No. 21-____

IN THE

Supreme Court of the United States

DOMINO'S PIZZA LLC,

Petitioner,

v.

EDMOND CARMONA, ABRAHAM MENDOZA, and ROGER NOGUERIA, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 15, 2022

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QUESTION PRESENTED

Whether drivers making solely in-state deliveries of goods ordered by in-state customers from an in-state warehouse are nevertheless a "class of workers engaged in foreign or interstate commerce" for purposes of Section 1 of the Federal Arbitration Act simply because some of those goods crossed state lines before coming to rest at the warehouse?

PARTIES TO THE PROCEEDING

All parties to the proceeding are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that the sole member of Petitioner Domino's Pizza LLC is Domino's, Inc.; that Domino's, Inc. is wholly owned by Domino's Pizza, Inc.; and that Domino's Pizza, Inc. is a publicly traded company.

RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), the following proceedings are related to this case:

- *Carmona v. Domino's Pizza LLC*, No. 8:20-cv-1905 (C.D. Cal.) (order entered December 9, 2020)
- *Carmona v. Domino's Pizza LLC*, No. 21-55009 (9th Cir.) (judgment entered December 23, 2021; petition for rehearing denied February 15, 2022)

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INTRODUCTION

In its recent opinion in *Southwest Airlines Co. v. Saxon*, this Court expressly left open a question regarding the applicability of the Federal Arbitration Act ("FAA") to "class[es] of workers carr[ying] out duties . . . removed from . . . the actual crossing of borders." No. 21-309, slip op. at 5 n.2 (U.S. June 6, 2022). This case squarely presents the Court with an opportunity to resolve a widening and problematic split of authority on that issue that has already caused inconsistency—and thus unpredictability—in the enforcement of arbitration agreements under the FAA.

Under Section 1 of the FAA, "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce" are not subject to arbitration that would otherwise be mandatory under Section 2 of that Act. 9 U.S.C. § 1. As interpreted by this Court, this exemption is to be construed "narrow[ly]," applying only to "transportation workers" actually "engaged in" foreign or interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 118 (2001). But as this Court recently recognized, the lower courts have struggled to apply this exemption when the "class of workers" at issue comprises individuals making entirely *intrastate* deliveries of goods that, at some point in the past, made an *interstate* journey. *Saxon*, slip op. at 5 n.2.

This case is an ideal vehicle through which this Court can resolve the split. The goods at issue here were purchased by Domino's and shipped, occasionally across state lines, to a Californian warehouse, where some were transformed into pizza dough and others were reapportioned and repackaged. Californian franchisees ordered these goods later, as the need

arose. And Respondents helped fulfill those orders by transporting the requested goods from the in-state warehouse to the in-state franchisees—i.e., an entirely intrastate delivery.

A dispute eventually arose between Respondents and Domino's, and Domino's sought to utilize previously agreed-upon arbitration procedures. But the district court declined to enforce the arbitration agreement, concluding that Respondents were a "class of workers engaged in foreign or interstate commerce" under Section 1 of the FAA. App. at 9a–19a. The Ninth Circuit, focusing on the goods' entire interstate journey, affirmed. *Id.* at 1a–8a.

This case would likely have had the same outcome had it been filed in the First Circuit, since that court, too, focuses on the transported goods' entire journey when evaluating Section 1's application. But Domino's and Respondents would likely be in arbitration had the dispute arose in the Seventh or Eleventh Circuits, since those courts expressly instruct that the focus is not on the *goods* but instead on the *workers*—who here are making entirely intrastate deliveries. So too if the dispute arose in the Second Circuit, since the focus for that court is the overall nature of the business—which here is pizza, not transportation. The case would also likely be in arbitration if Respondents were carrying *people* instead of *pizza dough*, since the Ninth Circuit *ignores* overall interstate journeys when considering the application of Section 1 to rideshare drivers.

Without guidance from this Court, the lower courts will continue to grapple with this issue, and identical cases filed in courthouses on opposite sides of state lines will have dissimilar results. This inconsistency, in turn, will create uncertainty for the business

and labor communities alike. The facts of this case squarely present the relevant question; this Court should therefore grant certiorari and resolve it.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 21 F.4th 627 (9th Cir. 2021). The opinion of the district court is unreported.

JURISDICTION

The Ninth Circuit filed its opinion and judgment on December 23, 2021, and denied Domino's rehearing petition on February 15, 2022. On May 2, 2022, this Court granted Domino's application to extend the time to file a petition for a writ of certiorari to June 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the FAA, 9 U.S.C. § 1, provides:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or

> between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

STATEMENT OF THE CASE

A. The FAA's Residual Clause

Congress enacted the FAA to combat the "hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). To that end, Section 2 of the FAA "*compels* judicial enforcement of a *wide range* of written arbitration agreements." *Id.* (emphasis added). The "range" is "wide," indeed: this Court has interpreted Section 2 as "reach[ing] to the limits of Congress' Commerce Clause power[.]" *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

But Section 2's expansive universe is not limitless. Section 1 contains a small carve-out for "contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). The italicized language, at issue in this case, is known as the provision's "residual phrase" or "residual clause[.]" *Circuit City*, 532 U.S. at 114. Consistent with Congress' crusade against arbitration-clause "hostility," this Court has squarely held that the clause's reference to "foreign or interstate commerce" was *not* an attempt by Congress to exclude *all* employment contracts that it could potentially regulate under the authority of the Commerce Clause. *Id.* at 114–19. Instead, again to further Congress' purpose, this Court has commanded lower courts to afford the clause "a narrow construction." *Id.* at 118; *cf. id.* at 119 ("Section 1 exempts from the FAA only contracts of employment of transportation workers.").

