litigating hurdle” that “stands as an obstacle” to the “purposes and objectives” of the FAA. Id. at 91a-93a (alteration omitted).

5. Counsel for applicant respectfully requests a 45-day extension of time, to and including January 13, 2020, within which to file a petition for a writ of certiorari. This case presents complex issues concerning the FAA’s preemption of a state rule of contract law. The undersigned counsel did not represent applicant below and needs additional time to review the record and opinions below. In addition, the undersigned counsel is currently preparing a merits brief in this Court in Seila Law LLC v. Consumer Financial

Protection Bureau, No. 19-7 (due Dec. 9, 2019), and will be presenting oral argument in the Fifth Circuit in Firefighters' Retirement System v. Citco Group Ltd., No. 19-30165 (Dec. 4, 2019). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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