B. Facts and Procedural History

Domino's® is a well-known pizza company, operating thousands of stores around the world. Respondents were Domino's Delivery & Service Drivers, delivering goods from Domino's Southern California Supply Chain Center ("Supply Center") to various Domino's franchisees within Southern California. App. at 4a. A *de minimis* portion of these goods crossed state lines before arriving at the Supply Center, but Respondents' delivery routes *never* crossed state lines. *Id.* at 4a, 6a. In fact, the orders filled by Respondents were entirely intrastate, as they were placed by in-state franchisees to the in-state Supply Center, and were for goods that had already been purchased by Domino's. *Id.*

Respondents signed agreements to arbitrate disputes arising out of their employment with Domino's. *Id.* at 4a. They nevertheless sued Domino's in state court, alleging that Domino's failure to reimburse various expenses they incurred violated California law. *Id.* at 11a. Invoking diversity jurisdiction under 28 U.S.C. § 1332, Domino's removed the action to the U.S. District Court for the District of California and moved to compel arbitration under the FAA. *Id.* at 10a. The district court denied that motion, concluding that Respondents fell within the FAA's residual clause. *Id.* at 19a.

The Ninth Circuit affirmed. *Id.* at 8a. Although it recognized that *Respondents'* work was entirely intrastate, it ignored Section 1's reference to the "*class of workers*" and instead focused on the fact that "*Domino's* is directly involved in the procurement and delivery of interstate goods." *Id.* at 7a (emphasis added). And although the goods came to rest at the California Supply Center and remained there *unless* and *until* an in-state franchisee specifically ordered them, the Ninth Circuit characterized Respondents' role as "transport[ing] those goods 'for the last leg' to their final destinations," which put them "in a 'single, unbroken stream of interstate commerce' that renders interstate commerce a 'central part' of their job description." *Id.* at 7a (citation omitted).

REASONS FOR GRANTING THE PETITION

In *Southwestern Airlines Co. v. Saxon*, this Court held that the "class of workers who physically load and unload cargo on and off airplanes" is "directly involved in transporting goods across state or international borders" and thus comes within Section 1's residual clause. No. 21-309, slip op. at 4 (U.S. June 6, 2022). As the basis for this holding, this Court cited the longstanding principle that "the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it." *Id.* at 5 (quoting *Baltimore & Ohio Southwestern R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)).

As *Saxon* recognized, however, this principle does nothing to resolve a question currently percolating in the lower courts—namely, whether workers involved solely in *intrastate* transport come within the residual clause simply because their cargo previously moved *interstate*. *Id.* at 5 n.2. This question, in fact, is subject to a clear split among the circuits, and will not be resolved without this Court's intervention.

I. The Circuit Courts Are Deeply Divided Regarding the Application of the Residual Clause to Workers Involved Solely in Intrastate Transportation

On the one side of this split are the First and Ninth Circuits. For these courts, the residual-clause analysis—for goods at least—turns on whether transported goods are "within the flow of" or are "moving" in interstate commerce, whether or not the workers at issue have made an interstate journey. In *Waithaka v. Amazon.com, Inc.*, for example, the First Circuit held that workers "locally transporting goods

on the last legs of interstate journeys"—i.e., workers taking Amazon packages from an in-state warehouse to in-state customers—are covered by the residual clause because those goods are still "within the flow of interstate commerce[.]" 966 F.3d 10, 13 (1st Cir. 2020). The First Circuit recognized—but did not find it dispositive—that the workers do not "physically cross state lines in the course of their work." *Id.* The Ninth Circuit came to the same conclusion about local Amazon delivery drivers in *Rittmann v. Amazon.com, Inc.*, holding that such individuals are "engaged in the movement of goods in interstate commerce, even if they do not cross state lines." 971 F.3d 904, 915 (9th Cir. 2020).

Citing this Court's decision in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Ninth Circuit in *Rittmann* suggested that a different result would have obtained if the packages had "come to rest" at the Amazon warehouses, since the "interstate transactions [would then have] conclude[d] at those warehouses." *Rittmann*, 971 F.3d at 916. But as the packages were "not held at [the] warehouses for later sales to local retailers" and instead were there only until "a delivery provider transfer[red] [them] to a different vehicle for the last mile of [their] interstate journeys[,]" the Ninth Circuit concluded that "[t]he interstate transactions between Amazon and the customer [did] not conclude until the packages reach[ed] their intended destinations." *Id.*

The Ninth Circuit relied on—but perceptibly expanded—its *Rittmann* decision when ruling in favor of Respondents below. Domino's had argued that the goods transported by Respondents had come to rest at the Supply Center, since the goods were purchased by Domino's and delivered to the Supply Center *before*

being ordered by franchisees, and would thus remain at the Supply Center *unless and until* ordered by franchisees. App. at 7a. The *Rittmann* goods' *entire* interstate journey, by contrast, was "initiated" with a customer order. *Id.* The Ninth Circuit found this "a distinction without a difference." *Id.* The Ninth Circuit also found that any "alteration" of the goods at the Supply Center was irrelevant, since while some goods were "transformed" at the Supply Center (into, e.g., pizza dough), other goods were merely "reapportioned, weighed, [and] packaged[.]" *Id.* at 7a–8a.

On the other side of this split are the Seventh and Eleventh Circuits. For these courts, the focus is squarely on the workers' conduct. In *Hamrick v. Partsfleet, LLC*, for example, the Eleventh Circuit considered whether the residual clause applied to "drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse." 1 F.4th 1337, 1340 (11th Cir. 2021). The district court there—in language similar to that used by the Ninth Circuit in *Rittmann* and below—held that it did, since "the goods at issue . . . originated in interstate commerce and were delivered, untransformed, to their destination." *Id.* at 1351 (internal quotation marks and alterations omitted). The Eleventh Circuit reversed, holding that the district court committed "error" by "focus[ing] on the movement of the goods and not the class of workers." *Id.* Instead, the Eleventh Circuit instructed that the proper inquiry was whether the workers, "in the main, . . . actually engage in the transportation of goods in interstate commerce[.]" *Id.* at 1346 (internal quotation marks and citation omitted).

And in *Wallace v. Grubhub Holdings, Inc.*, the Seventh Circuit held that the residual clause excep-

tion does not cover workers delivering restaurant takeout orders. 970 F.3d 798 (7th Cir. 2020). The workers there "stress[ed] that they carry goods that have moved across state and even national lines" and argued that "the residual exemption is not so much about what the worker does as about where the goods have been." *Id.* at 802. The Seventh Circuit rejected this approach, concluding that it "completely ignore[s] the governing framework"—i.e., whether the workers are "connected not simply to the goods, but to the act of moving those goods across state or national borders." *Id.*

If this split were not enough, the Second Circuit has identified another dimension of the residual-clause question. As noted above, this Court has instructed that the residual clause applies only to "transportation workers." *Circuit City*, 532 U.S. at 119. This Court has not, however, "provide[d] a complete definition" of that term. *Saxon*, slip op. at 6. In *Bissonnette v. LePage Bakeries Park St., LLC*, the Second Circuit considered whether the residual clause applied to workers who moved baked goods from in-state warehouses to in-state restaurants and stores. 33 F.4th 650 (2d Cir. 2022). Sidestepping the above-identified split entirely, the Second Circuit held that the relevant question before it was whether "the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and [whether] the industry's predominant source of commercial revenue is generated by that movement." *Id.* at 656. And although the workers there "spen[t] appreciable parts of their working days moving goods from place to place by truck," the court concluded that "the stores and restaurants [were] not buying the movement of the baked goods" but were instead buying "the baked goods themselves, [with] the move-

ment of those goods . . . at most a component of total price." *Id.* For that reason, the court held that the workers "are in the bakery industry," not the "transportation industry," and that the residual clause exception did not apply. *Id.*

The confusion below is throw into relief by examining how courts interpret the residual clause when the transported thing is *people* instead of *goods.* The First and Ninth Circuits, for example, examine interstate "flow" or interstate "movement" when *goods* are involved. *See supra*. But both courts have held that rideshare drivers do *not* come within the exception, "even when transporting passengers to and from transportation hubs as part of a larger foreign or interstate trip[.]" *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 867 (9th Cir. 2021); *see also Cunningham v. Lyft, Inc.*, 17 F.4th 244, 251 (1st Cir. 2021) ("[W]e do not think that plaintiffs are engaged in interstate travel merely because they bring passengers to and from an airport.").

In reaching their conclusions, the First and Ninth Circuits apparently relied on the fact that rideshare drivers are independently employed. *See Capriole*, 7 F.4th at 867 ("Uber drivers are unaffiliated, independent participants in the passenger's overall trip[.]"); *Cunningham*, 17 F.4th at 251 ("[N]o evidence of any . . . partnerships [between Lyft and the airlines] was presented in the district court."). But extending this principle creates more confusion and inconsistencies. If Domino's contracted with unaffiliated third parties to move goods from its *California* Supply Centers to its franchisees in *California*, it ostensibly avoids application of the residual clause under the test applied in the Ninth Circuit to rideshare drivers. But contracting out

deliveries from its *Connecticut* Supply Centers to franchisees in *Connecticut* likely pushes Domino's right out of an otherwise safe harbor under the industry-focused test applied in the Second Circuit. *See* App. at 17a ("[N]either party can dispute that Domino's is a pizza company and not a transportation or delivery company.").

II. The Decision Below is Incorrect

This Court should also grant certiorari because the Ninth Circuit's analysis was wrong and is in conflict with the FAA's text and in tension with *Saxon* and *A.L.A. Schechter Poultry*. The residual clause applies to any "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The *Saxon* plaintiff asserted that "air transportation as an industry is engaged in interstate commerce," and thus attempted to define the relevant "class of workers" as "airline employees." *Saxon*, slip op. at 3 (internal quotation marks omitted). But this Court rejected such an "industrywide approach." *Id.* Zeroing in on the text, this Court explained that "[t]he word 'workers' directs the interpreter's attention to 'the *performance* of work[,]' and "the word 'engaged' . . . similarly emphasizes the *actual* work that the members of the class, as a whole, typically carry out." *Id.* at 4 (second emphasis added). It therefore concluded that the plaintiff is "a member of a 'class of workers' based on what *she* does at Southwest, not what *Southwest* does generally." *Id.* (emphasis added).

The Ninth Circuit's reasoning below runs in precisely the opposite direction. Under that court's interpretation, "[t]he [residual clause] exemption applies if the class of workers is engaged in a 'single, unbroken stream of interstate commerce' that renders interstate commerce a 'central part' of their job

description." App. at 2a–3a (citation omitted). But in conducting this inquiry, the Ninth Circuit expressly disavows a close inquiry into "whether the plaintiffs themselves crossed state lines[.]" *Id.* at 6a. Instead, it believes that "[t]he 'critical factor' in determining whether the residual clause exemption applies is . . . *the nature of the business for which [the] class of workers perform[s] their activities*." *Id.* at 6a (emphasis added) (citation omitted).

With the test framed in this manner, the Ninth Circuit below proceeded to focus not on what *Respondents* do at Domino's, but instead on what *Domino's* does generally. The court, for example, noted that "*Domino's* is directly involved in the procurement and delivery of interstate goods[.]" *Id.* at 7a. It noted that "*Domino's* . . . 'business includes not just the selling of goods, but also the delivery of those goods.'" *Id.* (emphasis added) (citation omitted). It noted that "the relevant goods . . . were procured out-of-state by *Domino's* to be sold to a *Domino's* franchisee[.]" *Id.* at 8a (emphasis added). And it noted that "*Domino's* is involved in the process from beginning to the ultimate delivery of the goods to their destinations." *Id.* at 7a (emphasis added).[1] As explained by this Court in *Saxon*, such an approach is both unwarranted and erroneous. *Saxon*, slip op. at 4 ("Saxon is . . . a member of a 'class of workers' based on what *she*

[1] The Ninth Circuit's erroneous reasoning was further highlighted when it distinguished several cases solely because those cases "involve *companies* that engaged with goods only after [the goods] arrive in state." App. at 8a (emphasis added). As explained above, application of the residual clause should not turn on the identity of the entity that happens to be hiring the "class of workers" at issue.

does at Southwest, not what *Southwest* does generally." (emphasis added)).

Moreover, the Ninth Circuit disregarded this Court's stream-of-commerce precedent. In *A.L.A. Schechter Poultry*, this Court concluded that poultry shipped across state lines "c[a]me to rest" when it reached a slaughterhouse where it was "held . . . for slaughter and local sale to retail dealers and butchers[,] who in turn sold directly to consumers." 295 U.S. at 543. As a result, this Court held that "[n]either the slaughtering nor the [subsequent] sales . . . were transactions in interstate commerce." *Id.* The situation in this case is nearly identical: Any interstate journey of the goods at issue ended when those goods reached the California Supply Center. The subsequent transformation, repackaging, sale, and delivery of those goods, consequently, were not transactions in interstate commerce.

Finally, the approach the Ninth Circuit took simply cannot be squared with this Court's directive that the residual clause be construed narrowly. *Circuit City*, 532 U.S. at 118. If the panel's decision were correct, then any retailer who hires local delivery people to deliver products it acquires from out of state to its customers in-state would have delivery people who were exempt. Such an approach would "sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy." *Wallace*, 970 F.3d at 802.

III. This Case is an Appropriate Vehicle

This case squarely frames the important question left open by *Saxon*—i.e., whether drivers making solely in-state deliveries of goods ordered by in-state customers from an in-state warehouse are nevertheless a "class of workers engaged in foreign or interstate commerce" for purposes of Section 1 of the FAA simply because some of those goods crossed state lines before coming to rest at the warehouse. The resolution of this question should not depend on the circuit in which it happens to arise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 15, 2022

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 21-55009

D.C. No. 8:20-cv-01905-JVS-JDE

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EDMOND CARMONA,
Plaintiff-Appellee,

and

ABRAHAM MENDOZA; ROGER NOGUERIA, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

DOMINO'S PIZZA, LLC, a Michigan Corporation,
Defendant-Appellant.

———

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted November 15, 2021
Pasadena, California

Filed December 23, 2021

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OPINION

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Before: Kim McLane Wardlaw,
Barrington D. Parker,* and
Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY**

Federal Arbitration Act / California Labor Law

The panel affirmed the district court's order denying Domino's Pizza, LLC's motion to compel arbitration in a putative class action brought by Domino's drivers, asserting violations of various California labor laws.

The district court denied the motion based on its finding that the drivers were a "class of workers engaged in foreign or interstate commerce," and were therefore exempt from the requirements of the Federal Arbitration Act ("FAA"), notwithstanding their contracts with Domino's that provided claims between the parties be submitted to arbitration under the FAA.

Section 1 of the FAA exempts from the arbitration mandate certain employment contracts, including "workers engaged in foreign and interstate commerce," referred to as the "residual clause." The exemption applies if the class of workers is engaged in a "single, unbroken stream of interstate commerce"

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* The Honorable Barrington D. Parker, United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that renders interstate commerce a "central part" of their job description. *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 866 (9th Cir. 2021).

Domino's contended that the drivers who delivered goods to individual Domino's franchisees in California were not engaged in interstate commerce because the franchisees, all located in California, placed orders with the supply center in the state, and the goods delivered were not in the same form in which they arrived at the supply center. The panel disagreed. The panel held that *Rittman v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), which concerned Amazon package delivery drivers, was instructive. Like Amazon, Domino's was directly involved in the procurement and delivery of interstate goods, was involved in the process from the beginning to the ultimate delivery of the goods to their destinations, and its business included not just the selling of goods, but also the delivery of those goods. The alteration of the goods at the supply center did not change the result. The panel concluded that, as with the Amazon drivers, the transportation of interstate goods on the final leg of their journey by the Domino's drivers satisfied the requirements of the residual clause.

COUNSEL

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Aashish Y. Desai (argued) and Adrianne De Castro, Desai Law Firm P.C., Costa Mesa, California, for Plaintiff-Appellee.

OPINION

HURWITZ, Circuit Judge:

Three delivery drivers sued Domino's Pizza, LLC, on behalf of themselves and a putative class, asserting violations of various California labor laws. Domino's moved to compel arbitration pursuant to its contracts with the drivers. The district court denied the motion, finding that the drivers are a "class of workers engaged in foreign or interstate commerce," and are therefore exempt from the requirements of the Federal Arbitration Act ("FAA") under 9 U.S.C. § 1. We affirm.

I

Domino's sells pizza to the public primarily through franchisees. Domino's buys various goods, such as mushrooms, that are used by its franchisees in making pizzas, from suppliers outside of California. Those goods are then delivered by third parties to the Domino's Southern California Supply Chain Center ("Supply Center"). At the Supply Center, Domino's employees reapportion, weigh, package, and otherwise prepare the goods to be sent to franchisees. Domino's franchisees in Southern California order the goods either online or by calling the Supply Center, and the plaintiff drivers ("D&S drivers"), who are employees of Domino's, then deliver the goods to the franchisees.

Edmond Carmona and two other D&S drivers filed this putative class action against Domino's in 2020, alleging violations of California labor law. The three lead plaintiffs each had agreements with Domino's providing that "any claim, dispute, and/or controversy" between the parties would "be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act."

In response to the D&S drivers' complaint, Domino's moved to compel arbitration. The district court denied the motion, finding the plaintiffs exempt from the FAA under 9 U.S.C. § 1 notwithstanding their contracts with Domino's because they are transportation workers "engaged in foreign or interstate commerce." Domino's timely appealed. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(B) and review the denial of a motion to compel arbitration *de novo*. *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1219 (9th Cir. 2019).

II

The FAA provides that arbitration agreements "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 1 of the FAA, however, exempts from the arbitration mandate "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The clause setting out that last category, the one relevant here, is sometimes referred to as the "residual clause." *See, e.g.*, *In re Grice*, 974 F.3d 950, 955 (9th Cir. 2020). The residual clause is afforded a "narrow construction" to further the FAA's purpose of overcoming "judicial hostility to arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (cleaned up). "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

The "critical factor" in determining whether the residual clause exemption applies is not the "nature of the item transported in interstate commerce (person or good) or whether the plaintiffs themselves crossed state lines, but rather the nature of the business for which a class of workers performed their activities." *Grice*, 974 F.3d at 956 (cleaned up). The exemption applies if the class of workers is engaged in a "single, unbroken stream of interstate commerce" that renders interstate commerce a "central part" of their job description. *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 866 (9th Cir. 2021).

Domino's does not dispute that the third parties who delivered goods to the Supply Center are engaged in interstate commerce. But it contends that the D&S drivers who deliver goods to individual Domino's franchisees in California are not so engaged because the franchisees, all located in California, place orders with the Supply Center in the state, and the goods delivered are not in the same form in which they arrived at the Supply Center. We disagree.

Our recent opinion addressing the residual clause, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), is instructive. In *Rittmann*, we held that Amazon package delivery drivers were engaged in "a continuous interstate transportation" of goods because they picked up packages that had come across state lines to Amazon warehouses and then transported them "for the last leg" to their eventual destinations. *Id.* at 915–16. Amazon coordinated the deliveries from origin to destination, and the packages were not transformed at the warehouses. *Id.* at 907, 915–17. We emphasized that "Amazon's business includes not just the selling of goods, but also the delivery of those goods." *Id.* at 918.

Like Amazon, Domino's is directly involved in the procurement and delivery of interstate goods; the D&S drivers, like the Amazon package delivery drivers, transport those goods "for the last leg" to their final destinations. *See id.* at 915–16. Like Amazon, Domino's is involved in the process from beginning to the ultimate delivery of the goods to their destinations and its "business includes not just the selling of goods, but also the delivery of those goods." *See id.* at 918.

To be sure, there are some factual differences between this case and *Rittmann*. The customers to whom the Amazon drivers delivered the interstate goods in *Rittmann* initiated the purchases online with Amazon, *id.* at 907, while the Domino's franchisees order the goods from the Supply Center in California only after Domino's has already purchased them. But this is a distinction without a difference. The issue is not how the purchasing order is placed, but rather whether the D&S drivers operate in a "single, unbroken stream of interstate commerce" that renders interstate commerce a "central part" of their job description. *See Capriole*, 7 F.4th at 866. As with the Amazon drivers, the transportation of interstate goods on the final leg of their journey by the D&S drivers satisfies this requirement. Although some of the goods delivered to the Supply Center are from California suppliers, that does not change the outcome. *See Rittmann*, 971 F.3d at 917 n.7 (explaining that Amazon package delivery drivers are engaged in interstate commerce "even if that engagement also involves intrastate activities").

Nor does the alleged "alteration" of the goods at the Supply Center change the result. Although some of the goods are transformed into pizza dough at the Supply

Center, items such as mushrooms are simply reapportioned, weighed, packaged, and stored before being delivered to franchisees by the D&S drivers. This case is thus different than *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), upon which Domino's relies. *Schechter Poultry* held that live poultry was no longer in the stream of interstate commerce after being processed at slaughterhouses and then sold locally to retail dealers and butchers who in turn sold directly to consumers. *Id.* at 543. Here, the relevant goods are not transformed into a different form and were procured out-of-state by Domino's to be sold to a Domino's franchisee, not to an unrelated third party.[1] *Cf. Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015) ("Ingredients contained in the food that Plaintiff ultimately delivered from restaurants ended their interstate journey when they arrived at the restaurant where they were used to prepare meals.").

AFFIRMED.

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[1] The other cases Domino's relies on involve companies that engage with goods only *after* they arrive in state. *See Lee v. Postmates Inc.*, No. 18-cv-03421-JCS, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018); *Bean v. ES Partners, Inc.*, 533 F. Supp. 3d 1226, 1236 (S.D. Fla. 2021).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 20-01905JVS(JDEx)

Date Dec. 9, 2020

Title Edmond Carmona et al v. Dominos Pizza LLC et al

Present: The Honorable James V. Selna, U.S. District Court Judge

Deputy Clerk: Lisa Bredahl

Court Reporter: Not Present

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: [IN CHAMBERS] Order Regarding Defendant's Motion to Compel Arbitration

Defendant Dominos Pizza LLC ("Domino's") moved to compel arbitration of Plaintiff Edmond Carmona's ("Carmona") and the putative Class' claims. Dkt. No. 14. Carmona opposed the motion. Dkt. No. 15. Domino's then filed its Reply. Dkt. No. 18.

For the following reasons, the Court DENIES the motion.

I. BACKGROUND

1. Factual Background

The following background is drawn from Carmona's Complaint, filed in state court and attached as Exhibit A to Domino's Notice of Removal. Compl., Dkt. No. 1-2. While not incorporated in the Complaint, additional background information from declarations submitted by both parties is relevant to the Court's decision.

Carmona and the other named Plaintiffs filed suit on behalf of a putative Class of truck drivers for Domino's. Compl. ¶ 1.

Carmona and the putative Class deliver various products (cheese, boxes, trays, meats, dough, etc.) from various Domino's facilities to individual stores. *Id*. ¶ 2. Carmona and members of the class were responsible "for delivering products from the Southern California Supply Chain Center to Domino's franchisees located within Southern California." Declaration of Miguel Castaneda ("Castaneda Decl.") ¶ 6, Dkt. No. 14-3. At no point did they deliver or transport goods outside of California. *Id*. ¶ 7.

These supply chain stores operate as part of a "nationwide network of 16 supply chain centers." Compl. ¶ 2. At these Supply Chain Centers, employees "reapportion, weigh, package, store, and use these ingredients to create the Products that Delivery and Service drivers deliver to the individual corporate and franchise locations." Travis Wright Declaration ("Wright Decl.") ¶ 4, Dkt. No. 14-5. The products are then sold to corporate stores and franchisees. *Id*. ¶ 5.

At the center of the dispute is Domino's purported failure to reimburse Carmona and other members of

the putative class for use of their cell phones to communicate while on the job. *Id*. ¶ 3. Specifically, Carmona alleges that he and other members of the putative Class "are required to purchase their own cell phones to communicate with, and be available for, Domino's. Rather than utilize equipment in the drivers' trucks to communicate with drivers (which do not operate for communication while the truck is moving), Domino's managers and dispatchers instead would regularly text or call drivers' personal cell phones to communicate with them while on the road." *Id*. Carmona also alleges that Domino's was aware of this practice. *Id*.

Carmona and the named Plaintiffs filed suit alleging failure to reimburse necessary expenditures, for attorneys' fees, and for costs under the California Labor Code and Business & Professions Code. Compl. ¶ 15. They alleged two causes of action – the first for failure to *reimburse* for all necessary expenditures against all defendants under California Labor Code Section 2802, *Id*. ¶¶ 21-26, and the second for violation of California Business & Professions Code Section 17200 for actions in further violation of California's Unfair Competition Law and Labor Code Sections 90.5(a) and 2802. *Id*. ¶¶ 27-33.

II. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., any party to an arbitration agreement that falls within the scope of the FAA may bring a motion in federal district court to compel arbitration and stay the proceeding pending resolution of the arbitration. 9 U.S.C. §§ 3, 4. The FAA eliminates district court discretion and requires a court to compel arbitration of issues covered by the arbitration agreement. *Dean Winter Reynolds*, *Inc*., *v*. *Byrd*, 470 U.S. 213,

218 (1985). The FAA limits the district court's role to determining whether a valid agreement to arbitrate exists and whether the agreement encompasses the disputes at issue. *Chiron Corp. v. Orth. Diagnostic SYS., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

Section 2 of the Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes arising out of transactions involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001). Under Section 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, or unenforceability of contracts generally." *Ticknor*, 265 F.3d at 937 (*quoting Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)) (internal quotations omitted). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* (*quoting Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (2000)) (internal quotations omitted).

III. DISCUSSION

At the center of the instant dispute is the applicability of *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020) in determining whether Carmona and other members of the putative Class are transportation workers and then even subject to the FAA. Both parties discuss the applicability of *Rittman*.

In short, Domino's argues that it does not apply because in its decision, the Ninth Circuit distinguished between the workers carrying packages that

remain in a stream of interstate commerce until delivered and therefore are part of a continuous interstate transportation versus local food delivery drivers. Dkt. No. 14-1 at 10 (citing *Rittman*, 971 F.3d at 915-916). Domino's highlights and stresses this distinction between these truck drivers who participate in the movement of interstate commerce and drivers delivering food for companies like Postmates or DoorDash. *Id*. at 10-11 (citing *Magana v. DoorDash, Inc*., 343 F. Supp 3d 891 (N.D. Cal. 2018); *Levin v. Caviar, Inc*., 146 F. Supp. 3d 1146 (N.D. Cal. 2015); *Lee v. Postmates Inc*., No. 18-CV-03421-JCS, 2018 WL 4961802 (N.D. Cal. Oct. 15, 2018).

Domino's claims that Carmona and members of the putative class are the exception to *Rittman* because Domino's is not a transportation or delivery company like Amazon, FedEx, or UPS, instead delivering "its own branded products from its Southern California Supply Chain Center to franchisees located exclusively in California" and unlike in *Rittman*, Carmona and members of the putative Class "are not in the business of taking goods that have traveled across the country to the "last mile" to their final destination." *Id*. at 12. Lastly, to the extent that any of the products arrived in these Supply Chain Centers from out of state, they were then "[c]arefully created, selected, weighed, aggregated, reapportioned, and/or packaged for delivery" there and therefore ceased to be moving through interstate commerce. *Id*. at 13-13 (citing Declaration of Travis Wright ("Wright Decl.") ¶ 4).

Carmona claims that he and the members of the putative Class are subject to the exception as there is little doubt they are engaged in foreign or interstate commerce. Opp'n at 2-3, Dkt. No. 15. He claims that he and others are more like the truck drivers in

Rittman rather than the food delivery drivers and argues that like the drivers in *Rittman*, "at least some of the goods Plaintiffs deliver were once in the 'flower of interstate commerce.'" *Id*. He also claims that Domino's attempt to distinguish between the instant case and *Rittman* by claiming that the goods are repackaged at the Supply Chain Centers is baseless. *Id*. at 4-5.

In its Reply, Domino's reasserts that the FAA should apply, noting that Carmona bears the burden of proving he and the putative Class are subject to the exception and that they fail to do so. Reply at 2, Dkt. No. 18. Domino's claims that the situation is wholly unlike that in *Rittman* because here "Plaintiffs transported goods made in California (or transported items back from stores in California to the Supply Chain Center in California)." *Id*. Any facts used to substantiate a claim otherwise are conclusory, according to Domino's. *Id*. at 3. Lastly, Domino's claims that Carmona requests an impermissibly broad reading of *Rittman*. *Id*.

In *Rittman*, the Court explored whether Amazon 'AmFlex' drivers who facilitated 'last mile' delivery from Amazon warehouses to the products' destinations using the AmFlex smart phone application were transportation workers within the meaning of the FAA. *Rittman*, 971 F.3d at 908.

The FAA exempts workers "engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Court interpreted engaged in interstate commerce "to include workers employed to transport goods that are shipped across state lines," even applying earlier Supreme Court decisions that any exemptions to the FAA should be narrowly construed. *Rittman*, 971 F. 3d at

909-911 (*citing Circuit City Stores*, *Inc. v. Adams*, 532 U.S. 105 (2001).

The court then turned to the applicability of Section 1 to AmFlex delivery providers, finding that they fell within the aforementioned exemption. While the court noted the "massive scale" of Amazon's global operations, it impliedly relied on the assumption that AmFlex workers "pick up packages that have been distributed to Amazon warehouses, certainly across state lines." *Id*. at 915. The court also differentiated between these delivery drivers and those in food delivery services, recognizing "that local food delivery drivers are not 'engaged in the interstate transport of goods' because the prepared meals from local restaurants are not a type of good that are 'indisputably part of the stream of commerce.'" *Id*. (citing *Levin*, 146 F. Supp. 3d at 1153).

The court also stressed that not all local delivery is the same, declining to adopt the dissent's reasoning. *Id*. at 917. Instead, it adopted the First Circuit's analysis in a similar case:

> Although our ultimate inquiry is whether a class of workers is "engaged in . . . interstate commerce," the question remains how we make that determination. The nature of the business for which a class of workers perform their activities must inform that assessment. After all, workers' activities are not pursued for their own sake. Rather, they carry out the objectives of a business, which may or may not involve the movement of "persons or activities within the flow of interstate commerce."

Id. (*citing Waithaka v. Amazon.com*, *Inc*., No. 19-1848, 966 F.3d 10, 19 (1st Cir. 2020). It then also analyzed

the type of business Amazon was in, namely, not only as a seller of goods, but also as a shipper of goods. *Id*.

Numerous courts have since analyzed the effects of the *Waithaka* and *Rittman* decisions. Those courts (and others prior) have focused on "[t]he nature of the business for which a class of workers perform[ed] their activities." *In re Grice*, 974 F.3d 950, 956 (9th Cir. 2020) (*citing Waithaka*, 966 F.3d at 10). Other courts have focused on whether the "interstate movement of goods is a central part of the class members' job description." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020).

The Court finds significant similarities between the truck drivers here and the 'last mile' drivers in *Rittman*.

First, the "nature of the business" for which the truck drivers perform their work is to facilitate the movement of these products, coming both from within California and outside, to their final destination. Moreover, that Supply Chain Center employees may prepare or otherwise alter the products that arrive there from out of state prior to deliver to in-state franchisees does not transform the truck drivers into food delivery service drivers. Domino's still owns the products prior to their delivery to their franchisees. If anything, the repackaging, preparations, etc., can be viewed as merely an extension of the nature of the delivery.

The Court does take note of Domino's argument that it is unlike Amazon, UPS, FedEx, etc., because unlike those companies, it is not involved in the transportation business. Domino's notes that it "does not deliver other businesses good [sic] and products" and that it is "a pizza company." Dkt. No. 14-1 at 12.

While the Court acknowledges this distinction, it contradicts the overwhelming precedent that courts should look to the employee's job description and determine whether interstate movement of goods is a central part of it. *See Wallace*, 970 F.3d at 801. It also simplifies the issue: clearly, neither party can dispute that Domino's is a pizza company and not a transportation or delivery company. However, Domino's argument here requests that the Court generalize the company's actions at such a heightened level such that few or none of its employees could be viewed as engaging in interstate commerce, even though it is a national company.

Therefore, Court cannot conclude that the stream of interstate commerce concludes once the products arrive at the Supply Chain Centers. Rather, the products are similar – albeit not directly analogous – to the packages delivered by AmFlex drivers in Rittman. *See Rittman*, 971 F.3d at 916 ("The packages are not held at warehouses for later sales to local retailers; they are simply part of a process by which a delivery provider transfers the packages to a different vehicle for the last mile of the packages' interstate journeys.").

Second, under *Rittman*, the truck drivers are not like food delivery service drivers, which the Ninth Circuit (and others) have found not to fall within the relevant exemption. An analysis of the type of work and the nature of the business for which they would perform their activities reveals as much. Food delivery service drivers deliver "prepared meals from local restaurants," not the dough, cheese, tomato sauce, etc., that may be used to make those prepared meals. Put simply, there is a fundamental difference from "the local delivery of meals prepared in local restau-

rants" and the "[i]ntrastate deliveries of goods [] considered to be part of interstate commerce" when those "deliveries are merely a continuation of an interstate journey," even if the goods are repackaged or altered. *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274, 283, (2019), *reh'g denied* (Mar. 27, 2019), *review denied* (July 10, 2019) (quoting *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th. 62, 77 (2012). In the latter, the court found a "practical continuity of movement of the goods" to exist. *Bell*, 209 Cal. App. 4th at 77.

The Court recognizes that this instant tentative order differs from its earlier order in *Eddie Silva v. Domino's Pizza* (8:18-cv-02145-JVS (JDEx)). The Court can distinguish between Silva's situation and the one presented here. First, and most notably, *Rittman* had not yet been decided. In *Silva*, the Court based its holding partially on the fact that Domino's had cited a number of cases holding that section 1 of the FAA did not apply to drivers transporting goods intrastate, versus Silva had cited none. The Ninth Circuit's decision in *Rittman*, particularly its reasoning regarding AmFlex's last mile drivers, requires that the Court consider a different analysis, as it did above. Second, in *Silva*, the Court found that Domino's had presented evidence that Silva transported items to locations within California from the Southern California Supply Chain Center, and that even though he performed the last leg of a journey of goods that begun from out of state, Silva participated solely in intrastate commerce. The record – which also reflects that some of the goods come in from out of state – combined with the decision in *Rittman* provide a sufficient basis to distinguish the instant situation from that in *Silva*.

Therefore, the Court finds that Carmona and the other members of the putative Class are exempt from the FAA's mandate.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the motion. IT IS SO ORDERED.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 15, 2022]

No. 21-55009

D.C. No. 8:20-cv-01905-JVS-JDE
Central District of California, Santa Ana

EDMOND CARMONA,

Plaintiff-Appellee,

and

ABRAHAM MENDOZA; ROGER NOGUERIA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DOMINO'S PIZZA, LLC, a Michigan Corporation,

Defendant-Appellant.

Before: WARDLAW, PARKER,* and HURWITZ, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Wardlaw and Hurwitz voted to deny the petition for rehearing en banc, and Judge Parker so recommended. The petition for rehearing en banc was circulated to the

* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 37) is DENIED.